



**MONASH** University

Castan Centre for Human Rights Law

## Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010

Castan Centre for Human Rights Law,  
Monash University

Submission to the Senate Legal and Constitutional  
Affairs Committee

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## **I. Context of the proposed Parliamentary Joint Committee on Human Rights**

1. The Castan Centre for Human Rights Law welcomes the proposal to establish a Parliamentary Joint Committee on Human Rights for the purpose of scrutinising existing and newly proposed Australian laws for their consistency with Australia’s international human rights obligations. However, in the context of the National Human Rights Consultation from which this proposal arose, the Castan Centre wishes to place on the record its sincere disappointment that the government has rejected the Consultation Committee’s recommendation of a Human Rights Act at the Commonwealth level, leaving Australia the only country in the Western world without comprehensive legislative protection of human rights. The proposed Committee on Human Rights will serve an important function in requiring newly introduced Bills to declare their compliance or non-compliance with human rights (but not, it should be noted, requiring them actually to comply), and in scrutinising existing legislation for compliance. However, while important and strongly supported by the Castan Centre, it must be remembered that this is essentially an audit function, which in no way takes the place of a Human Rights Act, which would require government agencies to comply with human rights in carrying out their functions, and would provide a remedy to those whose human rights are violated.
2. All states which adopt human rights obligations under international law, including Australia, undertake to make provision within the state’s own domestic law for the effective protection and promotion of the human rights protected in the relevant treaty. That undertaking includes a requirement to bring the state’s domestic laws and administrative practices into compliance with the relevant human rights standards where they are not already, and to provide an avenue for individuals to seek a meaningful remedy if they claim that their rights have been violated. States are entitled to achieve this objective by different means, given the different constitutional and legislative arrangements in different countries.<sup>1</sup> Legislative scrutiny of the kind to be undertaken by the Parliamentary Joint Committee on Human Rights is therefore a necessary first step in fulfilling the compliance obligation that Australia already has under international law, but it falls significantly short of satisfying that obligation.

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<sup>1</sup> See for example article 2(2) of the *International Covenant on Civil and Political Rights* 1966 (‘ICCPR’), which provides: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Equivalent obligations exist in other international human rights treaties.

## II. Definition of human rights

3. It is imperative that the Committee's functions be measured against all human rights which are binding on Australia, as opposed to a small selection. This is consistent with the understanding that human rights are intended to be "universal, indivisible, interdependent and interrelated."<sup>2</sup> To that end, the Castan Centre supports the definition of "human rights" in clause 3 of the Bill extending to all seven of the core international human rights treaties to which Australia is a party, and we would expect that once operational, the Act would be amended in the future if and when further treaties came into force.
4. We further recommend that this opportunity be taken to bring other Commonwealth legislation into line with this comprehensive understanding of "human rights", for example by expanding the definition of "human rights" in the Australian Human Rights Commission Act 1986 and to update the mandate of the Commission accordingly.

## III. Role of the Committee – Legislative scrutiny

### Human rights in policy formation

5. The Bill provides three functions for the Committee in clause 7:
  - (a) To examine new Bills and Legislative Instruments for compatibility with human rights;
  - (b) To examine existing Acts for compatibility with human rights; and
  - (c) To inquire into any matter relating to human rights referred by the Attorney-General.
6. The first of those functions envisages no role for the Committee until the relevant instrument is in its final form, or close to its final form, and has been introduced into parliament, while the second function necessarily only involves the Committee after the legislation has been passed. The Committee's involvement at that late stage therefore amounts either to certification, or at best, troubleshooting. It would certainly be preferable to integrate human rights considerations into the design of government policy and legislative instruments at the formative stage. The Parliamentary Joint Committee on Human Rights is probably not the mechanism best suited to doing so, but it should be noted that the compliance function of the Committee can only ever be complementary to the consideration of human rights at a much earlier stage of the policy process. We recommend that this would be an appropriate opportunity for the government to strengthen the consideration of human rights in policy formation and legislative drafting, utilising where appropriate

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<sup>2</sup> United Nations, *Vienna Declaration and Programme of Action* (1993), Report of the World Conference on Human Rights, para 5.

expert advice on human rights compliance from the Attorney-General’s Department, the Australian Human Rights Commission or external experts.

7. If the Committee makes recommendations to amend the relevant instrument to make it more compliant with human rights, the earlier in the legislative process that the Committee can become involved, the more likely it would be that the instrument could be adapted to incorporate the amendments.

### Statements of compatibility

8. The principal method of scrutiny provided in the Bill is the preparation of statements of compatibility, provided in clauses 8 and 9. Dr Julie Debeljak, a Deputy Director of the Castan Centre for Human Rights Law, has made a separate submission to this inquiry which compares the operation of similar provisions in Canada, the United Kingdom and Victoria and makes recommendations on strengthening the system proposed in this Bill. We refer the Committee to Dr Debeljak’s submission and adopt her recommendations.

### Use of international jurisprudence and expert assistance

9. Given that the definition of “human rights” in clause 3 of the Bill refers to the seven core international human rights treaties, the jurisprudence of the various United Nations treaty monitoring committees monitoring the respective treaties<sup>3</sup> must logically form part of the content of human rights for the purposes of the Bill. Australian legislation and legislative instruments should therefore be assessed against the text of the treaties as interpreted and applied by the relevant bodies. Individual complaints brought through the treaty-monitoring committee system will therefore be relevant to the interpretation of the treaty text, as will the Concluding Observations issued periodically by each of the treaty-monitoring bodies.<sup>4</sup> The Universal Periodic Review conducted by the Human Rights Council, which assesses the compliance of every member state of the United Nations with its human rights obligations, will also be relevant.<sup>5</sup>

10. The Bill and the explanatory memorandum are silent on this point. To that end, it may be helpful to insert clarifying language in clause 3.

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<sup>3</sup> Each of the seven treaties listed in clause 3 has its own monitoring committee, comprised of independent experts, who receive reports from states parties as to their compliance with the treaties, and in some cases, complaints from individuals alleging violation of their human rights by their government. The name of each committee corresponds to the name of the treaty (eg the Committee on Economic, Social and Cultural Rights monitors the International Covenant on Economic, Social and Cultural Rights), with the exception of the ICCPR, the monitoring committee for which is called simply the Human Rights Committee.

<sup>4</sup> See for example the Human Rights Committee’s Concluding Observations on Australia for 2009, UN document CCPR/C/AUS/CO/5, 7 May 2009.

<sup>5</sup> Australia’s first Universal Periodic Review is due to be conducted in January 2011.

11. Apart from committees interpreting the treaties directly referenced in clause 3 of the Bill, the courts of other countries and regional human rights systems such as the European Court of Human Rights frequently adjudicate on the meaning of the rights contained in those treaties. Jurisprudence from those sources may therefore also provide a useful reference for the Committee in assessing the compatibility of Australian provisions with human rights. Language similar to that used in section 32(2) of the Victorian Charter of Human Rights and Responsibilities may be useful to clarify this.<sup>6</sup>
12. It would be impossible to expect a parliamentary Committee to be sufficiently familiar with such a broad and intricate body of law in order to carry out its scrutiny task without assistance. We therefore recommend that the Committee have access to a well resourced expert adviser or team of advisers, independent of the government.<sup>7</sup>

### **Audit of existing legislation**

13. Clause 7(b) empowers the Committee to scrutinise existing Acts for compatibility with human rights. Presumably the intention of this provision is to trigger recommendations to amend or repeal the relevant legislation if it is found not to be compatible with human rights, or indeed if it is thought that an amendment would achieve better outcomes for human rights.
14. The scope of this task is obviously massive, given the volume of existing legislation. The Bill is silent on the method for determining which Acts are to be reviewed first. We believe that the Acts with the greatest potential impact on human rights should be reviewed first. The follow-up process recommended in paragraph 17 below would be one way to identify such legislation. Another would be to invite public submissions as to which Acts ought to be reviewed. Expert bodies such as the Australian Human Rights Commission could also advise on appropriate legislation for prioritisation.
15. Unlike clause 7(a), clause 7(b) only applies to existing Acts and does not extend to subordinate legislation. Presumably this is due to the overwhelming volume of subordinate legislation if the intention was to review all of it. However, we can see no reason why the Committee should not review an existing legislative instrument that is drawn to its attention. We therefore recommend that clause 7(b) be amended to extend to legislative instruments. The Committee's terms of reference

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<sup>6</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 32(2) provides: "International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."

<sup>7</sup> See further the submission of Dr Julie Debeljak, noting the role of independent advisers to the corresponding committees in the UK and Victoria.

could then specify that the Committee should prioritise Acts for review and only review subordinate legislation when it has been drawn to the Committee’s attention for a particular reason.

#### **IV. Role of the Committee – Inquiry**

16. The Castan Centre welcomes the broad power of inquiry in clause 7(c) on “any matter relating to human rights”. However, we believe that limiting the Committee’s mandate only to those matters referred by the Attorney-General robs this provision of most of its utility. For such inquiries to be meaningful, it is essential that they can be initiated from outside of the executive. We therefore recommend that clause 7(c) be amended to enable the Committee to commence an inquiry on its own motion, or for either house of parliament to refer a matter to the Committee for inquiry.
  
17. Given the expertise that the Parliamentary Joint Committee on Human Rights will inevitably develop in applying international human rights standards to Australian laws, we believe that it will be a suitable body to conduct follow-up with Australia’s compliance with its international obligations under the treaties listed in clause 3. This includes following up recommendations from a treaty-monitoring committee in a case of an individual complaint after finding that Australia has breached its obligations. Australia’s record in implementing such recommendations, or at least publicly explaining why it will not be implementing the recommendations, has deteriorated in recent years and could be redressed by a systematic follow-up initiated by the parliamentary committee. This function would also include following up recommendations from the Concluding Observations on Australia from each of the treaty-monitoring bodies, as well as the recommendations from the Universal Periodic Review.
  
18. There is a natural synergy between this proposed follow-up function and the legislative scrutiny function of the Committee that is provided in the Bill. Whenever there has been a finding that Australia’s practices have breached its human rights obligations, there may be a case for reviewing the relevant legislation or instrument. This would be a good reason to prioritise one Act for review over another. Indeed, the practice that gave rise to the violation might not have been foreseeable when reviewing the text of the instrument during the original scrutiny process, with the result that the Committee’s statement of compatibility should be revised, perhaps accompanied with recommendations that the instrument ought to be amended.
  
19. We recommend a new clause 7(d) be inserted to mandate the Committee to follow up Australia’s compliance with its international human rights obligations.

## **V. Summary of recommendations**

20. The Castan Centre for Human Rights Law makes the following recommendations:

1. Update Australian Human Rights Commission Act and mandate to be consistent with the definition of “human rights” in the Bill (para 4).
2. Strengthen human rights input in policy formation and legislative drafting (para 6).
3. Clarify applicability of interpretations of human rights by international bodies (paras 10 & 11).
4. Extend clause 7(b) to legislative instruments (para 15).
5. Amend clause 7(c) to enable the Committee to commence an inquiry on its own motion, or for either house of parliament to refer a matter to the Committee for inquiry (para 16).
6. Insert a new clause 7(d) to mandate the Committee to follow up Australia’s compliance with its international human rights obligations (para 19).