

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,¹ 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).² 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.

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).³ 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.⁴ 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 1.⁵

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.

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).⁶

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.

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.⁷

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).⁸

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

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.⁹

9 The Index of bills is available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments.