

**AMNESTY
INTERNATIONAL**



Submission to the
Senate Scrutiny of Bills Committee
Inquiry into the future direction and role of the Scrutiny of Bills Committee

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Submitted by

Amnesty International Australia



Executive summary

Amnesty International welcomes any review of existing parliamentary mechanisms that will improve the promotion and protection of human rights in Australia. In its submission to last year's National Human Rights Consultation, it described Australia's current human rights protection measures as grossly inadequate. There is also insufficient parliamentary consideration of human rights when developing legislation and policies.

In response to the inquiry into the Future Direction of the Senate Scrutiny of Bills Committee Amnesty International argues that the Committee's primary function should be to assess the compliance of legislation before parliament with Australia's international human rights obligations. To maximise its effectiveness the Committee's mandate needs to be expanded.

Amnesty International recommends the Committee's Terms of Reference be amended to enable the Committee to monitor Australia's compliance with its international obligations, best highlight human rights concerns, require detailed ministerial responses that directly respond to and justify the necessity for any potential human rights breaches as identified by the Committee and be granted investigative powers to conduct thematic inquiries on human rights issues.

It is not enough to only bolster the role of the existing scrutiny committee. To ensure the Committee is able to perform these duties in relation to compliance with human rights standards a federal Human Rights Act is needed to provide the Committee with the necessary legislative framework to assess human rights compliance.

About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 2.8 million supporters in more than 150 countries and has over 100,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

Introduction

Amnesty International welcomes the opportunity to make a submission to the inquiry on the future direction of the Senate Scrutiny of Bills Committee.

Australia's current non-compliance with its international obligations¹, its ad hoc approaches to human rights protection at federal, state and territory levels and the lack of available remedies for violations motivate Amnesty International's call for better human rights protection in Australia.

¹ Amnesty International's submission to the 2009 National Human Rights Consultation provides an overview of Australia's non compliance to its international human rights treaty obligations, available at http://www.amnesty.org.au/images/uploads/adp/AIA_Submission_to_the_NHRC_Jun09.pdf



After an extensive public consultation, the National Human Rights Consultation Committee (NHRC Committee) last year found that Australia has “a patchwork quilt of protection for human rights”.² The NHRC Committee also stated that “insufficient attention is paid to human rights when the Federal Government and parliament are formulating policy and legislation.”³ It noted that there was broad public support for “government and parliament to be more attentive to human rights when considering new law and policies.”⁴

In an opinion poll commissioned by Amnesty International in March 2009⁵, there was significant public support for a Human Rights Act for Australia. The Nielsen survey results found that 81 percent of people surveyed would support the introduction of a law to protect human rights in Australia. In addition to this, 85 per cent of those who supported the introduction of human rights legislation believed its introduction should be a high or very high priority for the Australian Government.

While the legislative, executive and judicial arms of government all have an intrinsic role in promoting and protecting human rights, Amnesty International strongly believes the ultimate responsibility lies with Parliament to ensure Australia’s international human rights obligations are upheld. As such, the organisation supports any parliamentary mechanism that is specifically mandated to consider the human rights implications of new legislation as well as monitor Australia’s compliance with its international obligations.

As the NHRC Committee stated, a human rights scrutiny committee should be designed to improve consideration of human rights in the development of legislation. “*The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do no impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community*”. This will prevent legislation from being introduced which would potentially negatively impact on individuals rights without proper human rights scrutiny. It will also foster broader human rights considerations within the parliamentary system.

There are two significant issues Amnesty International wishes to emphasise in this submission:

1. The current Senate Scrutiny of Bills Committee needs reforming to maximise its ability to consider the human rights implications of legislation before parliament
2. A Human Rights Act is needed to underpin an effective human rights scrutiny committee

Recommended improvements to Senate Scrutiny of Bills Committee

In formulating its response to this inquiry, Amnesty International examined some key historic pieces of legislation which the organisation has repeatedly expressed concern over, to gain an understanding of how the Committee addressed the human rights concerns of the draft legislation as well as the responses from Government.

These include:

- o *Migration Amendment (Excision from Migration Zone) Act 2001*
- o *Anti-Terrorism Bill (No.2) 2005*
- o *Northern Territory National Emergency Response Act 2007*

As per the Committee’s terms of reference⁶, the Senate Scrutiny of Bills Committee’s examines all bills which come before the Parliament and as such reviewed the three pieces of legislation above. Amnesty International

2 Ibid, p.329

3 Ibid, p 355

4 Ibid, p 356

5 Amnesty International media release, “Majority support the introduction of a law to protect human rights in Australia”, issued 12 March 2009 available at - <http://www.amnesty.org.au/news/comments/20460/> (accessed 31.3.10)

6 As outlined at - <http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm>



notes that the Committee expressed concern that provisions within the excision and the Northern Territory emergency response legislation “*may be considered to trespass unduly on personal rights and liberties*”⁷, however in both instances the Ministerial response was provided to the Committee after the legislation had passed both houses of parliament and had received Royal Assent.

Amnesty International believes this undermines the parliamentary human rights scrutiny process. As long as governments have the necessary numbers in both houses, controversial pieces of legislation that risk impinging on individual’s can be rushed through parliament without proper scrutiny.

The organisation examined other Committee reports and identified a number of other instances where the Committee received ministerial responses after bills became law including *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, the *Aged Care Amendment (2008 Measures No.1) Act 2008*⁸, *Military Justice (Interim Measures) Act (No.1) 2009*⁹, and the *Family Assistance Amendment (Further 2008 Budget Measures) Act 2009*.

Recommendation –The Committee’s Terms of References should be amended to require Ministerial responses be received while the Bill is still being considered by Parliament. This will allow Committee members and other parliamentarians the opportunity to consider responses before voting on the legislation. The Committee also needs adequate time to consider the human rights implications of bills.

In relation to the Anti Terrorism Bill (No2) 2005, Amnesty International notes that while the Committee expressed concern that some of the provisions “*would clearly trespass on personal rights and liberties*”. It however left up to “*the Senate as a whole the question of whether it trespasses on those rights unduly*”.

The role of the Bills Scrutiny Committee should be to assess the compatibility of bills before Parliament to Australia’s international human rights obligations. In doing so it should refer to the international human rights treaties Australia is a party to when scrutinising bills, identify legislative areas that compromise these rights and make specific references to these instruments in its publications. It should not defer to the whole Senate for decision.

The Bills Scrutiny Committee is also a suitable framework to oversee the drafting and implementation of an overarching legislative human rights protection mechanism. It should also have responsibility for incorporating future international human rights conventions into its compliance scrutiny.

Recommendation – The Committee’s Terms of Reference should be amended to identify the core international human rights treaties Australia is a party to. The Committee should use these as the framework for scrutinising bills and provide a clear assessment of compliance for all bills.

The Committee’s publications must serve to inform all parliamentarians of the human rights implications of specific bills before voting on them. It is therefore equally paramount for ministerial responses to be required to address and justify the reasons for non compliance to specific clauses.

Recommendation – The Committee’s Terms of Reference should request ministerial responses address and justify potential non-compliance to international human rights treaties as identified by the Committee.

⁷ Senate Standing Committee for the Scrutiny of Bills First Report for 2002, 20 February 2002 available at <http://www.aph.gov.au/senate/committee/scrutiny/bills/2002/b01.pdf> (accessed 25.3.10); Senate Standing Committee for the Scrutiny of Bills Ninth report for 2007, 12 September 2007 available at <http://www.aph.gov.au/senate/committee/scrutiny/bills/2007/b09.pdf> (accessed 25.3.10)

⁸ Senate Standing Committee for the Scrutiny of Bills, seventh report of 2008, 27 August 2008 available at - <http://www.aph.gov.au/senate/committee/scrutiny/bills/2008/b07.pdf> (accessed 30.3.10)

⁹ Senate Standing Committee for the Scrutiny of Bills, thirteenth report of 2009, 18 November 2009 available at <http://www.aph.gov.au/senate/committee/scrutiny/bills/2009/b13.pdf> (accessed 30.3.10)



Amnesty International notes that the Bills Scrutiny Committee previously conducted two inquiries into search, entry and seizure provisions in Commonwealth Legislation (December 2006 and April 2000) as well as one on liability offences (June 2002) and penalty provisions (June 1998). The Committee's mandate should be expanded to allow the Committee to regularly conduct more thematic inquiries into human rights issues and how they relate to Commonwealth legislation.

For instance, the UK Joint Committee on Human Rights, which the Council of Europe describes as one of the most powerful and effective parliamentary human rights scrutiny committees¹⁰, regularly conducts inquiries on a broad range of areas with human rights implications. Recent inquiries have considered the human rights of: older people in healthcare; counter terrorism policy, the treatment of asylum seekers; mental health care; death in custody and human trafficking.

Recommendation - The Bills Scrutiny Committee's mandate should allow it to conduct regular thematic inquiries into human rights issues and table its recommendations in Parliament.

Finally, as part of its human rights monitoring functions, the Bills Scrutiny Committee should also be responsible for overseeing the Australian Government's response to and implementation of Concluding Observations of UN treaty bodies, recommendations of Special Rapporteur and other special procedures.

Recommendation – The Bills Scrutiny Committee should monitor and report on Australia's implementation of UN reports.

The need for a federal Human Rights Act

While Amnesty International strongly supports strengthened parliamentary scrutiny of human rights, it asserts that an overarching legislative mechanism is needed to underpin any human rights monitoring and scrutiny. A Scrutiny of Bills Committee with a broader mandate is not in itself a sufficient or adequate measure to integrate human rights considerations into the development of legislation within the parliamentary process. A Federal Human Rights Act would serve as the necessary framework to guide the Committee's review of legislation and would ensure a comprehensive and consistent analysis of human rights compliance. Furthermore, it would legislate the need for comprehensive parliamentary scrutiny of human rights.

The NHRC Committee recommended that Australia adopt a federal Human Rights Act.¹¹ In a study commissioned by the Committee, a stand-alone parliamentary scrutiny committee without a Human Rights Act was found to only have "above average" benefits to the Australian population.¹² In contrast, the Human Rights Act model recommended would produce "high" benefits to people in Australia.¹³

The NSW Parliament's Legislation Review Committee (the NSW Committee) is an example of the ineffectiveness of parliamentary scrutiny without human rights legislation. The NSW Committee was established following an inquiry into a bill of rights for NSW as an alternative measure to a bill of rights in 2003. The experience in NSW has been that:

- The NSW Committee was able to identify human rights issues in relation to civil and political rights; however a substantial proportion of civil rights issues were not identified and minimal attention was

¹⁰ Council of Europe Commissioner for Human Rights 'National Human Rights can do more to promote human rights' 16.2.09 available at http://www.coe.int/t/commissioner/Viewpoints/090216_en.asp (accessed 30.3.10)

¹¹ National Human Rights Consultation Committee Report, 2009, p.xxxiv

¹² Ibid, p.351

¹³ Ibid, p.351



given to economic, social and cultural rights.¹⁴

- The NSW Committee has failed to develop a human rights-based analytical framework, including legitimate objectives and restrictions on rights and freedoms or a consistent legal standard for what constitutes a 'breach' of human rights.¹⁴
- Even where significant human rights concerns are raised, the Committee's reports have failed to ignite any serious parliamentary debate or resulted in amendments to legislation.¹⁵
- Controversial legislation fraught with serious human rights concerns has been rushed through parliament with no opportunity for pre-enactment scrutiny, allowing Government to avoid the scrutiny of Parliament on the grounds of 'urgency'.¹⁶ For instance, the Crimes (Criminal Organisations Control) Bill 2009 was rushed through both Houses of Parliament in one day (2 April 2009), while the NSW Committee was only able to deliver its critical report one month later.¹⁷
- In assessing potential human rights protections for the state, the NSW Committee was advised by a former member of the Queensland Scrutiny Committee that review of legislation often takes a low priority in periods of high workload in Parliament.¹⁸

The NSW Parliament Legislative Council Standing Committee on Law and Justice has acknowledged that a parliamentary scrutiny of legislation committee is not a sufficient solution to breaches of human rights.¹⁹ A parliamentary committee may be ignored by the Executive and Parliament itself, and is unlikely to result in the development of a human rights culture within the government.²⁰ Furthermore, other jurisdictions have found that review of legislation often takes lower priority in periods of high workload in Parliament.²¹ For these reasons, a parliamentary scrutiny committee would be an insufficient protector and promoter of human rights in Australia without the overarching support of the Human Rights Act.

Victoria²² and the Australian Capital Territory²³ both have human rights scrutiny committee that are tied to their human rights legislation. Both of these committees are legislatively required to scrutinise draft legislation, assess compliance with international human rights standards and report back to Parliament.

The Victorian Equal Opportunity and Human Rights Commission released a report in March last year²⁴ on the operations of the State's Human Rights Act. The report found that the Scrutiny of Acts and Regulations Committee (SARC) continues to comprehensively subject bills to "thorough and multi-party scrutiny"²⁵. The report

14 Andrew Byrnes, "The protection of human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament's Legislation Review Committee" (October 2009). *University of New South Wales Faculty of Law Research Series. University of New South Wales Faculty of Law Research Series 2009. Working Paper 44.*

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14 Ibid 8.

15 Ibid 10.

16 Ibid 11.

17 Byrnes, op.cit., p.5

18 NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights (2001)*, para 8.46

19 NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights (2001)*, para 8.41

20 Ibid, para 8.41

21 Ibid, para 8.46

22 Pursuant to the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

23 Pursuant to the *Human Rights Act 2001 (ACT)*

24 Victorian Equal Opportunity and Human Rights Commission, "Emerging Changes: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities, (2009) available at <http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf> (accessed 31.3.10)

25 Ibid, p 71



noted that within SARC, all bills are subject to detailed human rights analysis. In reviewing SARC statements of compatibility for 2008, the report found that accessible human rights assessments were the most effective statements, especially those that *“managed to provide both a detailed human rights assessment of clauses and an accessible summary of how the proposed legislative scheme – as a whole – engaged human rights”*. Additionally the report stated that the SARC *“is facilitating an increased level of community engagement’ with the parliamentary dialogue’ and ‘playing a key role in influencing the accessibility and utility of this dialogue’* and as a consequence of SARC and other parliamentary mechanisms *“the Victorian Parliament is actively engaging with the “territory” of human rights.”*²⁶

Recommendation - The Australian Government should introduce a Human Rights Act which would provide the Scrutiny of Bills Committee with the legislative framework to assess human rights compliance of legislation before Parliament

²⁶ Ibid