

## **Submission to the Legal and Constitutional Affairs Legislation Committee and to the Senate Standing Committee for the Scrutiny of Bills Committee**

Thank you for the invitations to make submission to the Committees on the Human Rights [Parliamentary Scrutiny] Bill 2010 [the Bill].

My thoughts on the Bill seem to be apposite to both Committees and accordingly I have prepared a common submission and forwarded each a copy.

### **The Bill a Cautious Start But Needs Much Improvement**

The Bill gives a cautious start to a Committee whose discrete purpose is to draw Parliament's attention to legislation which may breach a limited number of international instruments. Hopefully amendments will be made to it, now or in the future, allowing it to advise the Legislature when Bills and Acts fail to be fair, reasonable and nurturing of a good civil life. Presently it fails to establish the processes needed to bring about those qualities. . Whether now or in the future it can and should be improved.

### **The Scrutiny of Bills Committee a Better Modal**

The Bill would be much better were it amended to give the Parliamentary Joint Committee on Human Rights [the Joint Committee] the same mandate as that held by the Senate Standing Committee for the Scrutiny of Bills [the Scrutiny of Bills Committee]. A comparison of the mandates of each illustrates this.

### **A Comparison of the Mandates of Each Committee**

The Bill sets up the Joint Committee to examine and inquire into matters to do with human rights. That is a good thing. What is not so good is the restricted area within which it is to operate. The Joint Committee's activities are limited

- 1 to examining legislation to see whether or not it complies with one or more of seven conventions and covenants and then reporting to the Houses of Parliament and
- 2 to inquiring into any matter relating to those conventions and covenants referred to it by the Attorney-General and then reporting to both Chambers.

The tests the Scrutiny of Bills Committee must apply whether to Bills or Acts are set out in Order 24 of the Senate's Standing and Other Orders. These are whether they

- 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.

The worth of the Scrutiny of Bills Committee's is further enhanced by the procedure it follows once it has made its decisions. The following quote is taken from its site on Google.

*"The committee regularly publishes two documents: the Alert Digest and the Report. The Digest contains an outline of each of the bills introduced in the previous sitting week, as well as any comments the committee wishes to make in relation to a particular bill. When concerns are raised in a Digest, the committee writes to the minister responsible for the bill, inviting the minister to respond to its concerns.*

*The committee then produces a Report containing the relevant extract from the Digest, the minister's response and any further comments the committee may wish to make. Reports and Digests are generally presented to the Senate on the Wednesday afternoon of each sitting week. They are available online after tabling.*

*The committee also produces reports on matters specifically referred by the Senate.*

### **The Superiority of the Scrutiny of Bills Committee**

The process now operating in the Senate is clearly superior to that proposed by the Bill.

The following factors illustrate the superiority of the process undertaken by the Scrutiny of Bills Committee over that proposed for the Joint Committee.

1. The Scrutiny of Bills Committee has an ability to exercise its mind in respect of human rights within a much wider ambit than that proposed for the Joint Committee.

2. The Joint Committee's task is limited to making a judgment as to whether or not legislation is in conflict with the provisions of a modest number of international conventions or covenants whereas the Scrutiny of Bills Committee can express an opinion about the overall fairness and justice of Acts and Bills.

3. The Joint Committee is restricted to interpreting legislation and deciding whether it is compatible with its concept of certain international instruments. This is a judicial like function rather than a parliamentarian one and confines the capacity of those on it to act as members of the Legislature. In contrast members of the Scrutiny of Bills Committee undertake a much wider exercise

and can deal with legislation as parliamentarians. [See below for a discussion on the three arms of government centred on a paper by Sir Gerard Brennan].

4. The Joint Committee has the ability to report to both Houses of Parliament but not immediately to ministers [See clause 7 of the Bill]. The Scrutiny of Bills Committee can and does communicate directly with members of the Executive. As a result bills are commonly amended the relevant minister to make them more in accord with human rights.

5. The Scrutiny of Bills Committee can call witnesses, gain outside assistance and hold hearings. The Joint Committee is required to wait and see what powers and proceedings both Houses of Parliament resolve to provide it with under clause 6 when it becomes law.

6. The Bill which sets up the Joint Committee is being advanced by the Executive. Further both Houses of Parliament are to define its powers and proceedings and that means they are to be restricted to what a majority in the House of Representatives allows. That majority is always held by the Government of the day. The Scrutiny of Bills Committee has its origins in the Senate a Chamber where it is usual for no one party to be in command. This allows it both in reality and in appearance to be more removed from Government influence.

7. Since its establishment in the early 1980s the Scrutiny of Bills Committee has established an outstanding culture and tradition which has done much for fairness and decency in civil life. It will be interesting to see what sort of culture and tradition the Joint Committee develops.

8. Members of the Scrutiny of Bills Committee carry out their work without undue influence from the Parties to which they belong. Given items 6 and 7 it will be interesting to see whether those on the Joint Committee can do the same.

### **Clarifying the Commission of the Scrutiny of Bills Committee**

It would be useful to have the commission of the Scrutiny of Bills Committee further defined by making it explicit that it can measure bills and acts against Australian legislation enacted to preserve human rights and against the provisions of treaties, conventions and like instruments made for the same purpose.

On the 17<sup>th</sup> March 2010 I made a submission to the Scrutiny of Bills Committee which contained the following passage.

*"In my view the following changes would assist the Committee in carrying out its duties.*

*1. The duties it has should be expressed to include that of testing bills and acts against Australian legislation enacted to preserve human rights and against the provisions of treaties, conventions and like instruments made for the same purpose and into which the Commonwealth has entered.*

*In my view there is nothing to stop the Committee from doing that now but for the reasons given below it should be expressed.*

*2. The resources available to the Committee should be increased to enable it to obtain added advice. Within that context it should gain the assistance of retired judges who have served on an appellate court.*

*3. More time should be given in the Chamber to the Committee's reports.*

*4. The Committee should have regular meetings with like committees and with other bodies working in the area of civil rights."*

If these provisions were adopted they would clarify the spread of the commission of the Scrutiny of Bills Committee. They would make clear that the Scrutiny of Bills Committee is equipped to test legislation against Acts of Parliament which protect human rights and against international instrument ratified by Australia aimed at doing the same. The Scrutiny of Bills Committee would be able to do so in the course of deciding what is fair and what is not - an exercise the Joint Committee cannot undertake.

### **The Scrutiny of Bills Committee Must Continue**

It is essential that the Scrutiny of Bills Committee continue its work across the entire span of its present mandate whether or not the Bill is enacted.

### **Acting as Classic Parliamentarians**

As suggested above the Scrutiny of Bills Committee gives greater scope to its members to act as what I have called classic parliamentarians than does the proposed Joint Committee.

This is of considerable importance because members of the back bench have a vital role to play as classic parliamentarians – an honourable role to which they should remain committed.

The backbench is more than a recruiting ground for ministers and there is need for it to play its role of tempering the untoward actions of the Executive.

### **The Classic Role of Parliament and the Dominance of the Executive**

It is worth referring to the long standing and oft repeated statement that Government is best when the Parliament, the Executive, and the Judiciary carry out their duties well. There is a perception abroad that of these three institutions Parliament is the one most likely to falter in its work.

The reflections of Sir Gerard Brennan are pertinent.

The Australian Law Journal for January 1991 sets out *the Blackburn Lecture* delivered by Sir Gerard, then a Justice of the High Court of Australia, on the 7th August 1990 and entitled "Courts, Democracy and the Law". [See

page 32 and following] It is a lucid and concise analysis of the relationship between the three arms of government. In it he said:

*“The theory of responsible government, which made the fate of an Executive Government dependent on the confidence of the Parliament, was, so to speak, turned on its head by the political dependence of the majority members of the Parliament on the Executive Government. Policy formulation became primarily an executive function. As the pressure on legislative time intensified, a virtual monopoly over initiatives for legislation passed to the Executive Government. The influence of Ministers in debate whether in the party room or Parliament was enhanced by the support they could command from the public service. These developments virtually destroyed the Diceyan theory.”* [See page 34]

In his talk Sir Gerard said that the Judiciary remains the most effective restraint on Government and that Parliament has come to lose much of its capacity to temper the actions of the Executive. He said:

*“As the wind of political expediency now chills Parliament’s willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.”* [See page 35]

Sir Gerard said that Parliament does do effective work. He said:

*“In so saying, I would not wish to diminish – much less to overlook – such political checks as Parliament imposes on the Executive, nor to pass over the real influence which Parliament brings to bear on the Executive. There are some regrettable and notorious exceptions, but the passage of a Bill in Parliament has not generally become a mere ritual, especially when the Government of the day does not command the support of a majority of the Senate or Upper House.”* [See page 36]

## **The Need for the Party System**

Presently the prime purpose of political endeavour is seen as gaining and holding government. The occasions are few when members act as classical parliamentarians unaffected by their party’s stance. This may be as it should be. Could the modern way of government work effectively were these occasions common?

Modern government depends upon the presence of vigorous and committed parties. The dynamics engendered by the interaction between the Executive Party, the Opposition and the Crossbench is vital to the way government operates in Australia. But there are occasions when those dynamics can be a hindrance. The testing of legislation against fundamental human rights is one such occasion.

## **Could Things Be Different?**

If members were to act as classical parliamentarians more and as representatives of their party less better scrutiny might be achieved. How to get parliamentarians to act so that party interests do not over much influence their work is usually problematic. However those on the Scrutiny of Bills Committee have achieved this. Whether members of the Joint Committee will be able to do the same remains to be seen.

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