

## Human Rights Issues

### The committee's mandate

2.1 The committee's remit is to consider bills and legislative instruments introduced into the Parliament for compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, as well as to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on these matters.

2.2 The Act defines human rights by reference to the rights and freedoms contained in seven core human rights treaties to which Australia is a party. These treaties are:

- 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 (CERD);
- Convention on the Elimination of All Forms 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)

2.3 In interpreting the treaties the consistent practice of the committee has been to draw on the views of human rights treaty bodies, international and comparative human rights jurisprudence and general international law sources where these are relevant and appropriate. At the same time, the committee considers that its interpretation of these rights and freedoms must have relevance within an Australian context.

### Relevance of the Refugee Convention

2.4 The Refugee Convention and its Protocol<sup>1</sup> are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee is mandated to measure the human rights compatibility of bills, Acts and

---

1 Australia acceded to the 1951 Convention Relating to the Status of Refugees on 17 January 1954, and acceded to its 1967 Protocol on 13 December 1973.

legislative instruments. However, a number of submissions to this committee and to other Parliamentary committees which have examined the regional processing legislation have referred to the Refugee Convention, arguing that the measures are inconsistent with Australia's obligations under that treaty.<sup>2</sup>

2.5 The committee notes that the Refugee Convention is a specialised body of law which can inform the general guarantees of the human rights treaties (and vice versa). For example:

- the provisions of the Refugee Convention and its associated jurisprudence may provide a guide to what constitutes 'arbitrary detention' under article 9 of the ICCPR as applied to asylum seekers or refugees, who may be detained for certain purposes which may not be applicable to citizens or other non-citizens present in a State;
- the rights of refugees to work and to access education guaranteed by the Refugee Convention may be relevant to determining whether it is permissible to limit the enjoyment of the general right to work guaranteed by article 6 of the ICESCR or to limit the access to schooling of refugee children; and
- the different treatment of refugees or asylum seekers compared with other categories of persons who may have arrived in a country without immigration permission, may give rise to issues of equality and non-discrimination, which references to the rights of refugees under the Refugee Convention might help to resolve (their status and the applicable international obligation may provide an 'objective and reasonable justification' for the differential treatment and thus be permissible differentiation).

## National interests and human rights

2.6 The committee recognises that under international law every State has the sovereign right to determine who may enter its territory. However, the exercise of

---

2 See, for example, B Saul, *Submission 2*; Law Institute of Victoria, *Submission 4*; Refugee & Immigration Legal Centre, *Submission 5*; Australian Human Rights Commission, *Submission 8*; Amnesty International, *Submission 9*; and Refugee Council of Australia, *Submission 10*. See also submissions to the LCA Committee inquiry on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, for example: G Appleby, A Reilly and M Stubbs, *Submission 2*; P Mathew, *Submission 6*; J McAdam, *Submission 11*; Law Council of Australia, *Submission 13*; Castan Centre for Human Rights, *Submission 17*.

These submissions generally argued that the regional processing arrangements amounted to a 'penalty' for those asylum seekers arriving by boat after 13 August 2012, contrary to article 31(1) of Refugee Convention and were also contrary to non-refoulement obligations in article 33(1) of the Refugee Convention.

this right is subject to any obligations the State accepts under international treaties (including human rights treaties) or by which it is bound under customary international law.

2.7 The committee acknowledges that the setting of immigration policies may involve judgments about the national interest. These national interest considerations may properly be taken into account in determining whether any restrictions on human rights resulting from the implementation of immigration policy are permissible. A State may derogate from some of its obligations under article 4 of the ICCPR in 'time of public emergency which threatens the life of the nation and which is officially proclaimed'. However, in the absence of a permitted derogation, it will be necessary to show that any immigration measure restricting rights pursue a legitimate goal in a rational and proportionate manner.

2.8 The goals pursued by immigration policies will generally involve the pursuit of a legitimate objective. Nonetheless, such measures must also be demonstrated to be rationally connected to the achievement of that objective and also to be a proportionate means of pursuing it, in order to be permissible under human rights law.