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, 25 NOVEMBER 2010

CANBERRA

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 25 November 2010

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

Substitute members: Senator Hanson-Young to replace Senator Ludlam for the committee's inquiry into the provisions of the Human Rights (Parliamentary Scrutiny) Bill 2010 and a related bill

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, Hanson-Young, 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, Brandis, Crossin, 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 4.00 pm

CHAIR (Senator Crossin)—I formally open this second hearing 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. The inquiry was referred to the committee by the Senate on 30 September 2010, for inquiry and report by 23 November 2010. On 17 November the Senate agreed to extend the reporting date until 7 December 2010. Together the two bills seek to implement the legislative elements of Australia's Human Rights Framework, which was announced by the government in April this year. 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 from 30 September 2009.

The main bill will establish the Parliamentary Joint Committee on Human Rights and set out the functions and administrative arrangements for the 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 bill also introduces a requirement for statements of compatibility to be prepared for all bills and disallowable legislative instruments. The consequential bill contains amendments that arise as a consequence of the main bill and other matters, including amendments to the Administrative Appeals Tribunal Act 1975 and the Legislative Instruments Act 2003. The committee has received 79 submissions for this inquiry. All of these have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee.

[4.03 pm]

ALLAN, Professor James, Private capacity

Evidence was taken via teleconference—

CHAIR—Welcome. You have lodged a submission with ours, which we have numbered 78. Do you need to make any changes to that?

Prof. Allan—No.

CHAIR—I invite you to give us a statement or some comments and then we will go to questions.

Prof. Allan—I really do not have a lot to say. I am a sceptic on this. I am probably opposed to it, for a number of reasons. Firstly, I think it would be a better bill if the joint committee were directed to consider whether bills trespass unduly on personal rights and liberties in accord with the existing set-up. I think there is a risk in outsourcing the rights to treaties that were entered into under the prerogative power. All of these big UN conventions also have committees that are set up. No-one really knows whether asking people to consider the human rights is really asking them to consider what some UN committee in the future will say they mean. I gave an example in my submission of article 19 of the Convention on the Rights of the Child. Personally, I am very sceptical that very many people have read through all seven of these treaties. I have not. I have read through lots of them, but it is a long, hard slog. In a way, you are asking people to outsource the human rights, when they are not even sure what they are outsourcing them to, which I find problematic.

Secondly, on the statements of compatibility, which is the other aspect of the bill, the problem is that it all seems fine to me in theory, before a bill is passed to see whether it accords with rights and liberties. But the problem is when you look at exactly the same sort of approach in Canada and New Zealand, what happens is that our legislators, and I am all for legislators thinking about whether bills are rights-respecting or not, but when you look and see what happens, it turns out that in those jurisdictions, and I bet in Australia as well, it turns into a sort of exercise in guessing what the judges are going to say. So to decide whether a bill has some sort of impact on free speech, whether it is rights-respecting, what has happened in New Zealand and Canada isn't that legislators sit down and say to themselves, 'What do we think?' What happens is that they go, 'What have the judges said in the latest Supreme Court case?' It becomes very much an indirect way of handing these things off to the judiciary. You either look at what the case law is or you get a bunch of students in the Attorney-General's chambers or whatever guessing what the judges are likely to say. So there is quite a bit of evidence to that effect, that statements of compatibility collapse into legislators looking to see what judges say about the latest case. I am not keen on that. I have to put this into context. I am delighted that the proposal for a statutory Bill of Rights did not go through. I think that would have been terrible for Australia. So in that context I am not overly worked up about this bill. I do not think it is a good idea to have the human rights defined in terms of seven treaties that almost no-one in Australia has ever read and also treaties where all of the big UN conventions have committees set up to tell you what they mean after the fact. I do not think that is good idea.

The joint committee aspect is a good idea. To turn it from a Senate committee into a joint committee seems like a good idea to me, but I think just asking the legislators whether the bill unduly trespasses on personal rights and liberties really puts the question right to the elected legislators. The way this bill has been set up is not asking you what you think, it is asking you what you think the UN committee thinks, which is a mistake—not the end of the world but not good. On the statements of compatibility again, it seems good in principle but in practice how it works out just has not worked at the way people expected in New Zealand or Canada and probably the UK, though it is a bit early there. So on balance the scoring in my view is moderately negative but it could have been worse. I am not a fan but I am not too worked up about it. I am a sceptic: it could turn out worse than I think but probably not. It certainly could be a better bill, in my view. That is about all I have to say, really.

CHAIR—I have one or two questions. Are you aware of the Scrutiny of Bills Committee of the Senate in the parliament?

Prof. Allan—Yes, and right now they are asked to consider bills whether they trespass unduly on personal rights and liberties. I think that is a good thing. I wish that were mirrored in this bill.

CHAIR—Except this bill has a different focus. Would you agree with that?

Prof. Allan—I am not sure what you mean by that. Do you think there is a different focus between asking a legislator whether a bill unduly trespasses on rights and then asking them whether it is in breach of human rights as defined in seven treaties? If that is your view then I really worry about this bill.

CHAIR—I am asking you whether you think that we could just add the human rights mandate to the scrutiny of bills committee rather than setting up another committee.

Prof. Allan—No, absolutely not. I would do it the other way. I would take the unduly trespassing on personal rights and liberties and use that as what I would use in the human rights scrutiny bill. I think it is a mistake to channel everything through seven UN treaties which I think almost no-one in Australia has actually read word for word. It just seems an odd way to go about it, to me.

CHAIR—Except in this instance it will be the parliamentarians on the committee who will be expected to have read those treaties and the secretariat—

Prof. Allan—And will they be expected to have read all the case law that comes out of those treaties?

CHAIR—At this point in time, if you look at the way in which the Scrutiny of Bills Committee works—when we talk about retrospective legislation, when we talk about the Henry VIII clause—then certainly that committee is guided by people who have expertise in those areas. They provide advice to politicians who then report to parliament each week.

Prof. Allan—Sure, but you are directed to use your own judgment on whether it unduly trespasses on rights and liberties. That seems like a good idea to me; I am totally in favour of that. I like the existing set-up.

Senator BARNETT—Thanks very much, Professor Allan. It is very much appreciated and, frankly, I think your arguments are very strong and persuasive.

Prof. Allan—Can I quote that to my wife?

Senator BARNETT—Yes, you can tell your wife. It is on the public record.

Prof. Allan—Okay, that is good. She would not agree.

Senator BARNETT—We are setting up a system concerned about what an MP thinks of what a UN committee thinks. I just want you to flesh that out. I seriously think a potential flaw in this bill is that we as a parliament will need to have, it would appear, representatives sitting in on the various UN committees—you mentioned seven-odd international conventions which have all got relevant committees—so we can know exactly what they think and why they think it. Then we are going to have to track the case law and the common law with respect to the various committees.

Prof. Allan—That is case law in the loose sense of the word. I do not know. There are two possible ways this could go. It might all collapse into paying very little attention to the UN committees, in which case you really have the status quo; that is a possibility. Or it could turn out the other way. Nobody really knows. I do not think it is a very good bill when going in you do not know how it is going to pan out.

It could be that not much comes of this, which would delight me no end or it could turn out, in the worst-case scenario, that a fair bit of attention is paid to the committees that are set up to monitor these UN conventions. You have to say that some of the countries that have representatives on these committees are countries that no sane person would take moral advice from—at least I would not. I do not think anyone can honestly say how this joint committee is going to play out. I do not know. I know how the statements of compatibility have played out in New Zealand and Canada and, to some extent, the UK and it has not turned out the way that people have wanted it to play out.

The underlying justification for this seems like a pretty strong one to me, which is that we want our legislators to think about rights and the balance between rights and other concerns before they pass legislation. No-one is against that. The question is how you implement it. One way to implement it is basically to say, 'Okay, let us have a Senate or joint committee that looks at whether a bill is unduly trespassing on rights and liberties.' You leave it to the legislators to think about that. If they want to call people in to tell them what the judges are doing, they can; if they do not want to, that is fine too.

Another way of doing it is to outsource everything. I want you just to think about the seven treaties that no-one has really read. I have got them in front of me; it is a huge book. We do not know what has been said by all the committees set up by the UN to monitor these conventions. How many people would know that article 19 of the Convention on the Rights of the Child has been interpreted by the UN committee to mean that you cannot have smacking/spanking legislation? Almost no-one knows that.

Senator BARNETT—Professor, I take your point and note it. I guess you really are emphasising one of the concerns that I just want to address, which is that we sitting here do not know exactly the implications of and the consequences flowing from these seven international treaties. We have obviously signed up to them and ratified them, but the various UN committees that have been established underneath these treaties are important bodies for which we as a parliament and this particular new committee will need to keep up to date with and abreast of. Is that your understanding of this bill?

Prof. Allan—My understanding is that could be an outcome. It is not clear. I do not know. Here is the thing about treaties: treaties are not part of domestic law. They have been entered into under the prerogative power—the executive power. The High Court of Australia does not use treaties when they are interpreting our constitution. So it is all very well and good to negotiate with Sudan or China some treaty where you know they are not going to live up to anywhere near the standard we do already and to try to have an aspirational document. That is fine. What this is doing is potentially making a part of domestic law through this committee assessing new bills on the latest standards that, when the treaties were signed, were never intended to be part of the domestic law in the sense that you would have to put it through parliament. So I do not know how it is going to play out. I do not think anyone honestly can say how it is going to play out. It will be sort of up to the senators and House members who are on this committee whether they take that line or not. No-one is going to know.

There will certainly be arguments from the project bill of rights lobby that this is the first step on the road to a bill of rights and that this is what you ought to do. It is possible you will tell them to get stuffed. I do not know. I do not think anyone knows for sure how it is going to play out.

Senator BARNETT—Thank you. I think you have made some very good critical comments. I am very interested in possible solutions. You have highlighted the merit of the Senate Standing Committee for the Scrutiny of Bills and their role in addressing in accordance with their terms of reference whether a person's rights have been trespassed unduly or their rights and liberties affected. If, for example, we did not have and struck out from this bill any reference to the seven treaties, would you have a suggestion on how we could define those rights? Do you think it is better to expand the terms of reference for the scrutiny of bills committee so that it undertakes some of these functions and roles as deemed appropriate for this committee in this bill?

Prof. Allan—If your latter question is asking whether this should be a joint committee, I quite like the idea of making it a parliamentary joint committee. I do not even mind calling it 'on human rights'. But I much prefer the reference to whether it unduly trespasses on rights and liberties. The thing about rights is that they are incredibly seductively attractive because they are so indefinitely and amorphously phrased, so everyone is in favour of them in the abstract. I will take an example from the UK. Everyone is in favour of the right to a fair trial, but when the legislature in the UK passed legislation to put limits on cross-examining would-be rape victims the top UK court said that was against the right to a fair trial. That is a highly debatable call, and personally I would prefer that the elected legislators make calls about whether supposed rape victims are allowed to be vigorously cross-examined or not. Different people are going to make a different call on that.

The problem with rights is that they are phrased so generally and so amorphously that they sort of finesse all the disagreement. Everyone is in favour of the right to a fair trial or the right to free speech, but when you start looking at the specifics case by case you get reasonable disagreement. I have a lot of colleagues I go out for beers with a lot, and we do not agree on the specifics but we would all agree on the general. So with rights you have to be a little bit careful. I want legislators making these calls but, if you think you are always going to agree with your colleagues, you are just not. The only way to get that agreement is to take the level of abstractions so high that everyone is in favour. So part of the problem here is that by just saying, 'Okay, there are these seven treaties out there that list all sorts of rights in general language that no-one disagrees with,' you are sort of pretending what happens when the legislators come to look at a particular bill. Can you cross-examine to the same extent a would-be rape victim? People do not agree about that. Some people reasonably think the limit should be here and other people think the limit should be there. The whole debate is going to collapse into whether we are in keeping with our international agreements when it should be, 'This is our view of where the line for rights stops.' I am not against thinking about rights; I just think that the problem, to a large extent, is that you are outsourcing all of the work. I do not like it.

Senator BARNETT—Thank you, Professor. We are limited for time, so I have a final question. If we removed any reference to the international treaties—and I am happy for you to take this on notice and get back to the committee—could you prepare or consider forwarding to the committee your views on the dot points

that this new joint committee would take into account to ensure that every bill was meeting our human rights obligations.

Prof. Allan—Are you asking whether, if you want something in addition to the general status quo where you are just asked to consider whether there are trespasses on personal rights and liberties—because I think that is quite—

Senator BARNETT—My point is: do you think it is entirely satisfactory if the criterion is whether there is any undue trespass on personal rights and liberties. If you think that is it, please tell us now. If there is a more expansive version of that in a number of dot points that would cover it, please let us know either now or on notice. If you do not agree, that is fine as well.

Prof. Allan—I will say this right now: if I had to choose between the two, I would take the status quo by a mile. But let me think about whether I can think of anything to add to it.

Senator BARNETT—Thank you.

CHAIR—Professor Allan, thank you. We do not have any other questions for you, so I thank you for your time this afternoon and your submission to our committee.

Prof. Allan—Thank you very much for asking me.

[4.21 pm]

JOSEPH, Ms Rita, Private capacity

CHAIR—Ms Joseph, good afternoon. Thank you for your submission. Do you have anything to say about the capacity in which you appear before us?

Ms Joseph—I am here in a private capacity, but I have always been interested in human rights and I have done a great deal of research. I have been involved in negotiation of documents at the UN, I have written a book on human rights and I want to share what I know.

CHAIR—That is great, thanks. We have your submission, which we have numbered 37. I ask you to provide us with an opening statement or some views, and then we will go to questions.

Ms Joseph—The really important concept in these bills that you are looking at is the concept of compatibility. What we have to agree on is what they are to be compatible with. I think that the seven conventions are comprehensive, and there will not be a huge problem in getting that compatibility if you stick to a few basic principles, which were outlined right from the beginning and which our Australian delegates negotiated right from the beginning. If we do that, I do not believe there will be a problem.

At present, of course, there is a lot of ignorance and confusion about what we agreed, and it does not help that the Australian Human Rights Commission and the Human Rights Law Resource Centre will be recommending this afternoon that you expand these bills to ensure compatibility with a plethora of often contradictory interpretations, decisions, concluding observations and recommendations by international, regional and localised committees, judiciaries, legislatures and human rights bodies. Once you start down that track, compatibility becomes impossible. The rules of logic, coherence and consistency make it impossible.

My recommendation is that you keep it simple. I would have three guidelines: one, stick to the ordinary meaning; two, apply the fundamental principles of human rights as honestly as you can; and three, remember that no new rights have been recognised. Regarding sticking to the ordinary meaning, you have to keep your interpretation of our obligations in these conventions to what reasonable people would understand as the ordinary meaning in accordance with the rules of interpretation in the Vienna Convention on the Law of Treaties. The ordinary meaning criteria is a strong argument in favour of a commonsense approach to treaty interpretation whereby legislators, judges, academics and treaty monitoring bodies in deciding the meaning of a particular commitment are expected to avoid giving the provision a meaning which plainly thwarts the drafting intention behind the convention.

The second criterion that I would put forward is that we apply the fundamental principles of human rights as honestly as we can. The whole architecture of modern international human rights law is built on deontological basis: on a small number of human rights principles common to all societies, philosophies and faith systems that were recognised to be universal. They were permanent principles not subject to change with each new ideology, opinion poll or democratic vote. The application of these human rights was based on another set of human rights principles: inclusion, inherency, equality, inalienability and indivisibility. These were definitional in human rights.

Should these bills be passed it is inevitable that the scrutiny committee will come up against the problem of competing human rights. This problem was faced by the framers of the universal declaration and the foundation covenants. It was solved by recognition of the fundamental human rights principle of indivisibility. This means that the rights of one set of human beings cannot be rescinded or sacrificed to enhance the rights of another group of human beings. The second one was inclusion: that these rights applied to absolutely everyone, including the child before birth. The next one is inherency: that these rights are seen as being inherent in each human being, not granted by external government or judicial decisions. A child's rights pre-exists its birth; they inhere in the child' s humanity. The next one is equality: that in modern human rights law there can be no concept of some human beings being more equal than others. Thus the child at risk of abortion has the same right to life as every other member of the human family. Lastly, there is the principle of inalienability: that no-one may destroy that right to life nor deprive any human being of that right nor transfer that right nor renounce. That is for other human rights, too—the foundational human rights. Human beings cannot be deprived of the substance of their fundamental rights in any circumstances—not even at their or their mother's request.

How did they get to all this? Rene Cassin put it most clearly of all. He said that the whole philosophy of modern international human rights law must rest on two things: on the unity of mankind, ensuring the dignity

every member of the human family everywhere, without discrimination of any kind; and on a second principle, the principle of solidarity and the brotherhood of man. All of this came together at a moment of grace after the terrible atrocities of World War II. If we tried to write these conventions again now—if we tore up these old ones and said, 'Okay, we're going to start again and we're going to write some new ones'—we would never make it, because we will never have that moment of grace again when people from all philosophies, political systems, societies and legal systems came together and achieved what they set out to: they found a number of basic human rights principles that they put into the Universal Declaration of Human Rights and which were then codified in the seven covenants that your scrutiny committee will look at.

The final bit of advice I would give a scrutiny committee is that you have to remember that no new rights have been recognised. Without understanding the existing human rights, people put forward a lot of nonsense about these new human rights. They just do not understand that international human rights law cannot be converted now from a principle based system to a utilitarian or consequentialist approach. You cannot do that without a catastrophe of unravelling the human rights protections that we have been painstakingly trying to keep in place.

My final point is that we can think of the whole human rights project as a seamless fire blanket to protect the whole of humanity. It was woven tightly throughout the whole fabric. These principles were woven into it to make it effective. It was woven by people like those from PASAN, who were brilliant. The people who got together, including the Australians, to actually negotiate the Universal Declaration of Human Rights were brilliant, because they had an edge that came from being so close to the red raw memories of the terrible atrocities of World War II. You have to realise that these seven conventions are holistic. It is a protection blanket and, like a fire blanket, if you allow new rights or bring in dubious new ideas or read into them new concepts, it can very easily put holes in that fire blanket and then the whole thing becomes useless.

CHAIR—Thank you, Ms Joseph. We will go to questions now.

Senator BARNETT—I know you have had a long interest and a great amount of experience in this area of human rights, so we thank you for coming to the committee and putting your views to us. It is very much appreciated. Firstly, a committee of members of parliament such as envisaged in this bill will need to be advised by somebody, perhaps a lawyer or somebody who is skilful, experienced and knowledgeable of the seven international treaties you refer to. Do you think that person will have enormous power and influence in terms of interpreting those international treaties and then putting his or her view to the members of parliament?

Ms Joseph—Yes, I think they will have a certain amount of influence but only if the committee members let them. The whole idea on the introduction of this human rights project was that it was to be written in language that people could understand, ordinary language. Professor Allan, who spoke before me, is right; it should not be farmed off. The right people to do it would be a parliamentary committee. They are the right people. They are good people, they are serving the community and they are meant to look at these things and take the ordinary meaning of it. It was never meant to be some kind of extremely complex puzzle that you are meant to read other things into. What it says is what is says. Ordinary, good people representing the people of Australia have the ability to look at it and say, 'Yes, the legislation we are putting forward is going to support these rights,' or 'It's going to contravene them.'

Senator BARNETT—Sure. Let me just go a little step further. The members of this committee will need to have at least a basic understanding of those seven international treaties, as I understand it, to perform their role. They are going to have to make an assessment of what they think these treaties mean, and I guess the question is whether that is possible or feasible, knowing that the treaties are long and comprehensive. According to the professor, who stays up at night reading these treaties and who understands the ins and outs and their consequences and implications for everyday Australians? The fact is that you could probably count on one hand the number of Australians who would understand fully and comprehensively the full implications of these treaties. You may be one of those, but there are not many who would. What do you say to that?

Mrs Joseph—As long as we approach these treaties with honesty and with intellectual integrity, as long as we can put aside any ideological reinterpretations of what was meant at the time, I think you can still do it. I think it can be done, but certainly I see your point that there is always that danger.

Senator BARNETT—The professor made the point—and please respond—that that is his view, and there is some validity to it in my view. He talked about the merit of the Scrutiny of Bills Committee. They have a role of ensuring that an individual's rights and liberties are not unduly trespassed upon and abrogated. That is part of their role, and he was of the view that that made a lot of sense. I do not want to misrepresent him, but

that is how I saw it. So he was of the view that rather than relying on these treaties, why not just have a dot point statement saying that that is a key principle that should not be abrogated? What do you say to that view?

Mrs Joseph—I think that would be helpful—a list of those key principles. The right to life would certainly be one of them, and the right to juridical personality—

Senator BARNETT—I guess that is really my question. Why can't we have a number of dot points—and you mentioned the right to life—the right to free speech, the right to religious activity, the right to freedom of association, the range of rights that we commonly understand in Australia today? What do you say to the merit of that argument?

Mrs Joseph—I would say that that would be all right, but I really do not think that we can remove ourselves from our obligations, which were undertaken to honour what we agreed to in the original conventions. I know that the professor was worried about our national sovereignty, but the point is that national sovereignty is not a problem. Our national sovereignty is such that we took on these rights and obligations—it was not done underhand. I can show you a whole history of the cablegrams that were sent backwards and forwards from Australian delegates when we were negotiating all of these things. What we as an honourable sovereign country did was impose these things on ourselves. That is why it is the parliament's job, because it is the Australian parliament that agreed to these things.

Senator BARNETT—My last area for questioning relates to something that you hold very firmly, and that is the right to life. I have previously asked the question in this committee of an earlier witness, 'Do these rights apply to the unborn?' and the witness was not able to answer that question. But in your submission you have outlined very strongly your view that it does apply to the unborn. Do you want to just summarise the reasons for that?

Secondly, do you have third-party support? Are there other people who hold a view similar to your own? I am happy for you to take that on notice because, rather than just you having this view, I would like to know whether there are other people who hold the view that this human right does apply not just to the born, or children after birth, but also to the unborn.

Mrs Joseph—I could certainly do that. Many people were involved right from the beginning in all the negotiations, not just today. What I want to be able to set out for you is that there is this whole continuity of understanding that the right to life included the child before birth. They use the term 'everyone' in these conventions, and they really did mean that: absolutely no-one was to be excluded. That is how it all started. Right at the beginning, when they were first getting human rights matters together, they collected material from all around the world. People, different groups, including lawyers, authors and so on sent in submissions from different countries. They boiled it all down to a number of key human rights principles that everybody would agree to. Then our Australian representative, Ambassador Hodgson, said, 'But what is the philosophy behind this?' That was when Rene Cassin was given the authority to write into the universal declaration the basic philosophy. One of those basic foundations was the unity of the human race. Rene Cassin said that Hitler started by hiving off different groups, and said, 'These people aren't included; these human beings aren't included, these members aren't members of the human family any longer.' That initial foundation was that human rights were to apply to absolutely everyone—all members of the human family—and they really meant that. That has continued right up to the present day.

Senator BARNETT—But the point you are making is that that applies to both the born and the unborn. Is that correct?

Mrs Joseph—That is right. Indeed.

Senator BARNETT—So you will come back to us on that question on notice?

Mrs Joseph—Yes, certainly.

CHAIR—Let me go to the first paragraph in your submission. You say that these bills are 'a commendable attempt to implement important recommendations of the National Human Rights Consultation Committee'. Is it your view then that what came out of the consultation committee has been picked up quite adequately in these bills and that these bills actually reflect some of the outcomes of those national consultations held by that committee?

Mrs Joseph—I believe so. I think these human rights issues should be ensured. They should be ensured by the parliament of Australia, honouring our commitment to those human rights, which we agreed to quite solemnly and with full knowledge and with full participation in the negotiating process.

CHAIR—I do not have any other questions and Senator Pratt is not here. I thank you for your submission and also thank you for making yourself available this afternoon. It is much appreciated.

Mrs Joseph—It is a privilege.

Proceedings suspended from 4.43 pm to 5.05 pm

BRANSON, The Hon. Catherine QC, President, Australian Human Rights Commission

DICK, Mr Darren, Director, Policy and Programs, Australian Human Rights Commission

RAMAN, Ms Padma, Executive Director, Australian Human Rights Commission

Evidence was taken via teleconference—

CHAIR—I now welcome representatives of the Australian Humans Rights Commission who are appearing by teleconference. We have your submission which has been numbered 47. Would you like to make an opening statement before Senator Barnett leads off with questions?

Ms Branson—We thank the committee for this opportunity to appear before it as representatives of the Australian Human Rights Commission. I do not think that there is any need for me to introduce the commission and its roles and functions to this committee. We have made. as you have mentioned, Madam Chair, a brief written submission to the committee on this inquiry and in that we make four recommendations including that the bills be passed. Those recommendations are neatly set out at pages 5 and 6 of our submission.

In this opening statement I wish to make briefly three additional points. First, there will be, we suggest, value in a clear identification of the human rights which will form the basis of the joint committee's scrutiny of bills. Not only will this make the work of the joint committee easier but it will assist those who work is intended to ultimately result in a bill that will come before the joint committee for scrutiny, in particular those who develop policy and those who prepare drafting instructions.

Second, we are aware that the United Kingdom experience has been that effective and timely scrutiny by its joint committee on human rights is dependent on its receiving via the statement of compatibility, whether a positive or a negative one, a full explanation of the proponent of the bill's reasons for believing that the bill is compatible or alternatively may not be compatible with relevant rights. Finally, the definition of human rights for the purposes of the Human Rights (Parliamentary Scrutiny) Bill being a definition by reference to international instruments should not result in scrutiny that does not have regard to Australian circumstances, to Australia jurisprudence or to what Chief Justice Spigelman has called the common law bill of rights. We suggest this because the international human rights instruments have been informed by and, in very considerable measure, reflect principles cherished by the common law

But secondly the bill is concerned with the domestic application in Australia of the broad principles expressed in the international instruments. Should the joint committee identify that a particular bill has implications for a relevant human right, it will turn to consider the issue of compatibility. Excepting the presumably rare case of a non-derogable right, such as the right not to be tortured, not to be enslaved, coming before the committee, the joint committee will be concerned with whether the proposed measure was compatible with respect for the right in question and thus legitimate in the circumstances. The critical test is thus likely to be whether the restriction on the right is proportionate to the legitimate aim pursued. This will involve the balancing of competing individual rights or more likely balancing the interests of society with those of individuals and groups. This is an exercise which in our democracy members of parliament are well equipped to do, and we say may be expected to do, by a reference to their knowledge of the context in which the proposed law will operate. That context includes Australian law and jurisprudence as well as Australian circumstances generally. Thank you.

ACTING CHAIR—Thank you. It is Senator Barnett acting as chair at the moment. Would Ms Raman or Mr Dick wish to make any further comments before we go to questions?

Mr Dick—No, thank you.

Ms Raman—No, thank you.

ACTING CHAIR—I will kick off with some questions and Senator Pratt also has questions. Ms Branson or whoever would like to answer, are you familiar with the Scrutiny of Bills Committee and its role?

Ms Branson—You mean the committee proposed to be established by the bill before this committee?

ACTING CHAIR—No, there is the Senate Scrutiny of Bills Committee.

Ms Branson—Yes, we are familiar with that. Sorry.

ACTING CHAIR—Do you think it performs an important role?

Ms Branson—I believe it does.

ACTING CHAIR—Do you believe there is either a direct or indirect overlap of the roles between the Scrutiny of Bills Committee and the joint parliamentary committee that is envisaged to be established under this bill?

Ms Branson—I think it is possible that there could be. It is the sort of potential we expect would be addressed by communication between committees or possibly an understanding between the two communities of what emphasis each of them would place on their respective work.

ACTING CHAIR—One of the terms of reference for the Scrutiny of Bills Committee is to ensure that a person's rights are not unduly trespassed. You are probably familiar with that particular term of reference.

Ms Branson—Yes, I am.

ACTING CHAIR—Do you think they would continue to have a role in that regard or would this joint parliamentary committee subsume that particular function of the Scrutiny of Bills Committee?

Ms Branson—I think that would be a matter for the parliament and very likely left for the committees to resolve. I am aware that Senator Coonan, who I believe chairs the parliamentary scrutiny committee, is herself not troubled by that, and that seems to me to be a very reasonable approach.

ACTING CHAIR—We had a witness in our Melbourne hearings, former Senator Barney Cooney, who was a longstanding chairman and a very strong advocate of the Scrutiny of Bills Committee, who indicated that there would be in his view, and I do not want to misrepresent his views but from my understanding of what he said, an overlap and that was cause for some concern. Do you accept that?

Ms Branson—I agree that there is some potential there for overlap. I do not believe it is a matter for concern and I do not think it would be the only example of potential overlap between committees of the parliament. As I understand it, the other ones have been managed efficiently and well and sensibly by the committees themselves.

ACTING CHAIR—A number of witnesses have put the view to us that including in a bill such as this the seven treaties—and I notice one of your recommendations is to expand that by a number of further treaties—means that it is nigh on impossible or extremely difficult for a member of parliament to have a full understanding and comprehensive view as to the human rights flowing from and the impact of those treaties on human rights in Australia. What do you say to that position?

Ms Branson—I think one of the purposes of the joint committee is educative—educative for members of parliament but also for the Australian public generally. I am sure there will be a growing familiarity with the conventions so long as the committee is in operation. But I think your question illustrates the very important role that the statements of compatibility or otherwise that will come before the joint committee will play, because there will be people whose job it is to understand the conventions. They will be responsible for giving a full explanation of why it is that the proponent of the bill believes that it is consistent with the human rights in those seven or, as we hope, 10 conventions—or, alternatively, what inconsistency or potential inconsistency they have identified and why it is that, nonetheless, the bill continues to be put forward to the house.

ACTING CHAIR—All right. I am interested in your view on whom those human rights apply to and, specifically, I would like you to advise the committee whether they apply to an unborn child.

Ms Branson—Senator, all I can say about that is that the rights of the unborn child obviously raise very critical issues—ethical, moral and philosophical questions—and I do not at all downplay their significance. Whether or not actual rights that are rights vested in the unborn—effectively, rights vested in a foetus before that foetus is born—is an issue on which I think international law has no firm position. I think you would be aware that each of the two relevant authors of, respectively, article 6 of the International Covenant on Civil and Political Rights and article 6 of the Convention on the Rights of the Child talks about the inherent right to life, but both conventions were deliberately silent on the issue of when life commences and when protection of life commences. The Australian Human Rights Commission has not been required to form its own view on that issue, and therefore I am unable to express a view on behalf of the Australian Human Rights Commission.

ACTING CHAIR—I find it rather extraordinary that the Australian Human Rights Commission, which has been around for a good while, and you as its president do not have a view as to whether an unborn child—whether at the first, second or third trimester—is entitled to human rights. This has been raised previously with the commission, in Senate estimates, and so I would have thought you would have formed a view as to whether you consider that an unborn child should have protection as a human right.

Ms Branson—It is not an issue that has been before the commission for consideration. You would understand, Senator, that we have roles and functions set by the act. They are a severe demand on our time and our resources, and we tend to concentrate on those factors which are part of our corporate plan for the period, that corporate plan being something that, by statute, we are required to provide to the Attorney-General. In addition, we do advise the Attorney-General annually of our work program, and that work program to date has not called on us to make a decision on this issue, which is a highly complex and difficult one in international law.

ACTING CHAIR—The commission is obviously very busy. How many staff do you have?

Ms Branson—I will ask the executive director to answer that question.

Ms Raman—I think that there are 107—

Senator BARNETT—How many—107 or 170?

Ms Branson—One hundred and seven.

Senator BARNETT—Can I just make it clear to you the importance of having this matter clarified prior to the commencement—if it is to commence—of the bill. You would not want the committee to then be subject to having to ask these questions themselves and, of course, one of the places they would go to try and find an answer would be the Australian Human Rights Commission. So could I please, please, Madam President, ask you on notice to provide your advice to this committee as to whether an unborn child will be protected by this bill.

Ms Branson—Senator, I would have to take advice on whether that is a legitimate request. I can advise you that should this joint committee on human rights have the issue before it and seek a submission from the Australian Human Rights Commission, we will do all we could to provide such help to the committee as we can. But formulating views on issues that do not at the moment have a practical application to our work is not something that we would normally do.

Senator BARNETT—The previous witness was very strongly of the view that it did apply—

Ms Raman—There are a range of views, Senator Barnett, as there are on most controversial issues.

Senator BARNETT—Indeed, and that is why, obviously, you have a remit to express a view with respect to human rights and whom it should apply to. I think that it is a very fair question and I would like you to take it on notice, please.

Ms Branson—I will take on notice your question, Senator Barnett.

Senator BARNETT—Thank you.

CHAIR—The committee will be charged with looking at and producing a compatibility statement with a range of international treaties. Your submission goes to extending that to the ILO, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination, and the UN Declaration on the Rights of Indigenous Peoples. Let me take these one by one. Would you not think that the ILO is covered by the International Convention on Civil and Political Rights?

Ms Branson—There are detailed aspects of the ILO convention, 111, which is concerned with equal opportunity in employment. The reason we think it would be desirable to have it added is that it is a convention under which complaints can presently be brought to this commission and, since Australian law allows for those complaints, it seems to us that it would be useful to have this committee considering those very issues before the law was passed.

It is the same explanation for our referring to the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief. We can currently receive complaints under the convention and for that reason I think consistency of approach might suggest that it is a convention that should be considered at the time that legislation is being enacted.

CHAIR—We have not formally ratified the UN Declaration on the Rights of Indigenous Peoples, so isn't that more like a statement of intent or agreement?

Ms Branson—You are precisely right. That is precisely what it is. The government has indicated its support for that declaration. What it does do is help people understand how general human rights particularly apply to indigenous populations and so it is in the form of an explanatory document. We think that it would be helpful but its significance is as you suggest.

CHAIR—Of the human rights treaties that apply to Australia—and these are the seven, I am assuming, that the committee will focus its attention on—do any of those actually mention the rights of the unborn child?

Ms Branson—Not in such language, no.

Senator BARNETT—When you say, 'not in such language', is that a yes or a no?

CHAIR—That was my next question, Senator Barnett.

Ms Branson—I think each of them, as I indicated previously, has been drawn, and one has reason to think deliberately drawn, to avoid saying that. That is not to say that some commentators, some experts, have not seen them as extending that far while many others think they do not go that far.

CHAIR—Ms Branson, finally I want to ask you this: the committee, as I see it, does not have the power to create its own reference—unlike some of the other joint standing committees I have sat on. We can either get a reference from the minister or the committee can initiate its own inquiry. This bill does not allow this committee to do that. Do you have a view about that? Do you think it should? Or do you think there are problems with the joint standing committee on human rights initiating inquiries into aspects of human rights?

Ms Branson—Senator, you will see that our first recommendation suggests that the committee be empowered to initiate and conduct inquiries regarding issues raised in the findings of UN treaty bodies and special rapporteurs of the UN Human Rights Council. We have not explicitly recommended self-initiated inquiries otherwise, but I do not think we wish to be heard to speak against that.

CHAIR—Initially what you are saying is: if the committee were to determine to have an inquiry into issues, they should be limited to any findings of a UN treaty body or a report from the UN Human Rights Council.

Ms Branson—We do not precisely say that. We positively say that you have that power to initiate those inquiries. The commission has not in its submission expressed a view about a wider self-initiating power, but we do not wish to speak against it.

Mr Dick—We note also that the bill does enable the committee, if established, to consider existing legislation as well as proposed legislation. So it could initiate an inquiry into any laws that currently exist—which is a very broad range as well. That is partly why we suggest only that partial ability.

Senator PRATT—Further to Senator Crossin's question in relation to the powers of self-referral, I personally would support a process of self-referral; but if that were to be not successful perhaps from either the Senate or the House of Representatives, other than the Attorney-General, might be appropriate. Is it within your scope to comment on that?

Ms Branson—I rather thought we had referred to that in our submission; but if we have not we would not oppose that.

Senator PRATT—Would you support it, or are not in a position—

Ms Branson—I think we would support it.

Senator PRATT—I notice that currently there are some differences between what is within your remit as the Human Rights Commission and what would be within the remit of this committee, and you seem to be advocating in your submission for a greater alignment between the two, and that is to bring in the declaration of the rights of Indigenous peoples and ILO conventions and intolerance and discrimination based on religious belief. Can you explain the significance of a better alignment between the two?

Ms Branson—I think there are a number of reasons why it would be a good idea, Senator. The first is because I think Australian legislation should be readily understood by the Australian public, and, if possible, terms should be used with the same meaning in legislation that people are likely to be reading. Therefore, I think to have differing definitions of human rights in this bill—should it become an act—as in the Australian Human Rights Commission Act, is likely to cause confusion, and I think it would be detrimental to the achievement of the objectives of the national framework on human rights and education and understanding in this country. It would of course also facilitate this commission providing submissions and such support to the committee should it come into existence, as it might be asked to do. We would then be able to make submissions more readily across the full range of the human rights that the joint committee is concerned with, and our own work would encompass that broader range of rights.

Senator PRATT—In terms of the relationship between the commission and such a committee in terms of the matters that might come before it, I suppose you would be familiar with the many groups of people who,

either individually or collectively, will start to agitate for recognition of their rights if they have been overlooked in Australia in some way. If we had an Attorney-General who was not responsive to that, it would not seem proper for the parliament not to be able to respond independently to movements like that, would it?

Ms Branson—If I understand your question, Senator, no. One would hope that in a democratic country the parliament would be responsive to the wishes of its people as expressed to it. If I could revert to the previous question around the definition of human rights, you may or not be aware that the definition of human rights in the Australian Human Rights Commission Act does not include the discrimination legislation either, and those conventions come within the powers of the commission through the Race Discrimination Act on the one hand and the Sex Discrimination Act on the other. So I think that harmonisation of the definitions of human rights would be extremely helpful for the reasons I gave before—principally educative purposes and to assist clear understanding of human rights.

Senator PRATT—Do you have a view on the committee's access to independent legal advice and where such legal advice should come from?

Ms Branson—I believe that legal advice to the committee will be critical. I think it would always be critical, but it will be at its most critical early in the life of the committee before it has established a jurisprudence of its own and a body of work of its own to reflect upon. We would hope that the committee would be resourced to retain highly qualified experts in human rights.

Senator PRATT—Do you have a view about what is essentially a political process, when you have members of parliament give diverse views, being asked to provide statements of compatibility? It has been put to us that such statements of compatibility somehow overlook what is essentially a political and parliamentary process when, in my view—and I am interested in your response to this—essentially what you end up with is members of parliament forming a view from a range of sources of information, and in effect they are simply reporting to parliament a statement of compatibility and then whether any variance from compatibility is justified or not, et cetera.

Ms Branson—The Australian Human Rights Commission is of your view. Indeed, we think that the final statement is very unlikely to be the critical aspect of the work of the joint committee. What is important, as in the statement of compatibility that proponents of bills are required to do, is the analysis of the legislation and the analysis of the reason why the legislation is believed to be compatible or—rarely, as one might assume—not compatible. It is a provision of information of information, material and resources to parliament to inform that parliamentary debate and we think enhance the quality of that debate and enhance the understanding, of all concerned, of human rights consideration.

Senator PRATT—Some people seem to be inclined to confuse what will in effect be a parliamentary report with some kind of legal finding, because it is a statement of compatibility. Do you agree that some people seem to be confused about that?

Ms Branson—We do agree entirely that that is so, Senator.

CHAIR—Ms Branson, thank you very much. I do not think we have any other questions for you and your team. I thank you for your evidence this afternoon. We appreciate your submission to our committee.

[5.39 pm]

HOWIE, Ms Emily, Director, Advocacy and Strategic Litigation, Human Rights Law Resource Centre

LYNCH, Mr Philip, Executive Director, Human Rights Law Resource Centre

CHAIR—Welcome, and thank you for making yourselves available this afternoon. We have your submission and we have numbered it No. 1 for our purposes. I will ask you to provide us with some opening comments and then we will go to questions.

Ms Howie—Thank you very much for the opportunity to appear before the committee. Our detailed position on the bills is set out in the submission that you have, dated 5 October 2010, so we will make brief opening remarks touching on some of the key issues that are raised in our submission.

The National Human Rights Consultation acknowledged that the Australian legal system has both strengths and weaknesses in human rights protection. While many human rights are protected by our democratic institutions—the common law, legislation and, to a much more limited extent, the Constitution—there remain gaps that need to be addressed. In the committee's words, 'the patchwork of protection is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable.'

Whilst our system undoubtedly has strengths, we should always strive to do better to ensure the enjoyment of human rights by all people in Australia. The Human Rights (Parliamentary Scrutiny) Bill 2010 is a small step in the right direction. It has the potential to make a modest but welcome contribution to the legislative and institutional protection of human rights in Australia and to play an important role in human rights education and acculturation. We support the expeditious passage of the bill. Delaying the bill will deny its benefits to all Australians but particularly to groups such as the homeless, elderly persons, people with disability and Indigenous Australians—all of whom were identified by the national consultation committee as being particularly vulnerable to breaches of their human rights.

We also support and call for the expansion of the new parliamentary scrutiny committee's role and function to include monitoring and reporting on the implementation of the recommendations from United Nations human rights bodies. Through this function, the parliament can become part of the constructive dialogue with the international community on the application of international human rights standards in Australia. Parliament has an important institutional oversight role to play in relation to the implementation of treaties that are ratified by the executive. Further both houses of parliament should be given the power to refer a matter to the committee for inquiry. This would ensure that the committee's thematic inquiries are not solely determined by the government of the day.

The inquiry function that is vested in the UK's joint committee on human rights has enabled that committee to take a proactive and innovative approach to the development of human rights law and policy in the UK, including in emerging areas such as that of business and human rights.

The two initiatives of the bill—the establishment of the joint parliamentary committee and the requirement for bills to be accompanied by statements of compatibility—will not completely fill the gaps in human rights protection that are identified by the national human rights consultation. Nonetheless, we support the passage of the bill and encourage you to recommend the expanded powers and functions for the joint parliamentary committee as we set out in our submission.

We note that our submission and our recommendations have also been endorsed by a number of other individuals and groups. Thank you again for the opportunity to make an opening statement. We look forward to your questions.

CHAIR—Thank you very much. Mr Lynch, do you want to add anything?

Mr Lynch—No, only that there is one very minor amendment to be made to our submission. At paragraph 36 on page 12, the second sentence should have the following words added at its conclusion: 'is less likely to be effective.'

CHAIR—So it would read, 'If public authorities—'

Mr Lynch—It would read, 'If public authorities do not have adequate planning, auditing and reporting procedures, the implementation and incorporation of human rights values and requirements into policy and legislative development is less likely to be effective.'

CHAIR—Okay. I am going to start with some questions to you. In the Australian Human Rights Commission's submission to us, they have put a position. I am going now to the powers of the committee to initiate inquiries. The bill allows the committee to conduct an inquiry that is referred to it by the Attorney-General, but it cannot actually initiate its own inquiries like most joint standing committees. There is a suggestion by the Human Rights Commission that the functions of the committee could 'be expanded to include an ability to initiate and conduct inquiries' relating to the findings of any United Nations treaty body or any particular procedures of the UN Human Rights Council. In other words, they are suggesting to us that it could initiate its own inquiries but they could be limited to particular areas. Do you have a view about that or do you think that, in the initial stages, only an inquiry given to it by the minister should be the way to go to start with?

Mr Lynch—Our views on that are set out at paragraphs 22 and 23. We think it should have the power to inquire into any matter relating to human rights referred by resolution of either house and that, additionally, the functions conferred under proposed section 7 should be expanded to include the power to monitor and report on the implementation of the recommendations of UN human rights bodies.

CHAIR—So your view is more expansive than that of the Human Rights Commission; it is that it should be any human rights matter referred by either house.

Mr Lynch—Any human rights matter referred by either house and, in addition, oversight of the implementation of the recommendations of UN human rights bodies. Our view is that parliament has an important institutional role to play in overseeing executive implementation of its international human rights obligations.

CHAIR—For the record, what is your view about whether or not the seven human rights treaties specified in the bill should be extended to also include the ILO, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination and/or the UN Declaration on the Rights of Indigenous Peoples?

Mr Lynch—We are content with the formulation in proposed section 3(1) in its present form. We do think, however, that it could be strengthened and perhaps clarified by replacing the word 'means' with the word 'includes'. That would do two things. The first is that it would allow for the evolutionary nature of human rights and enable the consideration of human rights instruments that are not enumerated in proposed section 3(1) but that are clearly relevant to the proposed law. It would also clarify that the committee was empowered to consider those human rights that are recognised in the seven treaties but are also enshrined in Australian law, whether in legislation, the common law or the Constitution.

CHAIR—Can you point me to where that suggestion about proposed section 3(1) is in your submission. It is at section 2.2, is it?

Mr Lynch—It is at 2.1 and 2.2, although we do not set out in this submission that we consider that the word 'means' should be replaced with the word 'includes'. Specifically on those additional treaties, we do not think it is necessary to explicitly enumerate them, for a couple of reasons. First, most if not all of the rights contained in those instruments are covered by the seven core human rights treaties. Second, declarations, particularly the Declaration on the Rights of Indigenous Peoples, whilst important instruments that should guide the development and interpretation of law and policy, are not legally binding and therefore do not have the status or carry the legal obligations of the seven treaties. Finally, as a practical matter, the task of pre-legislative and parliamentary scrutiny risks becoming overly complex if the assessment of compatibility is against too many instruments.

Senator BRANDIS—Mr Lynch, I am looking at paragraph 15 of your submission, in your discussion of the definition of human rights in clause 3(1) of the bill.

Mr Lynch—Yes.

Senator BRANDIS—In the event that the parliament were to enact the bill in those terms, what do you say would be the effect on Australian domestic law of doing so? Do you say that the terms of each of those instruments would become part of the domestic law of Australia? Do you say that following cases like the Teoh case some years ago that they would at least have a significant influence on the manner in which decision makers were obliged to make decisions? Mr Lynch or Ms Howie, please just state in your own words what change to Australian domestic law would be effected by the enactment of that clause of the bill?

Mr Lynch—You are referring to clause 3(1)?

Senator BRANDIS—The clause that defines human rights in terms of the seven international instruments.

Mr Lynch—Our view is that it would require policy makers and parliamentarians to consider explicitly and also report on the human rights implications of proposed legislation. We do not think that it would in any way constrain parliamentary power. We do not think that it would in any way confer any enforceable or justifiable rights. Statements of compatibility, as with any other extrinsic materials such as a second reading speech or an explanatory memorandum, may be relevant under section 15AA of the Interpretation of Legislation Act to the identification of the purpose and intent of that act. But that is an expression of parliamentary sovereignty.

Ms Howie—You asked about the Teoh effect that this might have.

Senator BRANDIS—Yes.

Ms Howie—I do not see that there is the effect that the passage of this bill could have in the sense of creating legitimate expectations. If those legitimate expectations are created, they are created at the time that the treaty is ratified and not through the passage of this bill.

Senator BRANDIS—All right. I gather from your answers that in relation to the impact on Australian domestic law you say it would have none, but that it would focus the mind of policy makers and decision makers. And in relation to the Teoh effect you say it would have none—is that a fair summary of your views?

Mr Lynch—Yes. Although, clearly, material created by consequence of the bill—and particularly statements of compatibility—

Senator BRANDIS—No, I think you are right. I do not need to ask you any more about that. I think you are right that it is not—

Mr Lynch—Yes, we agree with those propositions.

Senator BRANDIS—I think a statement of compatibility is somewhat similar to an EM.

Mr Lynch—Yes.

Senator BRANDIS—Staying with the definition of human rights: do you criticise the draft bill for defining human rights exclusively in terms of these instruments rather than inclusively?

Mr Lynch—As I said earlier, I think the bill would be stronger if the word 'means' was replaced with the word 'includes'. That said, I do not think that the bill in its present form excludes the consideration of other human rights instruments.

Senator BRANDIS—But it does seem to privilege the international instruments, does it not, as primary sources of human rights?

Mr Lynch—No, I do not agree with that. I think that, to the extent that Australian law—whether legislation, the common law or the Constitution—enacts or enshrines rights and freedoms contained within any of the seven core instruments, such law is plainly relevant to the inquiry task and the scrutiny task of the committee.

Senator BRANDIS—I must say with all due respect that I have a somewhat different approach to this. Whereas I am perfectly comfortable with the idea that relevant international instruments may have regard paid to them in considering human rights issues, it troubles me that the way in which this act defines human rights does not take as its starting point the existing human rights acknowledged—admittedly in piecemeal fashion, as you say—in the Constitution, the common law and the statutes of the Commonwealth and the state and territory parliaments; it does not take those sources as the primary source. Most of the human rights we enjoy in Australia—albeit they are something of a 'patchwork quilt', in the words of the Brennan report—do not have their sources in international instruments; they have their sources in domestic law, both common law and statutory, do they not?

Mr Lynch—I think that there are a number of reasons why defining primarily by reference to the seven instruments would be preferable to taking the starting point as defining by reference to the sources to which you have referred. The first is the issue which you have acknowledged, which is that, whilst Australian law does protect many rights, there do remain gaps, and that means, I think—

Senator BRANDIS—I did not actually say that; I said it is a 'patchwork quilt', to use the words of the Brennan report.

Mr Lynch—What that means is that the task of legislative and parliamentary scrutiny might not be as comprehensive and certainly not as systematic as it could be under the seven core treaties.

Senator BRANDIS—Perhaps it is, if I may say so, not as Benthamite. But, even though there are a variety of different sources with no necessary logical connection, that is the way the common law has developed and

the way statute law, for that matter, has developed. Do we need a pure Benthamite codification of human rights law? That sounds to me a bit like a bill of rights, which the Australian parliament, both government and opposition, have decided is not the right way to go.

Mr Lynch—Taking the second point first, it is not a bill of rights, and I think the assertions that other submitters to the inquiry have made that it is somehow a backdoor charter are completely misguided. What distinguishes bills or charters of rights is that they confer enforceable rights and justiciable obligations, and this bill has neither of those two key features.

Senator BRANDIS—That is a fair point.

Mr Lynch—The second reason is that, at the end of the day, the bill needs to be practicable and accessible, and I think that requires codification. I know it has been attempted by people such as Chief Justice Spigelman but, with all due respect to him, I have never seen a comprehensive statement as to all of the human rights that are recognised in the various sources of state, territory and federal legislation, the common law and the Constitution.

Senator BRANDIS—I assume you are referring to Mr Justice Spigelman's McPherson Lecture last year, which I think was a very fine piece of work. But, Mr Lynch, there might be a reason why you have never seen a comprehensive statement of all the human rights: that nobody can agree on what they are. Everybody has their own views on what are human rights. My views might be largely similar to yours, but there might be important points of difference. That is because human rights are contestable and, at the borderline, controversial.

Mr Lynch—I will leave Emily to answer that question but, just before I pass to her, I make the point that defining human rights by reference to Australian law would mean, in effect, that Australian law is being scrutinised against Australian law, which becomes a rather circular process.

Senator BRANDIS—No, I do not think that is right, with respect, because what this committee would be doing is looking at bills—primarily, at least, looking at new legislation. So it would be holding up new legislation to scrutiny against the existing corpus of human rights principles embodied both in the common law and in statute.

Ms Howie—There is also a question there about how that kind of a function would differ from the function of the Senate Scrutiny of Bills Committee, which already undertakes the function of assessing the extent to which laws trespass unduly on personal rights.

Senator BRANDIS—That is a good point. I think you are right. To a significant degree the Senate Scrutiny of Bills Committee does that already, with some success, but of course—

Mr Lynch—That is why it is appropriate at least initially for this to be tasked to assess scrutiny against the international instrument—

Senator BRANDIS—I do not think that follows. I was going to go on to say that there are two important respects in which this committee would differ from the Senate Scrutiny of Bills Committee. First of all, it obviously would be a joint committee of the parliament, and the reality of life in Parliament House is that joint committees of the parliament have more authority and prestige and power than committees of one house or the other, so it would enhance the status of the scrutiny of bills from a human rights point of view. Secondly, and even more importantly, it is contemplated by this bill, and it is a proposal I certainly support, that this committee would routinely have public hearings, which the Senate Scrutiny of Bills Committee does not. The core proposal is a proposal that was put to the Brennan committee by the opposition, not the government, to have a parliamentary human rights committee. My aspiration here is to have something like the Senate Scrutiny of Bills Committee operating on a wider and more regular basis across both houses of the parliament and have the capacity to conduct public hearings. What is wrong with that?

Mr Lynch—We think they are both highly desirable aspects of this committee. For the reasons we have set out, we think it is appropriate that the terms of reference for the committee reference explicitly sources of fundamental human rights obligations. I am not sure if you want Emily to return to the question that we have not answered until now, which was about rights being deeply contested.

Senator BRANDIS—We could have a philosophical debate but it is probably a waste of time because we all know the arguments on both sides of the question. It seems to me that if it be accepted, as I am sure it must be, that human rights are contestable and there are arguments about what are human rights and also arguments about what are the characteristics or elements of human rights that are admitted, then I rather wonder whether

it is more useful not to have a definition of 'human rights' at all, simply because what we are doing is establishing a parliamentary committee and each member of parliament who sits on that committee will have their own views about what 'human rights' consists of. My colleague Senator Barnett has a view which many members of parliament share that the definition of 'human' in the phrase 'human rights' extends to the unborn. There are others in the parliament who would vigorously disagree with that. I might have views about economic rights which would not be shared by some of my Labor Party and socialist colleagues. Why do we need to straitjacket the capacity of the members of this parliamentary committee to approach the issue of human rights informed by their own intuitive beliefs about what human rights consist of? It is not as if there is just a body of international law, if you will, which tells us what are human rights and what are not and that is the end of the argument.

Ms Howie—I think we would disagree with you particularly on the assumption that human rights are deeply contested. There is a body of international law around which there is broad international consensus—

Senator BRANDIS—I think that is complete nonsense, with respect. If you look at decisions of courts like the European Human Rights Commission and the domestic human rights courts, how can you possibly say that when more often than not there are majority judgments and dissenting judgments in those courts? How can you possibly say there is a consensus when the very human rights courts themselves embody wide differences of view?

Ms Howie—Where disagreement arises it tends not be about the existence or content of human rights but really whether a particular law, policy or practice breaches a human right. Just as it is with all areas of law context is everything and a case by case analysis is important. There is a broad consensus in terms of the content of international instruments, which is reflected in things like the European human rights instruments. Then where the disagreement might arise is in the way that those rights are actually applied to different factual situations. Therefore you do get different ideas coming out of courts in the way that those rights are applied in much the same way as you do in all types of law. You would have the same thing arising with misleading and deceptive conduct under the Trade Practices Act. There is general consensus about the meaning of that term.

Senator BRANDIS—No, there is not. I spent many years practising that field at the bar and I can assure you the meaning of that phrase in section 52 of the Trade Practices Act is one of the most frequently litigated provisions of Australian statute law.

Mr Lynch—What is litigated is the application of the term to the principles, to the facts of the case.

Senator BRANDIS—Sure, but let us frame this discussion by reference to an example. Do you say that freedom of expression is a human right?

Mr Lynch—Yes.

Senator BRANDIS—Do you say that freedom from vilification on the grounds of one's race, ethnicity or sexuality is a human right?

Mr Lynch—Yes.

Ms Howie—Yes.

Senator BRANDIS—All right. Now, do you accept that where the boundary is drawn between the right to insult as an expression of freedom of speech and the right not to be vilified on the basis of race, ethnicity and sexuality will be controversial? And where it is drawn will depend upon the facts of a particular instance. Given that different people have different views—

Mr Lynch—I think different people have different views not on what are human rights but, respectfully, on what constitute reasonable, necessary and proportionate limitations on human rights. The point of these instruments is that they define human rights. They do not define how human rights apply to a particular factual scenario and they do not dictate how a proportionality analysis must be undertaken. That is, of course, the function of this committee and something to which parliamentarians and policymakers are particularly adapted and suited. All that the reference in international instruments does is define what constitutes human rights.

CHAIR—The discussion that is happening is particularly interesting and Senator Brandis has pursued this a few times. I am not saying it is not helpful, but I am starting to wonder how this bill can encapsulate that or whether this would be a substantive discussion that would not only occur at the first meeting of this committee but, of course, may be an ongoing dialogue of members of this committee. How you define human rights and how you might form a view about whether or not that is compatible with legislation can actually be encapsulated in the legislation that is before us.

Senator BRANDIS—I think we have already been offered a solution to the particular question in the submissions of former Senator Cooney and former Senator Tate, both of whom are very distinguished gentlemen, and the latter of whom is a very distinguished scholar in this field as well. My own view is that we would get ourselves into a lot less trouble if we defined human rights not by topic but by source so that the remit of the committee were to have regard to human rights as revealed by the Constitution, the common law, relevant statute law and relevant international instruments and leave it at that, and let the members of the committee itself decide what human rights means to them and to apply those standards identified by source rather than by category to the scrutiny of the bills that may come before them. Would you like to comment on that Mr Lynch or Ms Howie?

Mr Lynch—Yes, I will. I think that your concerns, respectfully, could be accommodated by our recommendation, which is a replacement of the word 'means' with 'includes', although as we mentioned earlier we do not think that is strictly necessary. I think that the definition you propose has real complexities both for parliamentarians and for policymakers for the reasons we have discussed earlier. The reference to sources does not provide policymakers in particular with the comprehensive and systematic way in which to undertake a process of scrutiny.

Senator BRANDIS—You are in love with this idea of it being comprehensive and systematic, Mr Lynch.

Mr Lynch—My question is: which of the rights in any of the seven international treaties which are referenced don't you think that scrutiny should entail, and are there any human rights in Australian domestic laws that you do not think are reflected in those seven international instruments? I would, respectfully, say to each of those questions that the answer is no.

Senator BRANDIS—There are a number as a matter of fact and I have given papers on this at various conferences, but we will leave that to one side. It is not policymakers by the way who are going to be participating in this process.

Mr Lynch—It is policymakers through the provision of statements of compatibility.

Senator BRANDIS—It is going to be elected members of parliament.

Mr Lynch—It is bureaucrats who will be undertaking a significant part of the process of policy development and legislative development in the preparation of, as they do with explanatory memorandums and second reading speeches, statements of compatibility.

Senator BRANDIS—I do not want to open the front of statements of compatibility with you, but that is assuming that the bill in the form in which it is ultimately passed retains the reference to statements of compatibility. I for myself do not regard statements of compatibility as something particularly important because, once again, those who make decisions on legislation, that is elected members of parliament, will have their own views as to whether the bill is compliant or noncompliant with human rights obligations and they do not need a bureaucrat to tell them whether that be so or not.

Mr Lynch—That assumes that the only purpose of statements is to inform and expedite the work of the committee. Whilst that is a function of statements to inform committee, but certainly not fetter or constrain the committee, a more important purpose of statements is ensuring that bureaucrats have proper regard to human rights in the process of developing bills, which has, in turn, the benefit of enhancing transparency and accountability in policy making. Also, may I say, rendering much more clearly the executive's intent in a bill.

Senator BRANDIS—What courts look at is not the executive's intent so much as parliament's intent.

Mr Lynch—Surely the executive's rationale and purpose in the considerations to which it has had regard are relevant.

Senator BRANDIS—They are. That is why we have second reading speeches and explanatory memorandum, which are interpretive sources as we know. But, ultimately, it is the will of parliament not the will of the executive government. Last year this parliament passed an act which enormously invades economic freedoms—the Fair Work Act. It invades private property rights, it authorises the entry of trade union officials on premises against the wishes of a business owner and so on. There are some people who might think that was a violation of a human right. There are others who might argue that it was the assertion of a different form of economic right by or on behalf of employees of the business.

We always get down to these questions—human rights mean different things to different people. Your suggestion that there can be some corpus of uncontestable jurisprudence that would simply tell members of parliament what is a human right and what is not really means that members of parliament who sit on this

committee would be abdicating their role as decision makers by almost mechanically applying a body of legal doctrine. We had a very foolish man from Victoria at the last hearing of this committee who effectively said that—it is a mechanical process. Now, it is not a mechanical process—these are decisions that members of parliament, informed by their own values and philosophies, must make. To try to impose a uniform view and pretend there is a consensus about what human rights mean on the basis of a body of legal doctrine is not what members of parliament do, nor what they should be expected to do.

Ms Howie—We think that the committee is actually ideally placed to consider the application of human rights principles to Australian law, but it would, as we said in our submission, need to receive advice and assistance from people with expertise in international human rights.

Senator BRANDIS—Sure, and it will. If this committee were to be established and there were to be a particular bill of significance before it so that it had hearings, then you could bet your house on the fact that there would be witnesses—good citizens such as yourselves—who would come before that committee and say, 'Well, we think clause x, y and z of this bill is inconsistent with this particular human rights convention' and other witnesses would say, 'Well, in my view it is consistent with this other source of human rights', whether common law or statutory, and the debate about human rights would be framed by a committee very well informed by the witnesses before it, just as our committee has been very well informed by the difference of view we have seen between your submission and the submission we heard earlier on from Professor Jim Allan. They are very different views and both are based on a different view of both the content and the application of human rights. What we should not do is pretend that there is not a difference of opinion when plainly there is.

Mr Lynch—I know there has been a lot of previous discussion about whether referencing international human rights instruments somehow involves an abrogation of sovereignty. I know that is the issue with which James Allan is concerned. I will say two things in that regard. First of all, in the field of human endeavour it is useful when dealing with issues of human rights to look to international and comparative jurisprudence, experience and learning. We would not be bound by it but we would be foolish not to be informed by it. We should not aspire, as some such as James Allan and Christian Porter seem to suggest, to be a human rights island.

The other thing that I should say is that far from involving some abrogation of sovereignty, the contrary proposition is true. One of the benefits of referencing international instruments and the committee having explicit regard to them is that it would involve the Australian parliament directly in a dialogue about international human rights law and jurisprudence in a way that it is frankly not at the moment. That has significant potential to, in turn, inform and shape the international dialogue and framework in a way that more deeply reflects Australian values and concerns. That is an expression of Australian sovereignty; it is not an abdication of it.

There is one final thing. We provided to the secretariat a document which responds to some further issues that were raised by this committee at its previous hearing on 4 November. We seek to table that document for the committee's consideration.

CHAIR—Okay, thank you. We will consider that and have a look at that. Thank you for your assistance this afternoon.

EGAN, Mr Richard John, National Policy Officer, Family Voice Australia

CHAIR—I welcome Mr Richard Egan, representing Family Voice Australia. Do you have any changes to your submission?

Mr Egan—There are no changes to the submission.

CHAIR—You can make some opening comments, and then we will go to questions.

Mr Egan—I will just highlight the key elements of our submission. First, in regard to the proposed specification in the bill of seven international conventions, it has been our long-held view that UN treaties are ambiguous, that several of them are highly contested. To give a brief example, there is serious international concern that the Convention on the Rights of the Child has the balance between the rights of parents and the rights of children wrong, and so to bind the parliament to examining its legislation specifically against the Convention on the Rights of the Child would, in the view of those who think that convention has the balance wrong, just pull Australian law also in that wrong-headed direction of undermining parents' rights in favour of autonomy rights for children.

I think all of the other conventions also have serious issues that are highly contested and I am happy to give further examples if that is helpful to the committee.

There is of course the question of how do you interpret the conventions? Certainly some of the submissions to this inquiry have suggested that the findings of UN treaty-monitoring bodies be taken as interpretive guides at least to the meanings of the treaties. But we find that these bodies, which are appointed simply by election of the member states of the United Nations, often come out with the wildest propositions in terms of what contravenes human rights. Just to give one example: one of the Balkan states, I think, was censured by the committee for promoting the observance of Mother's Day. This apparently contravened the Convention on the Elimination of All Forms of Discrimination against Women, because it sought to privilege motherhood as something worthy of celebration—not a view, I think, shared widely in Australia—thank God.

The meaning of these conventions is clearly evolving, as there is international jurisprudence on them, and perhaps the decisions of these treaty-making bodies. So we do not really know what it is we are going to be testing Australian law against if we put these conventions into the statute.

My second point is to do with what I think is the ill-thought-out connection between this proposed committee and four very excellent committees of this parliament. Firstly, the Scrutiny of Bills Committee—and others better equipped than me have drawn the attention of this inquiry already to the excellent work of that committee. It is widely praised for its bipartisan culture and for its efficiency in reporting as it does each sitting week. It is a bit of a leap in the dark to expect that a new parliamentary committee, constructed the way this one is proposed, will be able to achieve that same high standing and respect.

I have to admit, I wonder why any committee of this house of review would ever consider the merits of a joint committee, but perhaps there are occasions when it is useful; I am not persuaded that it is in regard to this.

Senator BRANDIS—It is nice to make them feel part of the process sometimes.

Mr Egan—Yes. Of course there is the counterpart Standing Committee on Regulations and Ordinances which does similar work and which also would, to a large extent as far as I can see, be overtaken by this proposed committee. The fact that the government proposing this bill does not seem to have given any thought to that, or if it has its thoughts as far as I am aware remain private. That could be a trend.

The other two committees is this committee itself, because one of the terms of reference proposed for the new committee is to 'inquire into any matter relating to human rights which is referred to it by the Attorney-General and to report to both houses of parliament on that matter.' I would have thought recent inquiries by this committee—for example, into the effectiveness of the Commonwealth Sex Discrimination Act 1984 and the Disability Discrimination and Other Human Rights Legislation Amendment Bill into its inquiry into access to justice—have dealt with areas that are essentially human rights inquiries and areas that the legal and constitutional committees in both this house and the other place are quite well equipped to deal with what are essentially portfolio matters.

In other cases, matters that touch on human rights will also touch on portfolio areas that are the patch of other committees of the Senate, whether it is community affairs or so forth. So again, it seems to me that this committee would be, as it were, stealing work from some of those other committees that have an exemplary

track record in terms of their work. So, over all, it is our view that the proposed committee unnecessarily duplicates and could well undermine the good work being done by existing committees of the parliament.

The final point is to do with statements of compatibility and reports of the joint committee on human rights, which the explanatory memorandum to the bill admits—despite the clauses that say that 'statements of compatibility will not be binding on any courts', they nonetheless can be taken into account by the courts in interpreting the particular statutes to which they apply.

The fear of many Australians relating to a human rights act and the potential transfer of power from the parliament to the judiciary, while not as clearly happening by this mechanism, is that an activist judiciary could be tempted to find a backdoor means of importing the seven international conventions into its interpretive role. We have some concerns about that and think that is a reason to drop statements of compatibility. Of course, you cannot drop the report of the committee or it would have no work to do. Overall, it is our view that the bill should be opposed, but that may not be possible. If it cannot be opposed then I think a much more careful look needs to be taken at how it sits alongside the Scrutiny of Bills Committee and the other committees that I have mentioned in these opening remarks.

Senator BRANDIS—Mr Egan, apart from your ultimate conclusion that the bill should be opposed outright, which, with respect, I do not share, I do largely share your sentiments. It seems to me that your critique of the idea of having a joint parliamentary committee on human rights is really a structural criticism. In other words, we have got the structures in place to do this already so why replace them? What we do not have, though, in a single joint committee of the parliament, is a capacity for public hearings like this, that are specifically focused on human rights issues arising in legislation. I am with you on the contestability of human rights, I am with you in being sceptical of the utility of statements of compatibility and I am with you on the bizarre way in which human rights are being defined by this bill—and you heard my debate with the previous witnesses. But what is wrong with expanding parliamentary oversight of legislation, from a human rights point of view, by having a committee that would do somewhat similar work to the Senate Scrutiny of Bills Committee, but do it as a joint parliamentary committee and through public hearings?

Mr Egan—I do not think you can disentangle the human rights component of any piece of legislation from all its other policy aspects.

Senator BRANDIS—I think that is true.

Mr Egan—The Scrutiny of Bills Committee, by its mandate, runs the scanner over a bill to see whether it is trespassing unduly on personal rights and freedoms. That is an appropriate function, and one which I support. Say, for example, you were looking at a bill dealing with housing. To refer that to a human rights committee that is only going to look at the right to housing in the international covenant on economic and social rights—or whatever the correct name for that treaty is—already starts to distort the public debate on the question. That is particularly so with economic and social rights where you are dealing with two entrenched kind of conflicts. One is limited resources, and this is the reason why, so far, most jurisdictions have shied away from including economic and social rights in their charters of rights. The other is something you alluded to in a discussion with a previous witness today, and that is rights conflict—for example, a situation in which the right of someone to public housing conflicts with the rights of others who may also be on the waiting list or, in some cases, neighbours, when you are talking about how you can evict people from public housing.

I cannot see why we need to single out human rights for special inquiry. I think the legal and constitutional affairs committees are quite capable of doing anything that could be conceived as being in that area or, alternatively, the specific portfolio committees if the matter to be looked at essentially fell within one of them. It may be that we want to ask all committees to keep more of an eye open for human rights. That might be a good thing. Perhaps some general term of reference could be added to all committees when they are looking at legislation.

Senator BRANDIS—Mr Egan, I quite like your phrase, 'personal rights and liberties'. I share your scepticism about a lot of these so-called social and economic rights because, when you think about them carefully, they are philosophically meaningless—for example, the asserted right to access resources, whatever else it does, violates David Hume's principle that ought implies can. You cannot have a right to something that is not necessarily available to you. If you have a right to something then it necessarily means that you are being prohibited from enjoying that right by some human agency. Take, for example, the so-called right to adequate medical care. If you are a citizen of a very poor nation that has no adequate health or hospital system then nobody is violating your human rights if you happen not to have access to a health or medical system—you just don't have access because the country is too poor to afford it.

Mr Egan—I think we are on the same page on this question.

Senator BRANDIS—All of these social and economic rights that people speak of, and which imply access to resources, seem to me to be philosophically incoherent. Nevertheless, there is a core body of rights that do not involve access to resources that may or may not exist—such as, to use your phrase, 'personal rights and liberties'—including freedom of speech, freedom of association and those sorts of things which, I think, most people would recognise as being human rights. Surely, if the focus of the committee were on such matters then it would have a useful function.

Mr Egan—I am still not persuaded of the necessity for such a committee except for the political necessity of the Rudd and now Gillard governments to have something come out of a very expensive exercise in public consultation. It would be difficult, from their point of view, understandably, to have nothing to show for it. That does not mean that it is a good idea.

Senator BRANDIS—That may well be true, but I do not want to make any cheap political points that are, in a sense, too obvious for words. I think that is a fair point. I have nothing further.

Senator TROOD—Mr Egan, thank you for your contribution to this discussion. If we acknowledge that a committee of some kind may be desirable then it needs some point of reference in relation to human rights. You eloquently made the point about the difficulties with these international covenants and the fact that they are, on occasions, ambiguous. There is a body of international jurisprudence which puts them in a context and some of that jurisprudence is not necessarily consistent with many of the ways in which we would interpret rights in Australia. My question is: if we need some definition of human rights, and you are not persuaded the international covenants that are listed here are satisfactory, then what solution do you have to that particular problem if, indeed, you have one?

Mr Egan—I would prefer to leave them undefined. I am somewhat attracted to a proposition Senator Brandis was putting to an earlier witness that, as the issue of human rights is a contested one, each member of parliament—and therefore each member of the proposed committee—would bring to bear their own philosophical and personal convictions about human rights and their nature. I think there are actually quite incompatible notions of the origin of human rights. For starters, where do they come from? So the Scrutiny of Bills Committee has managed quite well, I think, with this term 'personal rights and liberties'. There may be some other phrases in their terms of reference as well that could usefully be brought forward to this committee. But otherwise I would be happier with no definition rather than one that skewed it towards the international covenant. Certainly the alternative of trying oneself to come up with an exhaustive list of human rights would not be helpful—and that is moving closer to a charter of rights and I think it is quite clear that that is not the direction to be pursued.

Senator TROOD—Other witnesses have urged upon us this embracement of rights, which would in fact, I think, lead to precisely that conclusion that we would have enshrined in a piece of legislation a list of rights.

Mr Egan—I am a bit unsure of the list. The list, as I understand it, has been common law, so I have no problem with that. I think it is quite appropriate for the parliament to see about it. I think in a sense that is what the Scrutiny of Bills Committee is already doing: seeing whether there is a trespass on common law rights. As for rights in other statutes, that seems to me an odd thing to be looking at: does this statute conflict with other statutes? I am not quite sure why you would be trying to single out the human rights elements of other statutes that the parliament has passed and test a new statute specifically against the things that are in other acts of parliament—that seems a complex notion to me—and to be privileging some statutes that have already been passed as against whatever is currently before the parliament. I am not quite sure of the merit of that proposition. And then generally there is a reference—and I have seen it in different forms; I think of the Reverend Michael Tate's proposition—to international conventions that are enshrined or enacted into Australian law—

Senator TROOD—Incorporated into Australian law—

Mr Egan—Incorporated; and I was not sure what weight to put on that. Does that include incorporation by their listing as matters that the Australian Human Rights Commission has to pay attention to, for example? Does that amount to incorporation? Are we talking about full incorporation? I am not aware that we have fully incorporated any of these seven treaties in the complete sense. Various governments have claimed that we do not need to because existing Australian arrangements take care of all the things covered by the convention, but they have done that without enacting the conventions themselves. So I am not quite sure what this last part of the proposal adds.

Senator TROOD—I suppose it is a reference to the fact that international instruments of any kind do not operate necessarily in Australia unless they are specifically incorporated through some part of Australian law. I assume that is the reference. You are right, in that it could mean the incorporation of all of the provisions of a particular international treaty or covenant. But it may mean the incorporation of only some articles of international conventions, I assume.

Mr Egan—Yes. It just seems to be that if you simply have the phrase 'human rights' all of those things are open to the committee to do without skewing it towards one thing or the other. If we must have a committee, then I would have thought the less defined human rights are in a sense the better ones, and that gives the committee the opportunity to develop its own practice on this question. It depends how you have this committee sit alongside the Scrutiny of Bills Committee. That seems to me a somewhat insoluble problem unless you do not give this committee the function of looking at all bills that come before the parliament and leave that to the scrutiny committee and limit this new proposed committee to more like the kind of public inquiry that you are talking about—so that sort of role.

Senator TROOD—Thank you for that.

Senator BARNETT—Thank you very much for your submission, Mr Egan. It is very comprehensive and persuasive. I am in broad support of and consensus with your views, but I do have a few questions, and I want to drill down a little. You mentioned the four committees that are already established and you indicated that there is an overlap in the different committees, particularly the Scrutiny of Bills Committee, as previous witnesses have indicated. It is your view that the government, in its second reading speech, in its explanatory memorandum and elsewhere, has not really set out how the two committees would work together. Is that right?

Mr Egan—I have not seen anything. I am open to being corrected if anyone can point me to anything the government said about it, but I have not seen anything.

Senator BARNETT—We will have the department here shortly, and I will be asking them that question. In your view, there is clearly an overlap—is that correct?

Mr Egan—I think it is very obvious that there is an overlap.

Senator BARNETT—I have one other question. In your view, do the human rights extend to children both born and unborn?

Mr Egan—Family Voice Australia's view on human rights is that those rights are inherent for human beings. No-one becomes a human being when they are born; it is simply a change of location and state of dependency. So I cannot for the life of me understand any philosophical view that attaches human rights to the event of birth. It seems to me that if there is such a thing as inherent human rights then they must be there from the point of origin of the human being, which is fertilisation. That is my view on human rights themselves. In terms of the UN convention—

Senator BARNETT—I now want to ask you about the convention. Do you think any rights of the unborn are protected in the UN Convention on the Rights of the Child or the ICCPR and other conventions?

Mr Egan—Certainly the Convention on the Rights of the Child makes explicit reference to the child because of its situation or its—there is a word there that I cannot recall. The child is entitled to special protection both before and after birth. So that is a very clear recognition of at least some rights for the child before birth. I am familiar to some extent with the work of an earlier witness to this inquiry, Mrs Rita Joseph. I find her arguments compelling in terms of international jurisprudence but obviously would concede that apart from being compelling they are also highly contested—as you would expect in this area, because everyone has a stake in the rights of the unborn child.

Senator BARNETT—But is it your view, from reading the conventions, that the rights are protected on the basis of the conventions? I do not just want your moral view, your social view and your Christian view. I want to know your view of the conventions—whether they protect the unborn.

Mr Egan—Yes. It seems to me that if you assert a right to life for every person, as the ICCPR does in article 6, then in the absence of something that limits that to particular persons it must apply to all human persons—and they exist from fertilisation to natural death.

CHAIR—According to your view, Mr Egan—that is your view.

Mr Egan—I think it is the way of things. Of course there are other views, like the view of Professor Peter Singer, who says that we are not a person until we are two years old and that if we get a bit of dementia we are no longer a person—and he is not sure if we are a person when we are asleep.

CHAIR—But the position you are putting to us today is your view.

Mr Egan—I was asked for my view on what the convention means. I am not quite sure who else's view I could give.

CHAIR—It is your view as opposed to whether you believe it can be backed up by a court case or a fact in law.

Mr Egan—As I said, I find the published work of Mrs Rita Joseph on this question—that is, do the international instruments protect the rights of the unborn child to life?—compelling. I find her arguments persuasive, and I have not seen any successful attempts at rebutting them. So it is not just my layman's view; I am deferring to her expertise on that question.

Senator BARNETT—Perhaps I will just conclude, Mr Egan. On notice, if you have any further evidence, whether it is your view or the views of third parties that you think are credible and thoughtful, apart from Rita Joseph, we would be happy to receive it if you want to share it with us on notice.

Mr Egan—I could just reproduce the hundreds of footnotes from Rita's book! I am not quite sure how that would assist the committee.

Senator BARNETT—That is fine. I will just leave that.

Mr Egan—It is a very comprehensive piece of work.

Senator BARNETT—So were you not surprised, when I asked the question of the President of the Human Rights Commission, that she did not have a confirmed view because they were very busy and had other things that they had to turn their minds to?

CHAIR—With all due respect, Senator Barnett, I think that takes some of her comments out of context, and I think you need to look at her whole answer.

Senator BARNETT—I would welcome Mr Egan having a look at the *Hansard*—

Mr Egan—Yes.

Senator BARNETT—I would be more than happy—

CHAIR—Senator Barnett, I am the chair—

Senator BARNETT—With respect—

CHAIR—I am the chair, so just let me—

Senator BARNETT—Well, you interrupted my question.

CHAIR—finish. I am the chair, and I have a right to make sure that previous witnesses do not have their comments taken out of context. So you might want to look at the totality of her response.

Senator BARNETT—I am more than happy for Mr Egan to do that. It would be most welcome.

Mr Egan—I did have the advantage of hearing the witness to whom you are referring. I do not think I am surprised that—

Senator BARNETT—Were you in the room at the time?

Mr Egan—I was, yes, so I did hear the evidence.

Senator BARNETT—Then you heard my questions and you heard her answer.

Mr Egan—Yes.

Senator BARNETT—Were you surprised?

Mr Egan—I am not surprised that the Australian Human Rights Commission has not formed a view on this. It is my view that the Australian Human Rights Commission is extremely partisan in its understanding of human rights. It engages in—as it is entitled to by its statute, of course—examining all kinds of issues on human rights without any reference from government. It just goes away and does the work—as it is doing on, for example, the question of whether religion is compatible with human rights; they are doing that off their own bat. We are still waiting for the results. It is doing things at the moment on gender identity rights and so forth. It seems to have plenty of time to pursue those interests that, in my view, reflect their partisan approach

to things. I am not at all surprised that they have not turned their minds to the one out of four unborn children whose right to life is being denied in Australia. But that is the nature of the culture of death.

Senator BARNETT—Thank you for that. I have asked them, on notice, for an answer. So we will wait and see what they say. Thanks, Mr Egan.

CHAIR—Thanks, Mr Egan. Thanks for your time this evening.

Mr Egan—Thank you very much, Senator.

[6.57 pm]

BOERSIG, Dr John, Assistant Secretary, Human Rights Branch, Attorney-General's Department

WILSON, Mr Scott, Director, Legislative Assistance and Review Unit, Human Rights Branch, Attorney-General's Department

CHAIR—Welcome. Is there anything you would like to add about the capacity in which you appear today?

Mr Wilson—I am the principal legal officer in the Human Rights Branch of the Attorney-General's Department.

CHAIR—Before we hear your evidence, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to the minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions about an explanation of a policy or factual questions about when and how policies were adopted. I remind you also that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim. Do you have an opening statement?

Dr Boersig—I do, yes.

CHAIR—I invite you to provide us with that and then we will go to questions. Thank you, Dr Boersig.

Dr Boersig—We would like to use this opportunity to discuss some of the matters arising from the hearing in Melbourne; indeed, they were touched on today, I noted. In particular we would like to address: the definition of human rights in the two human rights parliamentary scrutiny bills which are the subject of the committee's current inquiry; the importance of the proposed statements of compatibility process within the human rights framework announced by the Attorney-General, the Hon. Robert McClelland MP, on 21 April 2010; and the role of the proposed parliamentary joint committee on human rights.

I start first with the definition of human rights in the bill. A key focus of the hearing on 4 November was the definition of human rights set out in the human rights scrutiny bills which underpin both the work of the proposed parliamentary joint committee and the statements of compatibility. The primary aim of the bills is to encourage early and ongoing consideration of human rights issues in policy and legislative development. As the Attorney-General indicated in his comments when the bill was introduced, it is important to consider these matters at the starting point in a development of policy and laws to appreciate how laws impact on the individuals.

The reference point that the government has selected for consideration of human rights is the seven core human rights treaties to which Australia is a party. The government's view is that the seven treaties are widely recognised as the pre-eminent international human rights instruments. Together they cover the most prevalent areas of discrimination and human rights concerns. The rights in those treaties also overlap or duplicate rights found in other United Nations instruments. The seven treaties are directly relevant to the human rights issues which are likely to arise in the context of Australia's domestic legislation. The seven treaties are international instruments to which Australia is a party and we have indicated to the world that we will abide by the obligations set out in them. The seven treaties were identified in the national human rights consultation committee report as listing the rights which should be protected and promoted. The seven treaties taken together provide a clear and useable set of enumerated obligations on which the new committee and public officials can rely when scrutinising legislation or drafting statements of compatibility respectively. As mentioned, the Brennan committee acknowledged that the seven treaties provided a useful reference point for consideration of human rights in policy and legislative development. The role of statements of compatibility and the new committee may evolve in the future but it is important to give effect to these considerations now.

I turn to the purpose of the statements of compatibility. The bills establish a requirement that all new legislation be accompanied by a statement of compatibility outlining the compliance of the new laws with the rights set out in the seven treaties. However, statements are not simply an additional step in the legislative process. As the Attorney-General has said in the debate on the bills, the statements effect a dialogue between the executive which is responsible for formulating statements and the legislature which considers the statements as part of its process for enacting new laws. Statements of compatibility also ensure that human rights are considered from the very early stages of policy formulation and they contribute to the transparency

and accountability of government. Taken together the requirement for statements of compatibility and the establishment of the parliamentary joint committee on human rights will provide increased parliamentary scrutiny, support a transparent and accountable legislative process, and promote greater participatory democracy.

Statements will also be essential to the proposed parliamentary joint committee on human rights in scrutinising new laws. Consistent with the government's intention to protect and promote human rights, statements of compatibility will require policy and law-makers to give early consideration to Australia's human rights obligations. The Victorian government's submission to this committee sets out a number of positive outcomes achieved through their comparable statements of compatibility which are consistent with these expected outcomes.

It will be a matter for each minister how the relevant statement of compatibility is prepared and expressed. There is nothing which prevents ministers from including in those statements an explanation as to why the exercise of a certain right may have been limited. For example, statements may contain analysis of restrictions or limitations on rights in a bill and an assessment on whether restrictions are in the interests of other individuals or society more generally as consistent with the government's responsibilities under the seven treaties. Overall, statements are intended to be succinct assessments aimed at informing parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights. The bill does not confer additional powers on judges and statements of compatibility do not change the current rules of statutory interpretation. The courts can only use statements of compatibility as aides to statutory interpretation similar to explanatory memoranda. The bills do not provide judges power to issue statements of inconsistency—that is, declarations that a law is inconsistent with a jurisdiction's human rights obligations, as is the case in the United Kingdom, the Australian Capital Territory and Victoria.

Senator BARNETT—Thank you, Dr Boersig, for your opening statement. It helps to round out some of the questions we had in Melbourne and here. We have many more questions, so we will get into it. Did you consult in the development of the bill and, if so, with whom?

Dr Boersig—The consultation was taken on the basis of the Brennan committee's report. We acted upon that consultation process.

Senator BARNETT—So there has been no consultation since the election?

Dr Boersig—In relation to the development statements of compatibility, no.

Senator BARNETT—In relation to the development of the bill?

Dr Boersig—In relation to this bill.

Senator BARNETT—So there has been no consultation since the election, correct?

Dr Boersig—That is correct.

Senator BARNETT—How does this bill compare with those in the UK, Canada and New Zealand?

Dr Boersig—There are some similarities, of course, to the approaches taken in those jurisdictions but there are significant differences. The issue in relation to the development of statements of compatibility is one we have looked at in all those areas. Development of statements of compatibility—how they would be prepared, how they are dealt with by their various parliamentary committees and how they are dealt with by parliament has certainly informed the way we have developed this. There are significant differences. A statement of incompatibility is not part of this legislation.

Senator BARNETT—I will be a bit more specific. In the UK, Canada and New Zealand, how they define 'human rights' in their legislation?

Dr Boersig—They have bills, charters effectively, which set out a definition of 'human rights'—a list of rights. The difference here is that we have taken a set of seven treaties which the government is a party to.

Senator BARNETT—That is really my point. Would it be fair to say that, by doing that, that is unique?

Dr Boersig—It is certainly different from what is done in those places.

Senator BARNETT—Let us move through to the first point of the definition which, frankly, is a cause of considerable concern among many witnesses, including me and other senators. Do you accept that the conventions themselves are ambiguous?

Dr Boersig—The treaties? The position the government takes is that there is a clear enumeration of rights, freedoms and obligations in those seven treaties. The Attorney has indicated that these are a starting point for examination of human rights which needs to get under way now through this bill, but that there would be room for further consideration by, for example, the new committee.

Senator BARNETT—The previous witness, Mr Egan, put to the committee very strongly that they are ambiguous. He also indicated that there is cause for conflict, that somebody's right is another person's freedom denied and he use the example of smacking and the UN Convention on the Rights of the Child. What do you say to Mr Egan and his concerns?

Dr Boersig—The rights enumerated, in the government's view, are clear and unambiguous in those seven instruments but, as I said, the Attorney has invited to further consideration in relation to what other rights may in fact be included in an Australian-specific list.

Senator BARNETT—You are not really answering the question, if you do not mind my saying so. Have another crack at it. Mr Egan has given a specific example. Do you acknowledge the concerns that were expressed by Mr Egan with respect to the Convention on the Rights of the Child and the idea that one person's rights are another person's freedom denied—this idea of smacking not being appropriate, thus denying the rights of the parents to discipline their child. That is an example. Do you concede that or accept that that is the case?

Dr Boersig—Certainly, in the application of human rights and how they would apply in a particular situation, there are different views.

Senator BARNETT—So it would be up to this committee to do its best to interpret these various conventions to the best of its ability—is that what you are suggesting?

Dr Boersig—Indeed, and in the usual course of a parliamentary committee it would build up a bank of information and knowledge that would be used in the future.

Senator BARNETT—Professor James Allan, the first witness this afternoon at about four o'clock, put his concerns to the committee. He indicated that there would be very few people in Australia who would have a comprehensive understanding of all of the seven treaties and conventions and their implications for Australia and Australian law. Do you accept his concerns? What do you say about them?

Dr Boersig—I think the value of the establishment of the parliamentary joint committee is that there is a forum in which those issues could be fully ventilated—for example, through public hearings, through expert evidence and through the calling of witnesses—and that the committee could form views about exactly what they thought the particular piece of legislation meant, and of course inform parliament in that process.

Senator BARNETT—Do you accept, at least, the views that many witnesses have put to us that, because of the ambiguity, the conflict and the definitional problems flowing from the treaties, they would like to excise that entirely and include more strictly defined rights such as the rights to freedom of association, freedom of religion, free speech and so on?

Dr Boersig—The government's position is that the seven treaties enumerate those rights in a very detailed range. We set those reasons out in the opening statement.

Senator BARNETT—I appreciate your expressing the view of the government in that response. Could we go to the role of the committee. Clearly many witnesses have put to us the view that there is an overlap—in fact, in my view there is certainly an overlap—of roles and functions, particularly of the scrutiny of bills committee, which we hold in high regard—I think everybody here does. We had former Senator Barney Cooney speak to us, along with former senator the Reverend Michael Tate and, indeed, others. So do you accept, first of all, that there is and will be an overlap in roles?

Dr Boersig—It is clear that the basis upon which the parliament will allocate responsibility is something for parliament. There are issues which are currently considered by the scrutiny of bills committee around civil rights and which may also be considered by other committees. But, indeed, across government there are quite a number of cross-cutting issues that are considered by various committees and, in that context, government and parliament allocate certain roles and responsibilities to each committee.

Senator BARNETT—That answer could be interpreted as a yes, but I would like you to confirm that there will be an overlap between the scrutiny of bills committee and this joint parliamentary committee.

Dr Boersig—The context in which I am responding is that we understand that would be a complementary relationship.

Senator BARNETT—I am sure they will work together cooperatively and in a complementary manner but, based on the bill before us, do you agree that there will be an overlap of roles whereby each committee will have to discuss, liaise, work and cooperate with the other to ascertain which committee will undertake which role?

Dr Boersig—I think that, in the determination of which committee gets different bills, there will always be those questions asked. Indeed, there might be other committees which will need to ask the same question, particularly around human rights.

Senator BARNETT—Dr Boersig, you have been here this afternoon when I have asked whether a human right applies to both a child that is born and a child that is unborn. What is the view of the department?

Dr Boersig—In relation to that specific question, the department would need to consider it in the very particular context of a piece of legislation. What you would be asking me to do is speculate on what it might mean in certain circumstances, and I just would not be able to do that on behalf of the government today.

Senator BARNETT—I am not asking you to do that at all. I am asking you to refer to the seven conventions, and there are two in particular—the rights of the child and the International Covenant on Civil and Political Rights. You would be aware of article 6 in the latter; is that correct?

Dr Boersig—Indeed, yes.

Senator BARNETT—I do not want you to re-read into the *Hansard*, because it is on the public record, but it refers to the rights of the unborn. So do you acknowledge that that is a right that should be protected, because it is in the convention?

Dr Boersig—In terms of the government's position on all rights, it would be those rights that are enumerated in the seven treaties that would be considered by—

Senator BARNETT—Do you accept that article 6 is part of that convention?

Dr Boersig—Indeed.

Senator BARNETT—And you know what it says?

Dr Boersig—I do not have it verbatim in from me.

Senator BARNETT—If your officer has it, you can look it up and read it to us if you wish. It is article 6, subsection 7, I think. I am puzzled as to why you would have a view that is not consistent with the article.

CHAIR—I might be able to assist here, Dr Boersig. I am pretty certain this question has been asked a number of times in the last two or three years, either of the department or of the Human Rights Commission. I have just asked our secretary, Ms Robinson, to get the committee secretariat to go back and have a look at this, but I am almost certain that we have asked this question before and have got an answer from the Attorney-General's Department in relation to other legislation we looked at. So you can go ahead and answer it or you might want to take notice.

Dr Boersig—If I could just read out article 6, point 1:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Is that the point you were referring to?

Senator BARNETT—Article 6 (7), I think it is, isn't it?

Dr Boersig—That is article 6.

Senator BARNETT—Well, I do not have the specific one in front of me. Article 6(5)—have a look at that. Read that.

Dr Boersig—It says:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Senator BARNETT—Okay. I may not have the correct article in front of me. Could you take that on notice, please, and provide the committee with a view as to whether these conventions, as set out in the bill, provide that protection for both children that are born and unborn children.

Dr Boersig—Certainly.

Senator BARNETT—Thank you.

CHAIR—Dr Boersig, it probably goes to the very complex question about when life begins, essentially, and I am not sure we will get to the answer to that in this inquiry.

Senator BARNETT—If it begins from birth, I have a big problem with it, and I think many other Australians do as well.

CHAIR—I think you will also find the federal courts may well have decided that life begins when you take your first breath, which is a position that has been taken in common law back to the 1600s and 1700s, I think, that has not been challenged or reversed. I suspect—

Senator BARNETT—I suggest that it has been, and we are heading down towards the Peter Singer argument if we are taking that view.

CHAIR—We will await your answer on notice, Dr Boersig. I did want to ask you, though, about the fact that quite a number of submissions in Melbourne and before us have suggested that there should be three other conventions or documents we have signed, one being with the ILO, one being the United Nations Declaration on the Rights of Indigenous Peoples and the other being the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Can you provide me with reasons why the bill does not specify or should not include those three.

Dr Boersig—Certainly. You will see in our opening and draw from our opening the reasons why the seven instruments are set out. I refer to that but I will not repeat that.

CHAIR—No, I have got that. Now I just want to know why those three are not considered.

Dr Boersig—The Declaration on the Rights of Indigenous People is a UN resolution. It is not binding on Australia. The ILO is not considered to be a treaty in the same sense as those treaties I have referred to, and the declaration I think is exactly that and not binding on Australia.

CHAIR—Would it preclude the committee from having an opinion about whether or not, say, a piece of legislation contravenes the UN Declaration on the Rights of Indigenous People? Given the fact that only seven are mentioned in the act and not those three, are they absolutely precluded from extending a view about those that we have signed?

Dr Boersig—The parliamentary committee can consider all those matters but would only report back in relation to the seven—

CHAIR—I see.

Dr Boersig—It would only report back on the question of compatibility in relation to the seven treaties that we have spoken of. But all those issues could indeed be engaged with, particularly through public hearings and so forth.

CHAIR—I see. And what if they had a view that it was in a contrary spirit to the ILO? Is that covered by Civil and Political Rights, perhaps?

Dr Boersig—There is quite a considerable overlap, particularly in relation to Indigenous people, when you go through, for example CERD or CRC or even in relation to CEDAW—and, as you have said, the ICCPR. There is quite a considerable overlap between the kinds of issues that are picked up in those declarations and the rights and freedoms that are outlined in there.

Senator PRATT—I am interested in the way the bill constrains the matters before the committee to either legislation—acts—or matters referred by the Attorney-General. I note that the Human Rights Commission has said that the committee should be able to look at matters that are referred to it. I suppose those could be from the Human Rights Commission or from UN findings. Does the department have a view about that at this stage?

Dr Boersig—There is the capacity for own-motion inquiry around acts, which is very clear and, in the department's view, quite broad. The policy decision taken thus far does limit the own-motion inquiries to those. However, the Attorney is able to refer matters too.

CHAIR—Where is that?

Dr Boersig—If you want to get the explanatory memorandum, I will read—

Senator PRATT—If that is for the purposes of things that are in acts as well as bills, I suppose my question goes to something I have been trying to weigh up in my mind in relation to this bill in terms of rights that people do not enjoy, so they may not be the subject of an act, and whether someone's exclusion from a

particular bill means that if you inquire into that bill their exclusion from it might enable the committee to debate those matters. That is just one example.

Dr Boersig—There is nothing in the legislation in that sense that would stop the Attorney making that reference.

Senator PRATT—But what about the committee itself? For example, when an act provides for a certain set of rights and some people are excluded from enjoying those rights, you could inquire into that act and, by virtue of that, you would have the opportunity to look at the rights that people were excluded from.

Dr Boersig—Yes.

Senator PRATT—And what about matters where there is no act? For example, they could be rights that people may or may not enjoy at a state level, but the Commonwealth, should it act, would enable people to enjoy those rights—but there is no act that would provide for that. That would have to come from the Attorney-General in that instance?

Dr Boersig—Yes, that would have to come from the Attorney as it is currently drafted.

CHAIR—Can I go back to an answer you gave before. It has been pointed out to me that your explanation is in the explanatory memorandum but not in the bill. Is that right?

Dr Boersig—The explanatory memorandum explains the bill. I can read out that section.

CHAIR—I do not think that is helpful. I think we are looking for a specific clause in the bill that enacts that.

Dr Boersig—It says 'examine' in clause 7(b).

CHAIR—On the issue that Senator Pratt was talking about, the Human Rights Commission has suggested that the committee should have a power to self-refer inquiries but only in relation to two areas: a matter of a report from the UN or a matter from a procedural committee of the UN such as a special rapporteur. Do you have a view on that or a response to it, or is it strictly the government's position that the committee can inquire only into its own operations in the act or following a referral from the Attorney-General? Is that right?

Dr Boersig—It would be the referral from the Attorney-General in relation to those matters.

CHAIR—There is no self-referral power other than inquiring into the act under which it operates. Is that right?

Dr Boersig—The self-referral power is in relation to any act that comes before you.

Senator PRATT—A live issue before this committee at the moment is that of donor conception and the right of donor conceived people to access information about their origins. The majority of the law in that area is at a state level. There are some fairly obtuse acts that look at national health regulation and ethics, but they are not really there to define the rights of people to access that information. There is an argument that there are some international instruments that might go to the question of someone's right to know their family et cetera. I am interested to know whether a question like that would be able to come before this committee by any means other than by a referral from the minister.

Dr Boersig—As you say, by a referral from the minister. If in some way the issue touched on or was involved in Commonwealth legislation, it could.

Senator PRATT—What does that actually mean by virtue of the fact that the majority of those rights are defined at a state level? There is some Commonwealth legislation, but it relates largely to the ethical conduct of fertility clinics, and a lot of that regulation happens now. Unless there is a capacity for the committee to look more broadly at issues, you can to some extent exacerbate the problem of some people having access to rights and others not. There might be legislation through the National Health and Medical Research Council that picks up some very limited rights through its ethical framework, but the majority of that is dealt with by the states. To what extent could an act like the acts governing the National Health and Medical Research Council actually enable you to delve into a question of someone's human rights in relation to their genetic origins?

Dr Boersig—It would have to be a situation where the Commonwealth legislation led to that capacity. The highest I could put it would be that the Commonwealth legislation would have to touch on the issue in some way, I expect.

CHAIR—I think we are going to have to wind up. I thank the three of you for being here this afternoon and providing evidence to our committee.

Committee adjourned at 7.29 pm