

SUBMISSION

To the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*

Andrew Murray¹ October 2010

1 Note

Thank you for the Committee invitation to make a submission to this Inquiry into the *Human Rights (Parliamentary Scrutiny) Bill 2010*, and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* (the Bills).

I have not attempted a comprehensive response. However I do attach my March 2010 submission to the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). Inquiry into the future direction and role of the Scrutiny of Bills Committee, as it includes matters of relevance to this inquiry. It has been published by the Scrutiny of Bills Committee.

This is a personal submission by Andrew Murray and does not represent the views of any other individual or entity. The submission is not confidential.

This submission to the Standing Committee on Legal and Constitutional Affairs (SCLCA) has been copied to the Scrutiny of Bills Committee.

2 Inquiry into the future direction and role of the Scrutiny of Bills Committee

On the 8 June 2010 the Scrutiny of Bills Committee wrote to me saying it had published an interim report on 12 May 2010 and that:

...The interim report takes into account the Government's announcement on 21 April 2010 as part of its Australia's Human Rights Framework policy the establishment of a new Parliamentary Joint Committee on Human Rights to review legislation against human rights obligations...

The work of the Parliamentary Joint Committee on Human Rights is likely to have an impact on the remit of the work of the Scrutiny of Bills Committee. It will be relevant for the Scrutiny of Bills Committee to consider the content of the enabling legislation before it can develop an informed view of its own future role and direction and complete its current inquiry.

...The Scrutiny of Bills Committee will continue with its inquiry into its future role and direction once it has considered the proposed legislation and the Senate Legal and Constitutional Affairs Legislation Committee report.

¹ Andrew Murray BA Hons (Rhodes) MA (Oxf) was a Senator for Western Australia 1996-2008 and a Member of the Senate Scrutiny of Bills Committee 1996-2008. He is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children.

My strong recommendation to both the Scrutiny of Bills Committee and the SCLCA is that regardless of the report of the SCLCA, and (assuming the Bills pass into law) regardless of whether the Bills are amended or not, the Scrutiny of Bills Committee should proceed in terms of its present functioning, and should assess its own future role and direction, as if the new joint parliamentary human rights committee had not been formed.

Neither the Senate nor the Scrutiny of Bills Committee should reduce or diminish the role and responsibilities of the Scrutiny of Bills Committee just because a new joint parliamentary committee has been formed with a common interest in human rights.

Some years, spanning at least two electoral cycles, need to elapse before the workings and effectiveness of the new human rights committee become apparent. Only then will it become clear as to whether the committee has developed the depth independence forthrightness skill and advocacy necessary in this field. Only then will it become clear whether there is an unnecessary overlap in function between the two committees.

There is too the matter of independence from the executive. Only after some years will it become clear as to whether the new committee is perceived as in any sense or in any way a 'creature of the executive'² as a result of being unduly accepting of any executive restraints or limitations on human rights..

Parliamentarians know that in addition to the governing legislation or relevant standing orders, and the general practices and conventions of the parliament, each committee develops a culture and spirit that is material to outcomes, one that is affected by the leaders, members and staff of that committee. That is what happened over two decades with the Scrutiny of Bills Committee, with the result that the Scrutiny of Bills Committee's performance was enhanced beyond the bare requirements of its terms of reference.

The proposed new human rights committee may or may not develop a culture and spirit that is productive in this sense. Until it does the Scrutiny of Bills Committee should not alter its course to accommodate the proposed new committee.

3 Definitions

The Bill does not allow for an expansive view of human rights to be taken. An encompassing but not open-ended view of human rights is captured by philosopher John Tasioulas³ who recently said this:

...rights are above all moral norms that impose duties on others. They are not, therefore, simply to be identified with human interests or a shopping list of valuable goals...human rights are moral rights accepted by all human beings simply in virtue of their humanity...It unduly marginalises human rights to regard them as essentially about the regulation of intervention in a state-based global order...⁴

² This is a phrase recently used by the Leader of the Opposition in the House of Representatives that captures the dangers of a self-interested exercise of or preservation of power by the executive in its dominance or attempted dominance of aspects of parliament.

³ John Tasioulas is Reader in Moral and Legal Philosophy and Tutorial Fellow at Corpus Christi College in Oxford. In 2011 he will take up the Quain Chair of Jurisprudence at University College London.

⁴ Quoted in page 3 of *Oxford Philosophy Summer 2010* published by the Faculty of Philosophy University of Oxford.

From a legislators' perspective human rights might be summarised as falling under four categories; in some instances these might overlap:

- Internationally and domestically recognised moral norms that impose duties on others (a) captured within legal forms; (b) not captured within legal forms.
- Human rights recognised or declared by international instruments (a) fully ratified and supported by Australia; (b) partially ratified and supported by Australia; (c) not ratified or supported by Australia.
- Human rights recognised in customary international law, or in the law of countries of a similar democratic provenance as Australia.
- Human rights recognised in Australian domestic jurisprudence or statute.

Human rights have a precise meaning in the Bills:

3 Definitions

(1) In this Act: *human rights* means the rights and freedoms recognised or declared by the following international instruments:

(a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);

(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

...

(2) In the definition of *human rights* in subsection (1), the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

These are very important, indeed vital, international instruments for the proposed new committee to reference. Nevertheless this definition and list is restrictive. This restriction materially reduces the potential of the Bills human rights initiative.

It would be appropriate for the SCLCA to consider ways in which this list could be made non-exhaustive, and for relevant other human rights to be considered by the new committee at its discretion.

4 Functions

The Bills specify the functions of the committee:

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.

There is a deliberate omission in s7 which should be rectified. The SCLCA should recommend an amendment that gives the new committee the power to provide advice or make recommendations to the Parliament or to any Minister on human rights on its own motion.

S7(b) is of interest. It states that the committee must examine Acts. (Q. Does that include State and Territory Acts – the item does not exclude them.) S7(b) appears to indicate the potential for the new committee to systematically review any statute it considers relevant dating all the way back to 1901 that is still in operation, and report to the parliament. Such a power of review could be a very valuable contribution to ensuring important existing Australian statute is consistent with recognised or declared human rights.

The SCLCA should determine whether any amendments to the Act are necessary for the committee to be active in review.

S6 Powers and proceedings of the Committee state that all matters relating to the powers and proceedings of the committee are to be determined by resolution of both Houses of the Parliament.

The new committee must be able to freely interact with Ministers, government agencies, and other individuals or entities as part of its function. One would assume that would automatically be the case for any parliamentary committee, but if there is any doubt the SCLCA should recommend an unfettered ability to function in this manner.

Andrew Murray