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## **Senate Standing Committee on Legal and Constitutional Affairs**

Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010  
and the Human Rights (Parliamentary Scrutiny) (Consequential  
Provisions) Bill 2010

Submission by

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## Summary

*We believe that the most important aspect of any effort to protect human rights in Australia lies in promoting a culture of respect for human rights within the organs of government and the community at large. A scrutiny scheme such as this Bill proposes is, in our view, a significant contribution towards that end. However, our long-standing work with and experience of other human rights scrutiny processes, particularly in the United Kingdom, convince us that in order to ensure the most effective performance of the proposed Commonwealth scheme, certain institutional features and operating practices must be adopted. This submission outlines those features and practices.*

## The importance of a human rights culture

Human rights are best protected when they are embedded in the everyday thinking of policymakers, legislators and members of the wider community. We believe that the Human Rights (Parliamentary Scrutiny) Bill is as an important step towards creating a human rights culture. Its introduction ought to be commended. By proposing a Joint Committee on Human Rights and requiring new legislation to be accompanied by a statement of compatibility, the Bill seeks to make human rights considerations an integral part of the decision-making of Parliament and the Executive.

In its 2009 report, the National Human Rights Consultation Committee (NHRCC) stressed the need to create a ‘culture in which human rights are better understood and are respected, protected and promoted’.<sup>1</sup> Acculturation is as an indispensable component of any agenda for protecting and promoting human rights. A human rights culture is a culture in which human rights considerations factor into the everyday reasoning of governmental decision-makers. As Murray Hunt, legal advisor to the United Kingdom’s Joint Committee on Human Rights, has explained, a human rights culture is a ‘culture of justification’; although human rights may sometimes be interfered with, any such interference must be justified and subjected to public scrutiny.<sup>2</sup> A human rights culture integrates human rights decisions into policy formulation and delivery, thereby minimising the need for remedial responses such as litigation or dispute resolution.

It was based upon this reasoning that the first-named author of this submission formulated the first detailed proposal to establish a human rights scrutiny committee in the early 1990s.<sup>3</sup> In due course, the proposal was adopted by the Blair Government in the

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<sup>1</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), p. 131. See, generally, chapter five of the report.

<sup>2</sup> Murray Hunt, ‘The UK Human Rights Act as a “Parliamentary Model” of Rights Protection: Lessons for Australia’ (Speech delivered at the Australian Human Rights Commission, Sydney, 17 February 2009) <[http://www.hreoc.gov.au/letstalkaboutrights/events/Hunt\\_2009.html](http://www.hreoc.gov.au/letstalkaboutrights/events/Hunt_2009.html)> at 8 July 2010.

<sup>3</sup> David Kinley, *The European Convention on Human Rights: Compliance Without Incorporation* (1993; Dartmouth); David Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’ in Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999; Oxford); Michael Ryle, ‘Pre-Legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights’ (1994) *Public Law* 192, pp. 193-94.

UK in 1998 when a Joint Committee on Human Rights was set up to accompany the *Human Rights Act 1998 (UK)*.<sup>4</sup>

### **How can we cultivate a human rights culture?**

In recent years, many human rights advocates have seized upon a bill of rights as the best means of protecting and promoting human rights in Australia. Ninety-five percent of submissions to the National Human Rights Consultation Committee addressed the question of whether Australia should have a bill of rights.<sup>5</sup> The NHRCC's recommendation that a bill be introduced attracted widespread media attention.<sup>6</sup>

However, we see a bill of rights as but one way of cultivating a human rights culture. The NHRCC's recommendation for a bill of rights was nestled among a range of other strategies for protecting and promoting human rights. The NHRCC emphasised, among other things, the need to integrate human rights into the formulation of policies and legislation,<sup>7</sup> an emphasis that we strongly support. To this end, the NHRCC made two important recommendations: (i) that a Joint Committee on Human Rights be established, and (ii) that all new legislation be accompanied by a statement of compatibility outlining whether or not it complied with human rights.<sup>8</sup> These recommendations are the key features of the Human Rights (Parliamentary Scrutiny) Bill.<sup>9</sup>

### **A bill of rights by another name?**

A bill of rights is not an end in itself, but rather, one of a number of devices to advance human rights. In evaluating the Human Rights (Parliamentary Scrutiny) Bill, the relevant question is not how closely it resembles a bill of rights, but rather, how close it comes to accomplishing what a bill of rights sets out to achieve. We believe that a bill of rights has three main objectives.

First, a bill of rights aims to make human rights considerations an indelible part of public decision-making. The Human Rights (Parliamentary Scrutiny) Bill integrates human rights considerations into the decision-making processes of Parliament (by establishing a parliamentary scrutiny committee and, in the statement of compatibility, creating a potential platform for parliamentary debate) and the Executive (by requiring Ministers to prepare statements of compatibility and to respond to parliamentary scrutiny). A bill of

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<sup>4</sup> See the UCL Constitution Unit, *Human Rights Legislation* (1996), ch. 4, and 'The Setting up of the JCHR', in Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament: Nineteenth Report of the 2004-05 Session*, HC 552 (2005), paras. 13-15.

<sup>5</sup> National Human Rights Consultation Committee, above n1, p. 264.

<sup>6</sup> See, for example: Australian Associated Press, 'Australia Close to a Charter of Rights', *Sydney Morning Herald*, 8 October 2009 <<http://news.smh.com.au/breaking-news-national/australia-close-to-a-charter-of-rights-20091008-goag.html>> at 8 July 2010; Michael Pelly, 'Battle Looming on Human Rights as Committee Backs New Act, Role for Courts', *The Australian*, 9 October 2009 <<http://www.theaustralian.com.au/business/legal-affairs/battle-looming-on-human-rights-as-committee-backs-new-act-role-for-courts/story-e6frg97x-1225784569794>> at 8 July 2010.

<sup>7</sup> National Human Rights Consultation Committee, above n1, pt. 7.2.

<sup>8</sup> National Human Rights Consultation Committee, above n1, p. 174, recommendations 6 and 7.

<sup>9</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, pts. 2 and 3.

rights without such a scrutiny mechanism, on the other hand, focuses largely on integrating human rights considerations into the decisions of the courts. One of the principal concerns about a bill of rights is that it places too much power in the hands of the judiciary.<sup>10</sup> Critics fear that, by leaving human rights protection principally to the courts, a bill of rights sidelines democratic institutions and civil society.<sup>11</sup>

The Human Rights (Parliamentary Scrutiny) Bill ensures that the heaviest responsibility for protecting human rights rests with elected decision-makers. Judges cannot – and should not – be the sole guardians of human rights. As one of the USA’s most eminent judges remarked three-quarters of a century ago:

I often wonder whether we do not rest our hope too much upon Constitutions, upon Laws and upon Courts. These are false hopes .... Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>12</sup>

The second objective of a bill of rights is to provide an incentive for Parliament and the Executive to consider the human rights implications of proposed legislation. It relies on the fear of litigation to deter these actors from acting in a way that is incompatible with human rights. The Human Rights (Parliamentary Scrutiny) Bill pursues the same goal, but by different means. It is by way of a Joint Committee on Human Rights (JCHR) that proposed and existing legislation will be evaluated for compatibility with human rights.<sup>13</sup> The capacity of the JCHR to subject bills and legislation to close scrutiny by, among other things, putting questions to the relevant Minister and preparing reports on the relevant provisions is a critical feature of the proposed Bill. Of equal importance is the fact that the resultant reports of the JCHR will contribute significantly to debates on human rights matters within Parliament and among the public at large.

The Human Rights (Parliamentary Scrutiny) Bill also requires that statements of compatibility be prepared in respect of all bills and disallowable legislative instruments.<sup>14</sup> Since the proposers of bills will generally be reluctant to concede that a bill is incompatible with human rights, this creates a political incentive for proposed legislation to be made compatible with human rights. As Lord Lester has noted of a similar provision in the United Kingdom’s *Human Rights Act*: ‘few, if anyone, in Whitehall or Westminster appreciated just how significant the practical impact of the section 19

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<sup>10</sup> See, for example: The Hon Philip Ruddock MP, ‘Bills of Rights Do Not Protect Freedoms’, *Sydney Morning Herald*, 31 August 2007 <<http://www.smh.com.au/articles/2007/08/30/1188067275092.html>> at 8 July 2010; The Hon Bob Carr, ‘Lawyers are Already Drunk with Power’, *The Australian*, 24 April 2008 <<http://www.theaustralian.com.au/news/lawyers-are-already-drunk-with-power/story-e6frg73o-111116145912>> at 8 July 2010. See also National Human Rights Consultation Committee, above n1, ch. 13.

<sup>11</sup> See Tom Campbell and Nicholas Barry, ‘A Democratic Bill of Rights for Australia’, Submission to the National Human Rights Consultation (2009), p. 1.

<sup>12</sup> Billings Learned Hand, ‘The Spirit of Liberty’ (Speech delivered at the “I Am an American Day” ceremony, New York, 21 May 1944).

<sup>13</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, s 4.

<sup>14</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, ss 8-9.

procedure [which requires a Minister to declare whether or not legislation is compatible with human rights] would be upon the preparation and interpretation of proposed legislation'.<sup>15</sup>

In this respect, we consider there to be two distinct advantages of the mechanisms in the Human Rights (Parliamentary Scrutiny) Bill. First, they are targeted at an early stage of the decision-making process. They aim to improve a bill or legislative instrument before it becomes law, rather than relying on litigation to identify its deficiencies.<sup>16</sup> Secondly, they are consensus-based. By placing chief responsibility for human rights protection in the hands of Parliament and the Executive, the Bill avoids creating the impression that human rights standards permit the unwarranted interference by judges with the decisions of elected representatives.

The third aim of a bill rights is to ensure that, to the greatest extent possible, legislation is interpreted in a manner consistent with human rights. Under the Human Rights (Parliamentary Scrutiny) Bill, courts will be able to refer to statements of compatibility and the reports of the JCHR to assist them in interpreting legislation where Parliament's intent is otherwise unclear.<sup>17</sup> If a court finds that legislation cannot be interpreted in a way that is compatible with human rights, the JCHR may exercise its power to review existing laws, if it deems such review to be appropriate.<sup>18</sup>

### **Building on Australia's existing system of parliamentary scrutiny**

Australia's existing parliamentary committees play an important role in scrutinising proposed and existing legislation. However, experience has shown that their capacity to bring legislation into line with human rights standards is limited. The Australian Human Rights Commission has identified several reasons for this:

- There is no committee that is focused particularly on human rights.<sup>19</sup>
- There is no general requirement for specialist committees to consider human rights.<sup>20</sup>
- The only committees that have rights within their terms of reference are the Senate Scrutiny of Bills Committee and the Senate Committee on Regulations and Ordinances. Senate Standing Orders require these committees to consider whether bills, regulations or ordinances 'unduly trespass on personal rights and liberties'.<sup>21</sup>

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<sup>15</sup> Lord Lester and Kay Taylor, 'Parliamentary Scrutiny of Human Rights' in Human Rights Law and Practice, p. 600, cited in Janet Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4(1) *International Journal of Constitutional Law* 1, p. 12.

<sup>16</sup> See Hiebert, above n15, p. 36.

<sup>17</sup> *Acts Interpretation Act 1901* (Cth), s 15AB(2)(c), (e). Relevant documents, explanatory memoranda and parliamentary reports may be referred to provided that they were furnished to, laid before or made to Parliament before the relevant provision was enacted.

<sup>18</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, s 7(b).

<sup>19</sup> Australian Human Rights Commission, Submission to the National Human Rights Consultation (2009), p. 147.

<sup>20</sup> Australian Human Rights Commission, Submission to the National Human Rights Consultation (2009), p. 147.

<sup>21</sup> Senate Standing Order 24(1)(a)(i).

However, the committees are given no guidance on which rights and liberties they should consider, or how they should determine when those rights can be justifiably limited.<sup>22</sup>

Without a parliamentary committee dedicated to assessing whether proposed legislation is compatible with human rights, Parliament's power to restrict human rights in certain circumstances may go virtually unchecked. This occurred in the case of two controversial pieces of legislation: the Northern Territory Intervention Emergency Response Bill 2007,<sup>23</sup> and the Anti-Terrorism Bill (No. 2) 2005. In both cases, the Scrutiny of Bills Committee identified multiple provisions in the proposed legislation that might be considered to trespass on personal rights and liberties.<sup>24</sup> However, it deferred entirely to the Senate's view of whether this infringement was legitimate.<sup>25</sup>

In the realm of human rights law, the key question is not usually whether a human right is infringed, but whether that infringement is justified.<sup>26</sup> This is a fundamental point. Unless a parliamentary scrutiny committee grapples with the latter question, it cannot be said to be engaging in adequate human rights analysis. Governments are often aware that they are restricting human rights; the real controversy is generally whether that restriction is appropriate. Parliamentarians, who are accustomed to considering different perspectives and balancing competing interests, are well-positioned to advise the Government on whether it has attained the appropriate balance in any given case.

The experience of the United Kingdom's Joint Committee on Human Rights ('the UK Joint Committee') suggests that a specialised human rights committee can play a productive role in scrutinising legislation. In the case of the Anti-Terrorism, Crime and Security Bill 2001, the UK Joint Committee questioned the Minister just two days after the bill was introduced, and two days later released a report.<sup>27</sup> In the report, the Committee concluded that:

Parliament should take a long view, and resist the temptation to grant powers to governments which compromise the rights and liberties of individuals... [O]n the evidence available to us, the balance between

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<sup>22</sup> Australian Human Rights Commission, Submission to the National Human Rights Consultation (2009), p. 148.

<sup>23</sup> The Northern Territory National Emergency Response Bill 2007 was part of a package of legislation which included the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007; the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007; the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008; and the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.

<sup>24</sup> Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 9 of 2007, 13 August 2007; Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 13 of 2005, 9 November 2005.

<sup>25</sup> Ibid. The Committee consistently adopted the following formula: 'The Committee decides that these provisions may be considered to trespass on personal rights and liberties but, as is its practice, leaves for the Senate as a whole the question of whether they do so *unduly*'.

<sup>26</sup> Very few human rights are absolute, a notable exception being the prohibition on torture.

<sup>27</sup> Hiebert, above n15, p. 28. See also the report: Joint Committee on Human Rights, UK Parliament, *Anti-Terrorism, Crime and Security Bill* (2001).

freedom and security in the Bill before us has not always been struck in the right place.<sup>28</sup>

The report was referred to in parliamentary debate, and the Government subsequently amended the Bill to better account for human rights concerns.<sup>29</sup>

### **The efficacy of the committee**

In our view, a key challenge associated with the Human Rights (Parliamentary Scrutiny) Bill is to ensure that the JCHR is effective in scrutinising legislative and governmental action. In considering how this can be achieved, we draw on the lessons learned from the UK Joint Committee, which has now been operating for ten years. The UK Joint Committee has benefited from the assistance of two expert advisers – the first being Professor David Feldman of Cambridge University, the second and current adviser being Murray Hunt, a barrister, formerly of Matrix Chambers, a leading set of human rights chambers in London – both of whom are highly respected and well-versed in human rights law. Strong legal advisers can provide parliamentarians with a framework for engaging with human rights issues and assist parliamentarians in developing expertise in human rights.<sup>30</sup> In the case of the Human Rights (Parliamentary Scrutiny) Bill, it is essential that an expert adviser be available to counsel parliamentarians on the scope and nature of human rights, which are defined under the Bill as encompassing the rights and freedoms enshrined in no fewer than seven human rights treaties (including, it must be noted, economic, social and cultural rights).<sup>31</sup>

Feldman and Hunt have identified a number of factors that make for an effective human rights scrutiny committee. First, for the work of the JCHR to be taken seriously, it is crucial that the committee operate in a bipartisan manner.<sup>32</sup> Reports must be seen both within and outside Parliament as the product of principled deliberations rather than political posturing.<sup>33</sup> It is appropriate in this regard that members of the JCHR be drawn from both houses of Parliament, so that the committee will not necessarily be dominated by the governing party, or will at least be assured of as wide as possible representation. As Feldman explains, bipartisanship is also promoted by excluding from committee membership highly partisan figures such as ministers, whips and opposition spokespersons,<sup>34</sup> a practice we would strongly suggest that the Commonwealth model emulate.

Secondly, in the case of proposed legislation, the JCHR must be given sufficient time to review bills and report back to Parliament, so that Parliament can make use of the

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<sup>28</sup> Joint Committee on Human Rights, above n27, paras. 76, 78.

<sup>29</sup> David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323, p. 346.

<sup>30</sup> Hunt, above n2.

<sup>31</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, s 3.

<sup>32</sup> Feldman, above n29, p. 328.

<sup>33</sup> Hiebert, above n15, p. 15.

<sup>34</sup> Feldman, above n29, p. 327.

JCHR's expertise.<sup>35</sup> Statements of compatibility must be presented at the earliest stages at which a bill or legislative instrument is introduced, and legislation with significant human rights implications should not be rushed through Parliament in an effort to limit scrutiny. Hunt points out that it is also important that statements of compatibility be comprehensive.<sup>36</sup> This will enable the JCHR to consider fully the Government's position on all of the relevant human rights issues. Governments should take care to develop a clear template for assessing compatibility, to ensure that assessments are consistent and sufficiently detailed.<sup>37</sup> In addition, we believe it to be vitally important that the JCHR be empowered, and indeed encouraged, to put carefully focused questions to the relevant Minister, so that it can explore issues that are not addressed fully in the statement of compatibility or explanatory memorandum.<sup>38</sup>

Thirdly, we believe it is important that the JCHR be given a broad enough mandate to inquire into a range of human rights issues.<sup>39</sup> The UK Joint Committee's terms of reference enable it to consider 'all matters relating to human rights in the United Kingdom', except for individual cases.<sup>40</sup> The mandate of the proposed JCHR is considerably narrower. Rather than being able to inquire into 'all matters relating to human rights', the JCHR can inquire only into prescribed matters: Acts, bills, disallowable legislative instruments, and matters referred to it by the Attorney-General.<sup>41</sup> Consideration should be given to expanding the scope of the JCHR's mandate to resemble more closely that of the UK Joint Committee. This will enable the JCHR to initiate thematic inquiries into human rights issues it deems to be significant.<sup>42</sup> Under the current model, any such inquiries can occur only at the request of the Attorney-General. This makes scrutiny contingent on the Executive's willingness to subject its own policies or proposals to potential criticism, which has obvious drawbacks.

Finally, the success of the JCHR should not be assessed simply according to the number of legislative amendments made in response to the JCHR's reports.<sup>43</sup> From our discussions with those closely involved in the work of the UK Joint Committee, we know that much of the committee's success arises from its informal dialogue between Parliament and the Executive. In which case, another vital indication of the JCHR's effectiveness is that drafters of legislation have become more aware of the issues that they need to consider in devising new laws.<sup>44</sup> The JCHR will also have the wider impact

<sup>35</sup> See Hiebert, above n15, p. 15.

<sup>36</sup> Hunt, above n2.

<sup>37</sup> Hunt, above n2.

<sup>38</sup> Feldman, above n29, p. 333.

<sup>39</sup> Hunt, above n2.

<sup>40</sup> Joint Committee on Human Rights, *About the Committee*, UK Parliament <<http://www.parliament.uk/business/committees/committees-archive/joint-committee-on-human-rights/jchrabout/>> at 8 July 2010.

<sup>41</sup> Human Rights (Parliamentary Scrutiny) Bill 2010, s 7.

<sup>42</sup> See, for example, the recent report of the UK Joint Committee into business and human rights: Joint Committee on Human Rights Report, UK Parliament, *Any of our Business? Human Rights and the UK Private Sector* (2009).

<sup>43</sup> Feldman, above n29, p. 345.

<sup>44</sup> Feldman, above n29, p. 346. See also Michael Tolley, 'Parliamentary Scrutiny of Human Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41, p. 48.



of helping parliamentarians to develop a working knowledge of human rights and to engage in a sophisticated analysis of the human rights issues that affect the Australian community.