Australian Privacy Foundation

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Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

Submission to the Senate Legal and Constitutional Committee

July 2010

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Introduction

We refer you to our June 2009 submission to the National Human Rights consultation and to our April 2010 submission to the Scrutiny of Bills Committee - both at http://www.privacy.org.au/Papers/index.html - for some important context and background to this submission.

The Australian Privacy Foundation strongly supports the case for increased protection of important rights and freedoms, including by increased parliamentary scrutiny of legislation. The Scrutiny of Bills (SoB) Committee has for many years performed a valuable function in sometimes identifying, and drawing to the attention of the Parliament, privacy and related implications of proposed legislation. However, the SoB Committee's effectiveness has been compromised by the lack of clearer criteria and guidelines, the limited resources and the very compressed timetable for consideration of Bills. Currently, these limiting factors combine to ensure that the SoB Committee often 'misses' the significance of provisions in proposed legislation – in recent years the raft of anti-terrorism laws and laws imposing or modifying identification requirements are good examples.

No other mechanism currently exists for the routine and systematic assessment of Bills and other legislative instruments to check that they do not infringe a range of fundamental rights and freedoms. Interested third parties such as ourselves try, to the best of their ability given limited resources (in our case all-volunteer), to monitor the introduction of legislation and detect possible conflicts with important rights and freedoms. But only the Scrutiny of Bills Committee does soon a (theoretically) universal basis.

While we did not take a position for or against a statutory charter of rights in our submission to the National Human Rights Consultation referenced above, we support many of the recommendations of the final *National Human Rights Consultation Report* (2009). Given that the government has ruled out a statutory charter in the short term, we welcome the proposal for a new parliamentary committee to monitor the human rights implications of proposed legislation, including Regulations.

Committee constitution, membership and terms of reference

The Joint Committee proposed has some advantages. The involvement of members of the House of Representatives could contribute to the House being less of a 'rubber stamp' for government policy and playing a greater role in detailed consideration and review by the legislature of the Executive's proposals. Consideration by a joint committee before a Bill has been debated in the House of Representatives could also lead to sensible amendments before the government is 'locked in' to defence of detailed provisions. However, a joint committee will only be guaranteed to provide independent scrutiny if it does not have an overall majority of governing party members. We do not see the proposed membership as guaranteeing that outcome, which we submit should be expressly required.

We note that "In addition to the scrutiny function, the Committee will be able to examine Acts and conduct broader inquiries on matters related to human rights referred to it by the Attorney-General." This wider remit is welcome, but we believe the 'broader inquiry' role should not be constrained by references – the committee should be free to initiate its own inquiries if it sees fit. Also, it is not clear what if any criteria the Committee would apply in deciding what existing legislation to examine. We submit that a model like the Victorian Act, under which Departments progressively have to review *all* existing legislation against the Victorian Charter, would be appropriate. Commonwealth Departments should, within a specified period of time, have to submit statements of compatibility for all current legislation to the Committee, which could then choose which laws to review in more detail.

Benchmarks and criteria

One of the key issues is what 'benchmarks' the new Committee will use in its assessment of compatibility. We note that the Bill defines 'human rights' as the rights and freedoms recognised or declared by the seven core United Nations human rights treaties as they apply to Australia UN treaties. These include the *International Covenant on Civil and Political Rights* (ICCPR) which includes privacy (at Article 17). We suggest that the Bill should also specify the parent treaty – the *Universal Declaration of Human Rights*, which also includes privacy (at Articles 8).

The Committee will presumably have regard to existing privacy legislation – notably the Privacy Act 1988 which expressly gives effect to Article 17 of the ICCPR, but also the many privacy related provisions in other laws. We note however that there are major gaps in privacy law in Australia. The Privacy Act itself is severely weakened by the wide range of exemptions and exceptions (some of which may be addressed by amendments foreshadowed by the government in response to the 2008 ALRC Report 108 'For your Information'.) Another gap is the absence of a private right of action - which has now been recommended by both the Australian and NSW Law Reform Commissions. Such a right would allow individuals to take action for a range of privacy intrusions which do not necessarily involve personal information or data (such as 'real-time' CCTV surveillance, exercise of stop and search powers, or body searches. We argue that the Committee must interpret privacy rights, not only by reference to

existing privacy legislation, but more broadly by reference to world-best practices.

Ideally, the Committee should have a clear set of criteria against which legislation can be assessed which includes the full range of potential privacy intrusions.

The legislated criteria; i.e. the specified human rights treaties, should be a minimum 'floor', the Committee should have the discretion to make reference to higher 'ceilings' such as other human rights instruments and laws, both international and in other jurisdictions, even where they have not yet been adopted by Australia. This discretion will ensure that the role of the Committee keeps pace with both domestic and international developments, and does not fall behind 'world's best practice' pending the inevitably lengthy process of treaty negotiation and ratification. The Committee would of course distinguish in its reports between rights already formally accepted by Australia and other relevant rights and standards. Parliament, and the public, could then decide what if any weight to give to the latter.

We welcome the core concept of a 'statement of compatibility' and the proposal (Clauses 8 & 9 of the principal Bill) that such a statement be lodged with the explanatory memorandum (for a Bill) or with the explanatory statement (for a legislative instrument, under the Consequential Provisions Bill).

Presumably the Committee's first point of reference in assessing the compatibility of any Bill or proposed legislative instrument will be the 'statement of compatibility', although we are surprised that this is not expressly required, and submit that it should be. Also, given that these statements will be prepared by the same Ministers and Departments sponsoring the legislation, they will need to be treated with caution as only an initial assessment – it will often be in the interests of the government of the day to fail to identify, or downplay the extent of, any incompatibility.

We therefore welcome the provision that the Committee will also be able to inquire more thoroughly into bills and legislative instruments including calling for submissions, holding public hearings and examining witnesses, when it considers this appropriate.

The value both of the statements of compatibility and of the Committee's ability to inquire more thoroughly are highly dependent on the legislative timetable and process.

This goes to wider issues about the speed with which governments are able to progress legislation through Parliament, and whether the inordinate haste with which much legislation is processed is healthy for our democracy. We submit that except in exceptional circumstances of genuine urgency (and not of political expedience), both Bills and proposed legislative instruments should have longer mandatory periods for consideration, both the Parliament and by the wider community.

Even where the Committee does identify and report on a potential incompatibility, the usually very short time period between reporting and continued passage of legislation means that third parties (as well as legislators themselves) have little opportunity to use Committee reports in the course of parliamentary debates. While the Committee's own view on incompatibility will be very valuable, its reports will be even more valuable, potentially, as a trigger for wider debate. Few pieces of legislation are so urgent that a longer period for consideration, both by the Committee and by third parties, could not be provided.

Having identified a potential conflict with rights and freedoms, the Committee could also usefully develop clearer criteria for weighing the balance of interests. In this respect, s 7(2) of

the *Charter of Human Rights and Responsibilities Act 2006* (Vic) offers a useful precedent.

The Committee will also need to be adequately resourced, given that it will have a significant workload, particularly if its remit includes, as we suggest, progressive retrospective review of existing legislation.

Whilst conscious and respectful of the primacy of Parliament and its Committees, we suggest that there would be benefit in the Committee liaising more closely with the Privacy Commissioner (and with other relevant statutory officers in respect of other rights) both in developing better criteria and in assessing particular Bills.

Finally, we welcome the recognition in the explanatory memorandum that Subclauses 8(4) and 9(3) are not intended to prevent a court or tribunal taking account of a statement of compatibility in any proceedings, nothwithstanding that the statement would not be binding.

For further contact on this submission please contact
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