



Parliamentary Joint Committee  
on Human Rights

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**Annual report 2016-17**

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## Committee information

### Current members (June 2018)

Mr Ian Goodenough MP, Chair (14.09.16-present, Chair from 14.09.16-present)	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair (06.02.13-05.08.13 and 15.09.16-present)	Moreton, Queensland, ALP
Mr Russell Broadbent MP (14.09.16-present)	McMillan, Victoria, LP
Senator Carol Brown (01.07.14-present)	Tasmania, ALP
Senator Lucy Gichuhi (05.02.2018-present)	South Australia, LP
Ms Madeleine King MP (15.09.16-present)	Brand, Western Australia, ALP
Mr Julian Leeser MP (14.09.16-present)	Berowra, New South Wales, LP
Senator Nick McKim (12.09.16-present)	Tasmania, AG
Senator Claire Moore (01.07.14 to 09.05.16 and from 15.09.16-present)	Queensland, ALP
Senator James Paterson (12.09.16-present)	Victoria, LP

### Former members 2016-17

Senator Richard Di Natale (12.12.16)	Victoria, AG
Senator Sarah Hanson-Young (02.02.17)	South Australia, AG
Senator Linda Reynolds CSC (12.09.16-05.02.18)	Western Australia, LP
Senator Rachel Siewert (03.02.17)	Western Australia, AG

### **Secretariat 2016-17<sup>1</sup>**

Ms Toni Dawes, Committee Secretary  
Ms Zoe Hutchinson, Principal Research Officer  
Ms Jessica Strout, Principal Research Officer  
Dr Kate Mitchell, Principal Research Officer  
Ms Shennia Spillane, Principal Research Officer  
Ms Nicola Knackstredt, Principal Research Officer  
Ms Mayuri Anupindi, Principal Research Officer  
Ms Eloise Menzies, Senior Research Officer  
Mr Andrew McIntyre, Senior Research Officer  
Ms Alice Petrie, Legislative Research Officer  
Mr David Hopkins, Legislative Research Officer

### **Secretariat for the preparation of the annual report**

Ms Toni Dawes, Committee Secretary  
Ms Zoe Hutchinson, Principal Research Officer  
Dr Kate Mitchell, Principal Research Officer  
Mr David Hopkins, Legislative Research Officer

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two Principal Research Officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

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# Chapter 1

## Introduction

### Establishment of the committee

1.1 The committee was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) in March 2012. The establishment of the committee was a key element of Australia's Human Rights Framework, which was launched on 21 April 2010, and which was intended to enhance the understanding of, and respect for, human rights in Australia.<sup>1</sup>

### Role of the committee

1.2 The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

1.3 The committee's purpose is to enhance understanding of, and respect for, human rights in Australia; and to ensure appropriate recognition of human rights issues in legislative and policy development.

### Functions and powers of the committee

1.4 The committee has the following functions under the Act:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

1.5 The powers and proceedings of the committee are set out in the committee's resolution of appointment.<sup>2</sup>

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1 See, minister's second reading speech: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2010-09-30%2F0033%22>.

2 The committee's resolution of appointment is available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/).

## **Definition of human rights and the Act**

1.6 Human rights are defined in the Act as those contained in the following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

1.7 The committee's analysis of legislation is against the standards set out in these seven human rights treaties. The ICCPR and the ICESCR cover all the key civil and political and economic, social and cultural rights. For the most part, the five other treaties expand or elaborate on these rights in a more detailed way. This understanding is consistent with the approach the Attorney-General's Department has adopted in providing support to executive departments and agencies.

## **Committee membership**

1.8 The resolution of appointment governing the committee's operation provides that the committee consists of 10 members: three members of the House of Representatives drawn from the government party; two members of the House of Representatives drawn from the opposition or any other non-aligned member; two Senators drawn from the government party; two Senators drawn from the opposition; and one Senator from a minority party or an independent Senator.

1.9 The committee elects as its Chair a government member from either the House of Representatives or the Senate. The Deputy Chair is elected from one of the non-government members of the committee.

## **Acknowledgements**

1.10 The committee wishes to acknowledge the work and assistance of its external legal adviser during the reporting period, Dr Aruna Sathanapally.

1.11 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.



## **Structure of the report**

1.12 This report covers the period 30 August 2016 to 31 December 2017 (the reporting period). Mr Ian Goodenough MP has been Chair of the committee since 14 September 2016.

1.13 Chapter 2 sets out the committee's mode of operation, its analytical framework and the scrutiny dialogue model. Chapter 3 reports on the work of the committee during the reporting period.



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## Chapter 2

### The committee's mode of operation

#### Overview

2.1 The committee examines and reports on the human rights compatibility of all bills and legislative instruments that come before the Parliament. Since its inception, and in keeping with the longstanding conventions of the Senate scrutiny committees,<sup>1</sup> the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.

2.2 The committee generally meets when both the House of Representatives and the Senate are sitting, and has a regular reporting cycle around these meetings. The committee's reports are tabled after each meeting, and deal with the bills and instruments of delegated legislation introduced or tabled in the preceding period.

2.3 The committee seeks to conclude and report on its examination of bills while they are still before the Parliament, so that its findings may inform the legislative deliberations of the Parliament. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries. Where a bill is passed before the committee has been able to conclude its examination, the committee nevertheless completes its examination of the legislation and reports its findings to the Parliament.

2.4 The committee examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process under the *Legislation Act 2003* (LA).<sup>2</sup> The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the LA (15 sitting days). In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee may give a 'protective' notice of motion to disallow the instrument to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

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1 The three scrutiny committees in the Legislative Scrutiny Unit are the Senate Standing Committee on the Scrutiny of Bills; the Senate Standing Committee on Regulations and Ordinances; and the Parliamentary Joint Committee on Human Rights.

2 The LA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LA (section 9) or is otherwise not subject to disallowance (section 42). Prior to March 2016, the LA was called the *Legislative Instruments Act 2003*. References in this report are generally to the current provisions of the LA.

## **The committee's analytical framework**

2.5 Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

2.6 International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).<sup>3</sup> All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

2.7 Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

2.8 As required, the committee takes into account the views of human rights treaty bodies, as well as international and comparative human rights jurisprudence. These sources are relevant to the interpretation of the human rights against which the committee is required to assess legislation.

### ***Statements of compatibility***

2.9 The Act requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.<sup>4</sup> The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out an assessment of the extent to which the legislation engages human rights.

2.10 The committee sets out its expectations in relation to statements of compatibility in its Guidance Note 1.<sup>5</sup>

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3 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law; and the right to non-refoulement.

4 See Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

5 See Guidance Note 1 at Appendix 2.

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## The scrutiny dialogue model

2.11 The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seeking further information from the legislation proponent. Any response from the legislation proponent is subsequently considered and published alongside the committee's concluding report on the matter. As well as making findings on the human rights compatibility of the relevant legislation, the committee may make specific recommendations to ensure the compatibility of the legislation with Australia's human rights obligations.

2.12 In some cases, legislation proponents may provide an undertaking to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course).<sup>6</sup>

2.13 The committee does not generally call for public submissions in relation to its technical scrutiny of legislation. However, the committee welcomes correspondence and submissions from parliamentarians, interested groups and other stakeholders who wish to bring matters to the committee's attention that are relevant to its functions under the Act. The committee will take these into account where relevant to the examination of a particular item of legislation.

## Structure of the committee's reports

2.14 The structure of the committee's reports reflects the progress of the dialogue model described above, with matters proceeding from an initial report describing the human rights issues and concerns to a concluding report that takes into account any information received by the legislation proponent in response to the committee's initial report.

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6 See, for example, Parliamentary Joint Committee on Human Rights, Australian Public Service Commissioner's Directions 2016 [F2016L01430], *Report 10 of 2016* (30 November 2016) pp. 13-16: in response to the committee's request for further information about the compatibility of the directions with the right to privacy, the Australian Public Service Commissioner undertook to review the necessity of publicly notifying information about termination decisions involving Australia Public Service employees on the grounds of breach of the Code of Conduct. On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that the current arrangements of publishing terminations of employment for breaching the Code of Conduct in the Gazette should not continue. The Commissioner stated that he intended to establish a new secure database of employment terminations for breaches of the Code of Conduct that would not be accessible to the general public. See, Parliamentary Joint Committee on Human Rights, Australian Public Service Commissioner's Directions 2016 [F2016L01430], *Report 7 of 2017* (8 August 2017) pp. 37-40.

2.15 Chapter 1 of the committee's reports includes new and continuing matters. This generally includes all bills introduced during the preceding period, with bills not raising human rights concerns being listed as such, and bills raising human rights issues being the subject of substantive report entries setting out the nature of the committee's concerns and the information being sought from the legislation proponent.

2.16 Chapter 1 also includes the committee's reporting on any instruments of delegated legislation registered on the Federal Register of Legislation (FRL) in the reporting period that raise human rights concerns. The committee's reports cross-reference to the FRL for the full list of instruments considered during the reporting period. Due to the very high volume of delegated legislation examined by the committee, such instruments are substantively reported on as per an exceptions-based approach.

2.17 Chapter 1 also considers continuing matters (or further response required matters), which are matters in relation to which the committee has received a response from the legislation proponent, but requires further information in order to conclude its examination of the matter.

2.18 Chapter 2 of the committee's reports examines responses received in relation to the committee's requests for information and on the basis of which the committee will conclude its examination of the legislation in question. As noted above at paragraph [2.11], the committee's concluding remarks on legislation may include findings or recommendations as to the human rights compatibility of the legislation and/or specific recommendations to address any human rights concerns.

### **Legal advice**

2.19 The committee is assisted by an external legal adviser on a part-time basis, who is appointed by the Presiding Officers of the Parliament. The committee's legal adviser during the reporting period was Dr Aruna Sathanapally. Dr Sathanapally has researched extensively on the role of representative parliaments in applying and advancing human rights protections and previously worked with the Australian Government Solicitor providing advice on the interaction of domestic legislation and international obligations. During her time as legal adviser to the committee she continued practising as a barrister in New South Wales.

### **Committee publications and resources**

2.20 In addition to its regular reports on the human rights compatibility of legislation, the committee has produced a number of publications and resources to assist ministers, departments and interested parties more generally in engaging with the committee and its work.

### ***Committee guidance notes***

2.21 The committee has produced the following guidance notes to assist legislation proponents and other interested parties in understanding and engaging

with the committee and its work. The guidance notes are available on the committee's website and are included in **Appendix 2** to this report.

*Guidance Note 1—Drafting statements of compatibility*

2.22 This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is primarily designed to assist legislation proponents in the preparation of statements of compatibility.

*Guidance Note 2—Offence provisions, civil penalties and human rights*

2.23 This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

**Guide to human rights**

2.24 The committee's *Guide to human rights* (the guide) provides an introduction to the key human rights protected by the human rights treaties relevant to the committee's assessments of legislation.<sup>7</sup>

2.25 The guide is intended to provide a brief and accessible overview of Australia's human rights obligations, the key human rights considered by the committee, and the manner in which human rights may be justifiably limited. Case studies are provided to illustrate how human rights may be engaged and limited in practice. The guide also includes a references section for those seeking more comprehensive information about the rights listed in the guide.

2.26 The guide is available on the committee's website.

**Index of bills and legislative instruments**

2.27 The *Index of bills and legislative instruments* lists all the bills examined by the committee, and those legislative instruments in relation to which the committee has identified human rights concerns (as noted above at paragraph [2.16], the committee takes an exceptions-based approach to substantive reporting on legislative instruments).<sup>8</sup>

2.28 The *Index* contains a shorthand description of any rights engaged by the legislation; the key issues arising in the legislation; the action taken by the committee (that is, whether the committee considered that the legislation did not raise human rights concerns, made an advice-only comment or made a comment requiring a

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7 The committee's first *Guide to Human Rights* was published in March 2014. This guide was updated in June 2015.

8 The instruments received and considered by the committee in the reporting period are listed on the Federal Register of Legislation: <https://www.legislation.gov.au/>.

response from the legislation proponent); and the relevant report(s) in which the committee's full comments may be found.<sup>9</sup>

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9 The Index of bills is available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Index\\_of\\_bills\\_and\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments).



## Chapter 3

### Work of the committee in 2016-17

3.1 This chapter provides information about the work of the committee during 2016-17,<sup>1</sup> including the major themes and scrutiny issues arising from the legislation examined by the committee.

#### Legislation considered

3.2 During the reporting period, the committee assessed a large number of bills and legislative instruments in order to determine their compatibility with Australia's international human rights obligations.

3.3 Table 3.1 shows the total number of bills, Acts and legislative instruments assessed. It also shows how many in each category were found to raise no human rights concerns. Where a bill, Act or legislative instrument raised human rights concerns, Table 3.1 shows whether the committee provided an advice-only comment to, or required a response from, the legislation proponent in relation to the human rights issues identified.

**Table 3.1: Legislation considered during the reporting period**

	Total considered	No human rights concerns	Advice-only comment	Response required
Bills and Acts	405	309	42	54
Legislative instruments	2,942	2,875	32	35

#### Reports tabled during the period

3.4 The committee tabled 17 scrutiny reports during the reporting period, from *Report 7 of 2016* to *Report 13 of 2017*.<sup>2</sup>

1 The reporting period covers from the opening of the 45th Parliament on 30 August 2016 to 31 December 2017. The committee's first scrutiny report of the 45th Parliament, *Report 7 of 2016*, was tabled on 11 October 2016 and its final scrutiny report of 2017, *Report 13 of 2017*, was tabled on 5 December 2017.

2 The committee's scrutiny reports are available on its website at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

3.5 The committee also tabled its *Freedom of Speech in Australia* inquiry report as well as two annual reports, *Annual Report 2014-15* and *Annual Report 2015-16*.<sup>3</sup>

### Commonly engaged rights

3.6 The most commonly engaged human rights identified in legislation substantively commented on during the reporting period were spread across both civil and political rights and economic, social and cultural rights. These were, in order of most commonly engaged:

- right to privacy;<sup>4</sup>
- right to equality and non-discrimination;<sup>5</sup>
- right to a fair trial;<sup>6</sup>
- right to a fair hearing;<sup>7</sup>
- right to an adequate standard of living;<sup>8</sup>
- protection of the family/respect for family life;<sup>9</sup>
- right to social security;<sup>10</sup>
- right to be presumed innocent;<sup>11</sup>
- right to freedom of expression or opinion;<sup>12</sup>
- best interests of the child/rights of children;<sup>13</sup>

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3 The committee's annual reports are available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Annual\\_Reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports). The committee's inquiry report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, is available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Committee\\_Inquiries](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries).

4 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

5 Articles 2 and 26 of the ICCPR; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 14 of the ICCPR.

7 Article 14 of the ICCPR.

8 Article 11(1) of the ICESCR.

9 Articles 17 and 23 of the ICCPR; article 10 of the ICESCR.

10 Article 9 of the ICESCR.

11 Article 14(2) of the ICCPR.

12 Article 19 of the ICCPR; article 21 of the Convention on the Rights of Persons with Disabilities (CRPD).

13 Article 3 of the Convention on the Rights of the Child (CRC).

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- non-refoulement obligations;<sup>14</sup>
  - right to freedom of movement;<sup>15</sup> and
  - right not to incriminate oneself.<sup>16</sup>

3.7 During the reporting period, the rights listed above accounted for 71 percent of rights which the committee reported on substantively within both primary and delegated legislation. This figure does not include rights engaged in legislation which the committee initially examined and reported on as not raising human rights concerns (this may be because the bill or instrument promoted human rights and/or permissibly limited human rights).<sup>17</sup>

3.8 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined and substantively commented on by the committee in the reporting period. These statistics show similar trends to the previous reporting period with a balance between civil and political rights and economic, social and cultural rights engaged.

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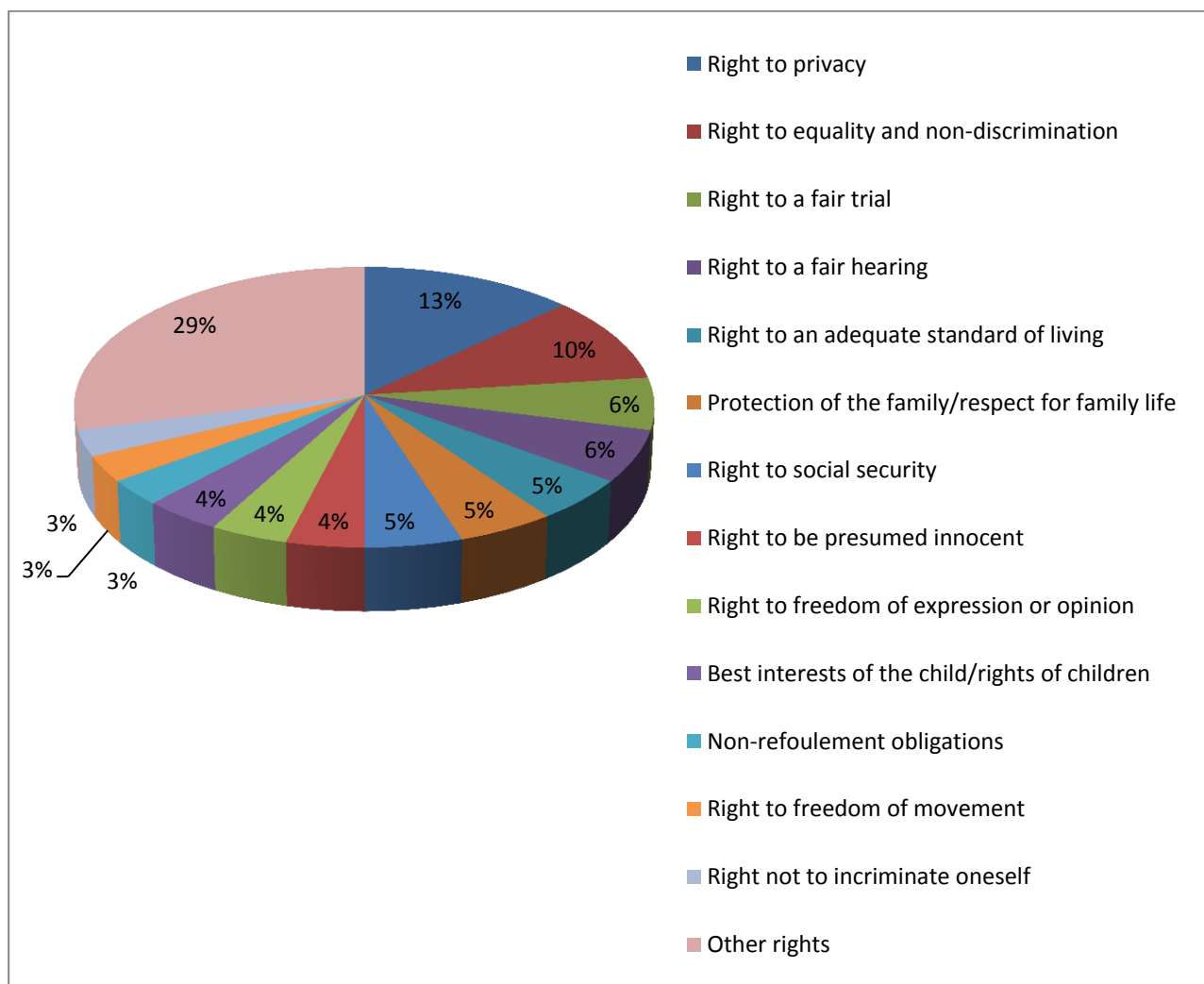
14 Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; articles 6(1) and 7 of the ICCPR; see also Article 33 of the Refugee Convention.

15 Article 12 of the ICCPR.

16 Article 14(3)(g) of the ICCPR.

17 The committee examines all bills and instruments that come before the parliament for compatibility with human rights. However, it focuses its substantive analysis or comments in reports on measures that raise human rights concerns in such legislation. Accordingly, the rights that are identified as engaged in the above statistics relate to legislation raising human rights concerns. During the reporting period, bills not raising human rights concerns were listed in the committee's reports. For legislative instruments not raising human rights concerns, a cross reference was made in the committee's reports to the list contained in the *Journals of the Senate*. Legislative instruments raising human rights concerns were identified on an exceptions basis in the committee's reports.

Figure 3.1: Human rights engaged by legislation in 2016-17



### Major themes

3.9 Three significant policy areas that attracted substantive comment from the committee in the reporting period related to social security, workplace relations and migration legislation. Additionally, the committee commented on various pieces of legislation that engaged the right to a fair trial and fair hearing.

#### ***Social security legislation***

3.10 The committee examined a number of bills and legislative instruments in the reporting period relating to social security. Measures examined included amended waiting periods, residency requirements and other qualification criteria for certain payments;<sup>18</sup> measures which sought to restrict how certain payments are used;<sup>19</sup> the

18 For example, Parliamentary Joint Committee on Human Rights, *Social Services Legislation Amendment Bill 2017, Report 5 of 2017* (14 June 2017) pp. 67-72; *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858], Report 4 of 2017* (9 May 2017) pp. 149-154; *Social Services Legislation Amendment (Payment Integrity) Bill 2017, Report 10 of 2017* (12 September 2017) pp. 75-81.

creation of a new jobseeker payment and the cessation of certain social security types;<sup>20</sup> and proposed penalties for non-compliance with certain conditions.<sup>21</sup>

3.11 Human rights engaged by this legislation included the right to social security; the right to an adequate standard of living; the right to privacy; the right to equality and non-discrimination; the rights of the child; the right to protection of the family; the right to health; the right to maternity leave; and obligations not to unjustifiably take retrogressive or backward steps in the progressive realisation of economic, social and cultural rights.

#### *Changes to waiting periods*

3.12 In the reporting period, several pieces of legislation sought to implement or adjust waiting periods for persons accessing certain social security payments.<sup>22</sup> The imposition of waiting periods before access to social security entitlements engages and limits the right to social security and an adequate standard of living because it reduces access to such entitlements and may impact on an individual's ability to afford the necessities to maintain an adequate standard of living.

3.13 In several cases, the committee was able to conclude that such measures were likely to constitute permissible limitations on human rights following further information from the relevant minister.

3.14 This was the case, for example, with the Social Services Legislation Amendment Bill 2017 (now Act), which sought to extend the Ordinary Waiting Period<sup>23</sup> to persons claiming youth allowance (other) or parenting payments. The committee's initial analysis outlined several human rights concerns, including the availability of adequate safeguards where a person may be unable to meet basic necessities during the waiting period.<sup>24</sup> The initial analysis also identified that, as

19 For example, Parliamentary Joint Committee on Human Rights, Social Services Amendment (Housing Affordability) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 43-52; Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-138.

20 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 138-203.

21 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 138-203.

22 Some of these measures were reintroduced measures. For example, the Social Services Legislation Amendment (Youth Employment) Bill 2016 sought to introduce a four-week waiting period for individuals under the age of 25 applying for Youth Allowance (Other) or Special Benefit. This measure was previously contained in the Social Services Legislation Amendment (Youth Employment) Bill 2015. The committee reported on the 2016 bill, which did not proceed, in its *Report 7 of 2016* (11 October 2016) pp. 97-99.

23 The ordinary waiting period is a one week period that new claimants must serve before they are able to start accessing payments, including Newstart Allowance and sickness allowance.

24 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 67-72.

women are the primary recipients of parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would disproportionately impact upon this group and the right to equality and non-discrimination was therefore also engaged.

3.15 In response to the committee's inquiries, the minister explained that there was an exception to the Ordinary Waiting Period for persons unable to accommodate their own living costs due to severe financial hardship. Further, the minister noted that there was also specific support for those who had experienced domestic violence (most of whom are women) to ensure they will have immediate support.<sup>25</sup>

3.16 Each of these exceptions appeared to provide a safeguard such that eligible individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of severe financial hardship, including leaving situations of domestic violence. In light of the additional information provided, the committee assessed that the measure appeared likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

#### *Income management arrangements*

3.17 The committee commented on a number of bills and instruments seeking to implement, extend or amend income management arrangements.<sup>26</sup>

3.18 The income management regime was examined by the committee in its 2013 and 2016 Reviews of the Stronger Futures measures, focusing on its operation in the Northern Territory.<sup>27</sup> Assessments of related legislation in the reporting period drew the findings of the 2016 review to the attention of legislation proponents. Along with the right to social security, this legislation engaged the right to privacy and family and the right to equality and non-discrimination.

3.19 Income management arrangements generally involve a portion of a person's social security payment being 'quarantined', with restrictions imposed on how these

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25 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 71.

26 Including, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill, Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 45-48; Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424], *Report 8 of 2016* (9 November 2016) pp. 53-54; Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210], *Report 8 of 2017* (15 August 2017) pp. 122-126; and Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-137.

27 See, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) and *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013).

'quarantined' funds can be spent. In particular, the committee noted that such arrangements may not be a proportionate limitation on human rights where the blanket imposition of the scheme occurs without an assessment of an individual's suitability and consent to participate.<sup>28</sup> The committee raised these concerns in relation to legislation that sought to extend the cashless debit card trial, implemented under the *Social Security Legislation Amendment (Debit Card Trial) Act 2015*. The committee noted that, as the scheme applies to anyone residing in locations where the trial operates who is receiving a social security payment specified under the scheme, there were serious doubts as to whether the measures were the least rights restrictive way to achieve the stated objectives.<sup>29</sup>

3.20 By comparison, it was noted that the income management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.<sup>30</sup> Accordingly, the committee stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.<sup>31</sup>

#### *Welfare reform bill*

3.21 Various changes to the administration, qualification and receipt of social security were proposed under the Social Services Legislation Amendment (Welfare Reform) Bill 2017. These included measures to:

- create a new jobseeker payment as the main working age social security payment and provide that a number of other social security payments will cease;
- establish a two year trial of mandatory drug testing for recipients of Newstart Allowance and Youth Allowance in three regions;
- remove exemptions from mutual obligation participation requirements in relation to certain social security payments where the reason is attributable to drug or alcohol dependency; and
- suspend income support payments for failure to meet mutual obligation participation requirements without a reasonable excuse, which may lead to cancellation in certain circumstances.

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28 See, Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-137.

29 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 131.

30 See, Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48.

31 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 47.

3.22 The committee sought the advice of the minister as to whether various identified measures in the bill were compatible with human rights. The further information provided by the minister enabled the committee to conclude that several measures may be compatible.<sup>32</sup>

3.23 For example, in relation to the creation of a new jobseeker payment and the cessation of certain social security types,<sup>33</sup> the committee sought the advice of the minister as to whether this may result in reductions in the amount payable, or the qualifications for, certain social security recipients and the availability of safeguards. The minister's response indicated that in the majority of cases, the cessation of certain categories of social security payments would not result in a reduction in the level of payments. The response also explained a range of safeguards in place to help ensure that individuals were able to access social security to meet basic necessities. On the basis of this further information, the committee concluded that the measures were likely to be compatible with the right to social security.<sup>34</sup>

3.24 However, in relation to various other measures, including the proposed drug testing trial and the removal of certain exemptions from mutual obligation requirements, evidence was not provided to demonstrate the proportionality of these changes. Based on the information provided, the committee concluded a number of these other measures were likely to be incompatible with various human rights.<sup>35</sup>

### **Workplace relations legislation**

3.25 In the reporting period, the committee considered a number of bills and instruments relating to workplace relations, including amendments to the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009*, as well as legislative instruments made under the *Building and Construction (Improving Productivity) Act 2016*.<sup>36</sup>

3.26 Measures examined by the committee included proposals to:

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32 Including measures in schedules 1 -7; schedule 10; and schedule 17.

33 Schedules 1-7 of the Social Services Legislation Amendment (Welfare Reform) Bill 2017.

34 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 146.

35 After the reporting period, the mandatory drug testing trial provisions in Schedule 12 were removed from the Welfare Reform Bill. However, on 28 February 2018 the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 was introduced in the House of Representatives. The 2018 Bill is substantively the same as Schedule 12 of the Welfare Reform Bill. The committee reported on the 2018 Bill in its *Report 3 of 2018* (27 March 2018) p. 124.

36 These included: Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]; Code for the Tendering and Performance of Building Work 2016 [F2016L01859]; Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017; Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017; and Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017.



- expand the circumstances in which a person may be disqualified from holding office in a registered organisation (such as a trade union or employers association);<sup>37</sup>
- expand the grounds for the cancellation of the registration of registered organisations;<sup>38</sup>
- provide that Commonwealth funded building industry participants must not be covered by an enterprise agreement that includes specific clauses;<sup>39</sup>
- prohibit the display of particular signs and union logos, mottos or indicia;<sup>40</sup>
- prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund;<sup>41</sup>
- prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme;<sup>42</sup> and
- increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009*.<sup>43</sup>

3.27 Human rights engaged by these and related amendments included the right to freedom of association; the right to collectively bargain; the right to just and favourable conditions of work; and the right to freedom of expression. In its assessments of the compatibility of legislation against these rights, the committee's

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37 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 113.

38 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 113.

39 See, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], assessed in 2017 in the committee's *Report 5 of 2017* (14 June 2017) pp. 2-13; *Report of 9 of 2017* (5 September 2017) pp. 45-63; and *Report 12 of 2017* (28 November 2017) pp. 58-79.

40 See, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], assessed in 2017 in the committee's *Report 5 of 2017* (14 June 2017) pp. 2-13; *Report of 9 of 2017* (5 September 2017) pp. 45-63; and *Report 12 of 2017* (28 November 2017) pp. 58-79.

41 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 16.

42 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017).

43 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 8 of 2017* (15 August 2017) pp. 104-121.

analysis was informed, in part, by International Labour Organization (ILO) treaties, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>44</sup>

3.28 In particular, concerns arose about measures that created an additional sanction or disincentive for taking industrial action and it was noted that existing restrictions on taking industrial action under Australian domestic law had been consistently criticised by international supervisory mechanisms as going beyond what is permissible under international human rights law.<sup>45</sup>

3.29 Concerns also arose over the prohibition of particular terms in industrial agreements, which limited the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.<sup>46</sup> In relation to the circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, the committee drew to the attention of legislation proponents comments by the ILO's Committee on Freedom of Association, that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'<sup>47</sup>

3.30 The committee also made some recommendations in order to assist to improve the human rights compatibility of certain measures.

3.31 For example, under proposed section 28 of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, the Fair Work Commissioner, the minister or another person with sufficient interest can apply to the Federal Court for an order cancelling registration of an organisation, if the person considers there are grounds for such cancellation. Under proposed section 28K, if the court finds that a ground is established it must cancel the organisation's registration unless the organisation can satisfy the court that it would be unjust to do so, having

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44 ILO treaties and jurisprudence are relevant to the interpretation of rights, such as the right to collective bargaining and the right to freedom of association, contained in the human rights treaties which fall directly under the committee's mandate. Further, the Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

45 See, Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 119.

46 Parliamentary Joint Committee on Human Rights, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], *Report 12 of 2017* (28 November 2017) p. 60.

47 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 18.

regard to certain matters.<sup>48</sup> The committee recommended that the court's proposed powers of cancellation be amended so as only to be available to be exercised as a matter of last resort where it is in the best interests of the members of the organisation in question.<sup>49</sup>

### **Migration legislation**

3.32 As with previous reporting periods, the committee considered a number of bills and legislative instruments relating to migration; citizenship; asylum seekers and refugees, and substantively commented on measures including in relation to visa cancellation and revalidation powers; review processes; measures made under, or amending, the *Australian Citizenship Act 2007* including relating to loss of citizenship and citizenship eligibility; and the management of immigration detention facilities.<sup>50</sup>

3.33 This legislation engaged a number of human rights, including the right to equality and non-discrimination; right to freedom of movement; right to privacy; right to protection of the family; right to take part in public affairs; right to liberty; obligations of non-refoulement; the prohibition on torture, cruel, inhuman and degrading treatment or punishment; right to a fair hearing and criminal process rights; the prohibition against retrospective criminal laws; the prohibition against double punishment; the rights of children; right to an effective remedy; and the right to freedom of expression.

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48 These include, the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant. See, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, explanatory memorandum, pp. 19-20.

49 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 127.

50 See, Parliamentary Joint Committee on Human Rights, Australian Citizenship (Declared Terrorist Organisation—Islamic State) Declaration 2016 [F2016L00665] and Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, *Report 7 of 2016* (11 October 2016); Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 and Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017); Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017); Migration Amendment (Validation of Decisions) Bill 2017 and Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017 [F2017L01031], *Report 11 of 2017* (17 October 2017); Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016, *Report 4 of 2017* (9 May 2017); and Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Report 10 of 2017* (12 September 2017).

### *Non-refoulement*

3.34 A number of the committee's assessments of legislation in this policy area focused on non-refoulement obligations, which are absolute and therefore may not be subject to any limitation.

3.35 Non-refoulement obligations require that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; and cruel, inhuman or degrading treatment or punishment.

3.36 In its consideration of legislation that engaged Australia's non-refoulement obligations, such as visa cancellation powers, the committee reiterated that effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.<sup>51</sup> The committee further noted that ministerial discretion not to remove a person is not a sufficient safeguard under international human rights law.<sup>52</sup>

3.37 For example, in its consideration of the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, the committee assessed that the power to remove a non-citizen following the cancellation of their visa contained no safeguards to ensure that a person was not removed from Australia in circumstances where Australia owes non-refoulement obligations. The committee drew its previous comments in this context to the attention of the parliament, namely, that 'independent, effective and impartial' review of decisions to remove or deport an individual are required to comply with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>53</sup>

### *Asylum seekers and immigration detention*

3.38 The committee also commented on proposed amendments to the *Migration Act 1958* that affected the rights of people in immigration detention facilities and the rights of people seeking asylum.

3.39 This included measures that prohibited certain items in immigration detention facilities and expanded search and seizure powers to allow searches for a 'prohibited thing'.<sup>54</sup> The prohibiting of certain items in immigration detention

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51 Parliamentary Joint Committee on Human Rights, Migration Amendment (Validation of Decisions) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 109.

52 Parliamentary Joint Committee on Human Rights, Migration Amendment (Validation of Decisions) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 111.

53 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 92.

54 Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017) p. 62-89.

engaged various human rights, including the right to privacy, right to respect for the family, and the right to freedom of expression. The committee noted that, in light of the broad wording of the power to prohibit items, including mobile phones and other electronic devices, the measure risked being incompatible with human rights. In relation to the measure's compatibility with the right to respect for the family, the committee recommended that its implementation in each detention centre be monitored by government to ensure that individuals are able to maintain an adequate and sufficiently private level of communication with families that is consistent with the right not to be subjected to arbitrary or unlawful interference with family.<sup>55</sup>

3.40 Other proposed amendments examined in the reporting period included a measure that would prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country after 19 July 2013, from making a valid application for an Australian visa.<sup>56</sup>

3.41 Analysis in the committee's report identified that this measure engaged the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, and that the proposed ban may also have a disproportionate negative effect on individuals from particular national origins, nationalities, or on the basis of race, giving rise to concerns regarding indirect discrimination. The analysis also identified that the measure engaged and limited the right to protection of the family and rights of the child.<sup>57</sup>

3.42 The engagement of some of these rights was acknowledged in the statement of compatibility accompanying the bill.<sup>58</sup> However, the committee's concluding assessment stated that to penalise people who seek to enter Australia illegally in order to seek asylum was not a legitimate objective for the purposes of international human rights law.<sup>59</sup>

### ***Fair trial and fair hearing***

3.43 The rights to a fair trial and fair hearing were engaged by a significant number of bills and legislative instruments examined by the committee in the reporting period.

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55 Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017) p. 73.

56 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) pp. 85-89.

57 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) p. 87.

58 See, statement of compatibility for the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.

59 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) p. 89.

3.44 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings. There are also specific guarantees of the right to a fair trial in the determination of a criminal charge under articles 14 and 15 of the ICCPR, including the right to be presumed innocent, the right not to incriminate oneself, the right not to be tried and punished twice for an offence, and a guarantee against retrospective criminal laws.

3.45 A significant issue that arose in this context was the proposed introduction or strengthening of coercive information gathering powers, including for bodies such as the Fair Work Ombudsman (FWO)<sup>60</sup> and the Australian Prudential Regulation Authority (APRA).<sup>61</sup>

3.46 These measures abrogated the privilege against self-incrimination by providing that a person was not excused from giving information or appearing before an agency or commission on the grounds that to do so might tend to incriminate that person. The right not to incriminate oneself may be permissibly limited, provided the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

3.47 In assessing these measures, the availability of 'use' and 'derivative use' immunities can be one important factor in determining whether a limitation on the right not to incriminate oneself is proportionate. For example, in relation to the proposed evidence gathering powers of the FWO, the committee noted that partial 'use' immunity would be provided for criminal offences, meaning no information or documents obtained under a FWO notice would be admissible in evidence in proceedings, subject to certain exceptions.<sup>62</sup> However, no 'derivative use' immunity was provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a derivative use immunity in the context of the proposed evidence gathering powers raised questions about whether the measure was the least rights restrictive way of achieving its

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60 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 8 of 2017* (15 August 2017) pp. 104-121.

61 Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 53-57. Other legislation examined by the committee in this area included measures to increase penalties for non-compliance with coercive evidence gathering powers. This included failing to attend a Royal Commission as a witness and refusing or failing to comply with a notice to furnish or produce information or appearing before the Australian Competition and Consumer Commission. See, Parliamentary Joint Committee on Human Rights, Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 35-48 and Competition and Consumer Amendment (Competition Policy Review) Bill 2017, *Report 9 of 2017* (5 September 2017) pp. 64-77.

62 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 6 of 2017* (20 June 2017) p. 22.

objective. There were also questions about whether the scope of the measure was overly broad with respect to its stated objective.

### **Scrutiny issues**

3.48 During the reporting period, the timeliness of responses to the committee's requests for further information and the quality of statements of compatibility continued to pose challenges in the context of the scrutiny process.

#### ***Timeliness***

3.49 The committee seeks to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days). In both cases, the committee's approach seeks to ensure that reports on the human rights compatibility of legislation are available to inform parliamentary deliberations. During the reporting period, the committee completed its reporting on most legislation prior to passage or, in the case of legislative instruments, during the period for disallowance. However, there were some occasions where the committee did not table its final report on legislation prior to its passage or until after the period for disallowance.<sup>63</sup>

3.50 In this respect, the responsiveness of legislation proponents to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process.<sup>64</sup> While the committee stipulates a deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides the response within this time period. There is also no procedural requirement for the committee to have finally reported on a particular bill prior to its passage by the Parliament, even where this is due to the failure of a minister to respond to the committee's requests for information.

3.51 While timeliness continued to be an issue during the reporting period, the percentage of responses received on or before the requested date increased by comparison with previous reporting periods. This coincided with the establishment of a Correspondence Register on the committee's webpage at the beginning of the

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63 This was the case, for example, in relation to the Australian Border Force Amendment (Protected Information) Bill 2017; the Migration Amendment (Validation of Decisions) Bill 2017; the Privacy Amendment (Notifiable Data Breaches) Bill 2016; and the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017. However, in several cases – including in relation to the four bills listed here – the committee tabled an initial report on the legislation prior to its passage.

64 For further information on the committee's scrutiny process see above at Chapter 2, 'The Scrutiny Dialogue Model'.

45th Parliament, tracking outstanding correspondence, correspondence recently received and any correspondence received after the requested date.<sup>65</sup>

3.52 The committee may also choose to conclude its consideration of legislation without a response from the relevant legislation proponent, which may act as an incentive for the timely receipt of responses in relation to the committee's scrutiny inquiries.<sup>66</sup>

3.53 Responses were requested in relation to 89 bills and legislative instruments in the reporting period.<sup>67</sup> Of these, responses in relation to 27 bills and instruments (30%) were provided to the committee by the requested date. Responses in relation to 60 bills and instruments (68%) were provided to the committee after the requested date and two bills and instruments (2%) still had a response outstanding as of 19 June 2018 (see figure 3.2).

3.54 By comparison, responses in relation to only 11% of bills and instruments were received by the requested date in the 2015-16 reporting period.

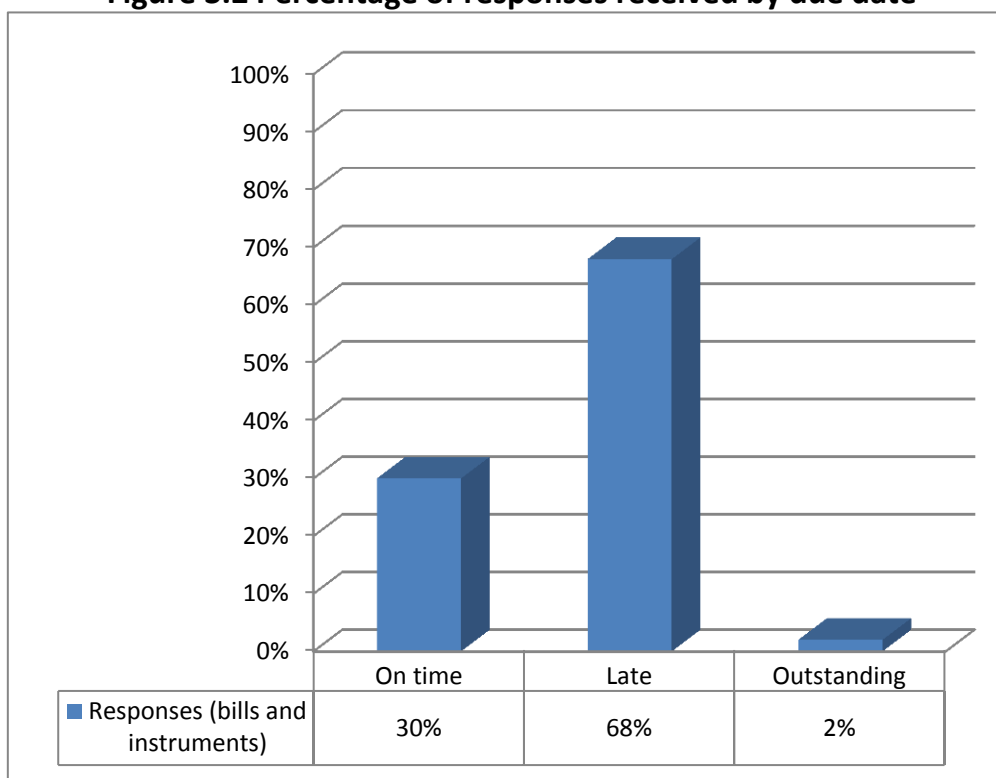
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65 See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Correspondence\\_register](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register).

66 The committee concluded its consideration of several bills and instruments in the reporting period without a response from the legislation proponent. See, for example, Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016, *Report 4 of 2017* (9 May 2017) pp. 99-111; and Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210], *Report 8 of 2017* (15 August 2017) pp. 122-125.

67 Responses were requested in relation to 54 bills and 35 legislative instruments in the reporting period.



**Figure 3.2 Percentage of responses received by due date**

### ***Statements of compatibility***

3.55 During the reporting period, a number of statements of compatibility provided sufficient assessments of limitations on human rights, which enabled the committee to conclude its scrutiny of specific legislation without needing to request further information from the legislation proponent.

3.56 For example, in his tabling statement in the House of Representatives on 14 June 2017, the committee's Chair referred to the example of the Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017, which increased compliance requirements in the vocational education and training sector. The Chair noted that the statement of compatibility for the bill clearly acknowledged potential limitations on the rights to education, work and privacy, but provided enough information to justify these limitations under human rights law.<sup>68</sup> The committee was therefore able to classify the bill as not raising human rights concerns.<sup>69</sup>

3.57 However, in general, there remained considerable room for improvement in terms of the quality of statements of compatibility during the reporting period. A

68 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Wednesday 14 June 2017. See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Statements](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements).

69 As noted earlier, a bill may be listed as not raising human rights concerns because the bill does not engage or promotes human rights, and/or permissibly limits human rights.

number of statements of compatibility asserted that measures did not engage any 'applicable rights or freedoms', in cases where human rights were engaged and potentially limited.<sup>70</sup> A number of statements failed to acknowledge that measures engaged specific rights, including the right not to incriminate oneself<sup>71</sup> and the right to equality and non-discrimination (indirect discrimination).<sup>72</sup>

3.58 In his tabling statement on 9 May 2017, the committee's Chair emphasised that a limitation on human rights is acceptable in many circumstances, but requires explanation as to whether it is permissible; namely, how the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.<sup>73</sup> This includes setting out in the statement of compatibility any safeguards that will be available to ensure that any limitations on human rights are the least rights restrictive alternative.

### **Additional work of the committee**

#### ***Freedom of speech in Australia inquiry***

3.59 On 8 November 2016, the Attorney-General referred to the committee the following matters for inquiry: firstly, whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech and, secondly, whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed.<sup>74</sup>

3.60 As part of the inquiry, the committee held nine public hearings between 12 December 2016 and 20 February 2017 in each state and territory and received a

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70 See, for example, Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 *Report 1 of 2017* (16 February 2017) pp. 2-4; Vaporised Nicotine Products Bill 2017, *Report 7 of 2017* (8 August 2017) pp. 34-35; Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822], *Report 9 of 2017* (5 September 2017) pp. 25-27.

71 See, for example, Parliamentary Joint Committee on Human Rights, Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 28-34 and Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-44.

72 See, for example, Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 46-49; Social Services Legislation Amendment (Payment Integrity) Bill 2017, *Report 10 of 2017* (12 September 2017) pp. 75-82; Social Services Legislation Amendment (Housing Affordability) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 43-52.

73 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 9 May 2017. See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Statements](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements).

74 The full terms of reference are available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/FreedomspeechAustralia/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference).

high volume of written submissions.<sup>75</sup> The committee tabled its final inquiry report on 28 February 2017, comprised of four substantive chapters addressing the four terms of reference for the inquiry.

3.61 The final report contained 22 recommendations aimed at improving the legislation and the complaints-handling process.

3.62 The committee is yet to receive a formal government response to this report. However, some of the measures in the Human Rights Legislation Amendment Bill 2017, which passed both Houses of Parliament in amended form on 31 March 2017, related to issues raised in the course of the committee's inquiry and the committee's final report, including its recommendations.<sup>76</sup>

### ***Liaison with external groups and delegations***

3.63 During the reporting period, committee members met with a range of individuals and delegations, including:

- Mr Michael Forst, UN Special Rapporteur on the situation of human rights defenders (11 October 2016);
- Dr Mutuma Ruteere, UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (28 November 2016);
- a parliamentary delegation from the United Kingdom (21 March 2017);
- Ms Victoria Tauli-Corpuz, UN Special Rapporteur on the rights of indigenous peoples (27 March 2017);
- representatives of the Refugee Council of Australia (23 May 2017);
- Dr Al-Saraj, Iraqi MP (20 June 2017);
- Professor Rosalind Croucher, President of the Australian Human Rights Commission (7 September 2017);
- DFAT representatives for a briefing on business and human rights (16 October 2017);
- Ms Jessie Majome, member of the National Assembly of Zimbabwe (5 December 2017); and
- representatives of the ASEAN Intergovernmental Commission on Human Rights (6 December 2017).

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75 The committee received approximately 11,460 items relating to the inquiry, 418 of which were accepted as submissions and published on the committee's website.

76 See, Parliamentary Joint Committee on Human Rights, Human Rights Legislation Amendment Bill 2017, *Report 4 of 2018* (9 May 2017) pp. 50-65.

3.64 Additionally, two committee members, Mr Graham Perrett (Deputy Chair) and Senator Linda Reynolds, attended the Commonwealth Parliamentary Conference on the Rule of Law and Human Rights in London on 24-26 January 2017. During the conference, topics discussed included best practices for parliamentary human rights committees and opportunities for such committees to work productively with national human rights institutions, civil society and executive government.

**Mr Ian Goodenough MP**  
**Chair**

## Appendix 1

### Outstanding correspondence

As at 19 June 2018, the following responses to committee comments in its regular reports in the 44th and 45th Parliament remained outstanding.

#### Outstanding correspondence

##### *Government bills and legislative instruments*

Legislation	Portfolio	Report(s)	Response requested by
Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014	Attorney-General	30/44	27 Nov 2015
Omnibus Repeal Day (Autumn 2014) Bill 2014	Prime Minister and Cabinet	5/44	11 Apr 2014
Plebiscite (Same-Sex Marriage) Bill 2016	Attorney-General	7/2016	26 Oct 2016
Road Safety Remuneration Repeal Bill 2016	Employment	38/44	20 May 2016
Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]	Social Services	5/2017	30 June 2017

##### *Committee inquiries*

As at 19 June 2018, the committee was still awaiting responses to its inquiries into the following:

Inquiry	Report tabled
Examination of the <i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i> and related legislation	19 June 2013
2016 Review of Stronger Futures measures	16 Mar 2016
Freedom of speech in Australia	28 Feb 2017



## **Appendix 2**

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### **Guidance Note 1 and Guidance Note 2**





## GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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*This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.*

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### Background

#### *Australia's human rights obligations*

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

#### *Civil and political rights*

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

## ***Economic, social and cultural rights***

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

### **Limiting a human right**

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.<sup>1</sup> For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

#### ***Prescribed by law***

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

#### ***Legitimate objective***

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.<sup>2</sup>

#### ***Rational connection***

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

#### ***Proportionality***

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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<sup>1</sup> Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

<sup>2</sup> For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at <http://www.aprh.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

### ***Retrogressive measures***

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

### **The committee's approach to human rights scrutiny**

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

### **The committee's expectations for statements of compatibility**

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.<sup>3</sup>

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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<sup>3</sup> The Attorney-General's Department guidance may be found at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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## GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

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*This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.*

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### Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).<sup>1</sup>

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.<sup>2</sup>

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.<sup>3</sup> However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

### Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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<sup>1</sup> For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Join/PJCHR/Guide%20to%20Human%20Rights.pdf>.

<sup>2</sup> The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

<sup>3</sup> See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

### ***Strict liability and absolute liability offences***

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

### ***Mandatory minimum sentencing***

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).<sup>4</sup> Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

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<sup>4</sup> See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.<sup>5</sup>

### **Civil penalty provisions**

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.<sup>6</sup> This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

**Note:** even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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<sup>5</sup> This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

<sup>6</sup> The UN Human Rights Committee, while not providing further guidance, has determined that 'civil' penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

### ***When a civil penalty provision is 'criminal'***

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

#### ***a) Classification of the penalty under domestic law***

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

#### ***b) The nature of the penalty***

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

#### ***c) The severity of the penalty***

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

### ***The consequences of a conclusion that a civil penalty is 'criminal'***

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where



a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

### ***Criminal process rights and civil penalty provisions***

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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