

SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 625 organisations and individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee community leaders, and this submission is informed by their views.

RCOA welcomes the opportunity to contribute to the inquiry into the *Human Rights (Parliamentary Scrutiny) Bill* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill* (henceforth, the Bill). RCOA is particularly interested in the impact that this legislation will have on the matter of Australia's treatment of refugees, asylum seekers, stateless persons and all other humanitarian entrants, including those people located within Australian territories and those in immigration detention settings.

There has been extensive investigation and documentation of the many serious breaches of the rights of refugees, asylum seekers, stateless persons and other humanitarian entrants by Australia and it is not the intention of this submission to reiterate them here. However, RCOA notes that many of these breaches stem from the nature of Australian legislation itself, for example:

- The absence of protections in Australian law against indefinite detention of stateless persons, as highlighted by the *Al-Kateb v. Godwin* case.
- The mandatory detention of asylum seekers as prescribed in the *Migration Act 1958* (hereafter, the *Migration Act*), a practice which breaches the right to freedom from arbitrary detention.
- The excision of certain territories from Australia's migration zone and exclusion of asylum seekers arriving in these excised zones from the refugee status determination process which applies on the Australian mainland, again as stipulated in the *Migration Act*, a practice which breaches Australia's obligations under the Refugee Convention as well as the fundamental human rights principles of equality and non-discrimination.

In light of this, RCOA believes that increased consideration of human rights principles when developing and scrutinising legislation is central to preventing violations of human rights. We therefore welcome the introduction of the Bill as an important step towards improving the protection and promotion of human rights in Australia.

RCOA reiterates its concern that refugees and asylum seekers who experience human rights violations in Australia face barriers when seeking formal recognition of and recompense for their experiences, barriers which stem not only from their restricted access to review mechanisms but also from the absence of an overarching human rights framework in Australia. We note with regret that the Government's Human Rights Framework does not include a commitment to legislate a Human Rights Act or any other form of overarching human rights protection. However, while noting that measures outlined in the proposed Bill alone are

insufficient to ensure protection of the rights of refugees and asylum seekers under Australian law, RCOA would welcome the passage of Bill in an amended form as per the recommendations below.

1. Definition of Human Rights

While RCOA welcomes the definition of human rights as outlined in the Bill, recognising Australia's ratification of seven core international human rights treaties¹, we are concerned that the scope of the definition is too limited. This definition does not include other international treaties to which Australia is signatory which, while they are not considered core human rights conventions, nonetheless have significant human rights implications. Such treaties include the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), the 1954 Convention Relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, conventions on war crimes and crimes against humanity and the International Labour Organization's conventions on labour rights. RCOA is concerned that the instruments currently included in the Bill do not, for example, acknowledge the right to seek asylum from persecution. This right is enshrined in the Universal Declaration of Human Rights but is not included in any of the core human rights instruments: it is only given force through the Refugee Convention.

Consideration of these other treaties within the definition of human rights is particularly necessary for the more at-risk group of refugees, asylum seekers, stateless persons and humanitarian entrants, given that Australian law, as outlined above, does not currently provide these groups with sufficient protection against human rights violations. Expanding the list of included human rights would therefore allow for consideration of a broader range of human rights issues when developing legislation.

Recommendation 1:

RCOA recommends that the definition of human rights be expanded to encompass other international treaties to which Australia is a signatory which have a focus on human rights issues, including but not limited to the 1951 Convention Relating to the Status of Refugees, 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

The definition of human rights also relies solely on the text of the Conventions and therefore does not allow for consideration of supplementary material developed by treaty monitoring bodies, such as conclusions, general comments and jurisprudence from individual complaints mechanisms. This material constitutes an important complement to international law and can provide valuable guidance when applying general human rights principles to specific situations.

Recommendation 2:

RCOA recommends that supplementary material relating to human rights and other relevant Conventions be used to further enhance the evidence-base for Statements of Compatibility and scrutiny of legislation.

2. The Parliamentary Joint Committee on Human Rights

RCOA welcomes the establishment of a Parliamentary Joint Committee on Human Rights. RCOA agrees with and promotes the position of other organisations, including the Human Rights Law

¹ The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ESCR), the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

Resource Centre (HRLRC), Amnesty International Australia, the Australian Human Rights Commission, UnitingJustice and many others, on expanding the power of the Committee to inquire into any matter relating to human rights and not have its powers of inquiry restricted by referral from the Attorney General. This would enhance the independence and effectiveness of the Committee and ensure that its capacity to conduct inquiries is not solely determined by the Government of the day.

RCOA also concurs with a number of other organisations in their suggestion that the Committee's power be expanded to monitoring and reporting on the feedback and recommendations of United Nations treaty bodies, including the Universal Periodic Review of the UN Human Rights Council. As the HRLRC notes in its submission, there is no coordinated, systemic method for the Australian Parliament to monitor its adherence to its international obligations. The expanded role of the Committee would give meaning to Australia's commitment to human rights and to its international obligations. As an organisation granted Special Consultative Status with the United Nations Economic and Social Council and a participant in the Universal Periodic Review process, RCOA has been witness to the need for ongoing scrutiny of domestic laws and their impact on refugees, asylum seekers, stateless persons and other humanitarian entrants and would welcome the Committee's scrutiny of legislation to ensure its adherence to international human rights treaties.

As the National Human Rights Framework outlines measures to not only protect but also promote human rights, RCOA and others deem it necessary that the Parliamentary Committee should have the power to call for submissions, convene public hearings and examine witnesses. This power would allow the Committee to facilitate the promotion of human rights through increased level of community engagement with both the parliamentary process and with the endorsement of human rights.

Recommendation 3:

RCOA recommends that the powers of the Parliamentary Joint Committee on Human Rights be expanded to enable it to:

- a) inquire into any matter relating to human rights, independently of referral from the Attorney-General.*
- b) monitor and report on feedback and recommendations from UN treaty monitoring bodies, and Australia's implementation of these recommendations.*
- c) call for submissions, convene public hearings and examine witnesses in the course of fulfilling its mandate.*

RCOA also advocates appropriate resourcing for the Committee, including through the provision of independent legal advice and the provision of adequate time to conduct its enquiries. These are common practices for like committees and for parliamentary scrutiny committees on human rights in other jurisdictions, such as in Victoria and in the United Kingdom.

Recommendation 4:

RCOA recommends that the Parliamentary Joint Committee on Human Rights be adequately resourced to ensure effective fulfilment of its duties.

3. Statements of Compatibility

RCOA notes that the HRLRC submission to this inquiry provides useful elaboration on the operational considerations in the preparation of statements of compatibility and in the interpretation of human rights, and endorses that submission in this regard and in its entirety. Briefly, these considerations include the need for human rights and the preparation of the Statements of Compatibility to be considered at the initial stages of policy formation and the

need for Statements of Compatibility to clearly justify any intrusion on rights, using rigorous, well-evidenced analysis of the issues.

RCOA is particularly concerned by the absence of oversight, accountability or quality assurance mechanisms in the proposed legislation. The Bill clearly states that failure to submit a Statement of Compatibility will have no impact on the validity, operation or enforcement of the Act in question. Additionally, the Bill provides no guidance for cases where legislation is found to be incompatible with human rights. As such, the statements have the potential to become little more than a tokenistic gesture rather than a well-considered practice contributing to the protection and promotion of human rights. At worst, the requirement to submit a Statement of Compatibility may simply be ignored.

Given the gravity of human rights violations which refugees, asylum seekers and humanitarian entrants in Australia currently experience, or are at risk of experiencing – many of which, as outlined in the introduction to this submission, stem from the nature of legislation itself – RCOA believes that mechanisms aiming to increase consideration of human rights in the legislative process must be treated with gravity equal to that of the violations they endeavour to prevent.

Recommendation 5:

RCOA recommends that:

- a) *The recommendations made by the Human Rights Law Resource Centre in relation to operational considerations in the preparation of statements of compatibility and in the interpretation of human rights be adopted in full.*
- b) *Oversight, accountability and quality assurance mechanisms be incorporated into the Bill to ensure that the Statements of Compatibility have a meaningful place in the development of legislation and thereby contribute to the protection of human rights.*

To gain insight into the application of statements of compatibility, the Victorian Government's parliamentary committee process and policy development protocols to support its *Charter of Human Rights and Responsibilities Act 2006* provide established examples. As referred to in this submission and in the submission of other organisations, the mechanisms outlined in this legislation (the establishment and operation of a Parliamentary Committee, the features of the Statements of Compatibility, etc) all have precedents in other jurisdictions, namely, the parliamentary scrutiny enacted in the Victorian, the Senate Standing Committee on Human Rights in Canada (*Canadian Charter of Rights and Freedoms 1982*) and the United Kingdom's UK Joint Parliamentary Committee on Human Rights. The experience and insight from the operation of these committees and the instruments of the related legislation should be incorporated into this Bill.

Recommendation 6:

RCOA recommends that the Bill should be amended to incorporate principles of best practice in parliamentary oversight of human rights issues, as have been developed in jurisdictions such as Victoria, Canada and the United Kingdom.

Summary of Recommendations

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