COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010; Human Rights (Parliamentary Scrutiny) Bill 2010

THURSDAY, 4 NOVEMBER 2010

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 4 November 2010

Members: Senator Crossin (Chair), Senator Barnett (Deputy Chair) and Senators Furner, Parry and Pratt

Substitute members: Senator Hanson-Young substituting for Senator Ludlam

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Boswell, Brandis, Crossin, Hanson-Young, McGauran, Pratt and Trood

Terms of reference for the inquiry:

To inquire into and report on: Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010; Human Rights (Parliamentary Scrutiny) Bill 2010

WITNESSES

Committee met at 8.59 am

CHAIR (Senator Crossin)—I declare open this meeting of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010. This inquiry was referred to this committee by the Senate on 30 September 2010 for inquiry and report by 23 November 2010. Together the two bills seek to implement the legislative elements of Australia's Human Rights Framework, announced by the government in April 2010. The framework outlines a range of measures to protect and promote human rights in Australia and reflects the key recommendations of the report of the National Human Rights Consultation Committee of 30 September 2009.

The main bill will establish the Parliamentary Joint Committee on Human Rights and set out the functions and administrative arrangements for that committee. The committee will examine acts, bills for acts and legislative instruments for compatibility with Australia's human rights obligations and report to both houses of parliament. It will also inquire into and report to parliament on matters relating to human rights referred to it by the Attorney-General. The consequential provisions 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.

To date we have received 74 submissions for this inquiry. They have all been authorised for publication and are available on our website. I remind witnesses that, in giving evidence, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of giving evidence to the committee, and we may treat such behaviour as contempt. It is also a contempt to give false or misleading evidence to the committee.

[9.01 am]

COWDERY, Mr Nicholas, AM, QC, Human Rights Adviser, Law Council of Australia

MOULDS, Ms Sarah, Senior Policy Lawyer, Law Council of Australia

CHAIR—Welcome. We have your submission, which we have numbered 31 for our purposes, and your supplementary submission, which we have numbered 31(a). Do you need to make any changes or amendments to those before I ask you to give an opening statement?

Mr Cowdery—There is one very minor amendment. On page 2 of our submission, in the acknowledgement section, the Queensland Law Society is mentioned twice. It does not necessarily mean we are twice as grateful to the Queensland Law Society; it is just a typographical error that the name has been repeated.

CHAIR—All right. I now invite you to make an opening statement.

Mr Cowdery—We thank the committee for the opportunity to appear before the committee on behalf of the Law Council of Australia. The Law Council is the peak body for Australian lawyers, representing over 56,000 members through their law societies, bar associations and the Large Law Firm Group. When preparing submissions to parliamentary inquiries, the Law Council consults with these legal representative bodies. With respect to the current submission, the Law Council wishes to acknowledge the particular assistance of the Law Society of New South Wales, the New South Wales Bar Association, the Queensland Law Society, the Law Institute of Victoria and the Victorian Bar, some of whom we understand have also made short submissions to the committee directly.

The Law Council expresses its general support for the bills, and in particular for the establishment of the Parliamentary Joint Committee on Human Rights and the requirement that all bills and certain delegated legislation be accompanied by statements of compatibility. As the council emphasised during its engagement with the National Human Rights Consultation last year, Australia is the only Western democracy without an effective federal constitutional or statutory mechanism to provide comprehensive parliamentary scrutiny of new and existing laws for compliance with human rights. The mechanisms proposed in these bills are, in our submission, an important step towards addressing this gap.

The Law Council is also pleased to see the government acting to implement one of the key recommendations made by the Brennan committee following the national human rights consultation and one of the initiatives contained in its recently released human rights framework. The council also notes the bipartisan support that has been expressed for the establishment of a parliamentary committee with the specific mandate to scrutinise laws for compliance with human rights.

Having generally welcomed the bills, the Law Council is of the view that a number of amendments should be made to improve the ability of the proposed parliamentary joint committee to perform its important human rights scrutiny function and to ensure that the proposed statements of compatibility are indeed effective at highlighting if and how a bill or a regulation complies with human rights requirements. The current inquiry provides an important opportunity to make sure that, when designing and implementing these mechanisms, consideration is given to the experience of jurisdictions such as the United Kingdom, Victoria and the Australian Capital Territory so as to ensure that both the parliamentary joint committee and the statements of compatibility are not merely tick-the-box exercises but do actually facilitate robust parliamentary scrutiny of the law's compliance with human rights standards.

I would like to make some brief comments about the two aspects: the parliamentary joint committee and the statements of compatibility. First, in relation to the proposed parliamentary joint committee, the Law Council is of the view that there are a number of amendments that would enhance the ability of this committee to perform its functions, and we have made recommendations in the submission that has been received by the committee. I will give only two examples at this point. From the current definition of human rights proposed in clause 3, it may be difficult for the committee to isolate the particular human right it is tasked with considering and to apply a consistent test of proportionality or limitation when determining whether the particular law unduly infringes that right. The council submits that this could be addressed by clarifying the proposed definition of human rights in clause 3 by either of two mechanisms: including within clause 3 a consolidated list of human rights protected in Australia; alternatively, providing a reference to a consolidated list of human rights to be contained in regulations. Such an approach would not necessarily limit the scope of rights to be considered, but it would greatly assist both that those responsible for preparing statements of

compatibility and the committee to identify the standard against which they are analysing a proposed law and the limitation or proportionality test that should apply.

The second comment about the committee is that, unlike other joint committees, the general powers for the human rights committee are not explicitly prescribed in the bill and do not extend to the committee initiating its own inquiries or receiving references from other than the Attorney-General into matters of substantial human rights concern. The Law Council submits that the effectiveness of the human rights committee would be enhanced by providing the committee with specific powers, including the power to initiate its own inquiries and receive references from elsewhere, and by expanding the committee's functions to include a monitoring role. This could be achieved by amending clauses 6 and 7 of the bill.

On the other aspect, the statements of compatibility, the Law Council submits that there is pressing need to ensure the quality of the content of statements of compatibility. This could be achieved by amending clause 8 to specifically require reasons to be given in statements of compatibility. This amendment could also be accompanied by a recommendation that the Commonwealth Attorney-General's Department develop two areas: one, comprehensive resources for other Commonwealth government departments to utilise when preparing statements of compatibility and, two, a workable template for statements of compatibility. This would also involve attention to the area of the training of those who would be responsible for the preparation of such documents. These recommendations, along with a number of other specific recommendations for amendment, are set out in some further detail in our written submission. I simply wanted to highlight them at the beginning of this session. Thank you very much for that opportunity and I am certainly available for questions.

CHAIR—Ms Moulds, do you have anything to add to that?

Ms Moulds—No, thank you.

Senator McGAURAN—I will start with one question—I have several. As a point of clarification: you said that you would recommend the prescribing of the elements of what the committee should look at with regard to human rights. Is it not your understanding, or should it be our understanding, that the bill itself is asking us to cross reference with our United Nations treaties, which are prescribed?

Mr Cowdery—The bill incorporates the human rights by reference to seven human rights treaties in clause 3.

Senator McGAURAN—Where is that in the bill?

Mr Cowdery—Clause 3. The clause provides that human rights mean the rights and freedoms recognised or declared by the seven international instruments that are set out there. It covers the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the last two of which prescribe general overarching international human rights. Then there are the other more specific conventions on discrimination against women, against torture, on the rights of the child and on the rights of persons with disabilities.

Senator McGAURAN—So why do we want another one?

Mr Cowdery—There are some gaps there. For example the Declaration on the Rights of Indigenous Peoples is not mentioned specifically, and yet that may be a source of further human rights that would be appropriate for Australia to recognise and to enforce. The difficulty about incorporating the rights by reference to instruments in that way is that in the first place Australia has made reservations in relation to some of those instruments, and so there is an issue of interpretation as to what parts of those instruments would be picked up and would apply.

There are also features of the rights that are prescribed in those instruments that lead to further uncertainty. These are, if you like, rights prescribed by reference to the lowest common denominator—rights that are internationally acceptable and approved for general application. Australia, we would submit, would be better served by having a prescription of specific human rights that Australia recognises and wants to enforce and identification of the limitations that might apply—the proportionality tests that might apply—to those rights when they are enforced.

So it is to bring greater certainty and greater confidence to the application of the process that we favour the prescription of a list in clause 3.

CHAIR—Do you think it should also include a reference to the ILO?

Mr Cowdery—Yes, that is definitely something to be considered. There would be some work involved, there is no doubt about that, in identifying and prescribing the rights that were to be incorporated in this way. Our submission is that that work is better done upfront rather than to lead to confusion and uncertainty further down the process.

CHAIR—Also you suggest that the committee should have a power to initiate its own inquiries. Certainly, joint standing committees that I am aware of in the parliament can initiate their own inquiries with, of course, the sanction of the houses of parliament as well as by getting a reference from the minister. You would also suggest that again the committee should have a broader scope than just looking at legislation.

Mr Cowdery—At the moment, as we understand it, the committee may act in relation to legislation and on reference from the Attorney-General. We would submit that it should also be able to act on reference, for example, from either house of parliament or initiate its own inquiries into compatibility of existing legislation and proposed legislation.

CHAIR—How do you see the committee interacting with the Scrutiny of Bills Committee?

Mr Cowdery—I do not know whether Sarah has a view about that. We have not discussed that specifically. We would see them as having different functions. The proposed committee, we would submit, gives the appropriate importance, significance and focus to the issue of human rights specifically. So it would take that specialist scrutiny away from the Scrutiny of Bills Committee leaving the Scrutiny of Bills Committee to do other things.

Ms Moulds—I endorse those comments by Mr Cowdery, but also we have made a submission in relation to the Scrutiny of Bills Committee inquiry into its future direction. In that submission we have discussed some criticisms and also some positive aspects of their role. For example the Scrutiny of Bills Committee's mandate includes things like looking at the appropriateness of delegated legislative powers which would be a function we would obviously like to see continue as very important for that committee but that is something slightly different to, say, an analysis of whether a law unduly trespasses on rights such as the liberty of the person which would be perhaps a different kind of analysis to the scrutiny of bills function.

Senator BARNETT—Are you familiar with the role of both the Senate Scrutiny of Bills Committee and the regulations and ordinances committee?

Mr Cowdery—Ms Moulds is more familiar with those aspects than I am.

Senator BARNETT—But you are familiar with those committees?

Mr Cowdery—Generally, yes.

Senator BARNETT—And, Ms Moulds, you appear to know about them as well.

Ms Moulds—In some limited capacity having helped put our submission on the Scrutiny of Bills Committee together.

Senator BARNETT—Do you think they perform an important role for the parliament?

Ms Moulds—I think we highly value their role. At the moment they probably provide the best opportunity to consider some of the issues that we think are in urgent need of consideration by the parliament, but we think that they are constrained in a number of ways from undertaking the broader human rights analysis that we think is needed. For example, while their mandate includes the ability to scrutinise bills for unduly trespassing on rights and freedoms, that mandate has not been unpacked in a way that would include the range of human rights considerations that a committee like this would look into. We think as well that there is importance in acknowledging the need for a specific committee with a specific focus on human rights issues that would enable it to perform that broader function.

Senator BARNETT—I appreciate what you are saying, but that was not my question. My question was whether you think they perform an adequate role. They have functions and they have a purpose, do you think that they fulfil the role for which both those committees have been established?

Ms Moulds—I think the Law Council's expressed the view that the role they perform for their current mandate is valued and in a number of instances has provided adequate scrutiny but that it does not fill the gap that we see in—

Senator BARNETT—All right, but you are answering a different question. I am just asking about their role and whether you think they fulfil an important role. I think you are saying they fulfil a valuable role. Is that correct?

Ms Moulds—Yes, that is correct.

Senator BARNETT—Barney Cooney has put a submission to the committee. He was a senator for Victoria from 1984 to 2002 and he is a former chairman of the scrutiny and bills committee—of which I am a former member, by the way, so I suppose I am somewhat biased as well. He has indicated strong support for the model that is currently utilised for the Scrutiny of Bills Committee and he has suggested that this committee is the appropriate forum for the consideration of human rights rather than the more limited role envisaged by the PJC. Have you read his submission or perused it? Do you have a response to his suggestion?

Mr Cowdery—Yes. He describes it as a limited role, but it is a specialist role and a role that should receive that level of emphasis and attention which the alternative that he proposes would not achieve to the same extent in our view.

Senator BARNETT—Okay. Let us move on. Are you familiar with the views of the Western Australian Attorney General, and have you read his submission to this enquiry?

Mr Cowdery—I have not, no.

Ms Moulds—I am afraid I have not either.

Senator BARNETT—He has expressed strong reservations and has, I think, valid concerns about the impact on the federal-state relationship. In particular he says that given the Commonwealth parliament's legislative powers—including the external affairs power placitum (xxix) of section 51 of the Commonwealth Constitution—that this clause would enable the committee to consider whether, for example, any state legislation, activity or practice did not conform to the requirements of those treaties.

Do you agree that this would have an impact or influence on state legislation—and he nominated, I think, the example of the Equal Opportunity Act 1994 (WA) but there would be a range of legislation in every state and territory that has human rights effects—policies, procedures and practice?

Mr Cowdery—May we take that on notice and provide the committee with a response?

Senator BARNETT—Of course. You do not have a preliminary view?

Mr Cowdery—Not at this stage, no.

Senator McGAURAN—Well, prima facie you could give us a view on that because with your background knowledge to it all this is the guts of it really, isn't it, and you know it to be.

Mr Cowdery—As you know, I am appearing in a representative capacity for the Law Council so I really need to know the Law Council's approach to that particular issue, and at the moment I do not.

Senator BARNETT—All right. Well, let us put it another way. This is going to have an influence on human rights law and how it is influenced in Australia. This committee is interpreting these at this stage under clause 3—those international covenants—and seeing whether Australian law fits and is compatible with those international covenants. Correct?

Mr Cowdery—Correct.

Senator BARNETT—So the content of Australian law includes both federal law and state law. Is that correct?

Mr Cowdery—Yes.

Senator BARNETT—Right, so by necessity it would have some influence on state law.

Mr Cowdery—Yes.

Senator BARNETT—So this is a key point as far as I am concerned—that is, the impact on federal-state relations and the balance which will clearly shift, you would have to say, in favour of the federal over the state. Would you agree with that?

Mr Cowdery—In relation to this particular area, yes, and subject of course to state legislation that may already exist—for example, in Victoria and in the Australian Capital Territory.

Senator BARNETT—In his submission at page 3 he also says, 'It would erode the political and legal basis of Australia's federal system.' You do not have a view on that at this stage but are happy to take that on notice?

Mr Cowdery—I am happy to take it on notice, but it sounds to be, perhaps, a slight exaggeration of the effect that might be experienced.

Senator BARNETT—That may or may not be the case. That is his view representing the government of Western Australia. Family Voice Australia have set out their concerns in a similar way and they have indicated that it would entrench international jurisprudence on human rights into the process of law making in Australia. Would you agree with that?

Mr Cowdery—Yes, and we would submit that is a good thing. It is an aspect of the rule of the law to have regard to international law.

Senator BARNETT—It is, but what about the proposition that Australian laws, wherever possible, should be made in Australia by Australians for Australians?

Mr Cowdery—That would still be happening, we would submit. It is not a surrender of sovereignty in any way.

Senator BARNETT—Would you agree it would help the nation focus more intensely on the relevant treaties, conventions, international agreements that we may or may not sign and ratify into the future?

Mr Cowdery—Yes, we would submit that would necessarily follow.

Senator BARNETT—Does it mean that perhaps we have not been putting enough emphasis and effort into the merits or otherwise of signing up to these relevant international treaties in the past?

Mr Cowdery—Yes, we would agree with that proposition, and indeed the Law Council have made submissions in connection with that sort of issue in the past on other matters.

Senator BARNETT—How will it affect the role of judges and their ability to interpret law—in this case, human rights law—in Australia? Would you agree that it would give them more liberty or freedom to interpret our international obligations in a more broader sense than perhaps has been the case in the past?

Mr Cowdery—Not necessarily. I do not agree with that formulation of the situation. I do not think it would give any greater liberty or freedom to judges to act in a particular way. Judges are very tightly constrained in the way in which they may approach their judicial functions. They apply the law, interpreting that law as required in the circumstances, and they do that every sitting day in every court. Nothing would change from that point of view. The same principles would apply to the way in which they approach their judicial tasks.

Senator BARNETT—I put it to you that that is something that may come to the fore in this inquiry—that some judges may become more active in their judicial roles.

Mr Cowdery—Speaking for myself now, I think there is a lot of misinformation on what is called judicial activism in some quarters. In our common law system, the judiciary has always had the ability and indeed the duty to apply the law, whether it be legislation or common law, and to interpret that law in order to be able to apply it as circumstances dictate. There is debate from time to time about the matters that judges may take into account when they interpret the law. But there is an increasing body of jurisprudence to the effect that the international treaties and international standards to which Australia has subscribed are legitimate touchstones by which the law may be interpreted, and there is High Court authority for that.

Senator BARNETT—I appreciate that, but we are a bit tight on time, so I just want to finish with this area of the definition of human rights. You have touched on it already in response to Senator McGauran, but we have important issues here of the rights of freedom of religion, freedom of association and freedom of speech, and what I would like to be assured of is that this is covered—that if we are going to cover these other human rights then those particular rights are also covered, including the rights of the unborn child. Do you agree with the importance of that?

Mr Cowdery—All the internationally recognised human rights should be incorporated. It may be that there are other specific human rights from international instruments or from Australian law that should be identified, described, applied and supported, and that is part of the benefit we see in having a prescriptive list in clause 3.

Senator BARNETT—Do you agree that the rights I have listed should be included?

CHAIR—Senator Barnett, your time has finished now.

Senator BARNETT—Mr Cowdery?

Mr Cowdery—Yes, certainly rights relating to—I am sorry; you mentioned religion?

Senator BARNETT—I mentioned religion, speech, association and the rights of the unborn.

Mr Cowdery—The rights of the unborn may be a matter of controversy, so I would not make a commitment in relation to that, but there are standards prescribed for the observance of rights in the other areas that you have mentioned.

Senator BARNETT—Could you take that on notice if you do not have a view on that? Thank you.

Senator PRATT—Mr Cowdery and Ms Moulds, you mentioned in your submission and before us today a number of powers that are absent from what this future committee's remit would be, and I am interested in exploring those further with you, one being the power of self-referral and the other being the audit power. In reviewing a bill to create a statement of compatibility, clearly a committee will go through a process of looking at the bill to see how it either supports rights or, I suppose, compromises them in some way. But clearly what you do not get from that is a capacity to identify other areas of law where people's human rights might be compromised or not supported, but the committee is not able to create a self-referral to say, 'Look, these particular rights are unsupported in Australia at the moment.' Could you explore that with me in some more detail for our evidence?

Mr Cowdery—Yes. Human rights may be protected by law, but law has to be applied, administered, and in the executive function of government there are a lot of agencies that impinge upon or potentially impinge upon the rights of people in the work that they do. So what we envisage is the ability of the committee to review the application of laws, not just the terms of the laws themselves and the formulation of the laws but the way in which they are applied and the impact that that may have on the human rights of persons in Australia. That is why we see value in broadening the ability of the committee to review matters of the kind that we have suggested.

Senator PRATT—So that would in turn give the committee the power to pick up areas where existing laws are impinging on rights or where there is an absence of laws entirely?

Mr Cowdery—Yes.

Senator PRATT—So the audit powers would similarly enable the committee to explore such areas without having a bill before it?

Mr Cowdery—Yes, where issues of concern have arisen—on its own motion or on referral, for example, from either of the houses of parliament.

Ms Moulds—I will just add to that. Another example would be if a UN committee, for example, had highlighted a particular area of concern about Australia's compliance with its international obligations under a treaty—for example, a gap in its antidiscrimination law or something of that nature. The committee might then be able to respond to that kind of observation.

Senator PRATT—It would be a pretty big gap, in a sense, if you had an Attorney-General that was ignoring such a statement and the parliament had its hands tied from taking action on such a statement from the UN, wouldn't it?

Ms Moulds—We make no comment on that, other than to suggest that there have been numerous observations by UN committees that have been responded to with various degrees of robustness by various governments.

CHAIR—Thank you. Senator Trood, do you have questions?

Senator TROOD—Thank you, Chair.

CHAIR—Then we will have to finish with these witnesses and go to the next witnesses.

Senator BRANDIS—I have some questions for the Law Council.

CHAIR—Senator Brandis, we have three bills today and these witnesses are due to finish at 9.40.

Senator TROOD—Perhaps I might yield some of my questions.

Senator BRANDIS—No, you can—

Senator TROOD—But I will ask a question. Mr Cowdery, the key to this issue surely is in the definition of 'human rights'. You have said, as I understand it, essentially two things. One is that you do not take exception to the international treaties and covenants as being the foundation of those rights but you then put the case that there ought to be an articulation of those rights. My question is: what are the origins of the articulation that you would like to see?

Mr Cowdery—That would be a consultative process that would result in articulated rights, and that would require, in all probability, input from a number of different areas.

Senator TROOD—Can I take it that you would articulate only rights that are included in the international conventions, or would you look more widely for the articulated rights?

Mr Cowdery—No, the international instruments would be the starting point.

Senator TROOD—What I am interested in is that this bill is structured only around the international conventions. By doing that, it excludes any particular rights that Australians might possess as a result of common-law rights, constitutional rights et cetera. You seem to be saying that the only rights that ought to be the foundation of right here are those that are contained in international instruments.

Mr Cowdery—No.

Senator TROOD—If there are rights that are outside international instruments then they are not going to be under the ambit of the bill.

Mr Cowdery—No, with respect, I do not think we are saying that. We are saying that if additional rights are identified arising out of Australian law or Australian values then they should be included as well.

Senator TROOD—So you would go beyond the international instruments.

Mr Cowdery—Yes. As I said, the international instruments would be a starting point, but if there were gaps or if they did not comprehensively cover the situation in Australia then others could be added.

Senator TROOD—How do you propose that we might get at those rights? How do you propose that we might arrive at an articulation of these rights?

Ms Moulds—I do not think we have a clear view on that, but we do note that the report following the National Human Rights Consultation suggested a starting point for a list of Australian human rights to be protected, and we would support that list as a starting point. Also, we would encourage consideration of the existing ACT and Victorian lists and the way that they have articulated some of the core rights following from those international conventions there.

Senator TROOD—My concern about that is that, by taking that course, you would essentially be proposing a de facto bill of rights, because you would be setting down in legislation a list of rights, which would be a proposal that would not be agreed to as a result of the consultation process. You seem to be achieving by the back door a proposal that the Attorney, in recommendations he has made in this bill, has set aside; he has set aside the list of rights. But you seem to be saying, 'We need them anyway and this is a good way to get them.'

Mr Cowdery—I suppose a similar argument could be applied to the existing clause 3 but with greater uncertainty—

Senator TROOD—I am actually sympathetic to the point you make about that, which is that the burden on the committee would be very great, because it would have to work out the basis upon which you would assess the application of those rights. So, in some respects, I am sympathetic to your argument. I am not sure I am sympathetic to it in relation to the proposition that we should set these down in a way which was proposed not to be done as a result of the human rights consultation process.

Mr Cowdery—We would submit that the two approaches are compatible, that it is not a charter of rights by the back door.

Senator BRANDIS—Yet a further perspective on this might be not to refer to the international instruments at all and to set out—as, for example, does the Senate order establishing the Regulations and Ordinances Committee—at a very general level certain basic rights, the interpretation of which might be contestable but the existence of which is not essentially politically controversial, against which legislative instruments or, in this case, bills could be tested. I am being the devil's advocate for a moment. Why do we need to define human rights by reference to the international instruments at all?

Mr Cowdery—They are international instruments to which Australia is a party, so we have agreed with the principles underlying those instruments. That seems to us to be a good starting point. But I take your point that there need not be reference in terms to the international instruments if there is a list of prescribed rights.

Senator BRANDIS—That really is an approach that seems to me to have something to commend itself, because when you say Australia has subscribed to each of these instruments, that may be so, but as you are of course aware there is an international jurisprudence surrounding each of these instruments. I am not sure at all

whether members of the Australian parliament would be comfortable in invoking the corpus of that international jurisprudence in relation to each of these instruments and perhaps having them through the Teoh case and like decisions incorporated or heavily influential in Australian law through the mechanism of this bill as it is currently structured.

Mr Cowdery—That would be another reason we would submit for having an articulated list of rights shorn of those qualifications and that jurisprudence—so as to give greater certainty and assurance.

Senator BRANDIS—I think we are somewhat of a common mind on this, but would you also agree with me that, were that approach to be adopted, given the contestability of a lot of these rights it would need to be expressed in very generic terms.

Mr Cowdery—In relation to some of the rights, yes. Others may be able to be expressed more specifically.

Ms Moulds—You may be able to address some of those concerns by the way you frame your general limitation test or proportionality test that may help decision makers determine whether a particular action unduly restricts or unduly limits a particular act.

CHAIR—Mr Cowdery and Ms Moulds, thank you very much again for your submission. Please pass on our appreciation to the Law Council for your work. Thank you for your time this morning.

[9.45 am]

DEBELJAK, Dr Julie, Deputy Director, Castan Centre for Human Rights Law, Monash University

McBETH, Dr Adam, Deputy Director, Castan Centre for Human Rights Law, Monash University

CHAIR—Good morning, Dr McBeth and Dr Debeljak. Welcome to our inquiry. Do you have any comments to make on the capacity in which you appear?

Dr Debeljak—We are both also senior lecturers at Monash University Law School.

CHAIR—We have two submissions before us with your evidence today: from the Castan Centre, submission No. 35 and, from you, Dr Debeljak, submission No. 25. Before I invite you to make an opening statement, do you need to make any changes to those submissions?

Dr McBeth—No.

Dr Debeljak—No.

CHAIR—You might like to provide us with some comments, and then of course we will go to questions.

Dr McBeth—You have our written submission, so we will not labour those points. The one thing that I wanted to emphasise was the context of the bill before us and the very limited scope that it purports to have. You are all of course familiar with Australia's international human rights obligations in a substantive sense. In an operational sense Australia, and every other state which is a party to these human rights treaties, has two main obligations. The first of those is to make all Australian legislation and administrative practices consistent with those international obligations to which Australia has signed on and the second is to ensure that individuals within Australia's territory and jurisdiction have access to an effective remedy.

This bill does virtually nothing towards the second of those and it goes only a very small way towards the first of those—that is, making Australia's legislation and administrative practices consistent with Australia's international obligations. I say it goes some way towards that because it is something of an audit process. It is looking for inconsistencies and making a statement of compatibility as to whether there is a consistency or an inconsistency, but there is no obligation to achieve consistency, which is an obligation that Australia already has under international law. So this only goes some very small way towards fulfilling the obligations that Australia already has under international law. We at the Castan Centre do want to be on the record as wholeheartedly supporting this bill; however, we want to emphasise the fact that it is a very small step towards fulfilling obligations that Australia already has.

Within that context we have made some recommendations as to how the bill might work better within this limited scope. They are summarised at the end of our submission. They include making sure that there is input from the proposed human rights committee earlier in the process of legislative drafting rather than it being an ex post facto audit. There is a recommendation that the committee have access to independent advisers, whether they be sourced from the Attorney-General's Department or the Human Rights Commission or whether they be external advisers. There is a recommendation that the committee process be used as an opportunity to follow-up issues that have been raised in international fora regarding Australia's human rights record—that is, things that may have been missed when viewed in the abstract. When you put them in a factual scenario, breaches or inconsistencies may be identified that were not identified when looking at the text of a particular instrument or act. That would include the treaty-monitoring committees of the seven treaties that are mentioned in the bill as well as the Universal Periodic Review of the Human Rights Council. We have also recommended that the scope of the committee to undertake inquiries be broadened.

Dr Debeljak—In terms of my submission, the thing I would like to start with is that it is not particularly clear to me what the aims of this legislation are. There is no aims or objectives section. I assume it is to do one or all of three things: firstly, to improve protection and promotion of human rights in Australia; secondly, to improve the conversation or the dialogue about human rights between the executive arm of government and the parliamentary arm of government; and, thirdly—and I think most importantly—to improve the transparency and accountability of decision making in relation to human rights, both from the executive and from the parliament.

With those three objectives in mind, I have looked at the legislation. You can see from my submission that I have made various suggestions as to ways in which I think the Human Rights (Parliamentary Scrutiny) Bill needs to be strengthened. In relation to the statement of compatibility, I think we need to have something much more explicit in the bill that indicates that the reason behind an assessment ought to be divulged in terms of,

mainly, increasing accountability. Secondly, I think that we need to have somewhere in the bill recognition that the executive is able to issue a statement of incompatibility. It is all couched in the terminology of 'compatibility' but there is nothing in the bill relating to establishing incompatibility. It is the executive and parliament's sovereign right to legislate incompatibility with human rights in this country. I also think that something needs to be inserted in relation to bills that are amended during the parliamentary process and that, at the end of the amendment process, a new statement should be formed on the amended bill. I think there needs to be a change in the culture of human rights debate within the executive and the parliament if this bill is going to have any impact.

Senator BARNETT—Sorry to interrupt, but could you repeat what you just said? I did not quite follow that.

Dr Debeljak—The final point?

Senator BARNETT—Yes.

Dr Debeljak—It has been relatively apparent in the Victorian parliament that there is not a broad-ranging understanding of what human rights are and the capacity to limit human rights. The debate that surrounds a lot of the bills that have rights implications is, in my opinion, at a very basic level. I think having some kind of broader educative program in place, both for the public service and for parliamentarians, is vital if these sorts of parliamentary scrutiny documents are going to have much impact.

In terms of the joint committee, my major point is that I think there needs to be some form of independent legal advice feeding into that committee. In the legislation, the role of that committee is described as 'functions'. I would much prefer to see it as described as 'obligations', to give that committee a bit more gravitas in the role that they are playing. Again, as I have already heard from previous witnesses at this inquiry, I think that committee should have its own motion power.

The final point I would like to make by way of introduction relates to what human rights we have and what ability we have to limit the human rights. I know you were already discussing that within this committee this morning, but I think there needs to be some greater focus on how we define and the scope of human rights that we have and how we assess any limitations that are placed on those rights. I am not convinced that enough thought has been put into that with this legislation. I am in support of this bill, but I think it can be improved by having a better articulation of how the rights are going to be interpreted and limitations justified. In that breath, I think it needs to be linked to international comparative jurisprudence.

CHAIR—Thank you. We will now go to questions.

Senator BOSWELL—Could you tell me a bit about the Castan Centre? What is it? Is it a group of people with an idea? Who do you represent and where do you come from?

Dr Debeljak—We are a centre within a faculty. Within the law faculty at Monash University, there are 10 or so academics that focus their work on human rights. So we have come together to create a centre to further the education and research of human rights. Technically, we are not an independent legal entity. We contract, if you like, through Monash University as a corporate entity but within the law faculty at Monash we sit as a group of academics that have got a human rights focus.

Senator BOSWELL—And Castan was the QC that led the Mabo case?

Dr Debeljak—Yes, so the centre was named in his honour.

Senator BRANDIS—Dr Debeljak, you said that it is not perfectly clear to you what the purpose of the bill is. Isn't the purpose essentially to be gleaned from the long title:

A Bill for an Act to establish a Parliamentary Joint Committee on Human Rights …

That is what it is meant to do. That is its core purpose, isn't it?

Dr Debeljak—I would prefer to see an objective section put into the bill to describe what that committee is intended to do.

Senator BRANDIS—Indeed. It seems to me, if I may say so, implicit in your submission that you think that this bill either is or, if it is not, ought to be a source of rights, a rights-conferring legislative instrument. Is that right?

Dr Debeljak—I do not think that the law does that at all, actually.

Senator BRANDIS—Do you think it ought to?

Dr Debeljak—I do not think this law ought to.

Senator BRANDIS—You do not. Okay, good.

Dr Debeljak—It does not and it simply cannot. My submission to the previous consultation on the broader issues of human rights did support a full instrument, but I think that has been clearly rejected. I hope this bill is a first step towards something more solid in this country, but I do not think this bill does achieve or ought to achieve that because, frankly, it would be a backdoor way of achieving it.

Senator BRANDIS—Indeed. I will tell you the genesis of the bill. The genesis of the bill is the adoption by the Labor government of coalition policy to establish a parliamentary human rights committee. That was the position the coalition took to Father Brennan's National Human Rights Consultation. It was not the position recommended in Father Brennan's report, but it was Father Brennan's principal recommendation. A bill of rights having been rejected by the government, the government then adopted the coalition's position by and large.

So that is where it comes from, but I am left wondering about two things. First of all, why do we need statements of compatibility? Surely there is a presumption that a government is not going to introduce legislation into the parliament that violates or significantly impinges on human rights? Were it to do so, one would expect that that would be explained and justified in the second reading speech. I am unpersuaded as to the need for statements of compatibility which, were they to be prepared, inevitably are going to be largely self-serving anyway. What would be lost if part 3 were simply dropped from the bill—the statements of compatibility provision?

Dr Debeljak—I will start with the earlier part of your question. I think there is great value in statements of compatibility in numerous areas. Firstly, in terms of early policy formation and legislative formation, the requirement to have a statement of compatibility makes sure that at the very early stages of policy formulation people within government are thinking of human rights. They are a core part of the matrix—

Senator BRANDIS—I know you come from the civil liberties lobby. No doubt you are a good lawyer and you are a bit cynical about the political process, but they really are already.

Dr Debeljak—That is one point which I would like to make on the record: it is going to be an obligation to make a statement of compatibility so that those rights are considered up-front fully at the beginning rather than being a tack-on at the end. Secondly, it adds to the transparency and accountability of government. If the executive has to say something is incompatible and explain the reasons why it is incompatible, that strengthens our democracy. If the executive is out there saying, 'Bill X will violate rights, but the countervailing objective, interest or concern outweighs that violation of human rights,' then individuals would understand that reasoning and at the ballot box they could decide whether they like it or they do not like it.

Senator BRANDIS—If I may say so, that is a perfectly sensible reason. As I say, it happens already. Let me give you a very good case in point. The legislation that supported the Northern Territory intervention in 2007 was declared by the then government to attenuate certain rights, and the rationale for the attenuation of those rights in service of what was regarded, I think correctly, as broader issues of social utility and social wellbeing was declared upfront. I just do not see why you are suspicious that that would not happen, as it has happened, for example, in that instance.

Dr Debeljak—That case was a case where there had to be an exemption made to the Racial Discrimination Act, so that was quite an extreme case, and I do not think the government could actually get around making those statements, both legislatively and in the parliament. There are many other areas of the law where human rights can be tread upon without intention.

Senator BRANDIS—That is why we are having a parliamentary committee, so that members of parliament who are astute to protect these rights can say to the relevant official, 'What about this and this?' You need a statement of compatibility—

Dr Debeljak—The way I conceive of statements of compatibility is a sort of circular dialogue between the executive and the parliament, so if the executive is the one forming the policy that the legislation is based upon and they have thought about what rights are involved, what the scope of those rights are and how they are going to justify any limits, surely it would help the parliamentary committee, in assessing the piece of legislation, to have before them the reasoning behind legislation from the very individuals that created the legislation. I do not see that there is a problem in adding a formalised layer of conversation between the executive and the parliament.

Senator BRANDIS—At least thankfully we are talking about a dialogue between the parliament and the executive, not the parliament and the judiciary. Look, I think that is perfectly sensible, if I may say so, with respect, but I also think it is unnecessary, because for all practical purposes where it matters it already happens and the real work, where the rubber hits the road on this issue, is going to be the exploration of these issues by the parliamentary committee itself. Having what I apprehend would be a rubber-stamping statement of compatibility is not going to advance the argument anywhere. These are government bills: the government is not going to be its own best critic on its own legislation. The government's best critic is going to be the parliament.

Dr Debeljak—One point I could put to you for when you are in government is that one other function that statements of compatibility serve is to actually set the boundaries. So being the first body, if you like, to establish the boundaries of the issue is a useful task. It can be of use to the executive as well as something that keeps them in tow.

Senator BRANDIS—I understand that you want to create a rights-respecting culture among legislative draftsmen and the executive government more generally. That is fair enough; so do I. But isn't the fact that these bills are going to be scrutinised by a parliamentary committee a much more powerful sanction or warning to those putting them before the parliament to be human rights respecting than some formulaic statement of compliance?

Dr Debeljak—I think that the parliamentary committee process will be strengthened if they have something formulated by the executive in relation to the assessment of human rights.

Senator TROOD—On this point, I take it from your remarks that you are not saying that a statement of compliance should be determinative, that the committee would nevertheless be enabled to go beyond anything contained in the statement.

Dr Debeljak—Absolutely.

Senator TROOD—So it reinforces the point about the committee's powers and whether or not anything that the executive might say to it should in fact be a foundation for its agenda.

Dr Debeljak—If you look at the way these interactions have occurred in the UK, for instance, I do not think there has been a statement of incompatibility yet.

Senator BRANDIS—Isn't that my point? They have had their bill for more than 10 years.

Dr Debeljak—The Victorian charter has improved that process, so if you would like me to talk about that issue I can, but for the moment—

Senator BRANDIS—The centrality of the statements of compatibility to the process.

Senator TROOD—The point I was making is that it is not definitive, obviously.

Dr Debeljak—Correct. And the UK parliament have actually gone beyond the issues that have been identified within the statements of compatibility and have come to conclusions on the compatibility, the legitimacy of the justifications et cetera and they have managed to secure greater safeguards, if you like, on particular laws and change various laws.

Senator TROOD—It seems to me to be making Senator Brandis's point.

Senator McGAURAN—It is my understanding of statements of compatibility that, given that they are written into the explanatory memorandum, which is a weighty document in the parliament when passing legislation, it would either take on a legal status or certainly have high legal influence. Therefore, if you get an incompatibility, what is your understanding then of being able to challenge on legal grounds that legislation either in Australian courts or beyond Australian courts in international forums? Does it give it that right?

Dr Debeljak—Within the law, legally under the bill the statements of compatibility, the joint parliamentary committee reports et cetera have no standing or influence legally. Where they might have an influence is in relation to parliamentary intention. If there is a parliamentary intention to enact a bill that is incompatible, that will bear weight with the judiciary when they are interpreting that legislation. On the flipside: if there is a statement of compatibility, that ought to sway the courts in their interpretation when they are considering what the parliamentary intention was behind a particular law. That is not to say that compatibility or incompatibility is going to dictate the outcome within the judiciary. It is one factor within a broader statutory interpretation matrix that can be considered.

Senator BRANDIS—I do not mean to be ignoring you Dr McBeth. My attention has been lit upon Dr Debeljak.

Dr McBeth—She is the expert on compatibility. I am quite happy for you to address her on this.

Senator BRANDIS—I think Senator McGauran is onto a good point. If you look at the consequential provisions bill, item 4 in schedule 1 inserts a new provision into the Legislative Instruments Act of 2003 which gives particular status to statements of compatibility. I must confess I have not looked at the Legislative Instruments Act. Can you explain to the committee what the legal effect of item 4 of the consequential provisions bill is?

Dr Debeljak—I cannot comment on that.

Senator BRANDIS—Would you take that on notice for us please and give us a written submission about that?

Dr Debeljak—Yes.

Senator BRANDIS—Thank you.

CHAIR—I want to go to the issue of noncompatibility. In my time on the Scrutiny of Bills Committee—and a number of us here have served on that committee—there were many times when the Scrutiny of Bills Committee alerted ministers to noncompatibility with the four objectives of that committee. There were many times when there were certainly improvements made and many times when the report of the Scrutiny of Bills Committee was ignored. Unfortunately, the same may well happen here if the human rights committee actually says this bill does not comply with a particular instrument or a particular right, it is just advice to the parliament essentially. I am assuming it will report to parliament, as the Scrutiny of Bills Committee does, although that is unclear in the legislation. Again, it is advice to parliament. That issue that is raised about compatibility or incompatibility will be picked up in debate or in amendments I assume, similar to the Scrutiny of Bills Committee and similar to this committee even. Is that the way you would see it operating?

Dr Debeljak—Correct. This bill is not changing our democratic processes, if you like. All it does is put a flashlight on the human rights issues within the democratic process. There is nothing in this bill that is taking out of the majoritarian process any subject matter or any human right et cetera. It is not like a constitutional bill of rights which essentially says that you cannot legislate on topics X, Y and Z. This is just saying that, if you are going to legislate on topics X, Y and Z, we want a flashlight put onto them. We want everyone to be aware that that is what is being legislated, to debate and decide upon the issue, taking human rights into account, and to let the democratic process play out. If the electors do not like it, the electors can vote you out at the election.

Senator BRANDIS—Dr Debeljak, if I may say so, the way you have characterised the effect of this bill is, from my point of view, exactly right. That is exactly what the coalition wanted, not something that tied the hands of the legislature, not something that was an additional, as it were, quality-control measure within the legislative process in relation to human rights issues. Can I come to this rather thorny issue of definition. The draughtsman of the bill has decided to define human rights in terms of seven international instruments. In doing so he or she has done a number of things. Firstly, they have disregarded existing Australian human rights that do not find as their source those international instruments. Secondly, he or she has disregarded what Justice Spiegelman in his McPherson lecture called the 'Common law bill of rights'. Thirdly, and I think Mr Cowdrey agreed with me about this, they have attracted not just those instruments but all of the international jurisprudence surrounding those instruments by force of this definition.

I must say, Dr Debeljak and Dr McBeth, that I am very sceptical of the wholesale invocation of the international jurisprudence surrounding these instruments by this bill. I am more than sceptical of it because, given that the purpose of the bill is to set up a parliamentary committee not to make Australia compliant with what you characterise as international human rights obligations, I just do not think that is the right way to go about that—much more modest aspiration that I have for the bill. Secondly, we disregard all of the existing established Australian domestic human rights. I cannot see why we would omit that. I know that is a very long prologue to a question but perhaps I could invite you to explain why it is that the human rights definition should be approached in the way in which this bill approaches it, with the limitations I have identified.

Senator TROOD—Can I just add, Dr McBeth, that in your submission you invoke the need to pay attention to international jurisprudence, but I do not see anywhere in your submission where you invoke the need to pay attention to Australian jurisprudence.

Dr McBeth—I will address Senator Brandis's question before I get to Senator Trood's related question. I mentioned in my opening remarks that the centre was interpreting this bill as a way of giving some small measure of effect to international obligations that Australia already has. So when Australia ratifies these international treaties Australia assumes obligations, which include making Australia's legislation and administrative practices consistent with these international legal obligations.

Senator BRANDIS—And, as you know, Dr McBeth, those obligations are assumed by the executive government; they are not legislated for by the parliament.

Dr McBeth—Indeed. But part of the obligation assumed is for the executive to do what is necessary within the constitutional mechanisms of each state—and, of course, Australia has its own mechanisms and each other state has slightly different mechanisms from one state to another—to do whatever is necessary within Australia's constitutional confines to bring Australia's laws and administrative practices into conformity with those international legal obligations. If looked at it in that light, it makes sense to define human rights in terms of those seven treaties because they are seven treaties to which Australia is a party. That does not mean that the existing human rights that are sourced elsewhere are not important. It does not mean that—

Senator BRANDIS—That is not what the bill says.

Dr Debeljak—The simple fix for the bill would be to add a clause, a savings provision, that says 'this definition of human rights', or you could make the definition inclusive, for starters: 'Human rights includes'—

Senator TROOD—But the bill is very specific. It says 'seven international instruments'. That is what it concentrates our attention upon.

Dr Debeljak—And the bill could be amended to make that an inclusive definition that also included a savings provision that simply indicates that pre-existing rights within Australian domestic law, be they common law, statutory based or constitutional based, are not excluded.

Senator BRANDIS—Why would it be a savings provision? That sounds almost grudging. You might not have meant it to sound like that, but why don't we primarily define human rights in relation to existing Australian domestic law and have the international instruments, if at all, as a subsidiary source of human rights definition?

Dr Debeljak—I did not mean to denigrate the Australian rights in calling it a savings provision. That is just my shorthand way of saying it. It would not bother me if the Australian rights were referred first, second, third or fourth. But the issue that I guess Adam and I are both getting at is: within the Australian domestic system we do not have a comprehensive protection of human rights, and we think—

Senator BRANDIS—Well, we have a piecemeal protection of human rights that seems to by and large cover the field.

Dr Debeljak—'By and large cover the field'—that is interesting. I would disagree with that.

Senator BRANDIS—I do not want to re-argue the bill of rights argument at this committee.

Dr Debeljak—If you consider the UK position, and our Australian law is based on the UK, for many years they relied on their statutory protection and their common-law protection. After around 50 years of external review by the European court of how the UK's common-law rights and statutory rights were behaving, the UK decided that it was time to introduce a broader, more comprehensive list of rights into the domestic regime. So I find it quite frustrating when people speak about piecemeal protection being as effective as comprehensive protection, because I just do not think it is.

Senator BRANDIS—That is a perfectly proper, legitimate point of view. I think—if I may say so, with respect—it rather undervalues the accumulation of rights through both the common law and statutory protection, going back literally centuries. Let me test an idea on you both, please. I am well familiar with and I have grappled in one way or another for many, many years with this issue of: do you list rights and, if you list them, do you limit them by definition and by exclusion and so on? Couldn't we approach this by talking about certain human rights principles, so that it is not actually a list—or, if it were a list, a list expressed in the most generic possible way? Let me give you an example. One of the human rights principles might be the presumption against retrospective legislation. That in fact is one of the principles to which the Senate, in the Senate order establishing the Senate Standing Committee on Regulations and Ordinances, requires that committee to have regard. If the parliament were to legislate for, for example, retrospective taxation, as it has done on occasions in Australian history, then that, certainly according to most people's way of thinking, would be a violation of a kind of property right, which would need to be justified. And that is exactly the sort of thing

that I think this parliamentary committee ought to be concerned with. Now, if we were to establish very generic scrutiny principles rather than invoke international instruments or even attempt a—

Senator Boswell interjecting—

Senator BRANDIS—I am sorry, Senator Boswell?

Senator BOSWELL—All right.

Senator BRANDIS—Wouldn't that be an adequate way of going about this task, allowing for the fact that you have established this parliamentary committee? The members of the parliamentary committee are there to test legislation from a human rights point of view. They will have different views about what those human rights might be. Some might think they should not extend to the rights of the unborn; others might vigorously dispute that proposition. You will never get a consensus on what all the rights are, but couldn't you get consensus on very broad scrutiny principles?

Dr McBeth—The Australian government, over successive governments, has come to a decided view on what those principles ought to be, by ratifying international instruments. So our view is that this bill seeks to go some way towards correcting Australia's 34 or so years of nonconformity with its obligations, to bring Australia's laws into conformity with Australia's international obligations.

Senator BRANDIS—I think, with respect, Dr McBeth, that if we want to enact, as domestic law, one of these seven instruments then the government of the day should put a bill before the parliament and see what the parliament thinks of it. That is not the purpose of this bill, you accept?

Dr McBeth—Indeed, Senator Brandis, but the point is not that this bill is seeking to enact each of these international instruments but to hold them up as the standard against which Australian legislation shall be measured, and the committee can comment as to whether the legislation complies or does not comply and the extent of that noncompliance.

Senator BRANDIS—Let me finish on this. But you know as well as I do, Dr McBeth, that—as a result of the Teoh case and a couple of other decisions following the Teoh case—if we were to pass this bill in this form, it would be well open to argue that there had been a Teoh foundation, at least in administrative practice, for giving effect to each of those instruments without the parliament actually having enacted them.

Dr McBeth—To be honest, Senator Brandis, I am not sure that this bill, if enacted, would make any difference to that. Once the treaty has been ratified, Teoh operates. I do not see that this bill makes a difference to that.

CHAIR—Senator Brandis, you need to finish because other senators have questions.

Senator BRANDIS—I will. But let me make it very plain to you as an advocate for expanding the reach of this bill that this is not going to get through the parliament, as the parliament is currently constituted, if it is reasonably seen by more conservative members of the parliament as a backdoor enactment of these treaties. That is what they are concerned about and I think they are entitled to be concerned, which is why I think that the way in which the draughtsman has gone about this is completely wrong.

Dr Debeljak—Can I make one comment about whether we do or do not define them. One of the major criticisms of a lot of people about human rights is that they are too vague. So to turn around and say that we ought not define our human rights against international treaties that Australia has ratified—and which we have a plethora of jurisprudence about, so we know what they actually approximately mean, and we know what sorts of justifications are valid in terms of limiting them—and to reject all that and say we want some other vague principles just does not sit well with me.

CHAIR—Senator Pratt, it is your turn for questions.

Senator PRATT—I want to return to, as we have already been discussing, the definition of human rights that are included, and to pick up on what Senator Brandis has asked and the discussion we have had around the inclusion of other rights. This is a human rights parliamentary scrutiny bill. I would imagine, if you were to draw on other rights, that they would have to be rights that were consistent with the definition of what a human right is and that, therefore, they would fall under the umbrella, I suppose, of these other instruments anyway, and there would not necessarily be a need to include them explicitly—otherwise we are introducing other rights that are not human rights, I suggest. What would your comment on that be?

Dr McBeth—I take it you are asking whether it is necessary, the counterquestion to Senator Brandis before—in other words, this is an adequate list. Is that what you are asking?

Senator PRATT—Yes.

Dr McBeth—I think it is an adequate list. I do not object to expanding it, but I do not think it necessary.

Senator PRATT—If you were to expand it, maintaining that list of rights within the definition of human rights, what bits of law in Australia would you draw on, as opposed to a right to not be unfairly taxed, which I would not consider a human right?

Dr McBeth—That is the reason that the international treaties are such a good reference point. There is of course a long philosophical debate within human rights discourse about where human rights come from and the notion of inherent human dignity, and all people being born with inherent human rights and so on. To reopen that debate and start talking about rights against retrospective taxation and whether we expand the list or not is a separate question. By all means pass separate legislation to enact that principle if that is the will of the parliament, but I doubt whether it is a human right. Certainly prohibition on retrospective criminal law is and that is included in the ICCPR.

Senator BRANDIS—We doubt whether that is a human right. I have no doubt that that is a human right. Doesn't that illustrate the contestability of the issue?

CHAIR—Dr McBeth, Senator Pratt has the call.

Senator PRATT—One of the other recommendations is to ensure that the mandate for the work of the Human Rights Commission is consistent with the work of this committee. I agree that that is a good suggestion. However, the Human Rights Commission is able to pick up on human rights in the broadest sense. At the moment, whilst the definition of human rights within this bill picks up most instruments does not pick them all up. I am interested in how we align those two definitions within the Human Rights Commission and the work of this committee?

Dr McBeth—My understanding is that the treaties which are specifically annexed to the schedule of the HREOC act is narrower than this list. That recommendation was to, in fact, make it broader to be consistent with this list. This list has seven treaties in it. I forget how many are in the HREOC act but it is fewer than that. It was an aligning recommendation.

Senator PRATT—Thank you.

CHAIR—Dr McBeth and Dr Debeljak, thank you for your time this morning and for your submission. We certainly appreciate the work that the Castan centre puts into assisting us with our inquiries.

Proceedings suspended from 10.28 am to 10.44 am

GARDINER, Mr Jamie, Vice-President, Liberty Victoria

ZIFCAK, Professor Spencer, Vice-President, Liberty Victoria

CHAIR—Welcome and thank you for accepting our invitation to assist us with this inquiry. We have your submission, which we have numbered 12. Just before I ask you to make an opening statement, do you have any changes or alterations you need to make to it?

Prof. Zifcak—No, we are happy with the submission as it stands.

CHAIR—You can give us an opening statement and then we will go to questions.

Prof. Zifcak—Thank you for the invitation to make further submissions to you today. Liberty Victoria applauds the introduction of this legislation. The statements we make this morning are designed to indicate why we support the legislation and to indicate how the joint parliamentary committee that is proposed might work most effectively. We believe that there are five criteria that should be taken into consideration for the effective operation of the joint committee. The five criteria are: there should be appropriate terms of reference; the committee should, as far as possible, work in a bipartisan fashion; the committee should successfully inform parliamentary deliberation; it should be supported by a high level of expertise in relation to human rights; and it should encourage the early and effective preparation of statements of compatibility.

Let me deal with each of those in turn very briefly. The first criterion was that the committee should have appropriate terms of reference. In this context we applaud the term which provides that the committee can scrutinise not just legislation passed after the legislation is in existence but also review all existing legislation. We agree, broadly speaking, with the definition of human rights in the legislation. However, we think that this ought to be an inclusive rather than an exclusive definition. In other words, the definition of human rights would include the rights in the seven human rights treaties but not exclude others that may also be recognised legitimately as fundamental human rights. We believe the committee should have the power to initiate own-motion inquiries and not simply be reliant on inquiries referred to it by the Attorney-General. We believe that the committee should have the power to review the conclusions of international bodies—in particular, for example, the concluding observations on Australia's human rights record by the UN human rights treaty bodies. We think that the terms of reference should also allow the committee to extend its inquiries to major policy documents and their compatibility with human rights—for example, documents such as white and green papers.

In relation to bipartisanship, we are of the view that the committee, if it is going to be successful, should as far as possible operate on a bipartisan basis. We deal with that issue in some detail in our submission. At one stage in my past career I was the director of research for the legal and constitutional committee of the parliament of Victoria which, at that time, had a chair that was taken from the opposition party in the parliament and, with a chair from the opposition party, the degree of bipartisanship that was promoted was enormously destructive. There were occasionally divided votes, but the divided votes were normally on an 11-1 or a 10-2 basis rather than being along straight party lines.

The third criterion is that the committee should properly inform parliamentary deliberation. It is crucial, therefore, that the committee adopt procedures and have sufficient resources to ensure that reports are prepared prior to the major debates in parliament on legislation rather than, as it is too often the case with parliamentary committee reporting, well after the legislation has been considered and passed by the parliament. If reports are only prepared after parliamentary debates, of course their reports will have no influence on legislation and that may cause difficulty down the track, if and when the legislation is challenged in the courts.

The fourth criterion is that the committee should have sufficient expertise to undertake its inquiries. This requires a high level of staff expertise. We think that the committee should be provided with a senior expert adviser, as scrutiny-of-legislation committees often are—someone, perhaps, who is a professor of law with some expertise in human rights. But then, of course, I would say that, because I am one such person. The staff should also preferably have some legal qualifications. The committee should be provided with sufficient research staff to undertake the tasks that are required and sufficient staff, as I have said before, to ensure that reports are put into the parliamentary arena in good time for debate in both houses.

The committee should work on an appropriate methodology. This is a complex question but, to put it very simply, the question that the committee ought to be asking, in our view, is not whether legislation is more or less compatible with human rights but a much more specific question which might be framed in these terms: can the legislation be interpreted, as far as possible, consistently with the human rights set down?

Finally in relation to the point about expertise, we believe that the committee ought to be able to convene public hearings on significant pieces of legislation, receive submissions and obtain appropriate testimony so that its deliberations will be informed by that open hearing process as and when appropriate in important cases, and not only by the committee's own consideration of the political, legal and social issues in question.

Finally, we believe that statements of compatibility are an important initiative. We think that the statements should be prepared and submitted to the parliament at the earliest appropriate time—that is, at the time that a bill has its second reading. The statement, as in New Zealand, should be accompanied by sufficient reasons for the government's view as to whether the legislation is compatible or incompatible with the human rights as set down in the definition. Preferably, as in New Zealand, a statement of compatibility ought to be accompanied by the legal advice provided to the government on the basis of which the statement as to compatibility or incompatibility is made.

Finally—again in relation to statements of compatibility—we think that a draft statement, at the very least, should be prepared at the time of the submission of draft legislation to the cabinet, thus providing the cabinet, in effect, with a human rights impact statement. That, in turn, should have the effect of sensitising not just the cabinet but government departments preparing policy and legislation to the human rights criteria in relation to which the joint committee will be assessing legislation.

CHAIR—Thank you. Mr Gardiner, do you want to add anything to that?

Mr Gardiner—No. I am happy to answer questions and elaborate on some of those points, but I have not prepared specific opening remarks, because Spencer has done that.

Senator PRATT—In your remarks and your submission to us, you have talked about the need for the committee to have powers to look at all acts and not just legislation that is before the parliament. As you are a watchdog organisation that inquires into and advocates on a wide range of human rights issues, I want to go through the significance of that with you, because to my mind not being able to look at the existing law makes a bit of a nonsense of going through the process for new laws, notwithstanding the fact that, with the best of intentions, parliamentary committees do not always pick up every flaw in a law as it proceeds through committee processes. Could you comment on that for me.

Prof. Zifcak—As I read the legislation, the committee is empowered to scrutinise bills that are coming before the parliament and through that process to provide reports to inform the deliberations of the parliament, but it is also empowered to scrutinise legislation that is already on the statute books. That, it seems to me, is a very good thing.

Senator PRATT—You have remarked on the instruments that are included within the definitions including the definition of 'human rights' being expanded to include those human rights that are recognised in customary international law. Could you explain what the legislation should look like in order to achieve that goal?

Prof. Zifcak—The seven human rights treaties cover a wide range of human rights that are recognised broadly speaking by the international community. Customary international law is law that is developed on that basis of state practice and which is accepted by the community of nations as being imperative. In my submission I have listed a number of the rights that are included in customary international law and for the sake of completeness it seems to me that those rights ought also to be considered as part of the joint committee's scrutiny. Having said that, from the list that you will see in our submission most of them are already included in the human rights treaties themselves, but just for the sake of completeness we have said let us look at the fundamental rights that are recognised as pre-emptory norms of international law.

Senator PRATT—What process do you use for working out which of that customary international law relates to human rights.

Prof. Zifcak—Customary international law is interesting because in the end it is law firstly that is recognised in the practice of states and secondly that is recognised by the international legal community as law that is binding on states. If we are looking for the content of international law there are a series of very fine textbooks which consider this issue and it is not difficult from those texts to divine which particular rights are included in that definition.

Senator PRATT—Okay. Lastly, if we were to go through the same exercise for our Australian law, what would that look like? I think you probably heard the discussion that we had with the previous witnesses about drawing on which Australian laws you might include in that.

Prof. Zifcak—I think that in my opening remarks I indicated that we would favour an inclusive definition so that human rights would include those rights specified in the seven international human rights treaties. It would also seem entirely proper and logical to include those rights contained in the Victorian Charter of Human Rights and Responsibilities and the ACT charter and in certain circumstances the parliament may also wish to consider rights recognised at common law. For all of those reasons an inclusive definition would seem to us appropriate.

Senator PRATT—How do we know which rights in common law fall within human rights versus other rights, if you like?

Prof. Zifcak—Again, these are matters that I canvass extensively in legal texts. It is not terribly difficult to work out fundamental common law rights and indeed in the process of statutory interpretation that we have in Australia at the moment it is not infrequently the case that the courts themselves have to refer to fundamental common law rights in determining the meaning of legislation where there is an ambiguity in it.

Senator TROOD—Do I take it then that you are not comfortable with the definition of rights as included in clause 3 because it only refers to international instruments?

Prof. Zifcak—Yes. For precisely the reasons that Senator Brandis was talking about earlier, I think that the definition would read better if it said that human rights 'include the rights and freedoms recognised and declared by the following international instruments' rather than 'human rights means the rights and freedoms recognised or declared by the following international instruments'.

Senator TROOD—I can see that that helps you to some extent but it leaves unsaid the range of rights that are actually included.

Prof. Zifcak—Sure.

Senator TROOD—So the question then is: how do you get to that issue?

Mr Gardiner—Senator, perhaps I could chip in and say a couple of words on that, and it goes to Senator Pratt's question too. The scope of the term 'human rights' is broad, and the role of each of the human rights treaties and, for that matter, the Victorian charter and similar bodies, is to try to bring some order to that. But that order does not exclude the things that are not mentioned in those lists. The scope of human rights at international law—and where of course we have signed up to them—which has obligations on Australia under international law, is very broad. We can see, as we say in our submission, that the practical reasons that draftspeople might have put a closed definition is because then you end up with a specific countable number of paragraphs and that is that. However of course as we know, courts deal with everything; it is never that; it always has to be explicated.

But it seems to us that the definition should be inclusive, it should be open, but the question of how you decide whether something is or is not a human right is going to be not only from the textbooks and the existing jurisprudence. It is also a matter of common sense and community understanding of members of the committee and members of the parliament. And also very importantly I would submit, as Spencer mentioned before, providing that the committee has the power and uses the power to invite submissions from the public then the issue of which human rights this particular bill or instrument that is being looked at by the committee engages human rights can be specified. Every piece of legislation, I would suggest, is likely to impinge on some human rights, because it is inevitable. But the question is: which ones are relevant; which ones are important? The statement of compatibility, done properly and professionally, will aim to identify the human rights issues that arise in any particular bill or other instrument, and that it is proper. The public, if submissions are invited early, as they should be and it should be a power of the committee, will also raise things that matter. Then it is for the committee of course in the exercise of its parliamentary responsibilities to consider the issues that matter, to put priorities, and to report to parliament appropriately. The field of human rights is open, but fairly well defined. As Spencer said, there are standard textbooks, some of them originating in this city, which give a very clear delineation to the field, broad though it is, but what matters in any particular bill is surely a matter for members of the committee informed by their experts and by the public.

Senator TROOD—I think we are probably at one on that. The challenge we have is deciding by reference to which rights the committee should undertake its deliberations, and that is the issue we are grappling with. The bill is very clear and the design is very clear. The bill says that the 'committee shall have regard to these international instruments'. It is clear, I think, from all of the witnesses that have been before us this morning that there is a view that that is an inadequate basis of definition.

Prof. Zifcak—I think that is right. In most human rights acts—in New Zealand, the UK and so on—there is usually a provision which says, 'The inclusion of a list of human rights in this legislation does not preclude the later inclusion or consideration of rights that are not on the list.' That is appropriate; it gives the legislation a measure of flexibility. It is not much flexibility because we have had 60 years of experience of international conventions of human rights, most countries in the Western world have comprehensive human rights legislation, all of those international treaties have extensive jurisprudence and all of the countries that have adopted comprehensive human rights legislation have extensive jurisprudence, so there is not much that is missing. However, it is useful for us to say, just as a saving clause: 'It may be that some new right, over time, becomes recognised.' And on that basis it may be appropriate for a joint committee to say, 'Here is something that is really important and we believe that we ought to have a look at it.'

However, having said that, ultimately when we are talking about compatibility with human rights or non-compatibility with human rights we are asking a legal question. We are not asking a political question, we are asking a legal question. For that reason the definition as far as possible has to be one that has some legal meaning. The best way of attaching legal meaning to the definition is to define human rights in the terms that they are defined in the international human rights treaties to which Australia is a party and which governments of all complexions have now ratified.

Senator BRANDIS—Professor Zifcak, it is very revealing that, to you, asking a question about human rights is asking a legal question. But this is a parliamentary committee we are talking about. For members of parliament, when you ask a question about human rights it is not a legal question, it is a political question and a moral question about which people of goodwill might have completely different views. Do you accept that?

Prof. Zifcak—There is a moral underlay to an acknowledgement of any and every fundamental human right. You do not define something as a human right unless you adopt a moral position that this is fundamental for the preservation of human dignity. So of course that is right. But you cannot have a situation where a parliamentary committee just says, 'Politically speaking, this legislation looks more or less as if it is consistent, or maybe it is consistent, maybe it is not consistent, with a human right contained in, for example, the International Covenant on Civil and Political Rights.' That would be a travesty of the process. What one has to do is look at the human rights contained in the covenant, look at the relevant legislation and make an informed judgment, which in the end, for the most part, is a legal judgment, about the consistency or inconsistency.

Senator BRANDIS—The members of the committee may not be lawyers.

Prof. Zifcak—That is right.

Senator BRANDIS—Some of them may be, but there is no necessary reason why any of them will be. It seems to me, with all due respect, Professor Zifcak, that your model is essentially a juridical model—you are expecting this parliamentary committee to act as if it were a court and to apply settled legal principles to its deliberations. The point I am putting to you is that is the very thing it should not be doing. The very thing it should be doing is, from the point of view of each of the members of parliament from wherever they may lie on the political spectrum, applying their standards of what they regard as a human right to a bill before the parliament.

Prof. Zifcak—They cannot do that, Senator. If you are saying that the human rights with which you are primarily concerned are those contained in international treaties—

Senator BRANDIS—We are not necessarily saying that, by the way.

Prof. Zifcak—We can move on to that as a separate question. For the time being, that is what is in the definition. We agree with you that the definition ought to be inclusive, so I am perfectly comfortable with that. But if you are asking, 'Is legislation compatible with human rights contained in an international human rights treaty to which Australia is a party, which Australia has ratified and consequently—

Senator BRANDIS—And which the parliament has not enacted.

Prof. Zifcak—which it has undertaken to observe?' you cannot have a parliamentary committee saying, 'We think that this piece of legislation is or is not compatible because we disagree with it or we agree with it politically.' It does not work that way.

Senator BRANDIS—But that is what parliament does. You seem to be excluding a role for parliament from this process. You seem to be saying, 'Because the executive government has decided to ratify a treaty and because courts, in particular international courts, have interpreted that treaty in a given way and therefore

developed a body of jurisprudence, there is no work for the parliament to do other than advise'—as you recommend, by competent lawyers—'that the jurisprudence in relation to this treaty is this; therefore, the legislation is compatible or incompatible.' Is that essentially the way in which you envisage this process would work?

Prof. Zifcak—No. It is a two-stage process. The first stage is to look at the legislation and determine whether or not it looks, on its face, to be consistent or inconsistent with a human rights contained international treaty—

Senator BRANDIS—Just put a full stop after human rights.

Prof. Zifcak—Just a moment. And then, as in the Victorian charter, as in the ACT charter, as in the Canadian charter, as in the New Zealand legislation, there is a second question, which is, if legally speaking it looks as though there is an inconsistency between a human right as defined in an international treaty for the purposes of this legislation and the legislation that we are concerned with, in all of the circumstances can the limit on human rights that is contained here be justified, to use the legal terminology, in a manner that is demonstrably justified in a free and democratic society? That is a question, of course, that the parliamentary committee is going to deal with and nobody has an argument with it.

Senator BRANDIS—You accept, surely, Professor Zifcak, that human rights mean different things to different people. Don't you?

Prof. Zifcak—No, I accept that. No, we have got to start from the point of view of how human rights are defined in the international treaties because Australia has ratified them.

Senator BRANDIS—But that is not the point, Professor. The fact that Australia, or Australian governments, may have ratified certain human rights treaties—which, by and large, have not been enacted by the parliament—you seem to regard as essentially the end of the inquiry.

Prof. Zifcak—Not at all.

Senator BRANDIS—The point of this bill is to establish a parliamentary committee to look at legislation, in particular from the point of view of human rights.

Prof. Zifcak—Yes.

Senator BRANDIS—That raises the question: what do we mean by human rights?

Prof. Zifcak—Exactly.

Senator BRANDIS—And human rights can be defined in many different ways, or perhaps not at all, and the work of that committee could be undertaken by reference to international instruments—that is a rational way of doing it; it could be undertaken with no reference to international instruments but by reference to established domestic principles of human rights acknowledged within Australian law; or it could be undertaken with no definition of human rights at all other than the views of members of parliament as to what human rights consist of.

Prof. Zifcak—If we took the idea that the joint parliamentary committee was to determine the consistency or otherwise of legislation with human rights but provided no definition whatever of human rights, the exercise would, in my view, be entirely redundant.

Senator BRANDIS—Why is that?

Prof. Zifcak—Because we do not know what we are comparing the legislation with.

Senator BRANDIS—But you make little or no allowance for the opinions of the members of parliament who will be the members of the committee. You seem to be saying—

Prof. Zifcak—We are talking about human rights contained in the international human rights treaties and, let us add for the time being, fundamental human rights recognised within the common law. If we take that as our starting point, that is what the committee has to look at in determining whether or not legislation is consistent with human rights; otherwise, you have got no standard and, in my view, you have got no effective process.

Senator BRANDIS—What is wrong with omitting all reference to the international instruments and, instead, directing the committee's attention to the human rights recognised in existing Australian law?

Prof. Zifcak—It is very difficult to determine which human rights are currently recognised within Australian law. In fact, apart from those in the Constitution and perhaps a general understanding about anti-discrimination law, we do not go very much further in Australia.

CHAIR—Senator Hanson-Young has questions. We have other witnesses waiting.

Senator HANSON-YOUNG—I want to talk about the definition as well. My question is why certain international instruments have not been included that we have already signed and have agreed to, such as the refugee convention, the general understanding of the UN human rights declaration. Why do you think they have not been included? Have we simply cherry-picked based on politics, or is this about what we think is most likely to come through the parliament in terms of legislation that needs to be assessed in terms of compatibility?

Mr Gardiner—I think the first thing is that unfortunately the people to ask that question of is the executive government. Our view is that the current definition is a good first step but, as we have said in our submission and in this conversation, it should go further. The reference should be inclusive and ideally we would include all of the international human rights treaties that Australia has ratified and is bound by it and has promised the world to be bound by as well as the human rights jurisprudence of the Australian courts obviously and the human rights jurisprudence of the international system and of other nations, not just the House of Lords.

Within that the notion of human rights goes to the questions that Senator Brandis was asking. Liberty Victoria believes that Australia should comply with its international obligations, which have all been adopted by the executive government after consultation with the states and in recent years, under an admirable innovation of the government in which Senator Brandis served, by a parliamentary committee so that they have at least these days been laid before the parliament. Those are obligations binding on Australia in international law and if we are to be a nation that abides by our public agreements we ought to obey them. So that is a very good reason for the international obligations contained in the treaties we have ratified to be included here. That I think is the fundamental answer also to Senator Brandis's question.

Why choose those? Because we have promised the world that we will abide by them. There is also a good political reason and a good social reason. Australia will, in our very firmly held view, benefit enormously by the development of a human rights culture in which people respect each other's human rights and shoulder properly the responsibilities that involves. This is something that is beginning to be seen in Victoria with our charter of human rights and responsibilities, which is changing the culture of government and changing the culture of the interaction of citizens with government to look at how human rights can better improve the workings of government and the experience and enjoyment of dignity by people. The foundation of all of that is the legal rights that my colleague Professor Zifcak is referring to. They are well-defined.

There are more things. The questions of a parliamentary committee, as we have both said, are both to report to the parliament, to inform the parliamentary debate on what it is doing. The parliament can decide whether it wants to legislate in defiance of human rights obligations or not. There is no problem about that at the legal level. There is, of course, at the social level, but that is something for elections to deal with. The legal question does this bill—first of all, let us go back a bit. The point of having a statement of compatibility, which we argue should also include statements of incompatibility—that is, the executive government should fess up—

Senator HANSON-YOUNG—What do you mean by a statement of incompatibility?

Mr Gardiner—The executive government, when it is proposing a bill—or anyone when they are proposing an amendment—should be required, as this bill does require, to explain how the bill deals with and interacts with Australia's human rights obligations. If the government intends to do something that is inconsistent with human rights law, it should say so and it should say why, because I think the parliament ought to know that and the people ought to know that.

Senator BRANDIS—Mr Gardiner, you are colliding two concepts there: Australia's international obligations and human rights law. They are not the same thing.

Mr Gardiner—There is a close overlap.

Senator BRANDIS—They are not the same thing.

Mr Gardiner—They are not the same thing. But, if we look at the notion of legislation, a bill, being compatible with international human rights obligations, that is within the context of that broader notion. International human rights law looks at the interpretation of those obligations in their international context; that is for sure. The parliamentary committee should be informed by the executive government and by

submissions from the public. There is a legal question as to whether or not the provisions of the bill trench upon human rights and comply with, breach or are inconsistent with human rights, and there is of course a political question as members of parliament. Do we recommend that the parliament go with or not go with human rights?

Senator HANSON-YOUNG—What do we do about legislation that is already enacted that is inconsistent?

Mr Gardiner—The committee's role—by whatever process it chooses or the government puts to it or whatever—is to say, 'As a parliament let's conduct an inquiry into the human rights compatibility of XYZ act 1959,' and that will come because members of parliament or the public see a problem that needs to be investigated and dealt with, and then assess that act against the human rights standards that are enacted in this bill as it finally becomes legislation. That would result in a report to parliament, as committees already report, saying, 'These things ought to be done or ought not to do be done. This legislation ought to be amended.'

Senator HANSON-YOUNG—Just to confirm, you have said several times that the definition in the current draft is a good starting point. Would a better starting point be all of those international instruments that we have already agreed to?

Mr Gardiner—Yes.

Prof. Zifcak—That is the starting point we have at the moment. What we are saying is—

Mr Gardiner—It is only seven.

Prof. Zifcak—Only seven. But, as I have already indicated, we should not exclude the possibility that other matters may be recognised as human rights over time, and it seems logical to me to say that legislation ought to be measured against not just the human rights contained in those international treaties but also fundamental rights recognised by the common law. That seems entirely appropriate to me. When we are talking about human rights, we have to start somewhere; we cannot start nowhere. And, if we are going to start somewhere, where do we start?

Senator BRANDIS—Why don't you—

Prof. Zifcak—Just a moment. Where do we start? We start with the Universal Declaration of Human Rights—

Senator BRANDIS—That is not one of the listed instruments.

Prof. Zifcak—no, I know that—and, I was about to say, the two international covenants that are derived from the Universal Declaration of Human Rights: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Now, as far as I am concerned, if we are serious about human rights scrutiny, that is where we have to start from and that is where every other Western democracy starts from. Why we would adopt some curious, idiosyncratic system of vague human rights principles is absolutely beyond me, since it is well recognised that those human rights treaties rest at the core.

CHAIR—Professor Zifcak, I need you to finish up.

Senator BRANDIS—Chair, I think the members of the committee would like to pursue this.

CHAIR—Well, we cannot because we have a program and a time line, we have witnesses waiting and we have two other bills to deal with today. Professor Zifcak, thank you for your time today. Mr Gardiner, thank you for your time.

Senator BRANDIS—I would like to put a motion before the chair: I would like to extend this session by 20 minutes.

CHAIR—I am happy to have a private meeting if that is what you want, but we have an agreed program and we have other witnesses waiting. I would suggest as chair that you should put your questions on notice, Senator Brandis. You are a participating member of this committee, so be mindful of that if you want to have a private meeting, we can go ahead and do that. If you want to do that, we will do that.

Proceedings suspended from 11.25 am to 11.29 am

CHAIR—We will resume with questions from Senator Trood.

Senator TROOD—Your most recent remark, Professor Zifcak, was, as I understood it, that we needed a starting point. I acknowledge the importance of that, but what I am a bit surprised about is why, since you, as an Australian citizen, enjoy a wide range of human rights and civil liberties, almost none of which come from the international instruments—they are rights that Australians have enjoyed since the founding of the colonies,

virtually—you would not begin your inquiry about where rights come from in relation to this matter from your Australian rights rather than your international rights.

Prof. Zifcak—Because the Australian rights that are recognised presently in legislation and in the Constitution are a very limited range and they do not cover the full spectrum of fundamental human rights—human rights that are designed to protect and preserve fundamental human dignity, in the way that the Universal Declaration of Human Rights and its associated covenants, to which Australia is a party and which it has agreed to observe and implement within Australia and which are recognised as the foundation for the definition of human rights by every other Western democracy—they should not be the starting point from which we commence. Why should we start from a very limited range of rights—some of which are contained in common law, which can be overridden in statute at any point; some of which are contained in antidiscrimination legislation, fine; three that were drafted at the turn of the century and which do not take us very far? Why should we start from this sort of patchwork that we have in Australia, rather than from the informed development of the idea of fundamental human rights ever since the end of the Second World War?

Mr Gardiner—Can I cut in and add my little bit to that. One of the things that these discussions about human rights tend to forget is that the international human rights jurisprudence which has just developed over the last century, and particularly since 1948, in fact derives precisely from the history of human rights developed in England, in our legal system, as well as in other legal systems going back a thousand years. What has happened is that those bits and pieces have developed through the battles and debates of the last thousand years, some of which were written into our Constitution but most of which were assumed to already be part of our Constitution as part of the common law but in fact are not. That architecture of human rights informs and is perhaps the original skeleton of something that has developed considerably since then. We, our legal system, our British heritage, have given a substantial chunk of the foundations of the international human rights system, but it has been developed. In fact, it has been developed more outside Australia than in.

What we are talking about here is reconnecting us to the development of human rights with the additional wisdom of the rest of the world. It would be a mistake to think that there is a huge and irreconcilable difference between the limited fragments of human rights that we have put real flesh around in the Australian legal system before the human rights treaties and the human rights jurisprudence developed from that. It is no coincidence that an Australian was President of the General Assembly of the United Nations when the Universal Declaration of Human Rights was adopted. Australia was part of the process that led to the two human rights treaties that developed from that universal declaration. Australia signed and ratified those treaties under governments of both political persuasions. The human rights architecture is one that we contributed to both through our heritage and through our participation in the international order.

The question really is: should we go with the most developed and the clear obligations that we have accepted or should we backtrack to the original sketch plan? I think we should go with the developed system and work to connect better with that, to take that as our starting point for assessing what we are doing because that is the modern system. This is like, for instance: whether we should drive a modern car or go back to the T-Model Ford. The T-Model Ford was perfectly good for getting us slowly from A to B, but it is not where we should be now.

Senator TROOD—I will not press this because other members of the committee have questions and we clearly are running out of time. Thank you for your evidence.

Senator BRANDIS—Please keep your answers short, gentlemen, because you can see the constraints that are being imposed on the committee by the government. What is very striking to me is that you seem to regard human rights as a settled body of principles, not a contestable body of principles. Do you understand that, from the point of view of many participants in this debate, what is and isn't a human right is an intrinsically contestable issue. It is not a question of just looking it up in a text book, as you have said.

Mr Gardiner—I have not said that.

Senator BRANDIS—You did actually, Mr Gardiner.

Mr Gardiner—No. I talked about text books in the context of customary international law.

Senator BRANDIS—This is the point. Professor Zifcak, do you think that the right to privacy is a fundamental human right?

Prof. Zifcak—I do.

Senator BRANDIS—Do you, Mr Gardiner.

Mr Gardiner—Yes.

Senator BRANDIS—Do you believe that the right to be protected from retrospective laws is a fundamental human right?

Prof. Zifcak—Yes, I do. It is contained in international human rights treaties.

Senator BRANDIS—Do you, Mr Gardiner?

Mr Gardiner—Yes.

Senator BRANDIS—Do you believe that retrospective taxation is a violation of a fundamental human right?

Mr Gardiner—It may be.

Senator BRANDIS—It may be. Professor Zifcak?

Prof. Zifcak—I will answer that question but then I will make a comment.

Senator BRANDIS—No. Just answer my question, please, because we are against the time.

Prof. Zifcak—In a number of international human rights treaties, certainly the International Covenant on Civil and Political Rights, there is a right not to be tried and convicted on the basis of retrospective criminal legislation, and that is a branch of the non-retrospectivity rule that exists in international human rights treaties. Within the context of that broad right, retrospective taxation might also be regarded as a breach of fundamental human rights. But the question—

Senator BRANDIS—No. Look, that is a sufficiently responsive answer. It seems to me that, by both of you saying 'it may be', you concede the point that what are fundamental human rights to some people are not fundamental human rights to other people.

Prof. Zifcak—I do not concede that.

Senator BRANDIS—For example, I know that Senator Boswell thinks the rights of the unborn are fundamental human rights. Would you agree with that proposition?

Prof. Zifcak—I think that almost every human rights treaty recognises the right to life.

Senator BRANDIS—You are being a bit weaselly now, Professor Zifcak. I said 'the rights of the unborn'. Do you regard the rights of the unborn as human rights?

Prof. Zifcak—I regard the rights of the unborn as a fundamental human right. The question then remains as to whether any restriction on the rights of the unborn would be demonstrably justified in a free and democratic society, which is the second question to which I referred earlier on.

Senator BRANDIS—And it is a question, would you acknowledge, on which different men and women of goodwill could have different views?

Prof. Zifcak—On the second question certainly.

Senator BRANDIS—Indeed. So rather than regard this magical corpus of international human rights jurisprudence as having resolved all these contestable issues, surely this body of jurisprudence merely reflects the views of the majority in those courts seized of particular issues in particular cases but it cannot be regarded as foreclosing the right of members of parliament to bring their own consciences and moral and political beliefs to bear on the definitional issue of what is or isn't a human right.

Prof. Zifcak—No. There is a distinction to be drawn here. The question we are fundamentally debating is: how do we define human rights? What I am saying is—

Senator BRANDIS—That begs the question as to whether there is a second definition.

Prof. Zifcak—we have a clear starting point in relation to that, and I will not go back into that point. The next question is: once we define those human rights in general terms, in terms of the international treaty, of course there is a process of interpretation to be gone into. That is why I say that at least the first part of the question is essentially a legal question, and to assist us with that we have 60 years of international and comparative human rights jurisprudence.

Senator BRANDIS—But this is the business of the Australian parliament to decide—not to accept uncritically and as a given the interpretations by foreign courts of international instruments without bringing its own mind to bear on what it considers to be human rights.

Prof. Zifcak—The point is—and where we are differing is—that if we are scrutinising legislation for consistency with human rights we have to know first what the human rights are that we are—

Senator BRANDIS—No, we have to have a view about what human rights are, and different minds will have different opinions on that issue.

Prof. Zifcak—I do not agree with that because we have—

Senator BRANDIS—You do not agree that different minds will have different opinions about what are human rights?

Prof. Zifcak—Different people will have different views on the interpretation of human rights that are defined in the international treaties but, no, I do not agree with you that human rights are such a vague concept that one person might say, 'The human right to this is X,' and another person might say, 'The human right to this is Y,' because we are talking about human rights; we understand what they are. We understand—

Senator BRANDIS—No, we do not. We differ about what they are.

Prof. Zifcak—Well, are you saying to me that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have nothing to say about how we define fundamental human rights?

Senator BRANDIS—I did not say that at all. What I said is that men and women of goodwill will have different opinions about what human rights consist of. In the very instance that you gave, Mr Gardiner, when you said it was no accident that Australia was an international signatory to the UN declaration of human rights, that signature was affixed by a minister in a cabinet that nationalised private businesses. Was that a human rights compliant government?

CHAIR—Professor Zifcak, I am going to ask you to respond to that extremely briefly. We are well over the 10 minutes. In fact, I think we are now debating the legislation, which we will do in parliament. Unfortunately you cannot join us on the floor of parliament, but I imagine you will watch our contributions very carefully. So I ask you to respond, and then we absolutely need to finish.

Prof. Zifcak—Can I remind you very briefly that the Universal Declaration of Human Rights, which is the document from which every other human rights treaty has developed, and appropriately so, arose from the ashes of the Second World War and the grave human rights abuses that occurred during that time. That is important. Can I also say to you that the Universal Declaration of Human Rights, which is the foundation for what every country—every Western democracy, at least—counts as human rights, was agreed to, by consensus, by nations of every region, every culture and every religion across the globe in 1948. That is not a bad starting point, it seems to me.

CHAIR—Thank you very much, both of you, for your submission and your time this morning. I am sure that if there are other questions they can be and will be put on notice.

Prof. Zifcak—We would be very pleased to answer them.

[11.44 am]

COONEY, Mr Bernard Cornelius, Private capacity

CHAIR—It is my great privilege to welcome former Senator Barney Cooney to provide us with submissions today and acknowledge his pre-eminence before our committee. We are most honoured to have you, Senator Cooney, as a witness today.

Mr Cooney—I am full of admiration for this committee.

CHAIR—Senator Cooney, we have your submission No. 13 with us. We invite you to make an opening statement.

Mr Cooney—The first thing I want to say is: 'You should never change a winning game,' and the Scrutiny of Bills Committee is a winning game.

I am proudly Tasmanian born, but I have lived in Melbourne for a long, long while. On 8 March 1898, Isaac Isaacs, who represented Victoria at the convention, made the following statement which I think is a good one. He said:

We want a people's Constitution, not a lawyers' Constitution.

I would like to develop a few thoughts about that. I have a copy of my statement for the committee. The Human Rights (Parliamentary Scrutiny) Bill establishes a committee of 10 and it gives it the duty of interpreting bills, acts and subordinate legislation, and testing them against its interpretation of the provisions of seven international instruments. This is a legal-like activity. Normally the judiciary interprets acts and international instruments that Australia has ratified. Under the bill, members of the legislature are required to carry out similar functions. This brings to mind the separation of powers—some very eminent lawyers on this committee would have an opinion about that.

The Human Rights Consultation Committee report, chapter 15, page 343, states that most people who participated in the consultation saw Australia as the land of the fair go. It goes to this concept of a fair go on page 344 and found that this concept was a strong force in the community. Not all members of parliament are lawyers—although there are some very eminent lawyers in parliament, may I say, some who are here now—but nearly all want a fair go for the people of Australia. When interpreting instruments whether made here or overseas it is an advantage to have a legal training, but you do not need legal training to know what a fair go is. People of goodwill know what it is. Most parliamentarians are people of goodwill. Parliamentarians have to have confidence in themselves. You cop the flak—though I don't anymore—but it must be seen that members of parliament are fundamentally decent people who want to do the right thing and who do have goodwill. That is important in this context.

In August 1990, Sir Gerard Brennan, a Queenslander, analysed the path the executive, the parliament and the judiciary play in ensuring a good civil life for all in Australia. He said that the legislature was the one that fell short of the mark. If the legislature is to function better then it should do with the parliamentarians acting as such and not as lawyers. Parliament must be enhanced in terms of its true purpose.

Standing order 24 sets up the Committee for the Scrutiny of Bills—with some additions which I have referred to elsewhere. It can make good legislation. Order 24 allows senators to say when legislation lacks fairness. If you look at it, you will see that it can do that. Questions are left up to your sense of decency and your sense of what is fair, and you can then develop things from there. Legal training is not required for it. Insofar as legal advice is necessary—and it is for the Scrutiny of Bill committee—it should be made available and whatever committee is set up should be properly resourced.

One of the problems in the bill we have to face is that if you have a committee of 10 looking at seven treaties, like the Scrutiny of Bills committee it will take in lawyers to get some advice and what you might get is that advice from lawyers coming through as opinion of the committee. There is a danger there, I think.

Senator BRANDIS—Quite right.

Mr Cooney—Whatever committee is set up, it should respect its members standing as parliamentarians. I have already covered that. The Scrutiny of Bills Committee does so quite successfully. There is doubt that the proposed committee will match it. I have got the romantic idea, which I have never sort of let go, that you can be good parliamentarians and get to the point where you are acting out of a sense of fairness. Everybody here belongs to a party, which is a good thing. As Sir Edmund Burke said that if you did not belong to a party you were lacking. I agree with that. But I think we can go beyond the party system and get legislation examined in

the light of what is fair. That includes of course looking at treaties right across the board—I do not see why we should be confined to seven—where you can take into account those bills or those statutes—the legislation that protects rights—which we all know about. Those are my opening remarks. I do not know what part the committee may come to play, but this is very much a statement in favour of the Scrutiny of Bills Committee. I note that a very eminent member who founded the Scrutiny of Bills Committee, former senator the Hon. Reverend Michael Tate, is in the room, together with Alan Missen—does anybody know Alan Missen?

Senator BRANDIS—I knew Alan Missen.

Mr Cooney—Do you remember Fred Cheney?

Senator BRANDIS—I had dinner with Fred Cheney only two months ago.

Mr Cooney—He was one of the ones who initiated the Scrutiny of Bills Committee. Then he was appointed a minister and had to say that it should not go on. For the first few months following the establishment of the Scrutiny of Bills Committee, the committee ran that line and it ran it very successfully. You people here can judge what is and what is not fair. You would have the advice of a lawyer, but that advice would be just that. You will have to make up your mind—the committee has to make up its mind. The committee system is the great glory of the Senate. I am not too sure how you will get on with five people from the House of Representatives—they are a different breed.

CHAIR—We train them. Can I ask you a couple of questions. You were a fabulous chair of the Scrutiny of Bills Committee, and together we were on that committee for a number of years. I imagine that, no doubt, when the Scrutiny of Bills Committee was established people were asking questions about how it was going to operate, whether there would be compliance with legislation and whether the ministers and the executive arm of government would take any notice of what the Scrutiny of Bills Committee actually came up with. That is probably still the case these days. But there have been plenty of times when the Scrutiny of Bills Committee has suggested that certain legislation be amended or changed because it does not comply with one of the four objects of that committee and that has been ignored. It has also been ignored on the floor of the parliament. Do you envisage that if this committee established a statement of either compatibility or incompatibility, the outcomes of its deliberations would be treated in the same way by ministers and the parliament—that is, it would vary?

Mr Cooney—It probably would. I think that the Scrutiny of Bills Committee does have the strength that it needs to state what it states. I am just a bit worried that this new committee will not be able to do that because it has not got tradition—it does not have the mark of former Senator Tate, former Senator Missen and former Senator Cheney upon it, and all those other—

Senator BRANDIS—And former Senator Cooney!

Mr Cooney—Well, yes!

CHAIR—So you do not think its mandate is strong enough?

Mr Cooney—The new bill?

CHAIR—Yes.

Mr Cooney—No, because they do not have to take any notice of it. It says that in the provisions: take no notice of it. All they have to do is say whether or not it is compatible. Somebody writes that out. It is not the committee that says it is compatible, as I remember; you have to get somebody who is introducing the legislation to say it is compatible.

CHAIR—Yes, the executive government will need to say whether the legislation complies or not, but then the committee may have a different view to that and will probably hand down its own report in respect of the legislation.

Mr Cooney—Yes, but then it need go nowhere. The fact that it does not follow what you say does not affect the legislation.

CHAIR—Let us take the case Senator Brandis raised before: the Northern Territory Emergency Response legislation in 2007 where the Racial Discrimination Act was set aside by that piece of legislation. I have no doubt that this committee would probably have determined that that legislation was incompatible with Australia's human rights. Nevertheless, the government of the day would have still put that legislation through. So what implications do you see for future court cases or people taking cases before the Human Rights Commission, if that is the case?

Mr Cooney—Whatever the committee says is not binding on the parliament; it is not even binding on the proposer of the legislation.

Senator BOSWELL—So what is the point of having it?

Mr Cooney—The point of having it is the same sort of idea as having a scrutiny committee—that is, that parliamentarians sitting together across the board from every party hopefully are saying: this is not right. That is available to the public.

Senator BOSWELL—What are you saying—

CHAIR—Senator Boswell, I have not finished yet. You say: what's the point of it? You could say: what is the point of any committee in the parliament?

Mr Cooney—That is right.

CHAIR—You could say: what is the point of this legal and constitutional committee? We will hand down a report into legislation and quite often we recommend legislation be amended. Sometimes the minister picks that up, the executive picks it up; sometimes the executive does not. I guess the point I am getting to is: are we perhaps trying to fine tune the way this committee will operate too early in the piece; that we should make some changes to the legislation that have been highlighted in submissions? Shouldn't we just let the committee get up and running and change legislation as it needs to once it finds its feet so to speak?

Mr Cooney—The only problem I find with that is that it is going to be a lawyers' committee really, isn't it? It is very specific. You have got seven human rights. Who is going to interpret what they mean? Then you have got the legislation that you have to test in respect of those seven human rights. You are to interpret that. You are going to get a lawyer in to do that.

CHAIR—Unless we say that none of the 10 members of the committee can hold a law degree. I do not know how you can avoid that because whoever advises the committee will have a legal background, so that will always happen.

Mr Cooney—That is right, and it worries me a bit that what you will be getting the whole time is not the committee of 10's opinion; you will be getting the lawyers' opinion.

Senator BRANDIS—You are dead right.

CHAIR—Yes. With all due respect, Senator Cooney, you get legal advice to the Scrutiny of Bills Committee, but sometimes people on that committee have accepted or not accepted that advice and have determined the reports themselves.

Mr Cooney—That is right. This is the point: if you look at the scrutiny of bills, they do not have to interpret treaties and legislation. You look at 24. What they have to do—

CHAIR—They are Henry VIII laws.

Mr Cooney—Does this trespass unduly on personal rights and liberties? You do not have to be a lawyer to answer that question—

Senator BRANDIS—Exactly.

Mr Cooney—whereas with this legislation, you probably do.

CHAIR—So where do you see the gap in the legislation then?

Mr Cooney—What I would do is take scrutiny of bills order 24 and—in amongst all this literature which I usually lose—I would amend it. What have I done with it? I do not know. Your leader Senator Brown is always talking about civil rights and civil liberties, but I do not think he has ever got onto the Scrutiny of Bills Committee, which is a big disappointment.

Senator BRANDIS—He often does not show up at committees that he makes a lot of noise about, Senator Cooney.

Mr Cooney—And fair enough. He is a great parliamentarian. The proposed amendments I would put into section 24, Scrutiny of Bills, are, firstly, after:

(i) trespass unduly on personal rights and liberties;

it would say:

(ii) fail to meet the provisions of Australian legislation enacted to preserve human rights;

And then:

(iii) fail to meet the provisions of treaties, conventions and like instruments entered into by Australia and preserve such rights;

Later in section 24 I would also put in a new subsection:

The committee is to have available to it the ongoing advice of retired appellate court judges, which is to be obtained with the approval of the President.

The idea of that is that they can give advice, but it is up to the committee to decide whether it would 'trespass unduly on personal rights and liberties' and whether it would 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. And, finally, I would also put in:

On the Wednesday of each sitting week, the chair of the committee will speak for up to 15 minutes on the considerations of the committee. Further debate about these matters will then take place for up to 30 minutes.

So you could get up and talk about that. The committee system is an adornment in the Senate but it does not get sufficient space in debate in the chamber.

They are my ideas. I am happy to admit that they are romantic ideas and probably are not going to be taken up, although it would be great if they were.

Senator BARNETT—I have some questions. Thank you so much for being here. It is very much appreciated.

Mr Cooney—Thank you.

Senator BARNETT—You have reminded us of the scrutiny of bills role, and we have a submission from the Scrutiny of Bills Committee. Of the five areas where they have a specific function, the first three seem to me to be a potential trespass, as in overlap—an overlap of responsibilities. One is 'trespass unduly on personal rights and liberties'; the second is 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'; and the third is 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Would you agree that, to that extent at least to date, there is either actual or potential overlap of role between the two committees—the one that is envisaged to be set up under the bill before us and the Scrutiny of Bills Committee?

Mr Cooney—Obviously—in my view, anyhow—there will be an overlap. What I am interested in is making sure that, if one has to go, it is not the Scrutiny of Bills.

Senator BARNETT—That is exactly right. That is why I asked the question because in their submission Senator Coonan, as Chair, says on behalf of the committee:

The Committee envisages that it wouldn't simply repeat work that was being undertaken by a Parliamentary Joint Committee on Human Rights …

So she envisages, on behalf of the committee, that there will be an overlap. So the question is: are we going to neuter, either substantially or entirely or at least in part, the Scrutiny of Bills Committee and what role will it play if this committee is established as envisaged?

Mr Cooney—I would envisage the Scrutiny of Bills Committee going on and that, no matter what the other committee does, it will keep doing what it does now. The other thing about the Scrutiny of Bills Committee is that it has got a terrific culture. Think of people such as Senator Tate and Senator Chaney and Senator Missen all those years ago and that culture. It will not be the same, but a culture will have to develop in the new committee. How long that will take, and what sort it will be, I do not know.

Senator BARNETT—I am a big fan of the scrutiny of bills, as a former member as well—when I came in we had a short overlap of a few months, from February to 30 June, when you left, in 2002. I just want to ask you about the role of the legal adviser, because this is an area of concern that I have—how it is different under the Scrutiny of Bills Committee from what is envisaged under this parliamentary joint committee. The concern that you have raised—and I just want to clarify it for the record—is that the legal adviser to this parliamentary joint committee will look at these international treaties and say, 'There is a breach here,' or 'It's incompatible,' and a legal adviser will either agree or disagree with that view and then put that opinion to the committee. You have said that that could then be endorsed by the committee, so that that legal adviser's advice becomes the committee opinion.

Mr Cooney—Yes.

Senator BARNETT—Could you just elaborate on that as to why you are concerned about that?

Mr Cooney—The question you ask with the scrutiny of bills is: 'Does this trespass unduly on …' You then think, 'Is this fair or is it not?' Then you turn to your legal adviser and you say, 'What's the law on this matter?' He or she tells you, and then you say, 'That might be the law on the matter, but I still think that is a bit beyond the pale.' With the new committee that is set up under the legislation, you have very specific tasks. You have the task of saying, 'Does this particular piece of legislation infringe upon these seven human rights provisions?'

Senator BRANDIS—Only if we keep that definition in the bill, of course.

Mr Cooney—That is right.

Senator BARNETT—As currently envisaged.

Mr Cooney—Yes—as currently envisaged. You have got a couple of silks in Canberra now—one of them is present here and the other is Mark Dreyfus—and they might well argue with the interpretation given. But this is what I am saying: if you have got to have lawyers running this, that removes the legislators who are not lawyers. There should be a reaction. After all, you are members of parliament, and that has got to function.

Senator BARNETT—My final question, because we have to move on, is this. The scrutiny of bills is set up in such a way that the leader of the opposition nominates the chair. That is the current process. Under this process, the bill indicates that you have five from the Senate and five from the House of Representatives. I have read somewhere that it is the government that appoints the chair. I might be wrong; I stand to be corrected. But, if that is the case, it appears as though it could be a government dominated committee rather than perhaps a non-government-dominated committee. Do you have a view on the make-up of the committee? The bill as it is written says: five senators and five House of Representatives, but it seems to be silent with respect to the chair. I understood that might be the intention of the government. We need to clarify that. But what is your position with respect to the make-up of that committee?

Mr Cooney—I have got to trust the committee itself. I would have the committee appointed and then let them appoint the chair, although that is a romantic thought, I feel! Somebody is going to appoint it—probably the government. Senator Tate has put in a submission—

Senator BARNETT—We can ask former Senator Tate; that is fine. It is something we will need to clarify with the government.

Mr Cooney—Yes. It is a great idea. And, as I said in my submission, it is a great first step. But as far as solving the problem, I think there is a bit of work to be done on that yet.

Senator BARNETT—Thank you.

CHAIR—I am going to go to Senator Pratt, so we can have one from each. So we will have Senator Pratt for a few minutes, and then I will come back to you, Senator Brandis.

Senator PRATT—As a current member of the Scrutiny of Bills Committee, I appreciate the historical insights you have given me today. You have submitted to us that the reference point for this committee should be drawing on whichever human rights provisions we put into the bill, but to draw on the way that the Scrutiny of Bills Committee currently conducts itself, in terms of rights, liberties, obligations; being duly dependent on insufficiently defined administrative powers.

So, in terms of trying to distinguish roles for the two committees into the future, the Scrutiny of Bills Committee will continue to successfully pick up things that might not be picked up by a human right's committee. But, in turn, I suppose you would also recognise that the Scrutiny of Bills Committee probably insufficiently turns its head to human rights issues such as race, gender and children. There are a whole range of things within human rights that could more actively be scrutinised. Do you agree with that?

Mr Cooney—Yes. What I would do is alter section 24 along the lines that I have suggested. I have put that in another submission to the Scrutiny of Bills Committee. I have highlighted the things I have suggested—and you can have this. There was a speech by Sir Gerard Brennan back in 1990 in which he went into the eternal question of the three arms of government and how the legislature is probably the weakest of them all. You have got to have a dream.

Senator PRATT—I share that dream. I am not quite sure where the anxiety around the legality of this debate is coming from. As parliamentarians we can frame whichever evidence we take, but we simply present our report against that evidence. But we are not in a quasi-legal role here; this is a parliamentary process. But, if we choose to frame the evidence that the committee receives within those parameters, it is a matter for the parliament to say that these are the rules we have set down as to how we would like to take your evidence, and

then it is up to the committee to report as it chooses against the way that evidence is framed. Do you agree with that?

Mr Cooney—Yes. Senator Crossin said that a lot of the stuff that the Scrutiny of Bills Committee said was not taken up. I can remember that there was one minister who never even replied over the years I was there. I will not tell you who that minister was, but you can speculate.

Senator BRANDIS—I find myself in almost complete agreement with everything you say, so I will not detain you for long. One thing the Scrutiny of Bills Committee does not generally do—and I am not sure it has ever done—is have public hearings.

Mr Cooney—It can have public hearings, but we did not have enough.

Senator BRANDIS—It may very well be that the model for the Scrutiny of Bills Committee is the best model on which the parliament could base itself for an expanded consideration of human rights issues in legislation. But the difference is that it would be a joint committee—and we would have those ill-bred members of the House of Representatives in respect of democratic values! Secondly, such a committee might have public hearings, like these standing committee do, at which various interested stakeholders might appear and alert the committee's attention to human rights issues of which it might not otherwise be sufficiently aware. Would you see any problem in reconfiguring the role of the Scrutiny of Bills Committee along those lines?

Mr Cooney—No. We did have some public hearings—not enough. I think resources are the problem, but it is always easy to say 'resources'. I like that idea, because it means it is developing, that the Scrutiny of Bills Committee keeps its culture but moves into other areas. I think that is right.

Senator BRANDIS—The other point I wanted to raise with you is this. You were here for the discussion with some of the earlier witnesses about a definition of 'human rights', and in the current bill it is limited to defining them by international instruments. The Scrutiny of Bills Committee, under standing order 24, actually does not define 'human rights' at all; it leaves it to the good sense of the members of the committee, who—as I was trying, I suspect without success, to make Professor Zifcak understand—might have different views about what human rights consist of. In your experience as chair of the Scrutiny of Bills Committee, did you find that the committee ever felt limited in its capacity to deal sensibly with human rights issues arising in the bills before it by the lack of a definition of 'human rights' in standing order 24?

Mr Cooney—No. I suggested some amendments but I said, either there or somewhere else, that I thought that the Scrutiny of Bills Committee could do it in any event, which is right. They can use whatever material is available. If people are worried about human rights being specified, then you can specify them, but it should not limit—

Senator BRANDIS—I am worried about it, Senator Cooney, and I think certainly some of my coalition colleagues are, because, the more specifically you define human rights, the more you get involved in playing the game of picking some rights and not others and putting an ideological spin on them rather than simply presenting the issue of human rights at large, which means different things to different people. That is what bothers me.

Mr Cooney—Yes.

Senator BRANDIS—Are you recommending to the committee—I think you are in your submission, but let us just have it on the record, please—that standing order 24 establishing the Scrutiny of Bills Committee, with the improvements or additional criteria which you specify in your submission, would be a good template for the powers and functions to be conferred on a human rights committee?

Mr Cooney—Yes, that would be my position. There is one other thing I want to know, and Senator Pratt might be able to tell me. There was one stage there where we were trying to get all the scrutiny committees all around Australia together. Is that still going, do you know?

Senator PRATT—No. It is unfortunate, but no.

Mr Cooney—Growth—if it keeps growing in the way it has been developing, all will be better. I was going to say 'well', but I amend that to 'better'.

CHAIR—Senator Cooney, thank you so much for contributing your knowledge and wisdom to deliberations on this legislation. I know you will follow it with interest.

Mr Cooney—I am being followed by a great senator.

CHAIR—Thanks very much.

[12.18 pm]

TATE, Reverend Professor Michael AO, Private capacity

CHAIR—I welcome former senator and Reverend Professor Michael Tate to our inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010. It is good to have you here; thank you very much.

Rev. Prof. Tate—Thank you very much, Madam Chair and senators. Senator Boswell is the only contemporary of mine still on these committees, but it is a great honour and privilege to appear before you this afternoon.

CHAIR—We have your submission, which we have designated No. 7. We invite you to make a short opening statement.

Rev. Prof. Tate—Thank you, Madam Chair. I agree with the underlying policy decision of the bill—that is, that one go for parliamentary scrutiny rather than judicial review in this area. I was always keen on a minimalist solution based on the Senate's Scrutiny of Bills Committee model, but this is a maxi-minimalist position, if I may put it that way.

My difficulty is that, when you look at the way it is going to operate, it does not even fulfil the promise of the title, 'a Bill for an Act to establish a Parliamentary Joint Committee on Human Rights', nor really of clause 7, which states:

The Committee has the following functions:

(a) to examine Bills for Acts … for compatibility with human rights …

That is the promise of the bill, but when you then look at the definition in clause 3, 'human rights' becomes so narrow, because it is only those human rights that relate to the seven international instruments that are listed. This excessively narrow definition of human rights really undermines the promise of the bill as ordinarily read. I think it is 'maxi-minimalist', if I may put it that way.

As was pointed out, I think by former senator, Mr Cooney, that will leave this committee as the poor and minor cousin of the Scrutiny of Bills Committee, because your terms of reference are so narrow. I think that is extremely unfortunate. I would like to see the terms of reference expanded so that clause 3 is amended so that 'human rights' include all those human rights which are based in the Constitution, common law, federal statutes and treaties ratified by the government and incorporated into Australian law.

It seems to me only proper that, if you are setting up a joint committee on human rights, that committee should have in mind the five or six or seven human rights that are enumerated in the Constitution. One thinks of religious freedom, civil conscription, certain electoral guarantees, common law—I found that a bit denigrated in some submissions I heard this morning. Justice Spigelman, Chief Justice of the Supreme Court of New South Wales, gave a paper on 18 principles of statutory interpretation which he called a common law bill of rights.

Senator BRANDIS—Sorry to interrupt, but I have that paper here. Would you care to table it so that it can be part of the committee's papers?

Rev. Prof. Tate—Certainly.

CHAIR—You can just—

Senator BRANDIS—No, it would be better if it came from the witness.

CHAIR—Reverend Tate, bear in mind that Senator Brandis can provide copies of that to us himself.

Rev. Prof. Tate—The fact is that the common law has got certain human rights, which can be listed. You do not have to agree with all of those put forward by Justice Spigelman, but there it is. In relation to statutes of the parliament, privacy was mentioned earlier. I remember the privacy legislation of the early 90s. That was filling a bit of a gap in the common law and perhaps in our international agreements also. Then you have our international covenants and so on. So there are at least four sources of human rights to which I think the committee should have reference, otherwise it is going to be the very minor poor cousin of the Scrutiny of Bills Committee. My definition would run this way: that the committee should report on the compatibility or incompatibility of the bills for acts insofar as they may trespass on personal rights and liberties recognised or expressed under the Australian Constitution in the common law, in statutes of the parliament or in treaties ratified with the government of Australia and incorporated into law. That seems to me—

Senator BARNETT—You said statutes of 'the' parliament.

Rev. Prof. Tate—The Commonwealth parliament.

Senator BARNETT—What about states and territories?

Rev. Prof. Tate—No. The task of the committee, after all, is only to alert each chamber to the fact that there is a bill before it which may unduly trespass on personal rights and liberties, to use the expression of the Scrutiny of Bills Committee. It seems to me that the parliament would be most willing to look at that matter if the claim were that the proposed legislation was incompatible with one of its own existing statutes, like privacy legislation. I do not think it would be very much impressed by being told that it is incompatible with something the Tasmanian parliament or the Western Australian parliament passed. It has to be substantially national—constitutional, common law, Australian parliament or treaty.

It is also important to remember that this is all very culture forming. I do not think the committee will have a lot of work to do, because if you adopt a proposal like I am putting, or the Scrutiny of Bills Committee formula, parliamentary counsel already has a look at that in anticipation and talks to the minister's officers, saying, 'Do you really want to press forward and implement the cabinet decision in this way when you know that the Scrutiny of Bills Committee or your joint committee will in fact put in a statement report of incompatibility in your case?' Where it will become important, perhaps, is in the new paradigm. May I use that expression? Has it been used before in this committee?

CHAIR—It has been used many times.

Rev. Prof. Tate—I say that because there will be more private members' bills, which perhaps will not be subject to quite the same scrutiny within government and parliamentary counsel and so on, so there might be things that would slip through. That is the task.

Senator TROOD—Thank you for coming. The committee has been urged to expand clause 7 in relation to the functions of the committee—and you have alluded to that—to include a whole range of other functions. Without necessarily going to the substance of those recommendations, I ask your view in relation to clause 6, which says:

All matters regarding the powers and proceedings of the Committee are to be determined by resolution of both Houses of the Parliament.

The bill itself proposes that the parliament will determine the range of responsibilities that the committee has, but we are being urged by some of these submissions to adumbrate these powers more fully than in the existing clause. Do you have a view on that particular position?

Rev. Prof. Tate—To be honest, I had not invested myself of clause 6 in great detail. I just took that to be when you meet, whether you can compel evidence—all that sort of thing. I think that is just normal. It is like providing a standing order for your committee to operate under.

Senator TROOD—I assume that it is a standing order but it does invest the parliament with widening the powers of the committee.

Rev. Prof. Tate—I think that is why clause 7 adopts a different language: 'the committee has the following functions', as opposed to powers. I would make the submission that clause 7 actually be reduced in functions. I think you are going to have a devil of a job, particularly when your sitting weeks only coincide every so often, to get your joint committee together in order to do the scrutiny of the bills that are put forward, both government bills and private member's bills. I was a bit against 7(c) anyway, because it seemed to me that the parliament cannot give you a term of reference to report on, only the Attorney-General. I think that is a bit demeaning for the committee, to be frank. In any case, reporting on general human rights matters might be better for another committee. You have got a job to do to alert each chamber to the fact that a bill has come in which is incompatible with human rights. That will give you more than enough work, and it will be difficult enough to get your 10 members together during a sitting week.

Senator TROOD—I think that is a telling point, but I am responding to some of the submissions which essentially take the committee beyond the powers that are provided for it in this bill. In fact, some submissions want to do a whole lot more than this bill proposes.

Rev. Prof. Tate—I think you have enough on your plate just doing the scrutiny of bills type activity as a joint committee, which is really what this is about so long as you go beyond the seven international instruments.

Senator BRANDIS—Can I come in on that. Father Tate, one particular part of your submission that I want to inquire of you further about is in the third paragraph from the bottom where you discuss your proposed definition of human rights. The last category is: 'Treaties ratified by the government of Australia and incorporated into law'. Just concentrating on the phrase 'incorporated into law', by that do you mean treaties which have been the subject of complementary domestic legislation or implementing legislation, or do you mean something else and, if so, what?

Rev. Prof. Tate—That is basically what I mean. I do not think it is enough, as we said in previous evidence today, that we have entered into an international obligation. We will let that be answered in some international forum if we are incompatible with an obligation we have undertaken by way of treaty. Your committee should be concerned with only those treaties which have been further incorporated into the actual effective operative law of Australia by parliamentary enactment. I think the High Court made some marginal comments about that. An administrator should take into account the fact that a—

Senator BRANDIS—That is the Teoh decision.

Rev. Prof. Tate—Yes.

Senator BRANDIS—One of the most highly criticised decisions of the High Court in recent decades.

Rev. Prof. Tate—But my intention is that that further step should be taken to incorporate.

Senator BRANDIS—Thank you. Father Tate, can I put a proposition to you and invite your comment on it, please. It seems to me that where the draftsman of this bill has gone wrong is by being both too narrow and too prescriptive in relation to the definition of human rights by listing these seven international instruments. The proposition I put to you is: may it not be better to extend the jurisdiction of the committee and to give it more flexibility and also to allow for the fact that, contrary to civil liberties Victoria, there is not a settled body of what is and isn't a human right and for the legislation to simply use a phrase like 'in considering a bill the committee may have regard to the common law, constitutional rights, existing Australian statutory law, relevant international instruments' and so on—much as standing order 24 does in relation to the Scrutiny of Bills Committee itself? In other words, direct the committee's mind to categories of, rather than being prescriptive about, different issues. Can I invite your comment on that?

Rev. Prof. Tate—I have given you four categories, which are the source, the admitted source, the agreed non-controversial and the politically non-controversial. These are four sources of human rights in Australia. Give that to the committee to work with, and that should be sufficient. Nevertheless, there is a political call in some quarters for a charter to develop. I would say that, once a year or once a session, the committee could publish a running list of what falls under those four categories, which is a guide to government and to private members drafting bills, and over a period of three or four years that list becomes the sort of material that would then be non-controversially changeable into a charter.

Senator BRANDIS—I know this is not a strict use of the term but, in a sense, through its practice and the accumulation of its reports, the committee would develop, as it were, its own jurisprudence which would itself further define and guide the future deliberations of the committee in the years to come.

Rev. Prof. Tate—It would effectively lead to the development of a charter, and parliamentarians would become more conversant with that idea and more comfortable—I hate using that term—with this compatibility and incompatibility report coming in.

Senator BRANDIS—Thank you, Father Tate. That seems very sensible to me.

Senator BARNETT—Just in regard to the concerns of state governments, we have received four submissions from different state governments and attorneys-general. Christian Porter on behalf of the Western Australian government has expressed concern about the bill. He has said:

> In my view all of these issues will adversely effect fundamental and basic principles of representative majoritarian parliamentary democracy.

He also talked about states' rights and so on. He explained that in a 2½-page submission. Wouldn't you agree that the various states and territories have acts which protect and at least impact in some way, shape or form on human rights?

Rev. Prof. Tate—Not all, but some do.

Senator BARNETT—Take the Equal Opportunity Act, for example?

Rev. Prof. Tate—Frankly, I would not worry too much about the states. Your job as a parliamentary committee is to keep your parliamentary chambers on track so far as human rights well recognised in those four categories are concerned.

Senator BARNETT—My point is that human rights are protected at least in part by state and territory law. So is that not, therefore, another category in which to have consideration to in the deliberations of this committee?

Rev. Prof. Tate—No, I think your federal parliament should have regard to the most politically noncontroversial, nationally agreed, Australia-wide sources of human rights. Fragmented or idiosyncratic state jurisdictions would not be confident in saying that they are the sorts of human rights, although they may use that term, which would command national adherence.

Senator BRANDIS—Let alone, I might say the latest outrage from the ACT parliament.

Senator BARNETT—There is some debate around that, but let me go to my final question. You mention the constitutional rights which I totally accept and acknowledge. Do you think in terms of human rights that the rights of the unborn child should be one of the rights considered by this committee?

Rev. Prof. Tate—I would say that in so far as the right of an unborn child is recognised in any of those four categories, then your committee should have proper regard to it.

CHAIR—Have you had a chance to read the submission from the Western Australian government?

Rev. Prof. Tate—Unfortunately not.

CHAIR—I invite you to do that and provide us with a view about their submission. They put to us that this committee may well oversight and interfere in their legislation. Do you believe they are overreacting and misunderstanding the role that this parliamentary committee would have?

Rev. Prof. Tate—The federal parliament can only affect state legislation if it acts within its power and the federal legislation is directly inconsistent with the state provisions.

CHAIR—I still invite you to have a look at that and provide us with your view about the previous comments. Thank you very much for your submission and for making yourself available for our inquiry this morning.

Committee adjourned at 12.38 pm