Submission to the Standing Committee for the Scrutiny of Bills of the Australian Senate

by Professor James Allan, University of Queensland.

Dear Committee,

Thank you for the invitation, dated March 12th of this year, to make a submission to your committee. My views are clear that the present terms of reference remain appropriate.

In particular, I am strongly opposed to any United Kingdom Joint Committee on Human Rights-type role being added to your purview. A main difficulty with that role, and indeed with the more-or-less analogous function under a statutory bill of rights of making a claim at Second Reading as to any Bill's compatibility with enumerated rights, is that the whole task collapses into a game of guessing what the judges will say about a Bill.

This has been borne out in New Zealand and Canada, as both Professor Grant Huscroft and Professor Janet Hiebert make clear. When legislators are asked if something is, or is not, rights-compliant with some list of enumerated rights in a convention or bill of rights – as opposed to your present remit of examining whether a Bill has trespassed unduly on personal rights and liberties – they inevitably look to see what domestic and overseas judges think when interpreting that bill of rights provision or some similar one. When it comes to the analogous task of Second Reading compatibility statements, legislators are advised by public service lawyers, who assume that the question of consistency with bills of rights is entirely a legal matter, one in which only judicial decisions count. Legislators are not encouraged to consider the meaning of rights for themselves, or the way in which rights should be balanced against important state interests. The matter is captured by the Attorney General and his or her advisors, and as a result no real legislative debate is possible.

One danger, then, of reworked terms of reference that asked your committee to pass judgment on a Bill's compatibility with specifically enumerated rights requirements from a convention or overseas bill of rights would be of a collapse into a legalistic guessing game about what judges here and abroad have said or would say. Another would be of a ratchet-up effect as you try to outdo the judges in giving these vague, amorphous rights provisions the broadest possible interpretation you can.

I think it would be far healthier not to play either of those games and to avoid any chance of turning political issues into pseudo-legal ones. Your present remit covers everything that needs to be covered and is wholly appropriate, in my view.

James Allan,

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March 30th, 2010.