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INTERNATIONAL COMMISSION
OF JURISTS
-VICTORIA-

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Committee Secretary
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15 July 2010

Dear Committee Secretary,

THE INTERNATIONAL COMMISSION OF JURISTS, FOUNDED IN BERLIN IN 1952, IS AN INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION, DEDICATED TO THE DEFENCE OF JUDICIAL INDEPENDENCE AND HUMAN RIGHTS THROUGH THE RULE OF LAW, WITH CONSULTATIVE STATUS TO THE UNITED NATIONS, UNESCO, THE COUNCIL OF EUROPE AND THE ORGANIZATION OF AFRICAN UNITY. IT HAS 82 AUTONOMOUS NATIONAL SECTIONS AND AFFILIATED LEGAL ORGANIZATIONS IN 62 COUNTRIES. ITS HEADQUARTERS ARE IN GENEVA, SWITZERLAND. ITS CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS WAS FOUNDED IN 1978. AWARDED THE FIRST EUROPEAN HUMAN RIGHTS PRIZE (1980), THE WATELER PEACE PRIZE (1984), THE ERASMUS PRIZE (1989) AND THE UNITED NATIONS HUMAN RIGHTS AWARD (1993).

THE AUSTRALIAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS WAS FOUNDED IN 1958 BY EMINENT JURISTS INCLUDING VICTORIANS SIR OWEN DIXON (CHIEF JUSTICE OF AUSTRALIA), EUGENE GORMAN QC, MAURICE ASHKANASY QC, RICHARD EGGLESTON QC & KEITH AICKIN QC. MEMBERSHIP IS OPEN TO ALL LAWYERS SUBSCRIBING TO ITS TENETS.

Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010

A. Introduction

The Senate Legal and Constitutional Affairs Committee is conducting an inquiry into the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* introduced by the Attorney-General into the House of Representatives on 2 June 2010.¹

The main Bill establishes a Joint Parliamentary Committee on Human Rights to be comprised of five members of the House of Representatives and five Senators having three primary functions:

- (1) to “*examine*” **Bills and legislative instruments** that come before either House of Parliament “*for compatibility with human rights and to report to both Houses of Parliament on that issue*”² (i.e. scrutiny of **new proposed laws**);
- (2) to “*examine*” **Acts** “*for compatibility with human rights and to report to both Houses of Parliament on that issue*”³ (i.e. scrutiny of **existing Acts**);
- (3) 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 on that matter⁴ (i.e. **general inquiry on specific reference**).

Human rights mean those rights and freedoms that are recognised or declared by the seven core international human rights treaties to which Australia is a party.⁵

The main Bill also will enact a requirement that each new Bill for an Act that is introduced to a House of Parliament must be accompanied by a **statement of compatibility** that “*must include an assessment of whether the Bill is compatible with human rights*”.⁶ The member who “proposes to introduce” the Bill

¹ For terms of reference see: http://www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills/index.htm.

² Cl. 7(a).

³ Cl. 7(b).

⁴ Cl. 7(c).

⁵ Cl. 3(1): namely:

- (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).

The clause contains the following Note:

In 2010, the text of an international agreement in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

⁶ Cl.8(1), (2) and (3). The statements are not binding on any court or tribunal and failure to comply with the requirements does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth: cl.8(4) and (5).

into the House is responsible to “cause a statement of compatibility to be prepared in respect of that Bill”. The obligation to present the prepared statement of compatibility to the House is placed on the member of Parliament introducing the new Bill into the House. Accordingly, it is expressly contemplated that the actual preparation of the statement of compatibility will be undertaken by some person or body other than the members of the Parliament themselves.

The consequential Bill contains amendments that arise as a consequence of the main Bill and other matters, including amendments to the *Administrative Appeals Tribunal Act 1975* and the *Legislative Instruments Act 2003*.

B. About the International Commission of Jurists

The ICJ is an international non-governmental organization, dedicated to the primacy, coherence and implementation of international law and principles that advance human rights and the defence of judicial independence through the rule of law.⁷

ICJ-Victoria is pleased to be able to make this submission to the Senate Legal and Constitutional Affairs Committee about the Bills before the Parliament.

C. Background and Context to the Bills

The background and context to the Bills is that they are intended to implement legislative elements of the Commonwealth Government’s new “*Human Rights Framework*” announced in April 2010 in response to the 30 September 2009 report by the National Human Rights Consultation Committee, which had made a number of specific recommendations to secure the protection of human rights under Australian laws and policies of government.

Included in the Consultation Committee’s recommendations were that the Commonwealth Parliament should enact a statutory Australian Human Rights Act, for which the Committee found there to be wide community support.

The recommendations of the 2009 National Human Rights Consultation Committee followed an extensive public consultation to which the International Commission of Jurists – Australia (**ICJ-Australia**) was pleased to make a written submission in May 2009 authored by ICJ-Victoria members. ICJ-Australia’s submission represented the views of a large number of people in the Australian community who work in the administration of justice and law.

In its submission ICJ-Australia called for systemic human rights reform in Australia’s democratic institutions of government and urged the government to enact a Human Rights Act for Australia for reasons that are outlined further below.

The Commonwealth Government determined in April 2010 that at that stage it would not implement that major recommendation of the National Human Rights Consultation Committee but announced its new

⁷ **About the ICJ:** The International Commission of Jurists was founded in Berlin in 1952 and has received a number of leading international human rights awards recognising its legal contribution to the promotion and development of international human rights standards and practice. These include the first European Human Rights Prize by the Council of Europe in 1980, the Wateler Peace Prize by the Carnegie Foundation in 1984, the Erasmus Prize by the Paremium Erasmianum Foundation in 1989 and the United Nations Award for Human Rights in 1993. The ICJ was designated in 1987 as a Peace Messenger by the United Nations General Assembly as part of its International Year of Peace. The ICJ holds consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organisation, the Council of Europe, and the African Union. The ICJ also maintains cooperative relations with various bodies of the Organisation of American States.

The Australian section of the International Commission of Jurists was founded in 1958 by eminent jurists including Victorians Sir Owen Dixon (Chief Justice of Australia), Eugene Gorman QC, Maurice Ashkanasy QC, Richard Eggleston QC & Keith Aickin QC. Membership is open to all lawyers subscribing to its tenets.

“Human Rights Framework” and committed to greater effort in the protection of human rights including further education about human rights and institutional reform within the Parliamentary system.

The Bills under consideration seek to implement two of the recommendations made by the National Human Rights Consultation Committee, namely that:

- **Recommendation 7:** that the Parliament establish a “Joint Committee on Human Rights to review Bills and regulations for Human Rights Compliance”;⁸
- **Recommendation 6:** that a “statement of compatibility be required for all Bills introduced into the Federal Parliament” which “assesses the law’s compatibility with Australia’s human rights obligations”.⁹

Submission

- (a) The Australian government is to be commended for conducting the 2009 National Human Rights Consultation and committing to the first step of a Human Rights Framework.
- (b) The establishment of the Joint Parliamentary Committee on Human Rights proposed by the 2010 Bill and the introduction of Statements of Compatibility are critical institutional changes in the legislative branch of Commonwealth government. The Bills should be passed into law as soon as possible.
- (c) We welcome the inclusion within the Joint Committee’s terms of reference of all the human rights treaties to which Australia has committed. Their inclusion in the Act will serve to promote education about Australia’s existing human rights obligations.
- (d) While maintaining our call for further human rights reform, including a Human Rights Act, we welcome the proposed Bills as an extremely important first step in the right direction to entrench within the Australian Parliamentary system an institutional change that makes human rights compliance a central matter of concern for Australia’s elected law and policy makers and those who advise and support them in public service.
- (e) In welcoming this commitment by the Australian Government we see the scrutiny Bills before the Parliament as very important *positive and practical action* by the legislative branch of government as part of the new “Human Rights Framework”.¹⁰ Institutionalised parliamentary scrutiny and review serves to promote a healthy and vibrant democracy and is an essential systemic change necessary to achieving protection and respect for human rights in Australia.

⁸ See Report of the National Human Rights Consultation Committee (2009) p. 168 – 175.

⁹ See Report of the National Human Rights Consultation Committee (2009) p. 165 – 168.

¹⁰ Not just in the area of parliamentary scrutiny and review but by their cementing the foundations for Australia’s reaffirmed **commitment** to our human rights obligations; promoting the importance of human rights **education**; enhancing domestic and international **engagement** on human rights issues; improving human rights **protections**, (including greater parliamentary scrutiny) and achieving greater **respect** for human rights principles within the community: see E below.

Further explanation

Early identification of human rights issues is critical to the avoidance of breaches of human rights occurring in the first place. In this way “policy and legislation can be developed in ways that do not impinge on human rights”.^{11 12}

It also promotes rational debate about these most important issues. Early identification of human rights issues promotes both a full and informed debate by the Houses of Parliament and greater education of the Australian community including those members of our community who work in public service.

The need to “demonstrably” justify any limitation

In the exceptional circumstances where limitations on human rights may be determined to be necessary in the public interest, early scrutiny of policy and legislation on human rights grounds ensures that the justification to the Parliament, and thus the community, for the need for the limitation is well considered and well thought through and takes into proper consideration all relevant matters that should be considered including:

- (a) the nature of the human right that is to be limited by the law or policy;
- (b) the importance to the purpose of the law or policy of the limitation on the human right;
- (c) the nature and extent of the limitation on human rights brought about by the law or policy (including its manner of execution and consequences);
- (d) the relationship between the limitation on human rights and the purpose of the limitation;
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation on human rights seeks to achieve.

These matters compel consideration of *the reason why* the policy or law is so important as to (even) justify any limitation on people’s human rights in the first place and of whether the limitation imposed is *actually necessary to achieve the purpose of the law or policy*. They compel consideration of whether the law or policy is *reasonably and proportionately adapted to achieving its objectives* through the limitations that it places on human rights of people. They compel consideration of whether the proposed law or policy imposes the *minimum impairment on human rights* necessary to achieve its objective and what *less restrictive alternatives may be reasonably available* that would better respect people’s human rights and thus preserve, for *all* people, the values of **human dignity, equality and freedom** which are so much part of modern Australian society and the society that our community aspires to uphold.

Scrutiny of law and policy on human rights grounds is good government and promotes a culture of regular regard to human rights compliance in the manners and institutions of government.¹³

¹¹ See Report of the National Human Rights Consultation Committee (2009) at p. 174.

¹² This important goal is recognised by the Attorney-General when introducing the Bill into the Parliament, stating that the design is to “*improve parliamentary scrutiny of the 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*”: The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010. (emphasis added)

¹³ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, p. 5 remarked upon the importance of creating a “practice and culture” of human rights compliance in his conclusions stating:

These measures are about ensuring that the business of government *as a matter of practice and culture considers how its legislation impacts* on the rights of the people of Australia.

... Early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues will make positive changes for the relevance of legislation and the parliamentary process to the lives of our fellow Australians. (emphasis added)

D. Importance of institutionalisation of human rights scrutiny in government

In its submission to the 2009 National Human Rights Consultation, ICJ-Australia called for systemic human rights reform in Australia's democratic institutions of government.

In urging the Commonwealth Parliament to enact a federal Human Rights Act for Australia it made the submission that, in our complex modern world, this is now necessary for contemporary Australian democracy: *for good government in Australia and the wellbeing of all people.*

In its 2009 submission, ICJ-Australia articulated many reasons why this was considered essential, addressing key reasons from a governance perspective.

At the core of its submission was that the legal protection offered by an Australian Human Rights Act would:

- (a) articulate in Australian law, and in policies and practices of successive elected governments, basic principles of "fairness" and "justice"; and
- (b) promote a more accountable and more robust democratic system.

It submitted that this was desirable for present and future generations of Australians, for families, children and people coming to Australia. It raised numerous examples of how the current system of human rights protection in Australia does not sufficiently protect the people's basic rights.

E. Human rights framework

The Commonwealth government has announced that its new approach under its *Human rights framework* is designed to achieve "**positive and practical action**" in relation to human rights based on **five key principles**:

1. **reaffirming a commitment** to our human rights obligations;
2. the importance of human rights **education**;
3. enhancing our domestic and international **engagement** on human rights issues;
4. improving human rights **protections**, including greater parliamentary scrutiny; and
5. achieving greater **respect** for human rights principles within the community.

The Bills under consideration begin the Government's action towards fulfilling the fourth of these key principles by:

- *establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with our international human rights obligations;*
- *requiring that each new Bill introduced into Parliament is accompanied by a statement of compatibility with our international human rights obligations.*

The announced changes in the new Human Rights Framework are intended to complement a number of actions the Government is already taking to encourage greater inclusion and participation in our community.¹⁴ They are designed to have **broad effect** and **enhance the understanding of, and respect for, human rights across the Australian community.**

¹⁴ Other "key commitments" include:

F. Submission on the main Bill

The *Human Rights (Parliamentary Scrutiny) Bill*, provides for the establishment of Parliamentary Joint Committee on Human Rights,¹⁵ sets out its functions¹⁶ and administrative arrangements¹⁷ and introduces a new requirement that each new Bill introduced into the Parliament¹⁸ and other legislative instruments¹⁹ must be accompanied by a Statement of Compatibility containing an “assessment of whether the Bill is compatible with human rights”.

Submission

- (f) The Joint Committee should be given the highest possible standing in the hierarchy of Parliamentary Committees and proper resources and expertise to fulfil its important function.
- (g) The Joint Committee’s powers and procedures should, as far as is possible to do so, maintain its ability to stand and function as an independent committee.

Further explanation

Australia remains the only democratic common law country not to have comprehensive constitutional or legislative protection of fundamental human rights and freedoms.

Thus in Australia, respect for human rights and the legal protection of human rights under Australian laws currently remains highly susceptible to the vagaries of the political and democratic process. It accordingly remains highly dependent upon the resolve of the elected governments of the day.

Courts and tribunals and independent commissions have only a limited legal role and influence in safeguarding protection of human rights. Courts, in particular, may only adjudicate upon and enforce people’s rights under law in cases that come before them.

Accordingly the role of the Parliament, and thus its new Joint Committee, in safeguarding the basic rights and interests of people (whether in Australia or affected by Australian laws and policies abroad) is critical.

It is also important that if, into the future, Australia is to properly discharge its international legal obligations under human rights treaties and customary international human rights law that there be strong and robust Parliamentary oversight by a bi-partisan Parliamentary committee.

To be of enduring benefit, it is essential that the Parliamentary Joint Committee is not merely given significant standing in the hierarchy of Parliamentary Committees, but that it is properly resourced and

-
- investing over \$12 million in a comprehensive suite of education initiatives to *promote a greater understanding of human rights across the community*;
 - *combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly*; and
 - *creating an annual NGO Human Rights Forum to enable comprehensive engagement with non-government organisations on human rights matters.*

¹⁵ Cl. 4.

¹⁶ Cl. 7.

¹⁷ Cl. 5, 6 and 10.

¹⁸ Cl. 8.

¹⁹ Cl. 9.

assisted by independent and highly regarded expert people to enable it to fulfil its responsibility to the Parliament and its members and, in turn, to properly inform the Executive branch of government of the human rights implications of government policies and proposed laws.

G. Comments on individual clauses of the Bill

- **Clause 6** of the Bill currently provides that “*All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of the Parliament*”.

Submission

(h) Given the importance of the new Parliamentary scrutiny committee in the scheme of the Human Rights Framework, to advance the Joint Committee’s functions and effectiveness, certain core powers securing its ability to act independently and conduct proper inquiry into any matter involving human rights should be contained in the Act itself. (See further below.)

- **Clauses 7(a) and (b)** of the Bill currently provide for power to “examine” Bills and certain legislative instruments that come before either House of Parliament, as well as all existing Acts.

Submission

(i) Scrutiny of **new proposed laws** and of **existing Acts**, under the power to “examine”, should be expressed (within the legislation) to include the power to receive submissions from the public and hold inquiries.

(j) Given the importance of the Committee, the Committee should be given the express powers in the legislation:²⁰

- to require the submission of written evidence and documents,
- to examine witnesses,
- convene public hearings and call for public submissions,
- to meet at any time (except when Parliament is prorogued or dissolved) and to adjourn from place to place,
- to appoint specialist advisers, including permanent independent experts so as to maintain continuity and provide the specialist knowledge required to be brought to bear on the task and to assist Parliamentarians serving on the Committee from time to time, and
- to make Reports to both Houses.

(k) Express wording (within the legislation) will also serve to assist the public and interest groups within the community to know that their views and submissions on laws and policies that affect them can be made and are welcome by the Joint Committee.²¹

²⁰ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, at p. 4 apparently envisaged that these would be conferred by resolution of both houses of parliament under cl. 6:

“Consistent with other committees, the powers and proceedings of the committee are to be determined by resolution of both houses of parliament.

As I have already flagged, it is proposed that the committee will have broad powers to seek submissions, hold public hearings and examine witnesses.”

²¹ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June

(l) The Reports and evidence of the Joint Committee should be published and available on the internet.

Further explanation

It is the understanding of members of the ICJ-Australia that the practice of some scrutiny of Acts and Regulations committees is to accept, and indeed welcome, submissions to them on instruments that they are scrutinising on behalf of the Parliament. This assists the committee and the parliamentarians that they serve. This open invitation however may not be widely known.

It is important (if the Joint Parliamentary Committee is to fulfil its mandate and the commitments embodied in the Human Rights Framework of ensuring that Australia's domestic laws comply with fundamental rights and freedoms) that there is better understanding of and respect for human rights in Australia and proper recognition of human rights issues in legislative and policy development.²² People who do not work in government also need to know (from at least the enabling legislation establishing the Joint Committee) that they can play a participatory role in the scrutiny process of Australian laws. It also promotes greater transparency and accountability in the legislative process.

- **Clause 7(c)** of the Bill, which contains the power to “inquire” into “any matter relating to human rights”, is currently limited to matters that are referred to the Joint Parliamentary Committee by the Attorney-General.

Submission

(m) The Joint Parliamentary Committee should be given a broad mandate and permissive power of inquiry to act on its own motion in regard to “any matter relating to human rights”, as well as specific duty to inquire on such matters referred to it by the Attorney-General.

Further explanation

A danger of precluding the Parliamentary Joint Committee from conducting inquiries on its own motion is that important human rights issues may not be investigated if the government of the day (through its Attorney-General) does not wish them to be. This risks important human rights issues becoming a matter of politics and the fulfilment of the commitment of the Human Rights Framework (namely improving human rights *protections* and achieving greater *respect* for human rights principles within the community) being undermined.

2010, at p. 4 made the comment:

“Essentially the implementation of these two measures—that is, statements of compatibility on human rights and a new Joint Parliamentary Committee on Human Rights—*establishes a dialogue between the executive, the parliament and ultimately the citizens of Australia.*”

First, the requirement of a statement of compatibility on human rights will establish a dialogue between the executive that is proposing the legislative action and the parliament that is considering the proposed action whereby members and senators will be specifically informed of human rights considerations so they are able to consider the impact of proposed legislation on the rights of people and families back in their electorates.

And in turn, the new parliamentary committee will be able to establish a dialogue between the parliament and citizens of Australia whereby the members of the new joint committee will be able to canvass the views of the public as to how they will be affected by proposed legislation.

In that sense, these measures incrementally advance the concept of participatory democracy in Australia by providing *additional means for citizens to have direct input into the legislative process.*” (emphasis added)

²² Amongst the other goals of the Human Rights Framework to be realised.

It also potentially harms the very standing of the Committee if important human rights concerns cannot be investigated by it when it considers them to warrant investigation.

While the activities of the Parliamentary Joint Committee will be constrained by time and the resources at its disposal, there is no reason to limit its inquiry role to areas that the government of the day directs it to inquire about. The function in cl.7(b) to “examine” existing Acts will necessarily involve a degree of broader inquiry about the effect the legislation is having in the community. The Parliament should not constrain its Joint Committee in its area of human rights inquiry. The activities that may be occurring *under* Acts and other Australian laws (or for that matter, by a failure to comply with Australian laws) should fall within the express power of the Parliamentary Joint Committee to inquire about. The matters may have been raised as a concern by human rights commissions or other bodies in government. The Parliamentary Joint Committee should retain the discretion to determine the scope and breadth of its own inquiries. If it is a matter requiring particular resources, it should also fall within its power to recommend to the Parliament that the matter be the subject of a broader inquiry by government.

These core powers as important not merely to maintain the Joint Committee’s ability to stand and function as an independent committee but to fulfil **the five key principles** contained in the Human Rights Framework, and in particular *reaffirming* a commitment to our human rights obligations; enhancing domestic *engagement* on human rights issues; improving human rights *protections* and achieving greater *respect* for human rights principles within the community.

In this regard the powers and practices of other Human Rights Scrutiny committees serve as a helpful guide.

- In the United Kingdom: ²³

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider *matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)*; proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

...

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

²³ House of Lords, House of Commons Joint Committee on Human Rights, *The Committee's Future Working Practices* (Twenty-third Report of Session 2005-06), <http://www.parliament.the-stationery-office.com/pa/jt200506/jtselect/jtrights/239/239.pdf>; House of Lords, House of Commons Joint Committee on Human Rights *Enhancing Parliament's role in relation to human rights judgments* (Fifteenth Report of Session 2009–10), <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>.

- The mandate of the Canadian Senate Standing Committee on Human Rights is the broad one of “*matters relating to human rights generally*”. (This committee operates under “orders of reference”, namely an Order of the Senate that authorizes it to examine a bill or to undertake a special study to undertake such work.)
- In Australia a further example includes the Victorian Scrutiny of Acts and Regulations Committee, established under s.5(k) of the *Parliamentary Committees Act 2003* (Vic) (and which consists of nine members of Parliament drawn from the Legislative Assembly and Legislative Council and from government and opposition members). Its terms of reference are contained in s.17 of the Act and relevantly state:

17 Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are—

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
 - (i) trespasses unduly on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the **Information Privacy Act 2000**;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the **Health Records Act 2001**;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- ...
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities.²⁴

The Victorian Scrutiny of Acts and Regulations Committee, has established a sub-committee to review regulations and instruments that are deemed to be regulations.

Its review of existing Acts is undertaken when required to do so under terms of reference provided by either a Minister or Parliament. The Committee may hold public hearings or call for evidence or documents in relation to any matters relevant to the inquiry.

The Committee publishes an Alert Digest of its findings on Bills introduced into the Parliament as well as its Annual Review and inquiry discussion papers and reports. All Committee publications are carried on the Committee’s website at: <http://www.parliament.vic.gov.au/sarc>.

²⁴ In this regard see *Charter of Human Rights and Responsibilities Act 2006* (Vic) s.30:

30. Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see [section 21](#) of the [Subordinate Legislation Act 1994](#).

- **Clause 5** of the Bill excludes from the membership of the Joint Committee a Minister, President, Deputy-President or Chair of Committees.

Submission

(n) This clause is considered desirable to ensure that scrutiny of the policies and activities falling under the responsibility of all government departments (and other Parliamentary committees) may be *independently* assessed for human rights compliance by the Joint Parliamentary Committee.

H. Other functions for the Joint Parliamentary Committee

It would be desirable that the Joint Parliamentary Committee have broader functions beyond legislative scrutiny, including that it assist the Australian Government respond to observations and recommendations of United Nations treaty monitoring bodies.

The United Kingdom committee is one example of a parliamentary committee that, consistently with its review mandate, also performs this function. It serves not only to provide important independent oversight of human rights compliance (which needs strengthening in Australia) but also greater education of members of the Parliament, members of the public service and the public generally as to human rights implications of policies and laws and government programs.

In his second reading speech introducing the Bill to the Parliament the Attorney-General also said that: *“The government believes that it is important to ensure that Australia’s domestic laws comply with our international obligations – particularly those that protect fundamental rights and freedoms”*.²⁵

Submission

- (o) Broadening the power of the Joint Committee to include assisting the Australian Government to respond to observations and recommendations of United Nations treaty monitoring bodies is sensible and desirable. It would also help to establish and maintain a knowledge base of international deliberations and interpretations of the rights that are protected in the core human rights treaties that the Joint Parliamentary Committee is currently to be charged to report about in the exercise of its other review functions.
- (p) It would also be desirable for the Joint Parliamentary Committee to play a part in reporting to members of the Parliament about Australia’s implementation of Concluding Observations, Recommendations and Views of United Nations treaty monitoring bodies and other international monitoring mechanisms (including the Universal Periodic Review of the UN Human Rights Council and Recommendations of its Special Procedures). This would assist Australia and its elected representatives and executive government to discharge Australia’s international human rights obligations and protect the rights and freedoms of all people affected by Australian government policies and laws.

²⁵ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, p3. The Attorney-General went on to say:

“Australia is party to the seven core United Nations treaties that protect human rights. The government believes that Australia can and should live up to its obligations under these treaties not simply because this is the right thing to do but because the principles contained in those documents provide a protection against unwarranted, unjustified or arbitrary interference with the fundamental rights enjoyed by all people irrespective of their colour, background or social status.

(q) Additionally, the Joint Parliamentary Committee should have included within its mandate the obligation to scrutinise for compliance with rights and freedoms that are recognised by customary international law.

I. Statements of Compatibility

Clauses 8 and 9 of the Bill concerns statements of compatibility. There is no detail in the section (and it may be included in Regulations under cl.10) as to what these statements should contain. There is no explicit statement to include reasons for an assessment of compatibility.

Submission

- (r) The provision of reasons for Statements of Compatibility should be an express requirement under the Act. A statement that a Bill or instrument is compatible with human rights serves little use without a clear explanation of why this conclusion has been reached. It also creates the grave risk of Parliament being misinformed unless rigour is prescribed in the preparation of Statements of Compatibility.
- (s) A requirement to provide reasons also helps those preparing Statements of Compatibility to know what issues that they need to address in order to assist Parliamentarians. It also helps inform Parliamentary debate and deliberations, increases the likelihood that human rights implications will be considered thoughtfully and ensures that human rights are properly contextualised and that competing interests carefully balanced so that any restriction or limitation placed on human rights is *demonstrably* justified.²⁶

²⁶ This is consistent with the statement by The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, p.4 that:

“Statements of compatibility will ensure human rights analysis is undertaken by the executive at an early stage when developing legislation.

It also provides a reference point for parliament’s consideration of bills and legislative instruments. The statements will alert parliament to the relevant human rights considerations in a particular bill or disallowable instrument and will inform parliamentary debate.

As with explanatory memoranda, which assist in explaining the purpose and intent of the legislation, *statements of compatibility will contextualise human rights considerations.*

Where appropriate, statements may justify restrictions or limitations on rights where such restrictions are in the interests of other individuals or society more generally as consistent with Australia’s responsibilities. For instance, citizens have a right to live free from fear, violence, intimidation or abuse, and the government has a corresponding responsibility to take all reasonable measures to ensure that occurs and that citizens receive that necessary protection. It is the case that in achieving that outcome of protecting citizens, clearly it may be necessary to take action against those who would abuse the rights of their fellow citizens.

Statements of compatibility will also aid the consideration of relevant human rights issues by the Joint Parliamentary Committee on Human Rights. After enactment, statements of compatibility may also be of assistance to the courts. Currently, in determining the meaning of provisions in the event of ambiguity, a court may refer to other material considered by parliament in the passage of legislation. This includes accompanying explanatory memoranda, second reading speeches and parliamentary committee reports.

A statement of compatibility and a report of the Joint Committee on Human Rights, while not binding on a court or tribunal, could be used by the court or tribunal to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.

By these measures, the parliament will be empowered through its response to a minister’s statement and any committee report, to give more precise guidance to the courts as to the legislature’s intention in enacting legislation in the context of Australia’s human rights obligations.” (emphasis added)

- (t) The regulations may set out in further detail what the reasons might cover. For example, the Statement of Compatibility should at least indicate those human rights engaged by a Bill or instrument that are potentially adversely affected. If a conclusion is drawn that there is no limitation on a human right (when properly considered), the reasons for that conclusion should be stated. If a limitation is found to be placed on a particular human right but is sought to be justified by the proponent of a Bill or instrument as demonstrably reasonable, the reasons should demonstrate why that is considered to be so by reference to “relevant considerations” (see earlier).
- (u) The Statements of Compatibility should be required to take into proper consideration relevant comparative human rights jurisprudence and refer to it if (it is relied on) to reach a conclusion in the statement. This would assist law and policy makers and those advising them to contextualise the human rights implications of what is being proposed and draw upon the learning and experiences of other countries that already have dealt with similar issues. It would promote, incidentally, uniformity in the interpretation and application of expressions used in international instruments which in turn is desirable.
- (v) Statements of Compatibility should be tabled with at the time of the Second Reading Speech with the Explanatory Memorandum of Bill (and incorporated into the Hansard). These measures will help inform members of Parliament and contribute to the debate as well as make the scrutiny of legislation more transparent and accessible.

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