

Submission

on the

Human Rights (Parliamentary Scrutiny) Bill 2010

and the

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

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 2 June 2010 the Senate referred the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* for inquiry and report.

The referral of the two Bills was due to a Senate Resolution on 13 May 2010.

Together, the two Bills seek to implement the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010.

The main Bill would establish the Parliamentary Joint Committee on Human Rights (the Committee) and set out the functions and administrative arrangements for the Committee. The Committee would examine Acts, Bills for Acts and legislative instruments for compatibility with Australia's human rights obligations, and report to both houses of Parliament. It would also inquire into, and report to Parliament, on matters relating to human rights referred to it by the Attorney-General.

The consequential Bill contains amendments that arise as a consequence of the main Bill and other matters, including amendments to the Administrative Appeals Tribunal Act 1975 and the Legislative Instruments Act 2003.

The reporting date is currently 15 June 2010. However, the Committee has advised that it intends to seek an extension of time to report when the Senate sits again on 15 June 2010. The new reporting date is likely to be in August 2010.

Submissions from the public have been invited and are to be received by 9 July 2010.

2. What are human rights?

The *Human Rights (Parliamentary Scrutiny) Bill 2010* would define human rights to mean:

the rights and freedoms recognised or declared by the following international instruments:

(a) *the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);*

(b) *the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 22 5);*

(c) *the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);*

(d) *the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);*

(e) *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);*

(f) *the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);*

(g) *the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).*

Many of the rights and freedoms recognised or declared by these seven international instruments are quite ambiguous. The rights and freedoms are often incompatible.

The ambiguity of some human rights and the difficulties of balancing competing rights with one another create significant problems of interpretation.

In seeking to interpret ambiguous rights and freedoms or to balance competing rights and freedoms it would be likely that recourse would be had to international jurisprudence on the international instruments. This jurisprudence is often held to include the general comments and views of the United Nations bodies that monitor treaties about the rights of people.

These United Nations treaty monitoring bodies have expressed some curious views. Such bodies have claimed that freedoms or rights declared or recognised in one or other of the seven international instruments obliges States parties to:

- refuse to foster the observance of Mother's Day;
- prohibit parents from withdrawing their children from a sex education class;
- ensure that at least 30 percent of children under age three are in full time day care;
- deny doctors or hospitals the right to conscientiously object to participation in abortion;
- deny economic support to mothers who choose to stay at home;
- allow children to access medical or legal counselling without parental consent;
- allow teenagers to access abortion without parental knowledge; and
- deny religious bodies any exemptions from anti-discrimination laws.¹

These views all touch on matters that are socially contentious. It is not helpful to resolve these issues by empowering one side of the dispute to gain the moral high ground by being able to claim that their position is backed up by international human rights jurisprudence and that any proposed law which does not comply with these human rights so interpreted is a "breach of human rights".

The Australian Human Rights Commission – in the absence of the requirements that would be imposed by this Bill – has already frequently charged that government bills would breach one or other of the seven international instruments or that various measures are needed to meet Australia's international human rights obligations.

In recent submissions the Commission has asserted the following breaches or obligations:

- Section 15AA of the **Crimes Act** which provides that persons charged with terrorism and other serious or violent offences must not be granted bail except in exceptional circumstances is in breach of the right to liberty (*International Covenant on Civil and Political Rights* Article 9 (3)).²
- Recent changes to the law on proscribing organisations as 'terrorist organisations' undermines freedom of expression and has a disproportionate impact on Arab communities.³
- Various special measures under the Northern Territory Emergency Response, including alcohol and pornography bans, violate the *International Convention on the Elimination of all Forms of Racial Discrimination* because they have not included community consultations of the kind required by the Committee on the Elimination of Racial Discrimination's *General*

*Comment 32 - The meaning and scope of special measures in the International Convention on the Elimination of all forms of Racial Discrimination.*⁴

- The *Convention on the Elimination of All Forms of Discrimination Against Women* obliges Australia to introduce quotas and targets for achieving equal outcomes for both genders in the workplace.⁵
- The principle of equality as set out in article 26 of the *International Covenant on Civil and Political Rights* supports the recognition of same-sex marriage. Although the most recent decision of the Human Rights Committee denied that the Covenant requires States parties to provide for same-sex marriage the views of the Human Rights Committee may evolve with State practice.⁶

This last comment from the Commission highlights a significant problem with entrenching the international human rights instruments in Australian law through the *Human Rights (Parliamentary Scrutiny) Bill 2010*. The meaning of provisions in these instruments can be changed by the decisions of the UN treaty monitoring bodies, such as the Human Rights Committee.

If, for example, there is a new decision from that committee which was to read in a right to same-sex marriage as encompassed by the right to equality, then an Australian government committed to maintaining the millennia old definition of marriage as between a man and a woman could find it more difficult to do so if Australian law had to be continually tested against the international human rights jurisprudence.

Recommendation 1:

The Bill would entrench international instruments in Australian law and subject Australian lawmaking to international jurisprudence including the ideological decisions made by United Nations treaty monitoring body.

Since the Bill defines human rights by reference to international instruments it should be opposed.

3. A new committee?

The Bill would establish a Parliamentary Joint Committee on Human Rights. It is helpful to compare the proposed functions of this committee with existing parliamentary committees.

3.1 Power to examine all bills and legislative instruments

Clause 7 of the Bill would give a newly established Parliamentary Joint Committee on Human Rights the following function:

(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;

Of course the Commonwealth Parliament already has two committees charged with examining bills and legislative instruments for their compatibility with “personal rights and liberties”: the Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances.

3.1.1 Senate Standing Committee for the Scrutiny of Bills

The Senate website describes the Senate Standing Committee on the Scrutiny of Bills as follows:

“The Senate Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

The committee examines all bills which come before the Parliament and reports to the Senate whether such bills:

- *trespass unduly on personal rights and liberties;*
- *make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;*
- *make rights, liberties or obligations unduly dependent upon non-reviewable decisions;*
- *inappropriately delegate legislative powers; or*
- *insufficiently subject the exercise of legislative power to parliamentary scrutiny.”⁷*

A report on the work of the Senate Standing Committee on the Scrutiny of Bills, which has been operating since 1981, describes its role as follows:

“The Committee has six members, three of whom are members of the government party, nominated by the Leader of the Government in the Senate, and three of whom are members of non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent Senators). The Chair of the Committee is a member appointed on the nomination of the Leader of the Opposition in the Senate. The Chair may from time to time appoint a member of the Committee to be Deputy Chair. The Chair, or Deputy Chair when acting as Chair, has a casting vote when votes on a question before the Committee are equally divided. However, the relative numbers of the political groupings represented on the Committee has proved to be of little or no significance to the Committee’s operation. The culture of the Committee is, and always has been, non-partisan.”⁸

“Since its inception, the Committee has operated in a non-partisan and apolitical way, on a consensus basis. In reporting to the Senate, the Committee’s practice is to express no concluded view on the provisions in a bill, but rather to advise Senators (and other readers of its reports) of the risk that particular provisions may infringe one or more of the principles in Standing Order 24. In essence, the Committee sees its task as drawing the Senate’s attention to provisions in legislation which may infringe people’s civic entitlements. Whether the legislation should be passed as introduced, or amended, is properly a matter for the Senate to decide.”⁹

The Scrutiny of Bills committee highlights issues in legislation that may transgress personal rights and liberties. The executive government – the minister – is asked to explain the case for such a transgression. The Committee considers this explanation and comments on it if it sees fit, but ultimately the Senate must decide.

3.1.2 Senate Standing Committee on Regulations and Ordinances

A similar role in relation to disallowable instruments is exercised by the Senate Standing Committee on Regulations and Ordinances.

These committees are appropriately committees of the Senate, which is the house of review. The success of these two committees in maintaining a professional, bipartisan approach to the task of scrutinising legislation is a highlight of parliamentary practice.

As Senator Dan Wortley expressed it in a recent submission on behalf of the Senate Standing Committee on Regulations and Ordinances to the inquiry into the role of the Scrutiny of Bills Committee:

*In seeking advice from Ministers this committee interprets its terms of reference expansively but, like [the] Scrutiny [of Bills Committee], does not seek advice on, or comment on the policy merits of an instrument... Such an approach has the advantage of fostering the bi-partisan nature of the Committee's work – it is a Parliamentary Committee engaged in review of the executive.*¹⁰

These Senate committees cover much of the intended role of the proposed new parliamentary joint committee. Consequently, the proposed new committee would either create unnecessary duplication or render the existing committees redundant.

There is a real risk that the proposed committee may not be able to develop the same bipartisan approach that has characterised the two Senate scrutiny committees. With half of its membership to be appointed by the House of Representatives the committee is likely to be dominated by the government of the day. Arguments about compliance with human rights treaties are likely to become mere surrogates for political disagreements.

It would be a great loss to Parliament and to the lawmaking process to lose the established benefits of the two very successful Senate scrutiny committees in an attempt to promote an allegedly superior approach to human rights scrutiny.

Recommendation 2:

The Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances are performing a valuable service by scrutinising all bills and disallowable instruments tabled in the Commonwealth Parliament in the light of personal rights and liberties.

There is no need for a new Joint Committee on Human Rights.

The Bill, which would establish such a committee, should be opposed.

3.2 Examining Acts and other matters to do with human rights

Clause 7 of the Bill would give to the Parliamentary Joint Committee on Human Rights the following functions:

(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.

The existing Senate Legal and Constitutional Affairs Committee and the House of Representatives Legal and Constitutional Affairs Committee are each well placed to carry out these functions.

For example the Senate Legal and Constitutional Affairs Committee has in recent times conducted inquiries into:

- the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality;
- the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*; and
- access to justice.

The House of Representatives Legal and Constitutional Affairs Committee has in recent times conducted inquiries into:

- draft *Disability (Access to Premises - Buildings) Standards*; and
- older people and the law.

These committees – and the other portfolio committees in each house – are the more appropriate committees for carrying out these functions. Human rights are just one aspect of policy that must be considered in relation to Acts and significant matters of public policy. A committee that is only tasked to look at the human rights aspects of a law or of a public policy matter may not be the best equipped to conduct a comprehensive inquiry and to provide a rounded report on a particular Act or matter.

However, once something has been referred to the Parliamentary Joint Committee on Human Rights it would be more difficult to have it examined as well by the relevant portfolio committee.

Recommendation 3:

Proposed functions (b) and (c) for the Parliamentary Joint Committee on Human Rights seem to overlap with the functions that are already being carried out by existing portfolio committees – especially the legal and constitutional affairs committees – in each house of Parliament.

As the Bill would duplicate committee responsibilities and perhaps undermine the work of the portfolio committees it should be opposed.

4. Statements of compatibility

Clauses 8 and 9 of the Bill would require statements of compatibility to be tabled with every Bill and disallowable instrument. Subclauses 8 (4) and 9 (3) specify that “A *statement of compatibility prepared ... is not binding on any court or tribunal.*”

However the Explanatory Memorandum states in reference to these subclauses:

Subclause 8(4) provides that a statement of compatibility in relation to a bill is not binding on a court or tribunal. This provision is not intended to exclude the operation of section 15AB of the Acts Interpretation Act 1901 which deals with use of extrinsic material in the interpretation of an Act.

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.

And:

Subclause 9(3) provides that a statement of compatibility in relation to a legislative instrument is not binding on a court or tribunal. This provision is not intended to exclude the operation of section 15AB of the Acts Interpretation Act. Consistent with current rules of statutory interpretation, a statement of compatibility in relation to a disallowable legislative instrument could be used by a court to assist in ascertaining the meaning of provisions in a legislative instrument where the meaning is unclear or ambiguous.

These provisions could increase the opportunity for judicial activism. A statement of compatibility or a report of the Parliamentary Joint Committee could be used by judges to draw on international human rights jurisprudence – including UN treaty monitoring bodies’ comments – to interpret allegedly unclear or ambiguous provisions. Activist judges could prove quite astute at discovering alleged ambiguity and thereby open the way to creative judicial interpretation based on human rights claims.

Recommendation 4:

The Bill would create new opportunities for judicial activism in interpreting statutes and legislative instruments in the light of statements of compatibility with human rights as declared in the seven international instruments and reports of the proposed Parliamentary Joint Committee on Human Rights.

Since such judicial activism is undesirable, the Bill should be opposed.

5. Conclusion

The proposed *Human Rights (Parliamentary Scrutiny) Bill 2010* is part of the Rudd government’s human rights framework being presented as a response to the report of the National Consultation on Human Rights. While declining to adopt the principal recommendation of this consultation and enact a Human Rights Act, the government is nonetheless seeking to entrench human rights provisions into the lawmaking process.

While superficially this may seem desirable, the scheme does have some of the same difficulties and create the same dangers as the much debated Human Rights Act.

Notions of human rights are complex, not simple. Human rights often conflict with one another. Simply asserting a desire to make legislation compatible with human rights does not necessarily improve lawmaking or public policy decision making. In fact, it may skew decisions in unwise directions based on specious assertions about human rights by United Nations treaty monitoring bodies or other players in the human rights game.

The Bill would:

- entrench international jurisprudence on human rights into the process of lawmaking in Australia;
- create a new committee that might take away from the good work of the two Senate scrutiny committees and which would duplicate the functions of the portfolio committees – especially the legal and constitutional affairs committees – in each house; and
- create new opportunities for judicial activists to engage in creative interpretation based on alleged human rights concerns.

None of these outcomes is desirable. For all these reasons the Bill should be opposed.

6. Endnotes

1. Patrick F Fagan, “How UN Conventions On Women’s And Children’s Rights Undermine Family, Religion, And Sovereignty”, *Heritage Foundation Backgrounder*, no. 1407, 5 February 2001; http://www.heritage.org/Research/InternationalOrganizations/upload/95496_1.pdf.
2. *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee*, para.105; http://www.hreoc.gov.au/legal/submissions/2010/20100506_law_enforcement_bill.html
3. *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee*; http://www.hreoc.gov.au/legal/submissions/2010/20100506_law_enforcement_bill.html
4. *Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills: Australian Human Rights Commission Submission to the Senate Community Affairs Committee*; http://www.hreoc.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html
5. *Inquiry into the Equal Opportunity for Women in the Workplace Act 1999 and Equal Opportunity for Women in the Workplace Agency :Australian Human Rights Commission Submission to the Australian Government Office for Women*; http://www.hreoc.gov.au/legal/submissions/2009/20091030_EOWA.html
6. *Inquiry into the Marriage Equality Amendment Bill 2009: Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs*; http://www.hreoc.gov.au/legal/submissions/2009/20090910_marriage_equality.html
7. <http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm>.
8. Senate Standing Committee for the Scrutiny of Bills, “The Work of the Committee during the 41st Parliament November 2004 – October 2007”, p 5; <http://www.aph.gov.au/senate/committee/scrutiny/work41/report.pdf>.
9. *Ibid.*, p 10.
10. http://www.aph.gov.au/senate/committee/scrutiny/future_direction_2010/submissions/sub33.pdf