



Received
6/7/09 jul.

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NEW SOUTH WALES



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Committee Secretary
House Standing Committee on Procedure
Parliament House
Canberra ACT 2600

By email: committee.reps@aph.gov.au

3 July 2009

Dear Secretary,

Inquiry into the effectiveness of the House Committees

This submission is directed to the current inquiry into the effectiveness of House Committees ("the Inquiry"). I am writing this submission in my capacity as a Senior Lecturer at the Faculty of Law, University of New South Wales, and as Director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law. I am solely responsible for the content of this submission.

The terms of reference for this Inquiry request consideration of a range of issues in relation to the House Committees, including their subject-matter coverage. This submission is confined to one issue of subject-matter coverage—namely, the impact of Bills of Parliament on human rights.

Currently, Parliamentary committees consider the human rights impact of draft legislation in a largely ad hoc manner. The most specific requirement is Standing Order 24(1)(a), which requires the Senate Standing Committee for the Scrutiny of Bills to report on, inter alia, whether proposed laws:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- ...

I endorse the observation made by my colleague, Professor George Williams, that this does not specify clearly which "personal rights and liberties" ought to be considered.¹ Moreover, this Standing Order does not provide a detailed framework for that assessment. Human rights are

¹ See, George Williams, Submission, *Inquiry into the effectiveness of the House Committees*, House Standing Committee on Procedure 22 June 2009 at 1.

rarely absolute. In considering defamation law, for example, it is necessary to balance freedom of expression and the right not to have one's reputation unfairly attacked. Similarly, sometimes it is entirely appropriate for Parliament to impinge on certain human rights in order to pursue other legitimate objectives. Well-drafted anti-terrorism laws, for instance, need to strike an appropriate balance between protecting the rights of the accused terrorist suspect, and protecting Australia from terrorist attack. Under international law, it is generally accepted that such laws should impinge on human rights to the minimum extent necessary in order to achieve the competing legitimate objective. However, no such principle is made clear in Standing Order 24.

I support the enactment in Australia of a statutory Human Rights Act or Charter, based on the model adopted in the United Kingdom, New Zealand, Victoria and the Australian Capital Territory.² A key feature of this statutory model is a parliamentary committee, usually of both houses of the relevant parliament, which has a clear mandate to scrutinise Bills against human rights principles. An excellent example is the United Kingdom's Joint Committee on Human Rights, which includes members of the House of Commons and House of Lords.

A dedicated joint parliamentary committee, operating within the rubric of a Human Rights Act, could have a number of benefits, especially in providing a mechanism for Parliament to give due consideration to the human rights impact of draft laws, with a view to encouraging new legislation to be drafted in a way that respects human rights.³ A parliamentary committee of this nature can help foster debate within Parliament, and in the public arena, about the impact of new laws on human rights. It provides a means for Parliament to 'catch' any unintended human rights breaches. Furthermore, where it is thought to be necessary to abrogate a protected human right or rights, this Committee could help Parliament do so in a way that intrudes on human rights to the minimum extent possible. By having this debate in the forum of a joint Parliamentary committee, with clear standards, it would promote more open and informed debate and democratic engagement with human rights issues.

Such has been the experience in the UK and elsewhere. In Victoria, for example, the legislature is obliged to table a Statement of Compatibility with each new Bill, which means it must advert to potential human rights infringements that may result from the Bill.⁴ The Scrutiny of Acts and Regulations Committee also examines new Bills and assesses their human rights compliance.⁵ Incorporating this standard of scrutiny into the legislative process is crucial to the protection of human rights in Australia.

Finally, these reforms to the scrutiny of Bills procedure should be made in the context of a broader reform of Australian human rights law. Specifically, these reforms should be accompanied by a Human Rights Act that, like the human rights statutes of the UK, New Zealand, Victoria and the ACT, has the following features:

- (i) It should set out the human rights that are of greatest importance in this jurisdiction.
- (ii) It should impose clear, enforceable human rights obligations on public authorities.

² See: *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

³ See, eg, Andrew Byrnes, Hilary Charlesworth & Gabrielle McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) at 165; Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) at 26.

⁴ *Charter of Rights and Responsibilities Act 2006* (Vic) s 28.

⁵ *Charter of Rights and Responsibilities Act 2006* (Vic) s 30.

- (iii) It should require that existing and new legislation be interpreted, wherever possible and subject to clear legislative intent, consistently with the human rights set out in the Act.

If you have any questions relating to this submission, or if I can be of any assistance to the Consultation Committee, please do not hesitate to be in contact.

Yours faithfully,

Edward Santow