McClelland smuggles UN rights standards in the back door

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HOW many readers have found themselves unable to sleep on some night and decided to have a read of the 1989 UN Convention on the Rights of the Child?

Implausible, I know, even for lawyers, but it's not the worst strategy for overcoming insomnia. And in your browsing you would come across Article 19 of that convention, or treaty.

It reads, in part: "State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence."

Now think about what you figure that covers and doesn't cover.

And remember that all these multilateral treaties, such as the CRC, have to be worded so as to get on board as many as possible of the world's Sudans, Chinas, Libyas, and worse -- and I say worse because Libya was just overwhelmingly voted on to the UN Human Rights Council, to be there along with a bunch of other countries no sane Australian would take human rights advice from -- but I'll leave that point for another article.

My point here is that it's not at all clear what Article 19 means. We know that a lot of countries whose standards look pretty awful compared to ours signed up too.

And we know that almost all countries at the time of signing permitted parents to spank or smack their own children, if the degree of force was reasonable.

Now let's say some democratic government, say like ours here in Australia, had a statute that allowed parents to spank their kids. Would you say that that statute breached human rights? And if you did would it be because of Article 19?

And if you thought parental spanking did not breach human rights but some overseas experts thought otherwise -- ones who were wholly undemocratically chosen and included people from countries with all sorts of undemocratic and downright authoritarian regimes -- would you defer to them?

This is not a pointless hypothetical. It matters. You see, our attorney-general, fresh from his bruising loss in cabinet on enacting a statutory bill of rights nationally -- and we can all get down on our knees and thank whatever gods there be for that -- has just introduced into parliament his back-up plan.

It's called the Human Rights (Parliamentary Scrutiny) Bill. First off it proposes there be a Parliamentary Joint Committee on Human Rights. As things stand we have a Senate-only committee charged with scrutinising bills, including whether a bill trespasses unduly on personal rights and liberties.

Moving from a Senate-only committee to a joint committee is not in the least problematic, but this newly proposed joint committee is not going to be asked to decide if bills trespass unduly on personal rights, exercising their own legislative judgment. No, this new joint committee is going to be asked something very different.

It is going to be asked whether bills and acts are compatible with human rights. But get this: human rights have been defined to mean what has been recognised in seven UN conventions, including the CRC noted above, together with all the other usual suspects, such as the ICCPR.

So what will this proposed new committee say if my above hypothetical came up? Before you answer that you might like to know that these big UN conventions have committees to monitor states' progress in implementing them.

You might also like to know not just that the membership of these committees is unbelievably undemocratic and weighted towards countries you wouldn't take any moral advice from if your life depended on it, but also that the committee for the CRC has consistently maintained that parental corporal punishment violates the convention -- regardless of the legislative history and intentions of the states that signed it.

So will that be decisive, or not? Do we defer to some Mickey Mouse UN committee or not? Or rather, do our elected MPs on this proposed joint committee defer?

Your crystal ball is as good as mine on this, but I'll tell you this flat-out: the existing demand that legislators use their own judgment on what counts as respect for rights is miles and miles better than this genuflecting before highly undemocratic supranational appointed experts.

Are my concerns exaggerated? Well, consider this. This new McClelland Human Rights (Parliamentary Scrutiny) Bill will also require all other bills to come with a statement of compatibility. The minister will have to say the bill is, or is not, compatible with human rights. Ah, but again that term human rights has been outsourced.

The test isn't what the minister thinks. The test looks like being what the minister thinks the UN thinks, or what the minister thinks lawyers think the committee members for the conventions think, or, well, you get the idea.

This is more of our attorney-general's anti-Midas touch. He takes an uncontentious notion and turns it into the most politically correct, undemocratic pap any law school special interest group favouring a bill of rights could dream up. Everything he touches turns to -- well, you know as well as I do.

Treaties and conventions in Australia's Westminster system have never, ever required passage through the elected legislature. They are entered into under the prerogative power, under straight-up executive power. We don't have the democratic checks on entering into treaties and conventions that the US does.

That's a problem, at least if you'd like your legislators to assess what is and isn't rights-respecting using their own judgment, not outsourcing it to treaties signed by the executive and monitored by UN appointees from Libya et al.

A worse problem is what has happened in Britain, New Zealand and Canada with these statements of compatibility.

Without exception, in all three of those jurisdictions they have collapsed into a guess about what the top judges and lawyers will think about some bill. You don't get the minister's opinion about the bill's respect for rights.

No, you get what the minister's in-house lawyers think, based on their reading of case law in the European Court of Human Rights, from UN committees, and the rest.

That has indirectly increased the power of unelected judges, through the statement of compatibility back door as it were, in all three of those countries.

I hope the Coalition blocks this in the Senate. A joint committee? No problem. In fact, it's a good idea, but tell them to assess things against their own view of whether the statutory language trespasses unduly on rights.

Don't put down seven UN conventions and outsource our human rights views to international bodies staffed, often, by people from countries whose records are pitiful.

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http://www.theaustralian.com.au/business/legal-affairs/mcclelland-smuggles-un-rights-standards-in-the-back-door/story-e6frg97x-1225881074355