Centre for Applied Philosophy and Public Ethics (CAPPE), Charles Sturt University

SYMPOSIUM: The Human Rights (Parliamentary Scrutiny) Act 2011
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Speech by Senator Dean Smith, Chair of the Parliamentary Joint Committee on Human Rights

E&OE……

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I would like to thank Professor Tom Campbell and the organisers of today's symposium for this opportunity to reflect on the role of the Parliamentary Joint Committee on Human Rights and its work to date.

I would also like to thank Professor Hiebert for her engaging analysis of the impact of statements of compatibility. I look forward to discussing with her the requirement for statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Professor Hiebert's paper also goes to a question that I would like to explore, namely: how might we measure the success of the Parliamentary Joint Committee on Human Rights.

In considering this question, I propose to briefly reflect on the origins of the committee and examine how the committee has approached its functions to date.

I will then briefly share with you some of my own early views as to how Australia could come to enjoy a more vibrant human rights conversation, and how the committee can contribute to that vibrancy.

Finally, I would welcome your thoughts on how the success of the committee and its particular model of human rights scrutiny might be measured.

As many of you are aware, the Act was the product of an extensive period of consultation through the National Human Rights Consultation (the Brennan Review). Key recommendations of the Brennan Review were:

- the enhancement of parliamentary scrutiny of human rights;
- the preparation of statements of compatibility for bills and legislative instruments; and
- the formation of a joint committee on human rights to review all bills and legislative instruments for compliance with a list of Australia's human rights obligations.

The Brennan Review recommendations were carried forward into the Australian Human Rights Framework which clearly places the committee, together with the requirement for statements of compatibility, at the heart of efforts to ensure that human rights are explicitly and systematically taken into account in the legislative process.

The Human Rights Framework also envisages a broader impact for the committee's work in the protection and promotion of human rights in Australia, particularly through enhancing the understanding of, and respect for, human rights across the Australian community.

In determining how to approach its functions under the Act, the committee has remained mindful of these expectations that the committee's work might usefully have a broader impact.

As you know, the committee has the function of examining and reporting to the Parliament on the human rights compatibility of bills and legislative instruments. The committee also has the ability to examine existing legislation, and to conduct broad inquiries into matters referred to it by the Attorney-General.

In contrast to other jurisdictions, the Act defines human rights according to seven international human rights treaties to which Australia is a party, including the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This definition of human rights has prompted much discussion, not least of all within the committee itself.

Indeed, to be frank, my personal view is that this definition is indeed too narrow, for a two major reasons.

First of all, it entirely ignores those human rights Australians enjoy as a result of our own domestic laws.

The human rights of Australians are largely protected by the three principal sources of our law; the Constitution, the common law and the statutes both the Commonwealth and various State parliaments.

My other personal concern is that each of the seven international instruments referred to purports to codify rights. This in turn risks creating a quasi-bill of rights – something which I have long and strongly opposed. I will return to this subject later in my address.

The committee's examination of human rights compatibility

Interpretation of human rights

The committee's starting point in its analysis of human rights compatibility has tended to be the rights set out in the International Covenant on Civil and Political Rights and the ICESCR. It then proceeds to an examination of the question of compatibility with the provisions of the other five treaties when issues arise that fall within the scope of those treaties. While the majority of compatibility issues raised by the committee relate to the two Covenants, there have been a significant number of pieces of legislation which also raise issues under the other treaties.

Approaching its work in this way, the committee has come to recognise that, in reality the key difference between its task and that of other similar committees is the requirement to consider economic, social and cultural rights.

At the same time, the committee has, on occasion, turned to international instruments not listed in the definition of human rights in the Act to assist its interpretation of the seven that are. For example, on occasion the committee has considered the United Nations Declaration on the Rights of Indigenous Peoples, the Refugee Convention[1] and International Labour Organisation Conventions. The committee has also considered international and comparative case law in its analysis of human rights principles, where

[1] The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees.

appropriate, though it has generally preferred to avoid including extensive references to such material in its reports.

The committee's analytical framework

The committee was quick to grasp the importance of establishing a robust analytical framework that could be applied consistently across all legislation that came before it. This has been important in enabling the committee to work through the human rights implications of each piece of legislation in the same methodical and principled way. This approach has also facilitated the consideration of complex and contentious issues in a measured, consistent and non-partisan way, resulting in consensus reports.

The committee does not see it as its task to consider whether a human rights compatible interpretation of legislation can be achieved through the application of statutory interpretation principles. Rather, it asks whether legislation could be applied in ways which could potentially breach human rights, including whether human rights could be breached as a result of the exercise of an administrative discretion.

The key focus of the committee's consideration of legislation is to try to understand the practical impact of the legislation and the extent to which any proposed limitation on rights is both justifiable and evidence based.

Where the legislation proposes to limit rights, the committee seeks to satisfy itself on three key questions:

- Are the measures aimed at achieving a legitimate objective?
- Is there a rational connection between the measures and that objective?
- Are the measures proportionate to that objective?

As part of its consideration of limitations the committee also considers whether they are imposed by 'law', which requires as a matter of international law that restrictions on rights be authorised by legislative provisions which are specific and precise and which do not confer unfettered administrative discretion.

The role of statements of compatibility

A key starting point for the committee's consideration of these questions is the statement of compatibility that the Act requires to be submitted with each bill and certain disallowable instruments.

In setting out its expectations for statements of compatibility in its Practice Note 1, the committee has been mindful of the expectations set out in the Explanatory Memorandum to the Act:

- The preparation and presentation of statements of compatibility is the responsibility of the sponsor of the legislation.
- The statement must assess whether the legislation is compatible with the rights in the seven human rights treaties.
- Statements are intended to be succinct assessments capable of informing Parliamentary debate and should contain a level of analysis that is proportionate to the impact of the proposed legislation on human rights. In this respect, the committee expects statements to be capable of being read as standalone documents.

The committee does not merely accept statements of compatibility at face value.

The committee considers that the sponsor of a bill or instrument bears the onus of demonstrating that limitations on rights are justified.

The committee further expects that factual assertions will be substantiated and that in appropriate cases reference will be made to relevant empirical or other relevant data to justify proposed limitations.

The committee expects that the statement will also set out the safeguards that will be applied in order to avoid infringement of rights, as well as details of other alternatives that were considered so that the committee can satisfy itself that any limitations are the least restrictive limitation on the rights in question.

Where statements fall short of the committee's expectations, the committee writes to the sponsor of the legislation, either in an advisory capacity where the legislation does

not raise human rights concerns, or to seek specific information to enable the committee to undertake its assessment of human rights compatibility.

The committee's engagement with the sponsors of legislation has been underscored by an appreciation of the importance of maintaining an effective and constructive dialogue that can contribute to the development of an appropriate level of understanding of and regard for human rights in the future development of policy and legislation.

Prioritising the committee's consideration of legislation

In its reports to Parliament the committee clearly identifies legislation according to three broad categories:

- Legislation that does not appear to raise human rights concerns;
- Legislation that potentially raises human rights concerns, but for which the committee has determined it requires further information before it can form a view on the compatibility of the legislation; and
- Legislation that raises human rights concerns of such significance or complexity that the committee may decide to defer its consideration to a later report to allow it to examine it more closely.

Working with other Parliamentary committees

The committee not only aims to complete its work while legislation is still under active consideration by the Parliament, but seeks to draw its work to the attention of other Parliamentary committees charged with examining particular bills and instruments at the earliest opportunity.

The committee is also mindful of the high degree of complementarity between its work and the Senate's two traditional scrutiny committees.

Contributing to Parliament's understanding of human rights

Of course, if the Parliament is to be able to draw on the committee's work effectively, the committee must strive to ensure that it discusses rights in clear language that is not overly legalistic and that its reports are reasonably accessible.

While the committee notes that the committee's work is increasingly referred to in committee inquiries and reports, and on occasion in debate in either Chamber, there is still some considerable scope for enhancing Parliament's consideration of human rights.

In the 43rd Parliament the committee's efforts were focused on developing its approach to the analysis of human rights compatibility. In the 44th Parliament, the committee intends to focus greater attention on enhancing the Parliament's awareness and understanding of human rights and ensuring the scope of its deliberations more accurately reflects the full breadth of our human rights heritage.

Broadening the scope

I thought it may also we worthwhile today for me to briefly share with you some of my own personal perspectives on where I see Australia's human rights dialogue heading in the future, and in particular my strong personal desire for the Human Rights Committee to have a wider brief.

That is, to consider matters other than the seven international instruments during its deliberations.

If human rights are to be at the heart of our parliamentary process – and I think everyone in this room would agree that is an unambiguously good thing – then we must ensure that Australia's human rights conversation is a vibrant one – and is inclusive of the full gamut of philosophical approaches to human rights issues.

The very worst thing that could happen in the protection of human rights in this country's legislative process is for human rights issues to be seen as a narrow side issue, wrapped up in impenetrable jargon and jealously guarded by an elite community of human rights practitioners.

The most effective way to ensure the protection to human rights to ensure that as many Australians as possible understand the issues at stake.

To that end, in my view it would be useful for the committee to adopt a more non-prescriptive approach to examination of human rights issues, in particular taking into account the Australian Constitution and sources of common law that have underpinned our understanding of human rights in this county for over a century.

Bill of rights does not mean enhanced human rights

Just to give you a general appreciation of my own philosophical approach in these matters, I think it's important that I indicate I am unequivocally opposed to the adoption of a bill of rights in Australia.

A bill of rights – in which rights are explicitly codified – is neither necessary nor appropriate in modern Australia.

For 113 years, Australia has operated once of the world's strongest and freest democracies without the need for a formal bill of rights.

To risk that record of success by implementing a formal bill of rights – which would have the effect of limiting, not widening the human rights enjoyed by Australians – would be to open the door to unforseen risks and consequences.

The codification of rights can never be neutral, because the decision of which rights to include and which to omit from a bill of rights necessarily gives rise to value-judgements.

Further, a codified list of rights would inevitable be treated by some – including some courts – as a definitive expression of the Parliament's view of what human rights Australians enjoy.

Following from that is the more worrying consideration that any omission from a list would be interpreted as an expression that Parliament did not consider a given matter to be a human right.

Conclusion

Returning to my original question, how might we measure the success of this committee and this particular model of pre-legislative scrutiny?

One measure of success might stem from the committee's ability to increase the level of awareness around the consideration of the impact of legislation on human rights.

Similarly, the committee's ability to apply a rigorous and consistent analytical framework to all legislation and continue to produce consensus reports setting out its

concerns in a principled and measured way, even when considering contentious legislation, might be considered a success.

Finally, there is a role for the community generally by raising any concerns they may hold regarding how particular legislation may operate in practice.

This is what I mean by improving the 'vibrancy' of Australia's human rights conversation.

I recognise that sometimes political imperatives are very strong. Both this committee and its predecessor have expressed significant reservations about the human rights compatibility of bills or legislation introduced by the current and previous governments that have nonetheless been enacted into law or maintained.

But the committee cannot, and was never intended to, do it all. Ultimately, success in terms of enhancing the recognition and consideration of human rights in the legislative process and in the wider community depends on each of us being prepared to play our part.