

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 1

Introduction

This practice note:

- (i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and
- (ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- 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.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether

a consistent meaning may be found through the application of statutory interpretation principles.

- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- 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 defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates¹ provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which

may raise human rights concerns in the time available.

- In line with the steps set out in the assessment tool flowchart² (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
 1. whether and how the limitation is aimed at achieving a legitimate objective;
 2. whether and how there is a rational connection between the limitation and the objective; and
 3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

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¹ <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>

² <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/Flowchart.pdf>

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