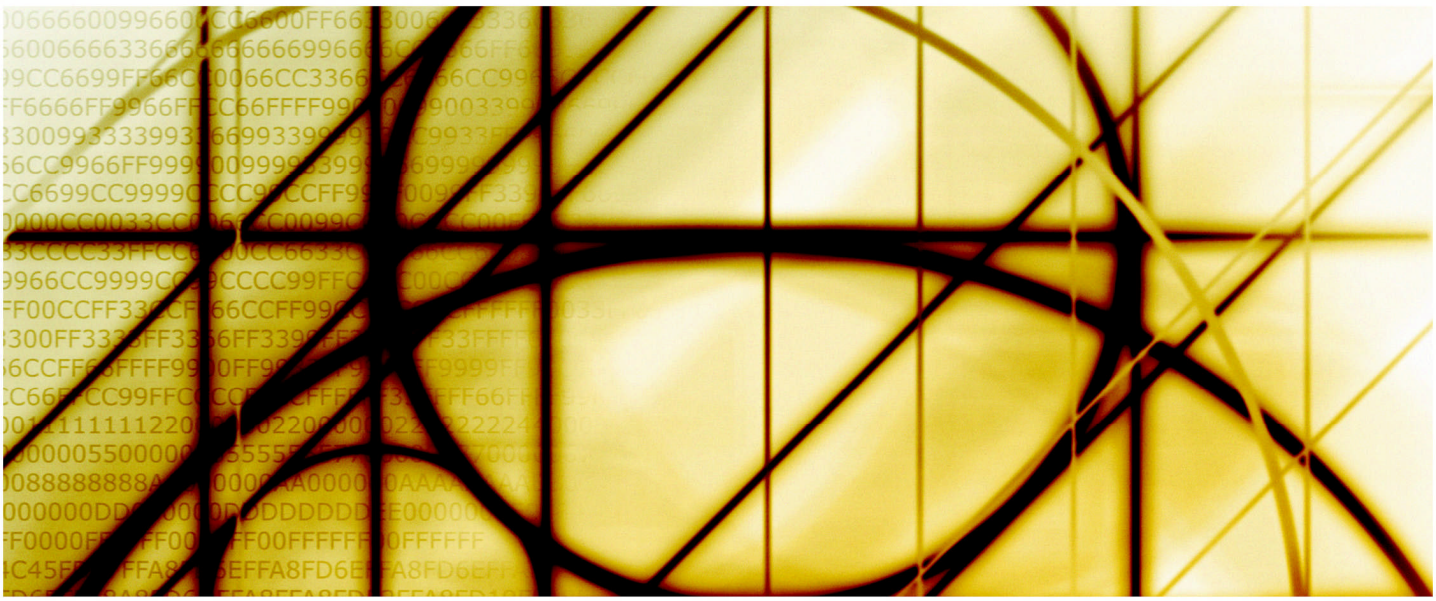
MALLESONS STEPHEN JAQUES

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill 2010

Mallesons Human Rights Law Group



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The content of this submission represents the views and opinions of the Mallesons Stephen Jaques Human Rights Law Group, and does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

Executive Summary

In relation to the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill 2010, the Mallesons Stephen Jaques Human Rights Law Group submits that:

- the definition of human rights in clause 3 of the Scrutiny Bill be amended to include the UN Declaration on the Rights of Indigenous Peoples (DRIP), except to the extent that such DRIP rights are incompatible with rights in the seven core international human rights instruments presently included in the definition;

- the definition of human rights in clause 3 of the Scrutiny Bill be expanded to incorporate the ILO Convention concerning Discrimination in respect of Employment and Occupation and the UN Declaration on the Elimination of Intolerance Based on Religion and Belief;

- the operation of the Joint Committee on Human Rights be amended to specifically include the power to inquire into any matter relating to human rights that is referred to it by either house of Parliament;

- the Joint Committee's functions include the power to monitor and report on the implementation of Observations, General Comments, Direct Requests, opinions and views of the various United Nations human rights treaty monitoring bodies and other international monitoring mechanisms;

- clause 6 of the Scrutiny Bill provide a non-exhaustive list of powers of the Joint Committee on Human Rights which includes the power to:

  (i) call witnesses and take evidence;

  (ii) call for submissions and convene public hearings; and

  (iii) to appoint specialist advisors.

  Such powers should be in addition to any that may be conferred on the proposed Joint Committee by resolution of Parliament in accordance with the current wording in clause 6 of the Scrutiny Bill;

- clause 8 of the Scrutiny Bill be amended to require the Attorney-General to be responsible for causing the statement of compatibility to be made and to state whether in his or her view the proposed Bill is or is not compatible with human rights. However, if this suggestion is not adopted, the Scrutiny Bill should be amended to require the Attorney-General to comment upon statements of compatibility prepared by private members before their proposed Bills and the accompanying statements are presented to the Parliament;

- clause 9(1) of the Scrutiny Bill be amended to require in addition that the relevant rule-maker consult the Attorney-General or the Attorney-General's Department, as appropriate, in the preparation of statements of compatibility for disallowable legislative instruments;

- the Scrutiny Bill require those preparing the statements of compatibility to explain in sufficient detail:

  (i) whether the bill is compatible with human rights and, if so, how it is compatible;

(ii) if any part of the bill is incompatible with human rights, the nature and extent of the incompatibility; and

(iii) if the relevant right is one that may be limited, whether any proposed limitation of human rights can be demonstrably justified in a free and democratic society, based on cogent evidence;

- the statements of compatibility produced under clause 8 be tabled with the Second Reading Speech and Explanatory Memorandum of a Bill and also be included in Hansard; and

- the Scrutiny Bill be amended to clarify that a compatibility statement prepared by a private member may be used for interpretative purposes in the same manner as one prepared by a Minister for the purposes of section 15AB of the *Acts Interpretation Act 1901* (Cth). This amendment would only be necessary if our above recommendation, that statements of compatibility should be the responsibility of the Attorney-General, is not adopted.

1 Introduction

The Mallesons Human Rights Law Group ("**Mallesons HRLG**") welcomes the opportunity to make this submission in relation to the Human Rights (Parliamentary Scrutiny) Bill 2010 ("**Scrutiny Bill**") and the Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill 2010 ("**Consequential Provisions Bill**"). These Bills implement important mechanisms for improving human rights outcomes at the national level.

The Mallesons HRLG made a submission to the National Human Rights Consultation in June 2009. We welcome this opportunity to comment on the Bill implementing two of the key commitments arising from the Government's response to the Report of the National Human Rights Consultation.

This submission was prepared by lawyers in the firm's Sydney and Melbourne offices. The content of this submission represents the views and opinions of the Mallesons HRLG, and does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

2 Background

In assessing these Bills, it is useful to consider their broader policy context. On 10 December 2008, the Commonwealth Government appointed a committee, chaired by Father Frank Brennan AO, to conduct a national consultation on the protection and promotion of human rights in Australia. The committee undertook extensive national consultations and presented its report to the Government in September 2010. The National Human Rights Consultation Report recommended a range of measures to strengthen human rights in Australia, including the enactment of a federal Human Rights Act.[1]

On 21 April 2010, the Commonwealth Attorney-General, the Hon Robert McClelland MP, launched Australia's Human Rights Framework, setting out the Government's response to the National Human Rights Consultation Report.[2] Through Australia's Human Rights Framework, the Government committed itself to implement a range of measures intended to further protect and promote human rights in Australia, but notably not including a Human Rights Act.

In its submission to the national consultation, the Mallesons HRLG supported the adoption of a federal Human Rights Act as the preferred means of enhancing human rights protection in Australia. In the absence of a comprehensive national Act, it remains likely that limited, individual measures to protect human rights will deliver piecemeal results. In particular, the current patchwork of federal and state laws addressing different rights, each with different responses and remedies, can be expected to continue. Significantly, the Australian Human Rights Framework does not include the following features, which we consider critical to best ensuring the protection and promotion of human rights in Australia:

(a) government agencies are not compelled to respect human rights norms in discharging their functions;

1 National Human Rights Consultation Committee; *National Human Rights Consultation Report* (2009).

2 Commonwealth of Australia, *Australia's Human Rights Framework* (2010), available at <http://www.ag.gov.au/humanrightsframework>.

(b) there is no requirement that the courts interpret legislation consistently with human rights, insofar as it is possible to do so;

(c) there is no mechanism by which the courts can declare particular legislation to be incompatible or inconsistent with human rights;[3] and

(d) individuals whose human rights are breached have no remedy, except where such remedies are provided for in specific statutes or at common law.

The current proposed Bills contain measures that have the potential to make a positive contribution to securing greater respect for, and observance of, human rights. Of these, in our view the two most important are the creation of a joint Parliamentary Committee on Human Rights and the requirement that statements of compatibility be prepared for new legislation and disallowable legislative instruments submitted to Parliament.

In our view however, those Bills should be amended to make them more consistent with their human rights objectives. This Submission outlines the amendments we propose should be made.

3 Definition of human rights

3.1 The scope of human rights should be expanded

Clause 3 of the Scrutiny Bill defines human rights to mean those rights and freedoms that are recognised or declared by the:

(a) the International Convention on the Elimination of all Forms of Racial Discrimination;[4]

(b) the International Covenant on Economic, Social and Cultural Rights;[5]

(c) the International Covenant on Civil and Political Rights;[6]

(d) the Convention on the Elimination of All Forms of Discrimination Against Women;[7]

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[8]

(f) the Convention on the Rights of the Child;[9] and

(g) the Convention on the Rights of Persons with Disabilities.[10]

[3] Although, in certain circumstances, legislation that offends rights protected by the Australian Constitution, and which is therefore unconstitutional, may be held invalid.

[4] [1975] ATS 40.

[5] [1976] ATS 21.

[6] [1980] ATS 23.

[7] [1983] ATS 9.

[8] [1989] ATS 21.

[9] [1991] ATS 4.

[10] [2008] ATS 12.

Although it is appropriate that this definition encompasses the seven core human rights treaties to which Australia is a party, in our view it does not sufficiently reflect other important human rights that have been accepted by Australia at the international level. In particular, the definition does not sufficiently take account of the rights of indigenous peoples. Having regard to the Government's recently announced objective of constitutional reform to recognise indigenous Australians and the comparatively poor Australian record in securing such reform by referendum (particularly if bi-partisan support is lacking), we submit that the Scrutiny Bill be amended so that the rights of such Australians are recognised and considered.

The UN Declaration on the Rights of Indigenous Peoples ("**DRIP**") was adopted by an overwhelming majority of the UN General Assembly in 2007, with only 4 negative votes and 11 abstentions. On 3 April 2009, Australia announced its official support for the DRIP.[11]

Although some of the rights identified under the DRIP merely require the non-discriminatory application of civil, political, economic, social or cultural rights identified in other treaties,[12] other DRIP rights are collective rights not otherwise covered by other instruments.[13] The special circumstances of indigenous peoples were specifically acknowledged in the foreword to Australia's Human Rights Framework, where the Attorney-General stated that "there is a need to ensure that all Australians, including those without a strong voice, can be heard". In this context, the Attorney-General listed a range of measures being undertaken to address indigenous vulnerability and disadvantage.

In recognition of these special circumstances, we submit that the definition of human rights in clause 3 of the Scrutiny Bill should be amended to include the DRIP, except to the extent that such DRIP rights are incompatible with rights in the seven core international human rights instruments listed above.

There are also other human rights instruments to which Australia is a party and which have been considered sufficiently important to receive legislative recognition by the Australian Parliament. Specifically, the *Human Rights Commission Act 1986* (Cth) permits the Human Rights Commission to investigate complaints on the basis of discrimination in employment and occupation,[14] and also in relation to the UN Declaration on the Elimination of Intolerance Based on Religion and Belief.[15]

For the reasons outlined in the Human Rights Commission's submission,[16] it is desirable that there be consistency between the human rights identified by the *Human Rights Commission Act 1986* (Cth) and those rights that will be the subject of parliamentary attention under the Scrutiny Bill. **We therefore submit**

[11] Hon Jenny Macklin MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples', Speech delivered at Parliament House, Canberra, 3 April 2009.

[12] See, eg, arts 2,9,14, 16, 17(3), 21(1), 24(1).

[13] See, eg, art 1, which relates to the maintenance of indigenous institutions, traditions and institutions and customs, and also arts 3, 4, which relate to self-determination in respect of internal and local affairs.

[14] See s 11 and Schedule 1, which attaches the ILO Convention concerning Discrimination in respect of Employment and Occupation.

[15] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN GA Resolution 36/55 of 25 November 1981.

[16] Australian Human Rights Commission, 'Submission to the Senate Legal and Constitutional Affairs Committee', 7 July 2010, 3-4.

that the definition of human rights in clause 3 of the Scrutiny Bill should be expanded to incorporate the ILO Convention concerning Discrimination in respect of Employment and Occupation and the UN Declaration on the Elimination of Intolerance Based on Religion and Belief.

4 Parliamentary Joint Committee on Human Rights

4.1 Functions of the Joint Committee on Human Rights

We support the introduction of a Parliamentary Joint Committee on Human Rights. We consider that the work of the Committee will help to ensure that legislation and policies are more consistent with human rights.

Under clause 7 of the Scrutiny Bill, the proposed Joint Committee on Human Rights would have the following functions:[17]

(i) to examine Bills for Acts and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament;

(ii) to examine Acts for compatibility with human rights, and to report to both Houses of Parliament; and

(iii) 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 Parliament.

We submit that the operation of the Joint Committee would be improved by specifically including the power to inquire into any matter relating to human rights that is referred to it by either house of Parliament. This would assist in broadening the human rights expertise of the members of the Joint Committee on Human Rights and ensure that the Committee is not simply regarded as a political forum dominated by the government of the day.

We further submit that the Joint Committee's functions should include the power to monitor and report on the implementation of Observations, General Comments, Direct Requests, opinions and views of the various United Nations human rights treaty monitoring bodies and other international monitoring mechanisms. This function would enable the Joint Committee to further assist the Australian Government in responding to monitoring bodies and fulfilling its obligations under international human rights law. In turn, the Joint Committee's functions in the area of legislative scrutiny would enable it to develop substantial expertise and experience in analysing human rights jurisprudence and practice and how these are applied in Australia.

The United Kingdom's Joint Committee on Human Rights provides a useful model for the proposed Parliamentary Joint Committee. The UK Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons. It has a broad power to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases). As part of this broad power of review, the UK Joint Committee on Human Rights assists the UK government to respond to observations and recommendations of United

[17] Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), s 7.

Nations treaty monitoring bodies.[18] The UK Committee considered the broader importance of such monitoring in a recent report, explaining that it: [19]

> [a]lso serves a wider purpose of directing domestic parliamentary and public attention to the extent to which the Government's policy is in accordance with the provisions of those human rights treaties by which the Government is bound in international law, stimulating debate about the treaties themselves and the human rights principles which they embody.

4.2 Powers of a Joint Committee on Human Rights

Clause 6 of the Bill provides that all matters relating to the powers and proceedings of the Committee are to be determined by both houses of Parliament. We note that some of the other joint statutory committees also leave such powers to be determined by resolution of both houses at the start of each parliamentary session.[20] However, we note that, in relation to certain joint parliamentary committees established by legislation, the Parliament has considered it to be important to specify the committee's powers in such legislation.

For instance, the *Public Accounts and Audit Committee Act 1951* (Cth) sets out detailed powers and rules for the conduct of proceedings in relation to the Joint Committee of Public Accounts and Audit. Some of the powers set out under the legislation include: the power to take evidence on oath or affirmation, the power to summon witnesses and the power to approve or reject a recommendation for the appointment of the Auditor-General.[21] Similarly, the Parliamentary Standing Committee on Public Works has the power to summon witnesses and take evidence under its establishing legislation.[22]

We recognise that the work of these committees may be more operational in nature than the work of the proposed Joint Committee on Human Rights, which will often be considering the framing of legislation. However, it is conceivable that the Committee may need to inquire into systems and practices (for example, within detention facilities or other such institutions) in terms of their compliance with international human rights obligations. Thus, we consider that there may be occasions when the Committee needs to consider human rights issues such as these with the assistance of direct testimony and evidence.

Accordingly, we submit that clause 6 of the Scrutiny Bill should provide a more detailed list of powers of the Joint Committee on Human Rights in a similar manner to the Parliamentary Standing Committee on Public Works and the Joint Committee of Public Accounts and Audit. Specifically, we submit that it would be consistent with the rationale for a Joint Committee on Human Rights to provide it with non-exhaustive powers in legislation, including the power to:

(i) **call witnesses and take evidence;**

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[18] House of Lords House of Commons Joint Committee on Human Rights, *The Committee's Future Working Practices*, 23rd Report of Session 2005-2006, 22.

[19] House of Lords House of Commons Joint Committee on Human Rights, *The Committee's Future Working Practices*, 23rd Report of Session 2005-2006, 22.

[20] See I C Harris (ed.), *House of Representatives Practice* (Fifth edition, 2005) 628-629.

[21] *Public Accounts and Audit Committee Act 1951* (Cth) ss 10, 12.

[22] *Public Works Committee Act 1969* (Cth) ss 20-21.

(ii) **call for submissions and convene public hearings; and**

(iii) **to appoint specialist advisors.**

These powers should be in addition to any that may be conferred on the proposed Joint Committee by resolution of Parliament in accordance with the current wording in clause 6 of the Scrutiny Bill. It should be noted that the UK Joint Committee on Human Rights has similar powers under the House of Commons Standing Orders 152B(7)(a)-(b). The Standing Orders specifically give the UK Committee the power to send for persons, papers and records and to appoint specialist advisors.[23]

The ability to appoint specialist advisors will be particularly important for the Joint Committee on Human Rights. This is because the Bill defines human rights by reference to various international instruments. Given the international application of the human rights in such instruments, they are often defined at a high level of abstraction. It is therefore sometimes necessary to draw upon an extensive international human rights jurisprudence in order to understand the scope of many human rights norms and obligations. The ability to appoint specialist advisors would also be consistent with the practice of numerous other parliamentary committees in Australia.[24]

4.3 Working methods of a Joint Committee on Human Rights

The working methods adopted by the Joint Committee on Human Rights and its interactions with the broader Parliament will be crucial to its effectiveness in scrutinising legislation with human rights implications. Among the key concerns relating to the working methods of the Joint Committee are the sufficiency of time to consider Bills and the focus of the Joint Committee.

Adequate scrutiny of legislation by the Joint Committee can only occur if there is sufficient time to consider and report on Bills. There are many examples of parliamentary committees having insufficient time to consider Bills with substantial human rights implications.[25] In order for the Committee to be an effective mechanism of oversight, the Minister or Member introducing a Bill should be required to give the Joint Committee adequate time to consider the Bill prior to a vote being taken. Alternatively, the relevant Minister or Member could work with the Joint Committee to give advanced notice of proposed legislation.

The ability of the Joint Committee on Human Rights to prioritise its scrutiny of legislation will be important to its ongoing effectiveness. Although the Committee will need to consider all proposed legislation that comes before Parliament, the Committee will need to focus on legislation that clearly raises human rights concerns. It will therefore be necessary for the Joint Committee to develop an appropriate methodology that recognises some of the common issues that arise when scrutinising legislation in relation to their potential impact on human rights. This is consistent with the experience of the UK Committee on Human Rights, which has developed a methodology to determine the significance

[23] Standing Orders, House of Commons United Kingdom, Standing Order 152B <http://www.publications.parliament.uk/pa/cm200910/cmstords/539/539.pdf> at 21 October 2010.

[24] See I C Harris (ed), *House of Representatives Practice* (Fifth edition, 2005) 643.

[25] For example, the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill* 2009 (NSW) and the *Crimes (Criminal Organisations Control) Bill 2009* (NSW). These pieces of legislation with significant potential human rights implications were passed within days of their introduction into the NSW Parliament.

of human rights issues raised by a Bill. The UK Committee applies the following criteria:[26]

(i) how important is the right affected?

(ii) how serious is the interference?

(iii) how strong is the justification for the interference?

(iv) how many people are likely to be affected by it?

(v) how vulnerable are the people?

We recognise that the UK Committee operates in a different context given the existence of the *Human Rights Act 1998* (UK) and in particular the ability of UK courts to make declarations of incompatibility. However, we consider that many of the above criteria will be relevant to any assessment of the human rights impact of legislation.

Thus we expect that the Joint Committee on Human Rights may need to develop a consistent methodology in determining the significance of human rights issues raised by proposed legislation. Although this is not strictly an issue about the Scrutiny Bill, we consider that the proposed Joint Committee, if established, would benefit from studying the methodologies adopted by other such committees, including the one in the UK. Ultimately, the development of a culture of robust scrutiny of legislation will be critical to the workings of the proposed Joint Committee.

5 Statements of compatibility

5.1 Purpose of statements of compatibility

In its report, the National Human Rights Consultation examined the role that statements of compatibility have in protecting and promoting human rights and responsibilities in Australia. The report recorded the Committee's findings that there was "broad support"[27] for such a measure and that "statements of compatibility accompanied by sufficiently detailed reasons would be valuable in ensuring that human rights receive the attention they deserve in the formulation of legislation and regulations".[28]

A number of jurisdictions, including New Zealand,[29] the UK,[30] Victoria[31] and the ACT,[32] have incorporated statements of compatibility as part of the legislative

[26] House of Lords House of Commons Joint Committee on Human Rights, *The Committee's Future Working Practices*, 23rd Report of Session 2005-2006, 13.

[27] National Human Rights Consultation Committee; *National Human Rights Consultation Report* (2009) 166.

[28] Ibid 168.

[29] In New Zealand, the Attorney-General must notify the House of Representatives of any provision in any bill introduced that appears to be inconsistent with the rights in the New Zealand *Bill of Rights Act 1993*: see s 7.

[30] In the United Kingdom, a Minister in charge of a bill in either House of Parliament must, before the second reading of the bill, state whether in their view, the proposed bill is or is not compatible with the rights protected under the *Human Rights Act 1998* (UK): see s 19.

[31] In Victoria, the member of Parliament who proposes to introduce a bill into either House of Parliament must cause a statement of compatibility to be made and must, before the second reading of the bill, present the statement of compatibility to the House: see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28.

process in order to assess whether proposed legislation is compatible with human rights. For example, in the ACT the Attorney-General must state whether a bill presented to the Legislative Assembly by a Minister is or is not consistent with human rights,[33] and a standing committee must report to Parliament about any human rights issues raised by the bill.[34]

According to the Government's Australian Human Rights Framework, statements of compatibility facilitate a "transparent and accountable legislative process" and "enhance public confidence that Australia's laws reflect our human rights obligations".[35] In light of experiences from other jurisdictions, we consider that statements of compatibility should improve the process of legislative scrutiny and, over time, improve the quality of legislation from a human rights perspective.

5.2 Preparation of statements of compatibility

Part 3 of the Bill introduces a requirement that statements of compatibility be prepared in relation to all Bills and for disallowable legislative instruments. This provides that a statement of compatibility must include an assessment of whether the proposed Bill or legislative instrument is compatible with human rights as defined in the Scrutiny Bill.[36]

The preparation of statements of compatibility in relation to each Bill and their subsequent presentation to a house of Parliament is the responsibility of the Member of Parliament who introduces the Bill.[37] The preparation of statements of compatibility for disallowable legislative instruments is the responsibility of the relevant rule-maker, who has to include the statement of compatibility in the explanatory statement relating to the legislative instrument.[38] The explanatory statement is then lodged with the Attorney-General's Department and tabled in the Parliament in accordance with the requirements in the *Legislative Instruments Act 2003* (Cth) ("**LI Act**").

Jurisdictions that have introduced statements of compatibility vary in relation to the allocation of responsibility for preparing the statement. In New Zealand and the Australian Capital Territory, responsibility rests with the Attorney-General. However, in the United Kingdom and Victoria, it is the Minister or Member of Parliament introducing the Bill.

We submit that clause 8 of the Scrutiny Bill should be amended to require the Attorney-General to be responsible for causing the statement of compatibility to be made and to state whether in his or her view the proposed Bill is or is not compatible with human rights. This is consistent with the approach adopted in the ACT and New Zealand.[39] It would ensure that a

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32 See Part 5 of the *Human Rights Act 2004* (ACT).

33 *Human Rights Act 2004* (ACT), s 37.

34 *Human Rights Act 2004* (ACT), s 38.

35 Commonwealth of Australia, *Australia's Human Rights Framework* (2010) 8, available at <http://www.ag.gov.au/humanrightsframework>.

36 See ss 8(3), 9(2).

37 Ss 8(1), 8(2).

38 S 9(1).

39 The statements by the New Zealand Attorney-General on the consistency of bills with the New Zealand *Bill of Rights Act 1993* have tended to be more detailed than the statements of compatibility under the Victorian Charter: see e.g. the Attorney-General's reports on the *Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill 2005* (NZ) and the *Policing Bill 2007* (NZ).

proposed Bill is scrutinised by persons with appropriate expertise in legal analysis and that statements of compatibility are prepared in a consistent manner.

Our recommendation is based in part on the experience in Victoria, where any Member of Parliament who proposes to introduce a Bill must prepare a statement of compatibility which considers whether the proposed Bill is compatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("**Victorian Charter**"). Requiring a Minister or private Member responsible for introducing a Bill to comment on its compatibility with the Victorian Charter may not always produce a sufficiently comprehensive analysis of the rights that may be affected by the proposed Bill. Some of the statements of compatibility tabled in the Victorian Parliament have failed to identify and consider all human rights issues raised by a Bill, and therefore have not contributed as fully as they could have to proper scrutiny of the Bill, nor the development of a positive human rights dialogue between the Parliament, the executive and the judiciary.[40]

One counter-argument that may be advanced against this is that it is desirable to have a range of Ministers and agencies take responsibility for preparing compatibility statements because this enhances their expertise and awareness in relation to human rights issues. In turn, this can be expected to lead to a stronger human rights culture across government.

In our view, such a counter-argument overlooks the broader effect of the proposed statements of compatibility under either approach. Consistent with established Cabinet processes, we expect that ministers proposing legislation will need to satisfy Cabinet that the human rights implications of new legislation have been considered prior to the drafting of legislation. Indeed, the Government has foreshadowed changes to Cabinet and Legislation Handbooks to include "guidance on the need address consistency with Australia's human rights obligations in developing policies and legislation".[41]

Thus, in practice, there is likely to be dialogue and interaction on human rights issues between the Attorney-General and other Ministers and their respective agencies under either model. This will necessarily increase awareness of human rights considerations across government. We therefore consider that it is preferable that the Attorney-General have responsibility for causing statements of compatibility to be prepared, as this will help to ensure that all relevant human rights have been properly considered. Naturally, this role becomes even more important in relation to Bills proposed by non-Government Members, who may lack the resources to prepare compatibility statements.

If our suggested amendments are not adopted in this regard, we submit that the Scrutiny Bill should be amended in the alternative to require the Attorney-General to comment upon statements of compatibility prepared by private members before their proposed Bills and the accompanying statements are presented to the Parliament. This would go some way towards ensuring that such statements are sufficiently comprehensive and robust in their consideration of relevant human rights issues.

Further, we submit that clause 9(1) of the Scrutiny Bill should be amended to require in addition that the relevant rule-maker consult the Attorney-

[40] See for example, the statements of compatibility for the *Summary Offences Amendment (Body Piercing) Bill 2007* (Vic), the *Medical Treatment (Physician Assisted Dying) Bill 2008* (Vic), and the *Crimes (Decriminalisation of Abortion) Bill 2009* (Vic).

[41] Commonwealth of Australia, *Australia's Human Rights Framework* (2010) 8, available at <http://www.ag.gov.au/humanrightsframework>.

General or the Attorney-General's Department, as appropriate, in the preparation of statements of compatibility for disallowable legislative instruments. Thus, although the rule-maker would retain responsibility for causing the statement of compatibility to be made, the Attorney-General or the Attorney-General's Department would be in a position to ensure consistency of assessments across government.

5.3 Content of the statement of compatibility

Clauses 8 and 9 of the Scrutiny Bill do not provide any detail of the form statements of compatibility should take beyond an "assessment of whether the [Bill or legislative instrument] is compatible with human rights". The Scrutiny Bill does not require members of Parliament or rule-makers to provide reasons for their compatibility assessments.

The ACT experience suggests that, absent a clear legislated obligation, statements of compatibility may simply be presented with no reasons. This occurred because the ACT legislation does not specify a minimum level of detail required for statements of compatibility (although the current ACT Government agreed as part of the agreement to form government in the 7th Legislative Assembly that a detailed statement of reasons would accompany each statement of compatibility, which has been followed thus far).[42] In contrast, the Victorian legislation requires a statement of compatibility to state how legislation is compatible with human rights (instead of just asserting this to be the case) and to explain any inconsistency with human rights. This requirement has led to more detailed and considered statements of compatibility in Victoria.

In order to ensure that statements of compatibility fulfil the objective of promoting proper consideration of human rights issues, as well as the presentation of reasons for rights curtailments for public and parliamentary scrutiny, a minimum level of content should be required. **We therefore submit that the Scrutiny Bill should require those preparing the statements of compatibility to explain in sufficient detail:**

(i) whether the bill is compatible with human rights and, if so, how it is compatible;

(ii) if any part of the bill is incompatible with human rights, the nature and extent of the incompatibility; and[43]

(iii) if the relevant right is one that may be limited, whether any proposed limitation of human rights can be demonstrably justified in a free and democratic society, based on cogent evidence.[44]

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42 ACT Human Rights Commission, 'Submission to the National Human Rights Consultation', 15 June 2009, 36.

43 This mirrors the Victorian Charter ss 28(3) and 7(2), which requires a greater level of detail to be included in compatibility statements than its equivalent provision in the ACT *Human Rights Act 2004*. S 37(3) of the *Human Rights Act 2004* (ACT) does not require statements of compatibility to specify how the bill is compatible with human rights. Statements of compatibility in the ACT have tended to contain less analysis than those in Victoria, hence the more specific and rigorous approach taken by the Victorian Charter is to be preferred. Canada, New Zealand and South Africa have a similar formulation to the one in Victoria.

44 The permissible extent of limitations on human rights will usually depend on the rights in question. Significantly, none of the international human rights treaties referred to in clause 3 of the Scrutiny Bill contain a general limitation clause (such as section 7 of the Victorian Charter). However, some, such as the ICCPR, recognise that certain rights may be suspended

This would ensure that statements of compatibility contain thorough and reasoned assessments of the human rights implications of Bills and legislative instruments and make a valuable contribution to Parliamentary and public debate on human rights. Amending the Scrutiny Bill to outline the form and content of statements of compatibility would also assist in ensuring that the Bill achieves its intention as stated in the Explanatory Memorandum ("**EM**"):

> *Statements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.*[45]

Provided that there are suitable guidelines for the preparation of statements of compatibility, we would not expect statements of compatibility to become unnecessarily lengthy or technical.

5.4 Enhancing public awareness of the human rights implications of legislation

Clause 8(2) of the Scrutiny Bill requires the Member of Parliament who introduces a Bill into the Parliament or their representative to cause a statement of compatibility to be presented to the House. However, the Bill does not contain any requirement that the statement of compatibility be introduced at a particular stage of the legislative process, or that the Parliament make the statement publicly available.[46]

The Victorian Charter requires that a statement of compatibility be laid before Parliament before a member gives their Second Reading Speech. This obligation means that the statement becomes part of the Hansard record and is available to all members of the public.

In the "FAQs" section in Australia's Human Rights Framework, the Government stated that statements "will form part of, or be attached to, the Explanatory Memorandum (EM) of a Bill. Therefore statements will be presented as part of presenting the EM".[47] The Scrutiny Bill does not expressly require this. This also appears to be inconsistent with the statements of compatibility produced under clause 9 in relation to legislative instruments, where the statement will be lodged with the Attorney-General's Department before being tabled in Parliament in accordance with the *Legislative Instruments Act 2003*.

We submit that the statements of compatibility produced under clause 8 should be tabled with the Second Reading Speech and EM of a Bill and also be included in Hansard. This will ensure that Members of Parliament have sufficient time to debate legislation while fully informed about its human rights

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temporarily (derogated from) in national emergencies where the life of the nation is threatened (under art 4). Some human rights are framed in a way that recognises the permissibility of certain limitations (see, eg, the right to a fair trial under ICCPR art 14). However, other rights, such as the freedom from torture and the freedom from slavery (ICCPR arts 7, 8), may never be limited (as specified in art 4(2)). A general limitations provision within clause 3 of the Scrutiny Bill would assist in the preparation of statements of compatibility.

45 Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2010, 4-5.

46 However, the Commonwealth Government has previously said that compatibility statements would be public, together with other explanatory materials: see Commonwealth of Australia, *Australia's Human Rights Framework* (2010) 8, 10; available at <http://www.ag.gov.au/humanrightsframework>.

47 <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_FrequentlyAskedQuestions-ParliamentaryScrutiny>.

implications. It will also enhance transparency and accountability in policy-making and legislative development.

5.5 Effect on legislation and legislative instruments

The Government has stated that it is expected that statements of compatibility will be able to be taken into consideration by courts in the interpretation of legislation in the same manner as other explanatory materials.[48]

Section 15AB(1) of the *Acts Interpretation Act 1901* (Cth) provides that:

> Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

Section 15AB(2) provides a non-exhaustive list of materials that may be considered by a court under section 15AB(1). However, section 15AB(2)(e) only refers to any "relevant 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".

Due to the operation of section 15AB as a whole, there should be little doubt that a compatibility statement prepared by a private member may be used for interpretative purposes in the same manner as one prepared by a Minister. **However, we submit that it may be desirable to amend the Scrutiny Bill to clarify this and remove any doubt for the purposes of the *Acts Interpretation Act 1901* (Cth).** We note that such an amendment would only be relevant if our earlier recommendation, that all statements of compatibility be the responsibility of the Attorney-General, is not adopted.

6 Conclusion

In the absence of a national Human Rights Act, it becomes even more important to ensure that human rights are fully considered in the legislative process. The Scrutiny Bill, and the Consequential Provisions Bill that accompanies it, have the potential to make a significant contribution to the promotion and protection of human rights in Australia. In light of this historic opportunity, Mallesons HRLG respectfully submits that the Senate Standing Committee on Legal and

[48] Commonwealth of Australia, *Australia's Human Rights Framework* (2010) 8, available at <http://www.ag.gov.au/humanrightsframework>.

Constitutional Affairs should adopt the recommendations contained in this submission in order to better protect and promote human rights in Australia.

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12 November 2010