

## **PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS**

**Speech delivered by Mr Harry Jenkins MP to the  
*Recent Developments in Constitutional Law: Centre for Comparative  
Constitutional Studies Conference, 21 July 2012***

### **THE FUTURE OF RIGHTS PROTECTION: COURTS AND PARLIAMENTS**

*This speech remarks on and considers the role for Parliament in the protection of rights with particular reference to Statements of Compatibility and the consideration of human rights in the development of policies, programs and legislation. This speech comments on the Committee's work to date.*

#### **PARLIAMENT'S ROLE IN THE PROTECTION OF HUMAN RIGHTS**

The Executive, the Parliament and the Judiciary each have important roles and responsibilities in the protection of human rights.

- The Executive - to bring forward and implement policies, programs and legislative proposals that prevent human rights violations;
- The Parliament as elected representatives of the people, have a duty to ensure that Australia's human rights obligations are translated into national laws and that policies and programmes are implemented in a way that is consistent with this duty; and
- The Judiciary - to offer remedies for violations of human rights.

I am an advocate for pre-legislative scrutiny. Getting the legislation right in the first place is preferable to the promise of remedies after a breach, but both are essential.

The Federal Parliament already has a range of mechanisms at its disposal to undertake pre-legislative scrutiny do this:

- standing committees with the power to call for documents and people and invite submissions;
- scrutiny committees to undertake a more technical level of pre-legislative analysis in dialogue with Ministers; and
- debate and deliberation on the floor of the Parliament.

However, it has been noted that, at best, Parliament's record to date has been uneven:

- research undertaken by Simon Evans and Carolyn Evans through the Legislatures and Human Rights Project has demonstrated that the Federal Parliament's consideration of human rights issues has a tendency to be ad hoc.<sup>1</sup>
- Submissions to the National Human Rights Consultation noted that existing parliamentary mechanisms do not always ensure that human rights are considered and debated before the passage of legislation.<sup>2</sup>
- Professor George Williams from the University of New South Wales has observed that Parliament has at times proved unable or unwilling to protect basic human rights.<sup>3</sup>

The *Human Rights (Parliamentary Scrutiny) Act 2011* offers a means to significantly increase the institutional capacity of the Parliament to consider human rights.

It does this through the establishment of two key mechanisms:

- the Parliamentary Joint Committee on Human Rights; and
- the requirement for each bill or instrument introduced into the Parliament to be accompanied by a Statement of Compatibility.

These two mechanisms have the potential to deliver a significantly more systematic and rigorous approach to the pre-legislative consideration of human rights by the Executive and the Parliament.

The approach implemented through the *Human Rights (Parliamentary Scrutiny) Act 2011* has a lot in common with that applied in other parliaments.

The key difference is that human rights are not defined in terms of a Charter of rights, but by direct reference to the rights and freedoms recognised or declared in seven international human rights instruments as applied to Australia.

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<sup>1</sup> The Legislatures and Human Rights Project was conducted between 2005 -2008 and aimed to provide a comprehensive and empirical analysis of the adequacy of the methods that parliaments employ to ensure the protection of human rights in various Australian jurisdictions.

Evans, S and Evans, C, 'Australian Parliaments and the Protection of Human Rights' (2007) *47 Papers on Parliament: Lectures in the Senate Occasional Lecture Series*

<sup>2</sup> National Human Rights Consultation Report, September 2009, p. 106.

<sup>3</sup> Williams, G, 'The Role of Parliament under an Australian Charter of Human Rights' (2009) Senate Occasional Lecture Series transcripts and audio recordings

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- International Convention on the Elimination of all Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of the Child;
- Convention on the Rights of Persons with Disabilities.

This, together with the volume of bills and instruments, clearly poses challenges for the Committee.

Some<sup>4</sup> have argued that this definition may prove too broad and may compromise the Committee's ability to undertake meaningful scrutiny.

The Committee has adopted a pragmatic attitude to this challenge by focussing on the practicalities of scrutinising legislation within the parameters set by the Act. The Committee will be supported by an appropriately qualified specialist legal adviser.

## **ESTABLISHMENT OF THE COMMITTEE**

The Act came into effect on 4 January 2012. The Parliamentary Joint Committee on Human Rights was appointed in March 2012. The Committee is comprised of 10 members drawn from the House of Representatives and the Senate.

The Committee has a very broad set of functions set out in section 7 of the Act:

- examine and report to Parliament on the compatibility of bills and legislative instruments with Australia's human rights obligations under the aforementioned seven core human rights treaties;

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<sup>4</sup> Williams, G and Burton, L, *Arts and Humanities Research Council and the University of Oxford Conference 17 – 18 April 2012: Redressing the Democratic Deficit in Human Rights*, 'Australia's Exclusive Model of Parliamentary Rights Protection'.

Edward Santow, *Australian Institute of Administrative Law National Forum, University of Sydney, 23 July 2010, Stream 1*, 'Human rights Protection: the non-adversarial approach', 'Enhanced scrutiny of human rights: of parliament, pigs and lipstick.'

- examine existing legislation; and
- conduct broad inquiries into matters relating to human rights as referred to it by the Attorney-General.

The powers and procedures set out in Committee's resolution of appointment give the Committee a great deal of latitude in how it will undertake its functions.

## **PURPOSE OF THE COMMITTEE**

Since its establishment the Committee has been actively considering the scope and purpose of the task it has been given.

The Committee is very grateful for the input of a number of key individuals and organisations who have generously made time available to brief the Committee on various practical aspects of its work and on the work of similar committees in other parliaments.

In considering the task before it, the Committee is conscious that it plays an important role in the Human Rights Framework introduced in April 2010.

The Committee's establishment is part of a concerted effort to enhance the understanding of, and respect for, human rights issues and to ensure the appropriate recognition of human rights in the legislative process.

The then Attorney-General stated at the time that:

"This important step is part of Australia's Human Rights Framework and will give the community confidence that their human rights are being recognised and respected in everything the Parliament does."

Other important elements of the Human Rights Framework extend to:

- the development of policies; programs and legislation that are consistent with human rights and the preparation of Statements of Compatibility;
- review of existing legislation for human rights compliance;
- human rights education and training for the Australian public sector; and
- education and engagement of the Australian community.

The Committee considers that it can make a significant contribution to each of these. Through its examination of legislation and its reports to Parliament, the Committee can foster and promote awareness, understanding and discussion of human rights in the Parliament, the public sector and in the community.

In doing so, the Committee hopes to make contribute to the development of a human rights culture in the public sector.

As well as noting a high level of support at community roundtables for government and Parliament to be more attentive to human rights when considering new laws and policies, the National Human Rights Consultation found that insufficient attention is paid to human rights in the formulation of policy and legislation.

The Consultation identified a need to better integrate human rights considerations into the development of legislation and policy in the parliamentary process. Statements of Compatibility offer a means to progressively achieve this.

## **STATEMENTS OF COMPATIBILITY**

Since 4 January 2012, each new bill and instrument must be accompanied by a statement of compatibility. The introduction of this requirement is intended to elevate the consideration of human rights in the development of policy and legislation.

As well as being an obvious starting point for the Parliament's consideration of human rights in the legislative process, the Committee considers that statements of compatibility have the potential to significantly increase transparency and accountability in the development of policy and legislation;

My statement to the House of Representatives on 20 June 2012 set out the Committee's expectations for statements of compatibility. These expectations are guided by the Explanatory Memorandum to the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- [a] statement of compatibility must include an assessment of whether the bill [or legislative instrument] is compatible with human rights as defined [in the Act];and

- statements of compatibility are intended to be succinct and should contain 'a level of analysis that is proportionate to the impact of the proposed legislation on human rights'.

The Committee observes that the preparation of a Statement of Compatibility should be the culmination of a process that commences early in the development of policy.

The statement of compatibility should reflect in a succinct form the assessment of human rights that took place during the development of the policy and the drafting of the legislation. The statement should:

- take the objective of the legislation as its point of reference;
- identify the rights engaged;
- indicate the circumstances in which the legislation may promote or limit the rights identified; and
- set out the justification for any limitations, in an appropriate level of detail, together with any safeguards provided in the legislation or elsewhere.

Ideally, Statements of Compatibility should not be drafted retroactively.

However, much of the legislation currently before the Parliament had its genesis well before the introduction of the requirement for statements of compatibility.

The Committee does not view Statements of Compatibility as an end in themselves. Rather, Statements of Compatibility have the *potential* to instil a culture of human rights in the federal public sector.

Indeed, the National Human Rights Consultation identified the development of such a culture as integral to the better protection and promotion of rights in Australia.

I used the term *potential* because, to date, most Statements of Compatibility indicate that we are still some way from the integration of human rights considerations into the development of policy in certain areas;

For instance, many Statements of Compatibility appear to have been drafted after the bill or instrument itself has been drafted and, possibly, by people not closely involved in the development of the policy and the legislation;

Many of the bills that have come before the Parliament in the first half of this parliamentary year will have started their evolution well before the HR (Parliamentary Scrutiny) Act came into effect. Therefore, a certain amount of retrofitting is probably inevitable.

Many Statements fall short of the expectations set out on the Attorney-General's Department website. For example,

- a lack of rigour in the assessment or lack of assessment altogether;
- a tendency to resort to generalisations or pro-forma conclusions; and
- a degree of confusion evident in the identification of applicable rights or freedoms.

While the training provided by the Attorney-General's Department for the public sector will progressively address many of these issues, the Committee also has an important role to play. Namely, to:

- provide clear feedback about the requirements of a statement of compatibility and highlight good examples of usage of these requirements; and
- emphasise that the Committee accepts the evolutionary nature of this process of cultural change and is prepared to work with Ministers and departments to achieve this change.

In those departments where the consideration of human rights is not already embedded in the policy development process it will take time to develop the necessary skills and mindset.

The Committee does expect policy officers to be able to discuss how human rights were considered in the development of policy.

The Committee is pleased to observe that the overall quality of statements appears to be improving as ministers and their departments become more familiar with the requirements.

## **COMMITTEE'S WORK TO DATE**

During the last sitting fortnight, the Committee took its first tentative steps in the consideration of bills currently before the Parliament, paying close attention to:

- the work of other parliamentary committees where this is relevant to the Committee's work; and
- correspondence from Members, Senators and from key stakeholders.

The Committee is currently considering requests to examine the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 and the Stronger Futures in the Northern Territory Legislation.

I do not propose to comment further on the Committee's consideration of either of these pieces of legislation, except to say that it is likely that the Committee will adopt a similar approach to the consideration of other legislation in the future:

- seek further information to evaluate the request or the concerns raised either through a hearing or via correspondence with the relevant Minister;
- in the case of the Social Security Legislation Amendment (Fair Incentives to Work ) Bill, the Committee's hearing enabled it to examine the matters raised with the Department and with relevant stakeholder in a public forum thus making the information provided immediately available to others in the Parliament;
- In the case of the Stronger Futures Legislation, the Committee was mindful that the package of bills had been introduced prior to the introduction of the requirement for statements of compatibility. The Committee wanted to offer the Minister the opportunity to provide a statement before the Committee determined what steps it might take in response to the request.

While the Committee has acted in response to correspondence from third parties in relation to these bills, it has made it clear that the Committee as a whole will decide what action, if any, it will take in response to such correspondence.

There is some inevitability that the Committee's first steps have been reactive rather than proactive. One of the reasons for this is that the requirement for Statement's of Compatibility had been in place for over two months before the Committee had its first meeting.;

Another is that while the Committee has been considering the scope and purpose of its role and the practical steps it needs to take to carry out this role, expectations of the Committee and the Parliament have been growing.



The Committee's focus to date has been primarily on bills, but it has been keeping a weather eye on legislative instruments.

The sheer volume of legislative instruments that come before the Parliament will present a significant challenge. However, the existence of the disallowance process may assist the Committee by affording the Committee some breathing space in the consideration of instruments. In theory, the prospect of disallowance may also offer a form of incentive to comply with the Committee's expectations.

## **RISKS**

The Committee is aware of the immensity of the task before it and a lot rests on how it undertakes its role, how it finds its voice within the Parliament and how it ensures that voice is heard.

There is a need for timely advice to the Parliament in language that is easily understood, even where there is great pressure for an expeditious consideration of particular bills;

The Committee aspires to be a trusted source of advice that is difficult to ignore;

Committee members see themselves as human rights advocates within the Parliament and within their own party rooms

The manner in which the Committee undertakes its dialogue with the Executive and Departments is also important.

The Committee wishes to see consideration of human rights genuinely elevated in the policy development process.

The Committee would certainly not like to see Statements of Compatibility outsourced to lawyers or viewed as mere procedural hurdles at the end of the drafting process.

As part of this process of cultural change, the Committee intends to approach its role in a considered and responsible way. It intends to support those who bring bills and legislative instruments before the Parliament to meet their obligations under the Act by providing constructive feedback.

The Committee acknowledges the excellent training and support that the Attorney-General's Department is providing to assist Departments.

In time, the Committee intends to be able to support this training through the publication of guidance materials of its own.

The Committee intends to make a statement at the end of the sitting year and hopes that by that time it will be able to provide greater clarity around the Committee's approach and working practices.