Civil Liberties Australia **CLA**

Submission to the

Senate Standing Committee on Legal and Constitutional Affairs

on the proposed

Human Rights (Parliamentary Scrutiny) Bill 2010

and the

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

Civil Liberties Australia (CLA) is a not-for-profit association, which reviews proposed legislation, to make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high human rights standards Australia aspires to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'.

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Executive Summary

1. Civil Liberties Australia (CLA) supports the passage of the proposed legislation, subject to some proposed amendments, and welcomes the establishment of the Joint Committee on Human Rights.

2. CLA disagrees with the arguments put forward by some submissions that the passage of this legislation will impermissibly undermine Australia's sovereignty. Rather, this legislation will partly return to Parliament its historic role as an independent legislative body charged with scrutinising legislation and not merely carrying into effect the wishes of the Executive.

3. However, CLA believes that the proposed legislation is not without flaws, and that the bill should be amended to allow the Joint Committee to consider existing constitutional and Common Law rights, such as the rights under sections 116, 117, 80, 92 (as it relates to individuals) and subsections 51 (xxiiiA) and (xxxi).

4. CLA further believes that the bill should be amended to clarify that the optional protocols to the seven key international treaties are included, and that the definition of 'Human Rights' include Australia's obligations under the International Convention of Migrants.

5. The Senate, as well as the Attorney-General, should have the power to refer a matter to the committee in order to maximise the usefulness of the Joint Committee as an instrument to scrutinise the operation of legislation.

6. The functions of the Joint Committee should be reconciled with those of the Standing Committee on the Scrutiny of Bills and Ordinances and the Standing Committee on Legal and Constitutional Affairs, and should extend to inquiring into executive/ministerial agreements with the States and Territories.

7. CLA maintains its strong support for an Australian Charter of Human Rights and urges the Australian Parliament to adopt the recommendations of the National Consultation on Human Rights and fulfil the wishes of 87% of the Australian population for a Charter of Human Rights.

Introduction

1. Civil Liberties Australia thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to comment on the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*. Our submission primarily focuses on the *Human Rights (Parliamentary Scrutiny) Bill 2010* unless otherwise noted.

2. CLA broadly endorses the comments made by the Human Rights Law Resource Centre in their submission.[1] Our submission seeks to add to those comments, rather than duplicate their arguments.

3. We have had the opportunity of reading the submissions from the Western Australia Government and FamilyVoice Australia and have set out our response to their remarks below.[2]

4. Should the Committee wish, CLA is willing to provide further information in support of its submission, or address the members of the Committee at a formal sitting.

5. Finally, while CLA does not wish to re-agitate the arguments in favour of the introduction of an Australian Charter of Rights, we wish to place on record our concern that the current Government has ignored the recommendation of the National Consolation on Human Rights[3] and the clear wishes of an overwhelming majority of Australians for the introduction of such a Charter.

A note on terminology: Where the phrase 'Committee' is used, it refers to the Senate Standing Committee on Legal and Constitutional Affairs. 'Joint Committee' means the proposed Joint Committee on Human Rights which would be established under the proposed legislation.

[1] Human Rights Law Resource Centre, *Submission number 1* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=79429922-7e20-4562-b54e-56fd3f2c6674 accessed 28 June 2010.
[2] Western Australian Government, *Submission number 2* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=08eb1305-9457-49ef-ab3c-a8bcb44a86d5 accessed 28 June 2010; FamilyVoice Australia, *Submission 4* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8af5bb3f-9538-4324-9cfd-f29b9a467d28 accessed 29 June 2010.
[3] Recommendation 18, *National Human Rights Consultation Report* (2009) at http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Recommendations accessed 29 June 2010.

Need for the proposed legislation

1. CLA believes that the federal government has a special responsibility to uphold and promote the rights of Australian citizens and residents. This responsibility comes not just from the position of the national government as the representative of Australia in international forums, but also from the increased reliance of Australians on federal government services.

2. Despite this responsibility, CLA has been concerned that the Australian Government has left it to one state and one territory – namely the Australian Capital Territory and Victoria – to protect human rights via statue.[4] As the signatory to the international conventions included under the definition of 'human rights' (section 1), the Australian Government needs to take stronger action to implement the rights and freedoms guaranteed by those covenants and treaties.

3. It would be unfair to deny that, since federation, Australia has witnessed remarkable domestic peace and stability, especially when considered within a global context of war, civil strife and bloodshed. However, it would equally be a dishonour to the victims of government cruelty, neglect or oppression to dismiss current and past injustices as well-intentioned errors, rare occurrences or the deeds of a few 'bad apples'.

4. Indigenous Australians, migrants, the mentally ill, those identifying as gay, lesbian, bisexual, transsexual or intersex (GLBTI), youth, women and other people apart from the mainstream have all suffered, especially from Government policies and legislation which ignored the principle foremost in all human rights discourse, that:

> *'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'*[5]

5. With the increased reliance of Australians on government services; ever broadening discretions given to the Executive and bureaucrats; and the rate at which long and complex legislation is increasingly rushed through the Parliament, CLA believes that a Joint Committee, dedicated to ensuring compliance with human rights, is a necessary step to ensure the worst excesses of state power are removed or, at the very least, the government is made to publicly account for its ignoring of fundamental freedoms.

6. As Australia's constitution contains few, if any, substantive rights, the people look to Parliament to safeguard their liberty. Unfortunately, strong party politics and the dominance of the lower house by the Executive has meant that

[4] For example, the *Human Rights Act 2004* (ACT) and the *Charter of Rights and Responsibilities Act 2008* (VIC).
[5] Article 1, *Universal Declaration of Human Rights* (1948) at http://www.un.org/Overview/rights.html accessed 29 June 2010.

Parliament as a whole has not lived up to the communities' expectations. Successful scare campaigns and wedge politics, on issues such immigration and – especially since 2001 – terrorism and organised crime, has led to the steady erosion of civil rights.[6]

7. CLA believes that the proposed legislation will accomplish two things. First, in requiring a Member introducing a bill (or rule-maker tabling an instrument) to present a statement of compatibility will ensure that human rights are at the forefront of a legislator's mind – rather than an incidental concern which may arise. Second, in allowing the House or Senate to refer a bill to the Joint Committee, the legislation reaffirms the role of Parliament as the primary legislative body, no longer merely giving effect to the wishes of Cabinet.

8. Most critics of a Charter of Rights argue that Parliament, not the judiciary, should be responsible for the protection of human rights. 'Unelected judges' are bad: 'elected parliament' is good – is their argument. Yet, now that this bill is before Parliament, those same critics say that this will give Parliament an impermissible power to review existing legislation,[7] a fundamental misconception of the constitutional role of Parliament.

9. Finally, the need for this legislation stems from the constitutional obligation on the Commonwealth to genuinely apply international treaties within Australia, including those which recognise and promote human rights.[8]

10. The proposed bill's definition of 'Human Rights' includes treaties which have been incorporated, to various degrees, into Australian domestic law. The validity of the domestic legislation is largely supported by the 'External Affairs' power under the Australian Constitution.[9]

11. On numerous occasions, the High Court of Australia has held that a Commonwealth Act, based on an international treaty, must be 'appropriate and adapted' to give effect to the provisions of the treaty, otherwise it is invalid.[10] While the High Court leaves Parliament to determine the manner in which it gives effect to a treaty,[11] the Commonwealth should not cherry-pick those provisions it wishes to follow and those it wishes to ignore. A treaty concluded in good faith – especially one that sets out universal rights – should be implemented fully into Australian law.

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[6] See, for example: *Anti-Terrorism Act 2004*; *Anti-Terrorism Act (No. 2) 2005*; *National Security Information (Criminal and Civil Proceedings) Act 2004; Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (No. 2); Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (No. 3)*

[7] Western Australian Government, *Submission number 2* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=08eb1305-9457-49ef-ab3c-a8bcb44a86d5 accessed 28 June 2010

[8] Under international law, Australia is also bound to give effect to the terms of a treaty, notwithstanding any 'internal law': Arts. 18, 26, 27 *Vienna Convention on the Law of Treaties* (1969) [1974] 2 entered into force 27 January 1980.

[9] Subsection 51(xxix) *Constitution of Australia*.

[10] See, for one example, *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486-487 Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[11] *R v Burgess*

12. So , for example, the *Racial Discrimination Act 1975* (Cth) is a valid law of the Commonwealth under the external affairs power because it implements the *International Convention on the Elimination of all Forms of Racial Discrimination*,[12] an international treaty which exposes rights and freedoms recognized under the proposed bill as 'human rights' (s1).

13. However, article 2(1)(c) of the *International Convention on the Elimination of all Forms of Racial Discrimination* states that member states shall 'take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'. CLA believes that the creation of the Joint Committee on Human Rights is not only an 'appropriate and adapted' measure to ensure compliance with the provisions of the Convention, but also provides support to the Commonwealth when it defends the *Racial Discrimination Act 1975* against charges of being *ultra vires*.[13]

14. Consequently, CLA believes that there are strong historical, moral and legal justifications for the introduction of this legislation.

Recommendation: CLA recommends that, subject to some amendments, the Senate passes the bills.

[12] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
[13] As it has in: *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373; and *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168

Operation of the legislation

Definition of Human Rights

1. Under the *Human Rights (Parliamentary Scrutiny) Bill 2010* (the 'bill') the primary functions of the Joint Committee are to report on matters relating to 'human rights' and the compatibility of Bills for Acts or legislative instruments with 'human rights' (s7(a),(b)).

2. The *Human Rights (Parliamentary Scrutiny) Bill 2010* limits the definition of 'human rights' to mean *only those* "rights and freedoms recognised or declared by the following international instruments…" (s 3(1)). Those international instruments are:

> (a) *The International Convention on the Elimination of all Forms of Racial Discrimination* ([1975] ATS 40);
> (b) *The International Covenant on Economic, Social and Cultural Rights* ([1976] ATS 5);
> (c) *The International Covenant on Civil and Political Rights* ([1980] ATS 23);
> (d) *The Convention on the Elimination of All Forms of Discrimination Against Women* ([1983] ATS 9);
> (e) *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ([1989] ATS 21);
> (f) *The Convention on the Rights of the Child* ([1991] ATS 4);
> (g) *The Convention on the Rights of Persons with Disabilities* ([2008] ATS 12).

3. CLA believes that this definition is overly restrictive and ignores existing Common Law rights and the express and implied rights that operate under the *Australian Constitution*. At a minimum, 'international instruments' should be clarified to include any optional protocol signed by Australia.

4. However, the current definition, even if amended to include optional protocols, still ignores the vast body of human rights which derive from the Common Law and the *Australian Constitution*. CLA believes this will deprive the Joint Committee of an important function to ensure the compatibility of proposed legislation with the full breadth of human rights.

5. Section 7 of the proposed bill sets out the functions of the Joint Committee, namely:

> (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.

(Emphasis added)

6. Importantly, the functions of the Joint Committee are tied to the definition of 'human rights'. A restrictive definition of human rights – as is currently proposed – will deprive the Joint Committee of jurisdiction to fully resolve the issue of human rights compatibility.

Existing Common Law Human Rights

7. Australia, as a former colony of the United Kingdom, has inherited a large corpus of Common Law rights, in addition to the rights contained within the bill's 'international instruments'. These rights are wedded to the historic interactions between the English Parliament and the Crown and have acted as a limit on arbitrary executive authority since the signing of the Magna Carta.[14]

8. Common law rights (or 'presumptions') already assist Australian Courts in the interpretation of legislation. Indeed, the presumption that 'parliament does not intend to limit Common Law rights' operates to limit the scope of some ambiguous laws.[15] Some classic Common Law rights include:[16]

    a. Trial by jury;[17]
    b. The presumption that private property rights are not to be alienated or interfered with without just compensation or express language;[18]
    c. That the state cannot intrude onto private land without a warrant or statutory authority.[19]

9. Currently, the proposed Act does not allow the Joint Committee to scrutinise a bill against existing Common Law and Constitutional Rights. While this may be to resolve a perceived conflict of roles between the new Joint Committee and the current Senate Legal and Constitutional Affairs, Scrutiny of Bills, and Regulations and Ordinances committees,[20] CLA believes that this will unduly restrict the Joint Committee's review.

10. Furthermore, given that a bill is, generally, only referred to one committee, the absence of a broad human rights review will undermine the intention of

[14] A codified form of Common Law civil rights applied to the settled Australian colonies through the application of the *Bill of Rights Act 1688* (UK) and continued in force, post Federation, via section 108 of the *Australian Constitution*.
[15] *FCT v Citibank Ltd* (1989) 20 FCR 404; *Balog v Independent Commn Against Corruption* (1990) 169 CLR 625, 635-6.
[16] For a more complete list see, D C Pearce, R S Geddes, *Statutory Interpretation in Australia* (2006, 6th Ed) [5.30].
[17] *Tassell v Hayes* (1987) 163 CLR 34.
[18] *Clissold v Perry* (1904) 1 CLR 363; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193.
[19] *Coco v R* (1994) 179 CLR 427
[20] A view expressed by other submitters.

the proposed legislation as facilitating the Government's National Human Rights Framework. Given than the Common Law must give way to clear legislative language, the community has a right to be involved where legislation seeks to wind back ancient Common Law rights

Constitutional Rights

11. While the *Australian Constitution* lacks Bill of Rights overtones and contains few rights, the Joint Committee should consider those few that have been recognised by the High Court of Australia.

12. Some of these rights are founded upon the express language of the *Constitution*, including:

a. The right to a jury trial for indictable offences (s 80) and to an opportunity to obtain legal aid (*Dietrich v the Queen* (1992) 177 CLR 292);
b. The protection of private property from Commonwealth expropriation or acquisition without compensation (s 51(xxxi));
c. A prohibition on the Commonwealth from instituting any form of 'civil conscription' for doctors, dentists and allied health professionals (s 51(xxiiiA);
d. Freedom of religious belief and a prohibition on the establishment of a state religion or religious test for public office (s 116);
e. Equality of inter-state residents while resident in another state (s 117); and
f. Freedom from onerous burdens on interstate trade and intercourse (s 92).

13. Other rights have been determined by the High Court as implied by Australia's system of representative democracy. These include:

a. A right to free political communication;[21]
b. A prohibition on the Executive exercising judicial power – including through Bills of Pains and Attainder;[22] and, most recently;
c. The right of prisoners serving a full-time custodial sentence of three years or less to vote.[23]

14. Although it may be argued that the enforceable nature of these rights sets them apart from the human rights defined by the bill,[24] CLA believes that the Joint Committee should be able to consider them for the following reasons.

[21] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[22] *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Brandy v the Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.
[23] *Roach v Electoral Commissioner* [2007] HCA 43.
[24] Section 75 of the *Australian Constitution* guarantees the jurisdiction of the High Court to hear a matter involving a challenge to the validity of Commonwealth legislation: *Croome v Tasmania* (1997)

15. First, as discussed above, legislation is generally subjected to only one Parliamentary Committee review. Unless the Senate adopts a new practice to refer Bills for Acts to a second or subsequent Senate Committee, following their review by the Joint Committee, these Constitutional Rights are currently excluded from the initial Joint Committee review.

16. Duplication could unduly delay the consideration of legislation (with possible consequences under 57 of the *Constitution*) or could artificially fragment the debate over a bill's compatibility with 'human rights'. After all, why should an unenforceable right under an international treaty be privileged over an enforceable right under Australia's *Constitution?*

17. Second, the cost of litigation – the only other option to challenge unconstitutional legislation – is prohibitive for most and, where a challenge is successful, presents a significant drain on the taxpayer who covers any costs awarded against the Commonwealth. It is a slow process and the prospect of a worthy case simply running out of funds is very real.

18. While radio shock-jocks may accuse Parliament of being an expensive talk-fest, CLA believes that the Senate Committee system can provide real value to the Australian public, provided it is able to consider all relevant matters and that the Government is willing to adopt its recommendations.

19. A final reason for extending the Joint Committee's functions to include Constitutional Rights is that, as the example of *Roach v Electoral Commissioner* demonstrated, legislation may be vulnerable on grounds previously unseen (or argued away) by Office of Parliamentary Counsel, the Australian Government Solicitor or the Office of Legislative Drafting and Publishing.

20. Opening the debate on human rights compatibility allows the Parliament to access the knowledge and expertise of academics, practitioners, community representatives and NGOs; and ensures that all legitimate arguments are considered. It should reduce surprise findings of invalidity. Ultimately, the cost of a comprehensive committee hearing pales against the cost of a High Court challenge.

Recommendations

1) That section 3(1) of the *Human Rights (Parliamentary Scrutiny) Bill 2010* be amended to clarify that an 'international instrument includes all optional protocols to that instrument that Australia is signatory to.

2) That a new subsection 3(3) be added to the *Human Rights (Parliamentary Scrutiny) Bill 2010*:

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191 CLR 119 per Brennan CJ, Dawson and Toohey JJ; *Toowoomba Foundry Ptd Ltd v Commonwealth* (1945) 71 CLR 545, 570 per Latham CJ.

'Despite subsection (1) the Committee is not prohibited from investigating any bill for an Act, legislative instrument or judicial ruling which has human rights implications within Australia '.

3) That the definition of human rights in section 3(1) be amended to read:
"***human rights*** **<u>includes</u>** the rights and freedoms recognised or declared by the following international instruments…" (underline emphasis added).

Role of the Senate

1. Under proposed section 7 of the *Human Rights (Parliamentary Scrutiny) Bill 2010* the Joint Committee is to have the following functions:

7 Functions of the Committee

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.

2. Currently section 7 denies the Senate the ability to refer 'any matter' to the Joint Committee, a privilege currently afforded only to the Attorney-General. Given the Executive dominance of the House of Representatives, this has the potential to undermine the role of the Senate (where the Government lacks a majority) in holding the Government to account.

3. While the Senate has an existing Committee system, this disparity in power seems at odds with the equal representation of the Houses on the Joint Committee (s 5(1)). Furthermore, given the potential fragmentation of human rights scrutiny (see discussion above), this absence of a Senate referral power is all the more concerning.

4. However, in order to reduce the chance for the Senate to overburden the Joint Committee, its power to refer a matter to the Joint Committee should be limited to cases where a resolution of the Senate has been passed by the ordinary means.

Recommendation

1) That subsection 7(c) of the *Human Rights (Parliamentary Scrutiny) Bill 2010* be amended to read:

"(c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General ***or by a resolution of the Senate***, and to report to both Houses of the Parliament on that matter."
(emphasis added)

Attachment 1

Response to arguments against the proposed bills

Argument: Passage of the proposed bills will undermine parliamentary sovereignty by holding elected representatives hostage to "ideological" human rights tribunals.[25]

CLA's view:

Central to the case against a statutory Charter of Rights was an incorrect assumption that such a Charter would undermine Parliamentary sovereignty. The continued role of Parliament as a legislative body; the absence of a judicial power to overturn incompatible legislation and the right of Parliament to ignore or reject any declaration of incompatibility clearly demonstrated that a Charter of Rights was not a threat to Parliamentary Sovereignty. It would, however, have allowed the Courts more scope to scrutinise an Act for its compatibility with human rights.

If the 'stronger' protection afforded by a Charter was too much for the critics of human rights, then their current criticism of the present rights-lite proposal should demonstrate that their objections are not based on a desire to protect Parliament, but to stifle and undermine any genuine attempt at reform.

The proposed bill's definition of human rights is narrowly defined in section 3(1). Human rights are defined by reference to the 'international instruments'. There is no compelling grammatical argument that 'instruments' include the reports of the UN Human Rights Committee, nor the jurisprudence of the International Criminal Court, the International Court of Justice or the European Court of Human Rights.

Indeed, the contrary appears to apply. Under the Victorian *Charter of Human Rights and Responsibilities 2008* (VIC) and the *Human Rights Act* 2004 (ACT) a court is able to consider "International law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights…", however this is due to a *specific* provision.[26]

The present bill contains no similar clause suggesting that 'human rights' or 'international instruments' includes 'judgments of domestic, foreign and international courts and tribunals relevant to a human rights'.

Even if the Joint Committee did consider the findings or interpretations of foreign tribunals, the legislation does not require Parliament to adopt the view of the committee. Even if the Joint Committee did frame its findings against a body of international jurisprudence it would still remain for Parliament (and *only* Parliament) to pass a bill for an Act or any amendments suggested by the Committee. Parliamentary Sovereignty is maintained.

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[25] FamilyVoice Australia, *Submission 4* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8af5bb3f-9538-4324-9cfd-f29b9a467d28 accessed 29 June 2010, p.2.

[26] s 32(2) *Charter of Human Rights and Responsibilities Act 2006* (VIC); see also, s 31(1) *Human Rights Act 2004* (ACT).

FamilyVoice's submission seeks to muddy the debate over the proposed legislation by raising the spectre of foreign tribunals sitting in judgement of Australians' "observance" of Mother's Day, [27] …just one of a suggested litany of atrocities conducted by foreign tribunals. CLA believes this is a not a credible argument against the proposed bill.

Argument:

Human Rights treaties are 'ambiguous' and their provisions 'incompatible', therefore the bill should not be passed.[28]

CLA's view:

With a few notable exceptions, the exact scope and content of rights is ambiguous. This, however, does not mean we should not have a public debate over the place of rights within Australia, and where the line should be drawn at any particular time in Australia's development. All laws, human rights and international treaties included, are developing and living works. We do not shut down the Australian Law Reform Commission because the scope and content of the Common Law is ambiguous and ever evolving. Neither should we shut down the dialogue on rights.

Some rights are self-evident and cannot be 'derogated' from. These include the right to life and freedom from cruel and inhumane treatment and slavery. If only these unambiguous rights were accepted, the Joint Committee could still examine legislation which authorised the deployment of armed forces within Australia, or mandatory detention or the arrangements by which Intelligence Agencies (including the AFP) share information with foreign jurisdictions where the death penalty is applied (such as the case of the Bali Nine). So, even if the Joint Committee confined its reasoning to unambiguous rights, it would still play an important role.

It is true, however, that other rights are subject to competing rights and interests. This is the natural balancing act that should take place in a free and democratic society. Such has been recognised by many domestic and international jurisdictions who have legislated that rights may be subject to reasonable limits.

Human Rights Act 2004 (ACT) – section 28[29]

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

[27] FamilyVoice Australia, *Submission 4* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8af5bb3f-9538-4324-9cfd-f29b9a467d28 accessed 29 June 2010, p.2.

[28] FamilyVoice Australia, *Submission 4* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8af5bb3f-9538-4324-9cfd-f29b9a467d28 accessed 29 June 2010, p.1.

[29] See also, s 7 *Charter of Human Rights and Responsibilities Act 2006* (VIC).

(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The passage of these bills will ensure that the debate over the limit and scope of competing rights and interests actually occurs, and involves a wide cross section of the community. Rather than a neglected afterthought – to be dismissed by a Minister's press release – the human rights implications of a bill or subordinate legislation will be front and centre of any debate over the merits of the proposed legislation.

Argument:

We already have the Senate Legal and Constitutional Affairs Committee, the Scrutiny of Bills Committee and the Regulations and Ordinances Committee, why do we need a new Joint Committee on Human Rights? We don't. Therefore, the bills should not be passed.

CLA's view:

Unnecessary duplication and legislative delay is a valid concern; however, CLA does not believe that the functions and role of the Joint Committee replicate those of the other Committees (even assuming the definition of human rights is broadened).

The Legal and Constitutional Affairs Committee

This committee is established under Chapter Five of the *Senate Standing Orders* to consider legislation or matters referred to it by the Senate.[30] Unlike the other Committees it does not have specific terms of reference (as the scope of an inquiry is determined by Senate Resolution). As such, CLA sees that there is no automatic duplication of functions. The Senate may, for whatever reason, decide to refer a bill to the Constitutional and Legal Affairs Committee *subsequent* to a review by the Joint Committee but this is its prerogative.

Indeed, if the Committee adopts CLA recommendation to allow a referral of any matter to the Joint Committee by the Senate then this scenario would become less likely.

Even if the Legal and Constitutional Affairs Committee did review a bill it could confine its discussion to issues *relating to Constitutional matters*, for example, 'does the bill undermine federalism?', 'does the legislation undermine the separation of powers?', 'does the bill impermissibly grant judicial power to a non-judicial body?' or, even more simply, 'is the bill constitutionally *ultra vires?*'

Indeed, by separating out the functions of the Committees so, the Legal and Constitutional Affairs Committee would become the perfect forum for Western

[30] Senate, 'Chapter 5 – Standing and Select Committees', *Senate Standing Orders* http://www.aph.gov.au/Senate/pubs/standing_orders/b05.htm accessed 1 July 2010.

Australia,[31] or states' rights advocates to make representations arguing that a proposed bill (human rights compliant or not) weakens the states and damages Australia's federal structure.

CLA does not consider that the roles of the Joint Committee and the Senate Constitutional and Legal Affairs Committee overlap by force of the proposed legislation. CLA believes that the above discussion applies equally to the House of Representatives Legal and Constitutional Affairs Committee: the Reps should be as free as the Senate to initiate its own inquiry, where it believes that to be necessary.

Scrutiny of Bills Committee

The terms of reference for the Scrutiny of Bills Committee are

> [to examine] …all bills which come before the Parliament and [report] to the Senate whether such bills:
>
> 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.

With the exception of point i. it is not obvious that the functions of the Scrutiny of Bills Committee overlap with those of the proposed Joint Committee. In regards to point i. CLA has noticed a trend to using the Legal and Constitutional Committee to inquire into rights matters, rather than the Scrutiny of Bills Committee. This may be due to the flexible nature of a Senate resolution referring a matter to the Legal and Constitutional Committee.

As such, under present practice, a committee other than the Scrutiny of Bills Committee deals with Human Rights issues. CLA believes that the move to the Joint Committee will not present any new issues concerning point i.

Points ii. – v. are primarily concerned with the scope and nature of Executive power. For example, whether proposed legislation contains excessive ministerial discretion (eg. RU486), a 'Henry VIII' clause, or privative clauses denying judicial review.

While the relationship between the Executive, citizens and the Courts does have a human rights dimension, this is not the framework in which Australian jurisprudence has developed. Administrative Law sets out the requirements of 'natural justice' and, while it does take human rights into account,[32] any serious transfer of legislative or decision making powers away from Parliament should be handled by a Committee tasked to protect the institution of Parliament itself, rather than also deal with whether a proposed bill infringes personal rights and liberties.

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[31] Western Australian Government, *Submission number 2* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=08eb1305-9457-49ef-ab3c-a8bcb44a86d5 accessed 28 June 2010

[32] *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1

Regulations and Ordinances Committee

Finally, concern is raised that the Joint Committee will replicate the roles of the Regulations and Ordinances Committee.[33]

The functions of the Committee are set out in *Senate Standing Order 23*, with the Committee to:

> scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety. The Committee engages in technical legislative scrutiny. It **does not examine the policy merits** of delegated legislation.[34]

It is clear that the work of the Committee – while very important – does not focus on ensuring compatibility with human rights (however defined). As with the Scrutiny of Bills Committee, its work could occur independently of the Joint Committee. Indeed, unless the *Legislative Instruments Act 2003* (Cth) is amended to limit the power of either House to disallow delegated legislation, the work of this committee is invaluable.

CLA does not believe that the role of any of the three Committees discussion above will be significantly undermined by the new Joint Committee. While there may be changes in the volume or nature of legislation referred to those Committees, this could have the benefit of reinvigorating a long absent discussion over whether Commonwealth legislation undermines the federal nature of Australia.

Argument:
As the proposed bill will impermissibly allow the Commonwealth to overrule State legislation it should not be passed.

CLA's view:

First, CLA is of the view that Australia is under a legal and moral obligation to its residents and the world community to uphold human rights and overturn state legislation that is an affront to human dignity. For example, CLA supports legislation such as the *Human Rights (Sexual Conduct) Act 1994* (Cth) which was used to overturn Tasmania's outdated laws which criminalised homosexuality in 1994.[35]

Nonetheless, taking the arguments of Western Australia at face value, there is little in the legislation to give support to their concerns of a Joint Committee riding roughshod over state legislation. First, the functions of the Joint Committee are limited to reviewing bills for Acts and legislative instruments introduced into either House of *Federal* Parliament (s 7). With the exception of the Attorney-General's

[33] Western Australian Government, *Submission number 2* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=08eb1305-9457-49ef-ab3c-a8bcb44a86d5 accessed 28 June 2010
[34] <http://www.aph.gov.au/Senate/committee/regord_ctte/cominfo.htm> accessed 2 July 2010. Emphasis added.
[35] See also, *Croome v Tasmania* (1997) 191 CLR 119.

power to refer a 'matter' to the Joint Committee for investigation there is little scope for the Joint Committee to review state and territory legislation (s7(c)).

Given the sheer volume of federal legislation and legislative instruments it is unlikely that the Joint Committee would consider many pieces of state and territory legislation. Even if the Joint Committee does consider state legislation, this can only be of benefit to parliamentary democracy.

It will empower Parliament to consider the harmonisation of laws in a similar manner to the existing arrangements under the Council of Australian Government's (COAG) and the Standing Committee of Attorneys-General (SCAG). Both SCAG and COAG are secretive bodies, dominated by the Executive, who do not release agendas and only publish communiqués, not minutes. By contrast, a parliamentary inquiry is open to the public, its hearings are reported in Hansard and its findings are referred in full back to the Senate or House of Representatives.

Despite the concerns of the WA Government, it is the emergence of COAG and SCAG which has undermined the federal democratic nature of Australia's Parliamentary system. The recent examples of the *Crime Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* and *Crime Legislation Amendment (Serious and Organised Crime) Bill (No 3) 2009* demonstrate how a secret SCAG agenda can turn into a legislative *fait accompli*, presented to the public as a done deal – with only tokenistic consultation offered.

The Joint Committee is a valiant attempt to bring genuine consultation back into the Parliament and should be supported.

Finally, the Federal Parliament is already empowered under section 109 of the *Australian Constitution* to pass laws which overrule state legislation.[36] WA's concerns are 70 years too late; since the High Court has already indicated that the Commonwealth is not subject to any 'reserve state powers' and can pass any law it is competent to under section 51.[37] As indicated above, CLA supports moves by the Federal Government to ensure that the human rights of Australians are recognised and protected, regardless of where they happen to live.

The inherent dignity of a New South Welshman is no different than a Tasmania and the Commonwealth has a legal duty under international law to ensure human rights treaties are given effect notwithstanding Australia's federal structure.[38]

Argument:

The bill will 'breach the separation of powers' by allowing the Joint Committee to review existing legislation.[39]

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[36] The Commonwealth maintains 'plenary power' over the Territories: s 122, *Australian Constitution*.
[37] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[38] Arts. 18, 26, 27 *Vienna Convention on the Law of Treaties* (1969) [1974] 2 entered into force 27 January 1980.
[39] Western Australian Government, *Submission number 2* at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=08eb1305-9457-49ef-ab3c-a8bcb44a86d5 accessed 28 June 2010 p. 2.

CLA's view:

CLA is of the opinion that this argument is without basis, either in logic or constitutional practice. It is *Parliament* that is sovereign in Australia, not legislation. Under the classic theory of Parliamentary Sovereignty which opponents of Charters of Rights so strongly (yet mistakenly) cling to, Parliament can ''make and unmake any law whatever".[40] This includes amending bills before they are enacted and reviewing existing Acts. The Joint Committee will not have delegated power to enact legislation, merely to report on its compatibility with human rights. Only Parliament can pass any recommended amendments to existing legislation and, in that sense, Parliament remains sovereign.

Argument:
The bill will encourage judicial activism and, therefore, should not be passed.

CLA's view:

CLA supports the general counter-argument to this claim put forward by Geoffrey Robertson and the National Human Rights Consultation Report.[41] 'Activists judges' are an easy target, however it is unlikely that this bill – if passed – would lead to an outburst of judicial creativity for three key reasons:

1) The bill sets up a framework for reviewing proposed legislation and legislative instruments (including their statements of compatibility) by the Parliament. The role of the courts is incidental to the actions of the Joint Committee. Proponents of this argument ignore that *all* legislation (including the Constitution), not merely human rights laws, is subject to judicial scrutiny and interpretation. With the exception of Constitutional interpretation, if Parliament disagrees with an interpretation given to legislation by a judge they can amend the Act to restate their true 'intention'.

2) The Judiciary are already able to consider extrinsic material to resolve ambiguous legislation. This includes 2nd reading speeches, committee reports and explanatory memorandum. Section 15AB of the *Acts Interpretation Act 1901*, relevantly subsection 15(AB)(2), includes the following materials which may be referred to by a court:

(c) any ***relevant report of a committee of the Parliament or of either House of the Parliament*** *that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;*
(d) any treaty or other international agreement that is referred to in the Act;
(e) ***any explanatory memorandum relating to the Bill*** *containing the provision, or any other relevant*

[40] AV Dicey, *Introduction to the study of the law of the Constitution*, 10th edn, Macmillan, London, 1959, p. 39. See also, Timothy Vines, 'An Australian Constitutional Experience' (2006) 2 *Cross Sections* at <http://eview.anu.edu.au/cross-sections/vol2/pdf/ch13.pdf> accessed on 3 July 2010.
[41] Geoffrey Robertson, *The Statute of Liberty* (2009); Commonwealth of Australia, *National Human Rights Consultation Report* at < http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Prelims).pdf/$file/NHRC+Report+(Prelims).pdf> accessed 3 July 2010, [12.2], [13.3].

document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
(f) the ***speech made to a House of the Parliament by a Minister on the occasion of the moving*** *by that Minister of a motion that the Bill containing the provision be read a second time in that House…* (emphasis added)

Two points emerge from this. First, a court will only have an opportunity to embark on 'judicial activism' where the meaning of a provision is ambiguous. Good legislative drafting, expressing a clear intention, is all that is required to ensure an Act is not ambiguous. The Scrutiny of Bills Committee in the Senate or the Joint Committee will be able to ensure drafting errors are noted and corrected.

Second, the objective of this argument is to prevent a court from taking the findings of human rights compatibility into account. Given the application of section 15AB of the *Acts Interpretation Act 1901*, this is a futile endeavour. Even if this bill is not passed, an advocate before a court could simply rely upon the minister's 2nd reading speech, or a report of a Senate Committee, to pursue a pro-rights reading of legislation. Do those who mount this argument argue that Ministers or Committees should not be free to express their views on their own legislation for fear that a court may refer to it later on?

3) Lastly, as discussed above, Australian courts already rely on international law and domestic human rights in the interpretation of laws. The influence of international law was one factor leading to the High Court's recognition of native title in the *Mabo* decision. These presumptions can be rebutted by express language but to suppose that judges, in the absence of this rights-lite bill, would no longer take human rights into account is misguided.

As such, CLA believes that the fear of 'activist judges' distracts from the real flaw in the proposed legislation: that it is not a clear enunciation of rights and freedoms which should apply in Australia. In short, this rights-lite bill is not a Charter of Human Rights.

While the Committee should recommend the passage of this bill as part of the Government's Human Rights Framework, steps should be taken to further the desires of Australians for a Statutory Charter of Human Rights.

CLA Civil Liberties Australia

Box 7438 Fisher ACT Australia

Web: www.cla.asn.au

Lead author: Tim Vines; associate author Stephen Morris