

Advice only

1.294 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Australian Bill of Rights Bill 2017

Purpose	Seeks to introduce a Bill of Rights in Australian law, giving effect to certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The bill further provides for the role of the Australian Human Rights Commission in inquiring into and receiving complaints concerning alleged infringements of rights or freedoms in the Bill of Rights
Sponsor	Andrew Wilkie MP
Introduced	House of Representatives, 14 August 2017
Rights	Multiple rights (see Appendix 2)
Status	Advice only

Incorporation of international human rights into domestic law

1.295 The Australian Bill of Rights Bill (the bill) seeks to enshrine a Bill of Rights in Australian law.¹ The explanatory statement to the bill explains that the Bill of Rights is modelled closely on the Australian Bill of Rights Bill 2001 (the 2001 bill).

1.296 Overall, the bill engages and promotes human rights that are contained in major human rights treaties to which Australia is party, principally in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child.² It should be noted that the UN Committee on Economic, Social and Cultural Rights has recently recommended that Australia incorporate human rights obligations into Australian domestic law.³

1.297 While other international human rights instruments to which Australia is a party and which fall within the scope of the committee's mandate are not explicitly

1 The Bill of Rights is contained in part 5 of the bill.

2 Statement of Compatibility (SOC) 1.

3 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (23 June 2017) E/C.12/AUS/CO/5.

mentioned in section 3 of the bill,⁴ a number of provisions in the Part 5 of the bill, which sets out the particular rights to be protected, protect some of the rights which are contained within these other treaties.⁵

1.298 Several of the provisions of the bill go beyond the human rights recognised in the seven core human rights treaties which fall within the scope of the committee's mandate under section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁶

Role of the Australian Human Rights Commission

1.299 The bill also gives the Australian Human Rights Commission (the commission) powers in addition to what it has under the *Australian Human Rights Commission Act 1986* (the AHRC Act).

1.300 In this respect, it is noted that the committee recently considered amendments to the AHRC Act which introduced a number of changes to the process for how the commission handles complaints of discrimination and the ability of persons alleging discrimination to apply to court after their complaint has been terminated.⁷

Permissible limitations to human rights

1.301 International human rights law recognises that reasonable limits may be placed on most human rights. Some rights have express limitation clauses setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause.⁸

1.302 There are, however, a number of absolute rights that may never be subject to permissible limitations in any circumstances. These include the right not to be subjected to torture, cruel, inhuman or degrading treatment, and the right not to be subjected to slavery.⁹

-
- 4 Specifically, section 3 (b) of the bill does not refer to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of Persons with Disabilities.
 - 5 Article 14(1) of the Bill of Rights.
 - 6 For example, Article 22 (Property) of the Bill of Rights.
 - 7 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017*, 50; see further Parliamentary Joint Committee on Human Rights, *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)*.
 - 8 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014).
 - 9 See Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, 7.

1.303 The bill contains a general limitations clause which sets out the permissible limitations to human rights in Article 3 as follows:

(1) The rights and freedoms set out in this Bill of Rights are subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.

(2) A right or freedom set out in this Bill of Rights may not be limited by any law to any greater extent than is permitted by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

1.304 This provision applies to all rights contained in Part 5 of the bill. The explanatory memorandum and statement of compatibility to the bill do not discuss this general limitation clause, however the explanatory memorandum to the 2001 bill (which is in substantively identical terms and upon which the bill heavily draws) explains the rationale for including a general limitations clause as follows:

...in order to produce an inspirational charter of rights in a simple declaratory style, the drafting technique of consolidating the qualifications into one Article has been used in preference to attaching detailed qualifications to individual Articles.¹⁰

1.305 The explanatory memorandum to the 2001 bill further explains that the provision is modelled on a similar provision in the 1982 *Canadian Charter of Rights and Freedoms*.¹¹

1.306 The bill does not expressly state that the general limitations provision does not apply to those rights which are absolute rights under international law. However, the terms of article 3(2) may be capable of addressing this such that it prevents the general limitations clause allowing for limitations to be placed on those rights within the bill which are absolute rights.

The rights of Indigenous Australians

1.307 Article 10 of the Bill of Rights contained in Part 5 of the bill sets out specific rights and responsibilities concerning Indigenous Australians.

1.308 Article 10 engages and promotes a number of international human rights, including the right for members of minorities to enjoy their culture, practice their religion and use their language and the right to self-determination. However, unlike the other subsections of Article 10, which are expressed in terms of rights, Article 10(e) is framed in terms of responsibility:

Aboriginal and Torres Strait Islander people have the following individual and collective rights and responsibilities:

10 Explanatory Memorandum to the Australian Bill of Rights Bill 2001, 8.

11 Article 1 of the *Canadian Charter of Rights and Freedoms* 1982.

[...]

(e) the responsibility to respect their laws and customs and to promote Indigenous culture.

1.309 The UN Declaration on the Rights of Indigenous Peoples (Declaration) contains a number of rights and freedoms of Indigenous peoples. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. The language of the Declaration is cast in terms of rights and freedoms (such as the right to be free from discrimination, the right to self-determination, and the right to cultural identity). The Declaration provides, among other rights, that Indigenous peoples have the right to determine the responsibilities of individuals to their communities.¹²

1.310 Neither the explanatory statement nor the statement of compatibility provide any information as to why Article 10(e) is phrased in terms of responsibility instead of rights.

Proposed right of every person to end his or her own life

1.311 Article 12(3) of the Bill of Rights provides that 'every person has the right to end his or her own life'.

1.312 The ICCPR recognises that every human being has the inherent right to life, that this right shall be protected by law, and that no one shall be arbitrarily deprived of his or her life.¹³ States must take positive steps to safeguard the right to life.

1.313 In giving persons a right to end his or her own life, the provision engages a number of human rights. In particular, it engages and limits the right to life. It also engages various other human rights, including the freedom from cruel, inhuman or degrading treatment, the right to respect for private life, and freedom of thought, conscience and religion.

1.314 The compatibility of voluntary euthanasia with international human rights law is not settled.¹⁴ The UN Human Rights Committee has made clear that States are obliged 'to apply the most rigorous scrutiny to determine whether the state party's obligations to ensure the right to life are being complied with', including stringent

12 Article 35 of the UN Declaration on the Rights of Indigenous Peoples.

13 Article 6(1) of the ICCPR.

14 See Australian Human Rights Commission, *Euthanasia, human rights and the law: Issues Paper* (May 2016).

safeguards.¹⁵ The European Court of Human Rights has held the right to life cannot be interpreted as conferring a right to die, and has further held that the right to life could 'not create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life'.¹⁶ The European Court of Human Rights has also emphasised, however, the importance of a patient's wishes in the medical decision making process, and that there is a balance to be struck between the protection of the right to life and the protection of persons' right to respect for their private life and personal autonomy.¹⁷

Committee comment

1.315 The committee draws the human rights implications of the Australian Bill of Rights Bill 2017 to the legislation proponent and parliament.

1.316 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.

15 UN Human Rights Committee, *Consideration of Reports by States Parties under Article 40 of the Covenant : Concluding observations of the Human Rights Committee – Netherlands*, CCPR/CO/72/NET (2001) 2; Australian Human Rights Commission, *Euthanasia, human rights and the law: Issues Paper* (May 2016) 34-35.

16 *Pretty v United Kingdom*, European Court of Human Rights Application No. 2346/02, 29 April 2002.

17 *Lambert and Others v France*, European Court of Human Rights Application No. 46043/14, 5 June 2015 [147].