



**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***

July 2010

ANTaR 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*, July 2010

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About ANTaR

ANTaR is the pre-eminent non-Indigenous national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to Indigenous policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Indigenous Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues such as [Close The Gap](#), [constitutional change](#), the [Northern Territory Emergency Response](#), [reducing Aboriginal incarceration](#), [eliminating violence and abuse](#), [racism](#) and other significant Indigenous issues.

ANTaR has been working with Indigenous organisations and leaders on rights and reconciliation issues since 1997.

Introduction

On 2 June 2010, the Senate jointly referred the *Human Rights (Parliamentary Scrutiny) Bill 2010* ('the main bill') and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* ('the consequential provisions bill') for inquiry and report.

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

ANTaR welcomes these bills and strongly supports their passage.

Recommendations of the National Human Rights Consultation Committee

In its final report published in September last year, the National Human Rights Consultation Committee made 31 recommendations for the improvement of human rights protections in Australia. The bills being considered by this Committee implement some of the recommendations of the Committee, including Recommendations 6 and 7, which state (respectively):

Recommendation 6

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

Recommendation 7

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

The Committee also recommended that Australia adopt a human rights act, based on a statutory dialogue model. Despite overwhelming community support for such an act as indicated by the consultation process, the Australian Government has indicated that it does not, at this stage, intend to introduce a national human rights act. A review of its human rights framework is to take place in 2014.

ANTaR supports the enactment of a national human rights act, with the UN Declaration on the Rights of Indigenous Peoples scheduled as a specific instrument to be taken into account in interpreting the provisions of the act.¹

ANTaR calls on the Federal Government to give serious consideration to the enactment of a national human rights act in the 2014 review.

¹ See Social Justice Report 2008 at 52.

Key provisions of the main bill

The main bill provides for the establishment of a Parliamentary Joint Committee on Human Rights ('the Joint Committee'), which will have 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 that is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

The Joint Committee is to consist of 10 members, half from each house but excluding Ministers and a range of other office-holders.

The bill would also require a member of parliament to prepare a statement of compatibility with human rights when introducing a legislative instrument subject to disallowance to parliament and present it to the House. For bills, this will be the responsibility of the Minister, Senator or private member responsible.

Definition of 'human rights'

ANTaR believes that human rights are interdependent and indivisible, and therefore emphasises the need for *all* of Australia's human rights obligations to be considered by the Joint Committee and in statements of compatibility.

ANTaR broadly supports the definition of 'human rights' contained in the main bill which refers to all of the international human rights instruments to which Australia is a signatory/party, subject to our recommendation on the UN Declaration on the Rights of Indigenous Peoples (below).

These instruments include:

- the International Convention on the Elimination of all forms of Racial Discrimination (CERD);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the International Covenant on Civil and Political Rights (ICCPR);
- the Convention on the Elimination of all forms of Discrimination against Women (CEDAW);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CATT);
- the Convention on the Rights of the Child (CROC)
- the Convention on the Rights of Persons with Disabilities (CRPD)

The main bill should clarify that these instruments should be interpreted by reference to the usual international human rights interpretative tools, including General Comments from UN human rights committees, customary law and consideration of international and foreign human rights jurisprudence.

The UN Declaration on the Rights of Indigenous peoples

The Australian Government indicated its support for the UN Declaration on the Rights of Indigenous peoples on 13 April 2009.

The UN Declaration sets a comprehensive standard on the rights of Indigenous peoples by elaborating on existing rights and principles. It is based upon principles of partnership, consultation and cooperation between indigenous peoples and States.

The Declaration does not create any new rights, is not legally binding and does not compel governments to certain actions. However, decision-makers are required to interpret human rights obligations consistently with the UN Declaration.

The Declaration is not included in the list of international instruments to which the Joint Committee must have reference. Those instruments set out general rights obligations, and include few rights which apply specifically to Indigenous peoples.

While the Declaration is not legally binding and does not create new rights, for the sake of clarity, the UN Declaration should be included as a relevant international instrument or scheduled as an interpretive tool to provide a comprehensive statement of Australia's human rights obligations to Indigenous peoples for consideration by the Joint Committee.

In particular, the Joint Committee should have regard to the obligation to secure **free, prior and informed consent** where legislation will have a direct impact on Indigenous peoples.² This is made prominent throughout the UN Declaration and is affirmed as an overarching principle in Article 19 which states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representation institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

It is also referenced in various other articles of the Declaration (10, 11, 15, 17, 28, 29, 30, 32, 36 and 38). The duty to effectively consult with Indigenous peoples is also contained in the core human rights treaties, including CERD and the ICCPR. It should be built into ordinary protocols for engagement with Indigenous communities.

A recent report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, clarifies certain aspects of the duty to consult, including:

- when the duty to consult applies: 'whenever a State decision may affect indigenous peoples in ways not felt by others in society'³;

² For a detailed and authoritative analysis of the duty to consult, see James Anaya, 'Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people', UNGA, Human Rights Council, Twelfth Session, Agenda item 3, A/HRC/12/34 15 July 2009.

³ Ibid at par [43].

- procedural requirements of the duty to consult, which will ‘vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples’⁴;
- the requirement that consultations be in good faith, with the objective of achieving agreement or consent (as distinct from creating a veto power). Consultations should be in the nature of negotiations towards mutually acceptable arrangements, with the importance of consent varying according to the circumstances and interests involved⁵; and
- the importance of confidence-building to achieving consensus.

Consultation is crucial to ensuring a respectful and fair process and to the achievement of positive outcomes for Indigenous peoples. As James Anaya wrote last year, the duty to consult recognises that:

...without the buy-in of indigenous peoples, through consultation, at the earliest stages of development of Government initiatives, the effectiveness of Government programmes, even those that are intended to specifically benefit indigenous peoples, can be crippled from the outset.⁶

Statements of compatibility

The main bill does not prescribe a form which statements of compatibility must take but stipulates that a statement of compatibility must include an assessment of whether the bill is compatible with human rights as defined in clause 3.

Statements of compatibility will not be binding on a court or tribunal, but may be considered by the courts as extrinsic material under the *Acts Interpretation Act*.

It is vital that these statements include rigorous and detailed analysis of compatibility with Australia’s human rights obligations. Statements which are very brief, or merely assert compatibility, will not achieve the objective of the legislation, which is to:

...improve parliamentary scrutiny of new laws for consistency with Australia’s human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development.⁷

In line with the Victorian human rights act, ANTaR recommends that the main bill be amended to include a requirement for the responsible member to state:

- **whether legislation is compatible with human rights (in whole or part) and;**
- **if so, how it is compatible; or**
- **if thought to be incompatible, the nature and extent of any incompatibility.**⁸

⁴ Ibid at par [45].

⁵ Ibid at par [46-47].

⁶ Ibid at par [36].

⁷ The Hon Robert McClelland MP, Attorney-General, *Second Reading Speech*, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010.

⁸ Section 28(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Role and function of the Joint Committee

The Joint Committee would have power to examine bills or Acts for compatibility with human rights, but would only be empowered to inquire into other human rights matters on the request of the Attorney-General. This means that the Government of the day would determine the scope of any human rights inquiries outside of the legislative process.

In addition, the Joint Committee will not be empowered to consider existing legislation, other than that referred by the Attorney-General. This means that existing legislation which raises serious human rights issues affecting Aboriginal and Torres Strait Islander people will remain outside the scope of the Committee's consideration (unless referred by the Attorney-General), including the legislation relating to the Northern Territory Emergency Response.

At present, there is no formal process for the domestic review of the findings of UN human rights committees and special rapporteurs. **ANTaR recommends that the Joint Committee's role should be expanded to include reviewing the findings of UN treaty bodies and special procedures of the UN Human Rights Council (such as special rapporteurs, working groups and under the Universal Periodic Review process).**

In order to discharge its functions effectively, the Joint Committee must be adequately resourced. ANTaR notes that Explanatory Memorandum for the main bill indicates that the items in the bill have no financial impact on Government revenue and is concerned that, without substantial resources, the Committee will be unable to properly perform its functions including conducting research and consulting with independent experts.

ANTaR recommends that:

- **adequate resources be provided to ensure the Joint Committee is supported by a experienced secretariat; and**
- **an independent human rights expert be appointed to advise the Joint Committee on matters related to the interpretation and application of human rights.**