Human Rights (Parliamentary Scrutiny) Bill 2010 and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

Submission to the Legal and Constitutional Affairs Committee

Submission by Professor Bryan Horrigan[1]

This submission is based upon the author's practical experience as a consultant to a state scrutiny of legislation committee, his submission and presentation to the National Human Rights Consultation Committee, and research under an Australian Research Council grant on the engagement of Australian courts (especially the High Court of Australia) with international and foreign law.

Summary of Recommendations

This submission makes the following overall recommendations:

1. The Parliament should pass these Bills in either their current form or in a form that maintains their overall thrust.
2. In reviewing these Bills, both this Committee and the Parliament as a whole need to have regard to the interaction with both existing and any future responsibilities of the Senate Scrutiny of Bills Committee.
3. In reviewing the interaction between the primary roles of legislative scrutiny that form the key functions of both the existing Senate Scrutiny of Bills

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Committee and the new parliamentary committee proposed in these Bills, there is a need to delineate and allocate the different dimensions of 'compatibility' discussed in this submission in the most effective and efficient way.

4. If the Committee is minded to suggest and the Parliament as a whole is minded to make some supportive amendments to these Bills, some of the clarifications and other minor amendments canvassed in this submission could be considered for that purpose.

5. These Bills need to be considered not only in their own right but also within the overall package of measures outlined in Australia's Human Rights Framework, and also with regard to their implications or ripple effects for all three arms of government. Nothing on those levels justifies not proceeding to pass these Bills into law.

Overview of This Submission

Background to this Submission

The academic expertise and practical experience that the author of this submission brings to this exercise can be summarised as follows. In the late 1990s, the author occupied a role as one of the academic consultants on scrutiny of legislation to a state scrutiny of legislation committee. Along with another academic colleague, the author conducted one of the early projects this century to interview parliamentary and other members of Australian parliamentary committees at Commonwealth, State, and Territory levels engaged in scrutiny of legislation.[2]

In light of the author's submission to the National Human Rights Consultation Committee on parliamentary scrutiny of legislation (including issues relating to the internationalisation of municipal law across all arms of government), the author was invited to speak at the Committee's public hearings in Canberra, and spoke on the panel that specifically focused on mechanisms for improved parliamentary scrutiny of

[2] Eg B. Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and The Quality of Law-Making', in T. Campbell, J. Goldsworthy, and A. Stone, eds, *Protecting Rights Without s a Bill of Rights: Institutional Performance and Reform in Australia,* 2006, Ashgate, UK.

legislation, such as those mechanisms that are the subject matter of these Bills. In his professional role as a long-standing consultant to a leading Australian-based international law firm, the author has also been involved in scrutinising proposed legislation for governmental and non-governmental clients from a variety of perspectives, including consistency with requirements for legislative scrutiny of proposed laws.

Finally, the relationship between various institutional rights-protection mechanisms and the wider system of governmental and non-governmental regulation is the subject of ongoing work and publications by the author, including a focus on the place of both parliamentary and judicial rights-protection mechanisms in such wider systems of national and global governance.[3]

Support for These Bills

In his public submission and presentation to the National Human Rights Consultation Committee, the author of this submission advocated a new joint parliamentary committee to scrutinise legislation with enhanced rights-protection mechanisms, amongst other things. Accordingly, the author supports the broad thrust of these Bills and the mechanisms proposed in them. Nothing in this submission detracts from that basic support for these Bills.

Purposes of This Submission

This submission has three distinct purposes in assisting the Committee's and the Parliament's consideration of these Bills. Now that the details of the machinery for the new Parliamentary Joint Committee are before this Committee and the Parliament as a whole, the following comments are intended to inform review and fine-tuning of this machinery as the Bills proceed through Parliament. What follows is also designed to highlight implementation issues for the Parliament and the courts that this Committee and Parliament as a whole might wish to consider in their final review of these Bills. Finally, as the passage of these Bills has an impact upon the

[3] Eg B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models, and Practices Across Government, Law, and Business,* 2010, Edward Elgar Publishing, UK, Chapter 9.

future work of the existing Senate Scrutiny of Bills Committee and its own current inquiry into its future, this submission also addresses aspects of that question too. Once these Bills pass into law, they have important and beneficial implications for the other arms of government too, and also for the enhanced engagement of the Australian people with their organs of government.

These ripple effects are easily illustrated. First, as the Explanatory Memorandum accompanying these Bills notes, their mechanisms generate material that might also be used as extrinsic material by courts in working out the meaning of laws. Secondly, as outlined below, scrutinising proposed legislation for its impact upon rights is the common reference point between the existing Senate Scrutiny of Bills Committee and the proposed Parliamentary Joint Committee. Thirdly, as the Attorney-General indicated in a recent address to the Non-Government Organisations Forum on Human Rights in Canberra in June 2010, the Bills' mechanisms create twin pathways of 'dialogue' - one between the institutions of government and the other between them and the people of Australia:

> I recently introduced legislation to establish a new Parliamentary Joint Committee on Human Rights and to require all new legislation to be accompanied by a Statement of Compatibility against our Human Rights Obligations.
>
> The implementation of these two measures – Statements of Compatibility on Human Rights and a new Joint Parliamentary Committee on Human Rights – establish a dialogue initially between the Executive and the Parliament, and, subsequently, through the Parliamentary Committee process, a dialogue between the Parliament and the citizens of Australia. In that sense the measures will have their own impact on fostering genuine participatory democracy.

Even at a rhetorical level, such high-level comments do more than simply pay lip service to the extensive body of scholarship and policy material on the notion of institutional 'dialogue' between institutions of democratic government in settling questions about legal protection of human rights. Such comments also illustrate how the conventional understanding and instruments of majoritarian and representative democracy are adapting to the contemporary community demand for mechanisms of participatory and deliberative democracy too. This is part of the new public order of

governance and regulation, in which governmental and non-governmental institutions and actors are all engaged, albeit in different ways and with different roles, and with government maintaining the lead role.

If passed into law, these Bills also potentially have wider significance for Australia's membership of the community of nations and the associated rights-protective mechanisms on the global stage. Australian laws passed after enactment of these Bills and their accompanying statements of compatibility will form material that might be reviewed by foreign and international institutions (eg UN treaty-monitoring committees) and NGOs in scrutinising for themselves Australia's compliance with its obligations under international law. Arguably, what Australia puts in place under these Bills might also, in effect, form part of Australia's fulfilment of the role of governments under the three-pronged framework for business and human rights proposed by the UN Secretary General's Special Representative on business and human rights (Harvard's Professor John Ruggie), as endorsed recently by the UN Human Rights Council. Interestingly, the Australian Human Rights Framework adopted this year by the Australian Government locates the subject matter and mechanisms of these Bills within a framework that fulfils the governmental function to 'protect' and 'respect' human rights, which has some parallels with the language of the three-pronged framework that the UNSRSG has produced for the UN HRC, at least in terms of governmental responsibilities under that international framework.

In part, the need to consider the impact of these Bills and their mechanisms across the public, private, and community sectors arises because scrutinising all Commonwealth legislation from here for compatibility with designated internationally recognised human rights can touch legislation that affects everyone (including businesses) as well as legislation that is more directly rights-focused. In other words, its reach is not confined to proposed legislation that relates to government or the public sector alone. Businesses should not be unduly alarmed by that prospect. Existing legislative scrutiny mechanisms already allow for ventilation of the extent to which proposed laws that might affect businesses, corporate workplaces, or industry sectors align with Australia's existing law as well as Australia's international obligations on workers' rights, non-discrimination, and so on. These Bills simply bring such matters into sharper focus for due legislative attention. The final decision

remains Parliament's alone, in deciding whether or not to pass laws that might or might not be consistent with international human rights instruments, and in determining the justification for any inconsistency.

Relationship of the Parliamentary Joint Committee on Human Rights to the Senate Scrutiny of Bills Committee

Comparing and Contrasting Functions of the Two Committees

Under the Senate's relevant standing order (ie Standing Order 24 (1) (a)), the primary scrutiny function of the Senate Committee is as follows:

> At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
> (i) trespass unduly on personal rights and liberties;
> (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
> (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
> (iv) inappropriately delegate legislative powers; or
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

At the outset, it is important to note the difference between that function and the proposed function for the Parliamentary Joint Committee under the main Bill, as outlined in Clause 7:

> The Committee has the following functions:
> (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
> (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
> (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Juxtaposing these two functional statements immediately highlights a number of things. First, the focus of the new Parliamentary Joint Committee is rights-specific, whereas the focus of the existing Senate Committee includes but also extends beyond a rights-specific focus. In particular, the latter also includes reference to wider considerations concerned with the operation of Parliament, democracy, and key aspects of the rule of law. This reason alone suggests the need for an additional and ongoing scrutiny role on such matters for a body like the Senate Committee, whatever overlap there might or might not be in the rights-focused functions of both committees, and however else the functions of the Senate Committee might be recast in light of other parliamentary reviews of its role and operation.[4]

Secondly, to the extent that both committees focus upon rights-protection, the catalogue of rights to which the Senate Committee refers is one that includes but also extends beyond the rights in the specific international human rights instruments that are the focus of the Parliamentary Joint Committee. In other words, there are many individual rights and liberties under both statutory and non-statutory law that are not crystallised expressly as human rights in key international human rights instruments and, conversely, there are human rights in such international instruments that are not yet enshrined fully or at all in Australian municipal law. This might or might not lead to functional overlap between the two committees, depending upon how the different dimensions of the 'compatibility' question are handled (see below).

Thirdly, evaluating the extent to which Bills or Acts 'trespass unduly on personal rights and liberties' (under the Senate Committee's function) is not completely coextensive with evaluating Bills and Acts 'for compatibility with human rights' (under the Parliamentary Joint Committee's function). For example, deciding whether legislation 'unduly' infringes rights introduces a policy dimension to the assessment of legislation that extends beyond simply deciding whether or not legislation is legally consistent with the content and scope of a right outlined in a relevant legal source, regardless of whether that source is an international human rights instrument, judge-

[4] See the parallel Senate Committee inquiry into the Future Direction and Role of the Scrutiny of Bills Committee (Interim Report 12 May 2010).

made common law recognition of a basic right, or existing statutory protection of the same right.

Inherent in the notion of an assessment that legislation 'unduly' infringes rights is at least a legal assessment that a right of a particular content and scope as defined under law of some kind is being infringed and that such an infringement is or is not justified in the public interest. In the author's academic and consultancy experience, most legislative scrutiny committees across the nation approach their work in terms of highlighting and framing rights-sensitive issues for parliaments to consider on their policy merits, which is an important part of maintaining the institutional respect of parliaments for their scrutiny committees and vice versa.

Commenting publicly on these Bills, Professor James Allan argues that there is a major difference in the rights-based functions of the two committees, as follows:[5]

> Moving from a Senate-only committee to a joint committee is not in the lease problematic, but this newly proposed joint committee is not going to be asked to decide if bills trespass unduly on personal rights, exercising their own legislative judgment. No, this new joint committee is going to be asked something very different.
>
> It is going to be asked whether bills and acts are compatible with human rights. But get this: human rights have been defined to mean what has been recognised in seven UN conventions, including the CRC noted above, together with all the other usual suspects, such as the ICCPR. …
>
> … Are my concerns exaggerated? Well, consider this. This new McClelland Human Rights (Parliamentary Scrutiny) Bill will also require all other bills to come with a statement of compatibility. The minister will have to say the bill is, or is not, compatible with human rights. Ah, but again that term human rights has been outsourced.
>
> The test isn't what the minister thinks. The test looks like being what the minister thinks the UN thinks, or what the minister thinks lawyers think the committee members for the conventions think, or well, you get the idea.

In practice, this difference might be more abstract than real, at least on some levels. The 'outsourcing' analogy goes so far and no farther, in the sense that Parliament is

[5] J. Allan, 'UN Rights Views Slip in the Back Door', *The Australian* (Legal Affairs), pp 37-38.

not deferring simply to someone else's judgment on the ultimate legislative decision of whether or not incompatible Bills should pass into law, and Parliament is using a benchmark that is tied to human rights obligations as accepted by Australia, in whatever form and with whatever reservations and caveats are necessary for Australian conditions. There is a spectrum here between deciding everything for ourselves regardless of authoritative instruments and rulings on human rights and abrogating all institutional responsibility in simply 'going along with the crowd'.

Moreover from the perspective of Australia's membership of the international community, there is a need for all countries and their legislatures and courts to at least take due note of how each of these institutions conceives of human rights when they are making institutional decisions about the same rights and interpreting or applying the same human rights instruments, as reflected in some ordinary rules of statutory interpretation in Australia and elsewhere.

The past work of scrutiny at federal, state, and territory levels has been informed in part and where relevant by human rights jurisprudence internationally and in other jurisdictions, including reference to relevant international human rights instruments and official decisions on their interpretation. So, to the extent that there is a concern about official foreign and international legal sources of guidance on legislative consideration of human rights, this concern already exists in terms of possible sources of reference for legislative scrutiny. The question is one of degree.

In any case, parliamentary sovereignty is maintained by the fact that it is ultimately the Parliament's judgment call whether or not to pass proposed legislation, whatever the extent to which it might or might not be in accord with international human rights law. To be sure, there could well be public, political, and media pressure brought to bear not to legislate against something that is crystallised as a human right in designated human rights instruments, regardless of the circumstances, and especially when Australia has accepted that obligation under international law.

A similar concern animates commentary on the large extent to which legislatures in Westminster-based systems with bills of rights, such as Canada and the UK, ultimately defer to judicial pronouncements on rights matters, on the basis (amongst

others) that it is difficult for the legislative arm of government to justify to the people why it is overturning a contrary official pronouncement from the judicial arm of government about the people's fundamental rights. Yet, however difficult they might appear to be, and whatever these Bills might or might not add to that perceived difficulty, the environmental pressures that surround such a judgment call are simply part and parcel of transparent institutional accountability of law-makers to the people in contemporary democratic government. To foreshadow later discussion in this submission of the 'principle of legality', and in judicial language at the highest levels in the UK that has been endorsed at the highest judicial levels in Australia and New Zealand too, 'the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost [as] (f)undamental rights cannot be overridden by general or ambiguous words'.[6]

Nevertheless, having conceded all of that, there are some important things to notice here about both the form of reasoning being asked of the Parliament, as distinct from a court. The structure of institutional decision-making, the forms of reasoning, and the permissible sources of reference for legislative law-making are different in important respects from those for judicial interpretation and law-making. When courts in comparable jurisdictions with bills/charters of rights and correlative interpretative provisions adjudicate on the compatibility of legislation with identified human rights, essentially they are making a legal decision by reference to accepted legal sources of law and permissible processes of judicial reasoning. In that context, the question of 'compatibility' is a question about how a particular Act's explicit or implicit treatment of a right sits with what that jurisdiction's governing bill of rights says about such a right, including applicable rules of statutory interpretation and reference to domestic, foreign, and international law where applicable.

Moreover, even jurisdictions with a bill of rights and correlative judicial interpretation provisions often have an in-built capacity for courts to read legislation compatibly with human rights concerns, in ways that permit limits upon rights where such limits are necessary and justified in terms of public order, public policy, and the democratic system of government, or where it is necessary to settle a conflict between

[6] *Secretary of State for the Home Department, Ex Parte Simms* [1999] UKHL 33, as discussed in Spigelman, infra at pp 35-36.

competing human rights. Whatever debate surrounds the nature of those value-judgments and their suitability for courts rather than legislatures, the present point is simply that, in the end, the various aspects of compatibility are resolved within the judicial domain, according to the sources and forms of reasoning that characterise that domain.

However, in the context of legislative law-making, where legislators are not as constrained as judges by the existing law and its associated forms of reasoning and rules of judicial interpretation, the 'compatibility' question has a number of different dimensions. Here, at least three distinct dimensions of the 'compatibility' question are relevant, and they can be called the 'international consistency' dimension, the 'legal coherence' dimension, and the 'policy merits' dimension accordingly. Admittedly, at the outset of this important discussion, it can be conceded that the analytical clarity gained from describing different dimensions of the one 'compatibility' question inevitably still oversimplifies things to some degree. For example, all three dimensions in particular jurisdictions might involve some reference to the existing international and municipal legal position concerning such human rights, as well as some form of substantive assessment and justification of limits upon otherwise legally recognised rights.

Put another way, it is certainly a relevant consideration for the Parliament to be informed of the extent to which a Bill's or Act's treatment of a particular human right sits in terms of a legal assessment of its compatibility with Australia's international legal obligations, as enshrined in a relevant international human rights instrument listed in the Human Rights (Parliamentary Scrutiny) Bill. This institutional focus most directly matches the 'international consistency' dimension of the 'compatibility' question. However, it would also be relevant for the Parliament to know more than simply whether or not such a Bill or Act is in technical accordance with Australia's obligations under international law, assessed in terms of proposed legislation's impact (if any) upon the content and scope of such rights as defined in that instrument, and as interpreted by officials charged with a relevant jurisdiction to do so, including perhaps what Australian courts have said on the question.

In addition, in would be important for the Parliament to know how such rights as expressed in those instruments are dealt with under existing municipal law (if at all). This could be in terms of express or implied constitutional rights and guarantees, domestic legislation that gives effect in whole or in part to nominated international human rights instruments, and judicial decisions that develop the common law in accordance with rights recognised in such instruments (and underlying legal norms and values of human dignity and autonomy that are reflected in domestic and international law alike). This next level of institutional focus matches the 'legal coherence' dimension of the 'compatibility' question. This dimension can engage both legislative and judicial law-makers in a substantive evaluation of the existing law, at least to some degree, albeit for different institutional purposes and through differently structured institutional modes of reasoning and decision-making. It is also part of the conventional work of legislative scrutiny.

Beyond this second possible dimension of 'compatibility' lies a third and more explicitly 'political' dimension in terms of the ultimate policy question for the Parliament (as distinct from courts) about the balance between conflicting individual rights and liberties, on one hand, and between individual rights and wider public policy goals or community-wide interests, on the other. These are ultimately matters for the legislative arm of government, although courts inevitably confront a different and lesser order of policy considerations within judicial interpretation and law-making too, confined as such legal policy considerations are to the body of existing law and the accepted modes of reasoning associated with its interpretation, application, and development. This level of institutional focus matches the 'policy merits' dimension of the 'compatibility' question. Here, the 'compatibility' question has an in-built evaluative component, in which a legislative proposal that might technically be inconsistent with the existing legal position on particular rights under either international or municipal law might nevertheless be justified by higher-order public interests in legitimate circumstances.

The point in identifying all such possible dimensions of the 'compatibility' question is to assist the Committee and the Parliament in clarifying and confirming the senses in which assessments of 'compatibility' are made and by whom. In the author's submission, it is important for the Committee and the Parliament as a whole to focus

upon all three dimensions of that ‘compatibility’ question in the consideration and passage of Bills and Acts, through one institutional means (or committee) or another. Nothing in these Bills before this Committee expressly prevents such consideration by the proposed Parliamentary Joint Committee, although the Bills as framed direct attention primarily to the first dimension of the ‘compatibility’ question. The point being made here is simply one of clarity, functional delineation, and overall efficiency in the business of the Parliament. The importance of this consideration is underscored by the Senate Scrutiny of Bills Committee’s need to await the outcome of these Bills in making recommendations about its own future directions.

Institutional duplication of rights-based scrutiny for the Parliament’s overall benefit could be minimised (although not avoided altogether) by clarifying and demarcating the various rights-based and other scrutiny functions of the various committees that engage in scrutiny work. Even if the Parliament retains both the new Parliamentary Joint Committee and a reformulated Senate Scrutiny of Bills Committee, other parliamentary committees sometimes need to engage in rights-based scrutiny directly or indirectly in the course of fulfilling their own functions (such as analysis of a proposed Bill’s constitutional validity in terms of consistency with expressed or implied constitutional rights and guarantees). So, the Parliament is never in a position where everything to do with scrutiny of laws from some rights-based angle can be located wholly and only within the domain of one parliamentary committee, although obviously one or more parliamentary committees can have such a role amongst their primary or sole functions.

At the same time, having two different parliamentary committees cover the same ground in the same way is obviously to be avoided. If functions of legislative scrutiny of one kind or another are to remain part of the core business of both the Senate Scrutiny of Bills Committee and the new Parliamentary Joint Committee, part of the answer lies in recognising and allocating the different rights-related scrutiny functions packed into the different dimensions of the ‘compatibility’ question, and part of the answer lies in recognising the important work that the Senate Scrutiny of Bills Committee does in scrutinising legislation on grounds other than their potential infringement of rights and liberties.

If the sense in which the new Parliamentary Joint Committee engages in 'compatibility' assessments is confined to the 'international consistency' dimension of the 'compatibility' question, this would be a confined although still valuable parliamentary exercise, in terms of checking laws against the international human rights obligations accepted by Australia, whatever the extent to which those obligations have been translated into domestic Australian law. Such a demarcation of rights-based scrutiny roles would make the work of the new Parliamentary Joint Committee less extensive than that undertaken, for example, by the UK Parliament's Joint Committee on Human Rights, but that result will follow to one degree or another in any case, given that the Australian Government has presently decided not to implement all of the institutional architecture for rights-protection that additionally informs the work of the equivalent UK joint committee.

Alternatively, if it is thought to be too unwieldy for one parliamentary committee to handle one dimension of rights-based scrutiny and for another parliamentary committee to handle other dimensions, all rights-based dimensions of scrutiny could be located in the new Parliamentary Joint Committee and all other aspects of legislative scrutiny that are equally important – legislation's proper respect of democracy, the institution of Parliament, and requirements of the rule of law in law-making – could be located in the Senate Scrutiny of Bills Committee. Such matters are for the Parliament's ultimate determination in clarifying the relationship between these committees after passage of these Bills.

Definition of 'Human Rights' Under These Bills

Importantly, the definition of 'human rights' in clause 3(2) of the main Bill makes it clear that the list of human rights and freedoms under international human rights instruments 'is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia'. Both in context and in terminology, this form of wording is clearly directed at the form of the international instrument in which Australia has become a party or signatory to it, which might contain various caveats and reservations in terms of the basis upon which Australia is prepared to accept this international obligation. This needs to be contrasted with

the forms of those rights and freedoms as enshrined to whatever extent (if any) under Australian constitutional, statutory, or non-statutory law.

Again, this is a point with some significance. Firstly, it relates to the different dimensions of the 'compatibility' question, as outlined above. Put another way, the catalogue of possible legal sources to which the Parliament might have regard in assessing how a proposed law interacts with basic rights and liberties – under international human rights instruments, human rights as protected under Australian legislation (whether pursuant to formal international instruments or not), and human rights respected by the common law – are part of the legal equation in assessments of compatibility of laws, even putting to one side for the moment wider public policy goals in assessing competitions between rights and conflicts between rights and social goals within the legislative domain.

Secondly, Australia has taken steps to enshrine the obligations in some of the listed international human rights instruments in domestic statutory law (eg the Racial Discrimination Act 1975 (Cth)), and might even do so at a future time in relation to other listed international human rights instruments. At least some of the listed international human rights instruments have also informed the reasoning if not the outcomes in some important Australian cases on the development of Australian common law. Consider, for example, the influence of international human rights instruments on landmark High Court decisions such as *Mabo v Queensland (No 2).*[7] At the same time, tying the meaning of 'human rights' for this legislative scrutiny purpose to the human rights listed in designated international human rights instruments confines attention only to those sources of international human rights law, and leaves aside other important sources of international human rights law.[8]

The Standard for Parliamentary Assessment of Compatibility

Clause 8 (3) of the main Bill requires statements of compatibility to 'include an assessment of whether the Bill is compatible with human rights'. The structure and wording of this provision suggests that a reasoned and hence meaningful

[7] (1992) 175 CLR 1.
[8] Other submissions to the Committee argue a similar point.

‘assessment’ is what is contemplated, instead of simply a stated conclusion of compatibility without supporting justification. If any amendment of this provision is thought desirable to make that plain, the phrase ‘an assessment’ could simply be amended to read ‘a reasoned assessment’. The provision for equivalent statements of compatibility under section 28(3) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provides another model of further detail to bolster the obligation to produce a meaningful assessment of compatibility of Bills with designated human rights, in the wider interest of good government:

> A statement of compatibility must state-
>
> (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
> (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

Another advantage of such a provision is that it more clearly structures the evaluative components of the ‘compatibility’ assessment. In addition, it legitimises the possibility of justifying an incompatibility and passing a law despite that incompatibility, for higher-order public interests. Of course, this is perhaps more necessary in the Victorian instance than in the context of these Bills, because Victoria also has additional rights-protective provisions in a charter of rights to which statements of compatibility relate. Any downside or potential fall-out caused by enhancing the requirement to make and disclose a meaningful assessment of compatibility is minimised by other provisions in the main Bill that limit the effect of a failure to meet the necessary requirements.

In the past, occasionally there have been some examples at federal and state levels of financial impact statements, regulatory impact statements, and even scrutiny of legislation statements that inadequately disclose the underlying rationale for the conclusion expressed in them. As these statements of compatibility will have significance in the judicial domain as well as in the parliamentary domain, as well as being a means of informing the public ‘dialogue’ between the Australian people and their government (and perhaps other fora too), it is important that formal statements of compatibility are as complete on their face as necessary for their parliamentary

purpose. No doubt this is the governmental intention, and the point is simply about what needs to be explicit and what can remain implicit or even be addressed by other means (see below).

On a wider level, meaningful disclosure of the basis for a statement of compatibility also supports the contemporary conditions of participatory and deliberative democracy, in the sense of enabling anyone who scrutinises or interacts with the business of government to see transparently the basis upon which such assessments are made. If there is otherwise no need for amendments of this or any other kind before these Bills pass into law, this need could also be addressed in ancillary ways (eg reinforcement in parliamentary discussion of these Bills as recorded in Hansard, emphasis in the new Parliamentary Joint Committee's own guidelines, etc).

Implication of These Bills for the Executive Branch of Government

As cited and discussed by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 at [87]–[89], two justices of the High Court in the earlier landmark case of *Teoh* expressed the relation between Australia's ratification of an international instrument and its impact upon the executive government and Australian law as follows:

> (R)atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the [convention] … (I)f a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

The first point here is that *Teoh* remains a controversial decision in some political, judicial, and academic quarters, and the High Court's subsequent treatment of *Teoh's* comments on executive ratification of international instruments giving rise to a legitimate expectation for the purposes of Australian law has been lukewarm: see *Lam*. Still, whatever the ultimate fate of the *Teoh* doctrine, for present purposes the judicial comments quoted above make it clear that it is the government's ratification of an international instrument that is the trigger for whatever follows. All of the international human rights instruments listed in these Bills fit that category. Accordingly, these Bills do nothing one way or the other to affect the future of the *Teoh* doctrine. They certainly do not amount to a statutory indication against any legitimate expectation.

The fact that the Parliament gives an additional special emphasis to these international human rights instruments in these Bills if passed might sharpen the need for the departments and agencies of the executive arm of government to ensure that policy-making and public administration are also consistent with Australia's international human rights obligations, but that policy need arises independently of these Bills in any case. The enhancement of awareness, training, and consideration of human rights within the work of the Australian public sector is flagged in the Australia's Human Rights Framework. Accordingly, any concern about potential undue impact or ripple effects for the executive arm of government that arises simply from passing these Bills is misplaced.

Implications of These Bills for the Judicial Branch of Government

Analogous Use of Legislation

How might Australian courts use both the products of the rights-protective mechanisms outlined in these Bills and the presence of these mechanisms in federal legislation if the Bills proceed into law? Again, this is not an insignificant point on a number of levels. First, there is a meaningful difference under the rule of law between rights-focused scrutiny requirements that are enshrined in the standing orders for how one of the parliamentary chambers conducts in business, on one

hand, and legislated rights-based scrutiny on the other. In a liberal democratic system of government founded upon the rule of law, legislation has the force of law in a way that procedural rules for the conduct of parliamentary business do not possess, at least to the same degree. In addition, there are a variety of accepted ways in which courts might make analogous use of legislation in the interpretation and development of the common law.[9] This point has relevance for whatever analogous use might later be urged upon courts, in terms of what the fact that such international human rights-related requirements for scrutiny have been legislatively embedded might mean for the relevance and weight of such international human rights instruments in ongoing judicial interpretation and law-making. Finally, what appears in legislation forms part of the body of law as a whole, to which legislatures and courts alike refer in the course of performing their institutional functions.

Secondly, the scope of rights that become the centre-piece of scrutiny under these Bills covers international human rights as enshrined in international instruments that govern Australia's obligations, as distinct from international human rights where and to the extent that they are already enshrined in Australian law. Strictly speaking, the scrutinising function conferred upon the Parliamentary Joint Committee differs in important ways from the interpretative function performed by courts, although at least some of the dimensions of the 'compatibility' question will be relevant to the functions of both, in the ways outlined in this submission.

Thirdly, as foreshadowed above, Australian courts have already indicated in various contexts that the human rights contained in such international instruments as they relate to Australia do not become part of Australian domestic law unless they are legislated into force,[10] although the extent to which Australia's commitment to an international human rights instrument is relevant for other domestic legal purposes remains a matter of some judicial controversy.[11] If the Australian Parliament passes these Bills and thereby declares to the Australian people and the world at large that the legislative arm of the Australian Government is going to take its international

[9] Eg P. Finn 'Statutes and the Common Law: The Continuing Story', in S. Corcoran and S. Bottomley, eds, *Interpreting Statues, 2005,* The Federation Press, Sydney; and W. Gummow, *Change and Continuity; Statue, Equity, and Federalism,* 1999, Oxford University Press, Oxford.
[10] See, for example, *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7; and *Brown v Human Rights and Equal Opportunity Commission* [2000] FCA 634.
[11] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6.

human rights obligations seriously in the legislative forum, that is an important action that, no doubt, someone arguing before a court will try to use in particular ways to advance an argument in the judicial domain too.

For example, although it might or might not be drawing a long bow, someone might try to convince a court that, by analogy, the court should give greater common law recognition to a designated human right. Similarly, someone might try to use the passage of these Bills to bolster an argument by analogy that, if the Parliament takes international human rights obligations seriously in the business of law-making in this way, similarly the courts should be more attuned to such considerations in reviewing administrative decisions, interpreting legislation, and deciding matters of common law. Again, Australian law is already pregnant with such possibilities, and it remains a matter for the courts under their normal processes of reasoning. To be sure, judicial outcomes on anything to do with human rights will still be analysed and criticised in the political, public, and media domains in terms of crude measure such as 'judicial activism' and 'judicial conservatism', but those labels have little commonly agreed content across all schools of thought and they usually do little more than signify agreement of disagreement with a particular judicial outcome. The point remains that nothing in these Bills creates or significantly magnifies a problem that already exists and which will be worked out beyond the legislative domain in any case.

Judicial Use of Extrinsic Evidence

The Explanatory Memorandum accompanying the Human Rights (Parliamentary Scrutiny) Bill refers to the use of extrinsic material in judicial interpretation of legislation in the following terms:

> As is currently the case, courts may use extrinsic material to assist in determining the meaning of a provision in the event of ambiguity. This can include other material considered by Parliament in the passage of legislation such as accompanying Explanatory Memoranda, Second Reading Speeches and Parliamentary Committee reports. Consistent with current rules of statutory interpretation, a statement of compatibility and a report of the Joint Committee on Human Rights could be used by a court to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.

The desirable policy position is for all statements of compatibility for all Bills to be available as extrinsic aids to interpretation for courts. For so long as parliamentary practice is to require such statements of compatibility to be included within an explanatory memorandum accompanying a Bill, whether the bill is proposed by the government of the day or by a private member, this effect should be achieved.

As a matter of minor parliamentary housekeeping, at some point it might be necessary to revisit the interaction between these requirements and the categories of extrinsic evidence as expressed in the Acts Interpretation Act 1901 (Cth). For example, these Bills impose requirements upon all parliamentary members introducing Bills in relation to statements of compatibility, whereas section 15AB(2)(e) talks in terms of relevant documents provided to 'either House of the Parliament by a Minister', and there is perhaps a residual question on the face of that provision whether its reference to 'any explanatory memorandum relating to the Bill' applies generally to all Bills or only to government Bills, in light of the reference to 'any other relevant document' in connection with material provided by a relevant Minister. In any case, the listed items of extrinsic material form an inclusive and not exhaustive list, and there are other categories in that list that can also facilitate judicial reference to statements of compatibility in various circumstances, including relevant reports by scrutinising committees that incorporate reference to such statements of compatibility or their incorporation in Hansard debates over Bills.

The Human Rights (Parliamentary Scrutiny) Bill adequately deals with ancillary aspects of the need to prepare and table a statement of compatibility in an appropriate form for later judicial reference, where the conditions under section 15AB of the Acts Interpretation Act are otherwise satisfied. Appropriately, section 8(5) of the Bill ensures that any failure to prepare and table a statement of compatibility has no invalidating or other operational effect upon the resulting legislation and its enforcement. Similarly, it is appropriate for section 8(4) to indicate that a judicial assessment of the resultant legislation's meaning is not bound in any way by a statement of compatibility's conclusion about the legislation's 'compatibility' with the designated human rights. To do otherwise would be to introduce a possible fetter or

control upon the judicial function that trespasses upon the necessary boundaries between legislative and judicial functions.

At the same time, it is important to notice what this provision allows. A court will still be at liberty to decide that even an Act that has an accompanying statement of compatibility has a legal effect upon rights under existing law that might differ in whole or in part from the conclusion expressed in that statement of compatibility. These different results are possible for a number of different reasons. Parliament might decide that a particular legislative measure is consistent with Australia's international human rights obligations, and a court might form a different view and make a comment to that effect in passing in a judgment, whether it is necessary for the decision before the court or otherwise. Courts have to focus upon the treatment of rights under all sources of Australian law, whereas the statement of compatibility is focused (at least primarily) upon compliance with Australia's international human rights obligations, whatever the extent (if any) to which they relate to the body of existing law. In determining the ultimate 'policy' dimension of the 'compatibility' question, Parliament might decide that any limitation upon a designated human right that is necessary for good government and the wider public interest is nevertheless 'compatible' with Australia's international human rights obligations, whereas a court might reach a different view on a more limited set of grounds based on the law.

Interpreting Legislation Compatibly with International Law

There is some evidence that some Australian judges at the highest level are reconsidering the ongoing viability and scope of a long-standing judicial approach towards reading national legislation in a way that is consistent with a country's obligations under international law. For example, there are renewed contemporary questions about the extent to which such an approach is suitable in the modern era with its multiplicity of international instruments, whether such an approach is confined to the state of international law at the time of a national law's enactment, and whether such an approach is or should be confined in any case to situations where national legislation is enacted in contemplation of implementing a particular international instrument.

All that needs to be said here is that the passage of these Bills has some symbolic and substantive relevance to such questions, because Parliament is affirming the importance in the human rights context of ensuring due consideration of compatibility with Australia's international human rights obligations in legislative law-making. Still, as with other potential implications of these Bills beyond the legislative domain, these developments in Australian judicial interpretation by reference to international law remain a work-in-progress that will proceed to be resolved in the judicial domain regardless of the fate of these Bills.

Other Implications for Judicial Rules of Legislative Interpretation

Nothing in these Bills detracts form the fundamental contemporary position, as enshrined in the Acts Interpretation Act itself, under which courts interpret legislation according to its text and structure and in consideration of its context and underlying purpose. At the same time, there are limits to which a purposive approach might be able to settle particular interpretive questions about competitions between individual interests, the extent to which particular provisions pursue a particular purpose, and how multiple purposes are accommodated in different parts and provisions of an Act, as recent cases at the highest judicial level now make clear.[12]

In jurisdictions that contain particular interpretative provisions under charters of rights that require judges to interpret laws compatibly with human rights, there is an ongoing controversy about the extent to which such formal interpretative instructions to courts from the legislative arm of government interact with ordinary rules of statutory interpretation. For example, when interpreting legislation with a possible impact upon rights in a way that accords with its overall purpose but subject to an additional legislative instruction to read the legislation in a rights-compliant way, how does the court proceed? Does it start with a list of possible interpretations according to general principles of statutory interpretation and then work out which of those interpretations is the most rights-friendly one, or alternatively is the starting list of possible interpretations reducible only to those interpretations that are sufficiently rights-friendly, including whatever in-built judgment-calls are necessary to resolve

[12] Eg *Carr v Wester Australia* [2007] HCA 47; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; and *CSR Ltd, in the matter of CRS Ltd* [2010] FCA FC 34.

competitions between individual rights or between individual rights and collective goals? In considering these Bills, it is important to consider what difference it makes to the courts if there are no such interpretative provisions but the courts can nevertheless use the products of the new Committee's work as extrinsic aids to interpretation.

In terms of judicial interpretation, there is likely to be little meaningful difference in practice between the interpretative processes of courts in light of these Bills and the interpretative processes that might have been followed with interpretative provisions of the kinds recommended by the National Human Rights Consultation, due mainly to the combined effect in Australia of a purposive approach to statutory interpretation and the 'principle of legality'. The present Chief Justice of the NSW Supreme Court makes this point clear in his recent McPherson Lectures (Spigelman, 2008: 15):

> The process of interpretation pursuant to the principle of legality, or any of its sub-principles, may not differ in essence from that to be conducted pursuant to a statutory requirement to interpret any act or statutory instrument to conform with the list of human rights … When the rights-compliant interpretation provision is made expressly subject to the purposive requirement, its operation would probably be very similar to the principle of legality. Nevertheless, it can have some additional force when there is doubt about Parliament's intention in other legislation because it is more likely that the judiciary will apply an express parliamentary authority than a common law principle.[13]

In other words, Australian courts already have some tools at their disposal to interpret legislation in rights-friendly ways. Legislation that adversely affects fundamental rights and liberties will only be given that interpretation if the statutory language and structure makes that plain on a purposive (cf literal) reading of the legislation, notwithstanding the additional protection of the 'principle of legality'. On the view expressed by Chief Justice Spigelman, the most significant difference made by legislatively enshrining a requirement for judges to read legislation in rights-compatible ways is that the source of that instruction becomes the Parliament (as the architect of both the legislation being interpreted and the legislation containing such a rights-friendly interpretative provision), as distinct from a court (acting only in

[13] Spigelman J, *Statutory Interpretation and Human Rights* (McPherson Lectures), University of Queensland Press, Brisbane, 2008, at pp47-48, and 65.

accordance with judge-made rules of interpretation and presumptions with a rights-protective effect).

What is this 'principle of legality'? Australian courts have recently given new impetus to the 'principle of legality' in statutory interpretation, according to which the work of statutory interpretation is approached by courts from the standpoint that parliaments do not intend to intrude upon fundamental rights and liberties *under the existing law* unless the legislative language makes that interpretation unmistakable. Conceived in this way, the 'principle of legality' is more than simply another judge-made rule of construction, but rather occupies a special place in the governmental infrastructure underpinned by the rule of law.

This status of the 'principle of legality' is clearly evident in one of the most recent statements of the principle in context, by the immediate past Chief Justice of the High Court of Australia, as follows:[14]

> The joint judgment in *Coco* went on to identify as the rationale for the presumption against modification or abrogation of fundamental rights an assumption that it is highly improbable that Parliament would 'overthrow fundamental principles, infringe rights, or depart from the general system of law' without expressing its intention with 'irresistible clearness'. In *R v Home Secretary; Ex parte Pierson*, Lord Steyn described the presumption as an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

Again, for present purposes, the point is that nothing in these Bills significantly affects what courts are already charged to do – namely, read legislation purposively and with due regard to the 'principle of legality'. To the extent that the 'principle of legality' relates to fundamental human rights, its primary focus – at least as presently conceived and used – is in relation to such rights as represented under existing law, principally common law doctrines. The focus of these Bills is different, at least to some degree.

[14] *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40 at [31] per Gleeson CJ.

What happens if, because of the passage of these Bills, someone puts to a court in future that the ‘principle of legality’ should somehow extend to cast its net not only over common law rights but also over fundamental rights under international law, at least in terms of those acknowledged for legislative scrutiny purposes under these Bills, regardless of the extent to which those international human rights obligations of Australia have been enshrined in Australian law already? First, this would be a significant extension of existing judicial understanding and practice concerning the ‘principle of legality’. Secondly, it would be drawing a long analogical bow from scrutiny requirements in the legislative domain to legal enshrinement of designated human rights in the judicial domain. Thirdly, Australian courts already look in appropriate situations to international and foreign legal developments in developing the common law, especially in matters that concern fundamental rights and liberties. Forthly, even if the notion of rights under the existing law embraces both rights that have formally been recognised by law and also rights that are inherent but as yet unarticulated in law or possibly even universal in nature (as influenced by developments in international human rights law), such an argument can already be made without the benefit of these Bills. It also travels beyond the human rights as defined in these Bills, confined as they are in present form to the human rights identified in named international human rights instruments. Finally, any such extension or related questions fall to be determined by the courts, within their ordinary modes of reasoning, again regardless of the legislative fate of these Bills. So, on this ground too, there is little basis in substance for objecting to the passage of these Bills, based on potential concerns about ripple effects across the legislative, executive, and judicial domains.