



The first step to realising rights: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry on the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

21 October 2010

Edward Santow, Chief Executive Officer
Louis Schetzer, Research and Policy Officer
Brenda Bailey, Senior Policy Officer

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on human rights

Much of PIAC's current and previous substantive work involves human rights. This includes work on privacy, discrimination, freedom of information, detention (including immigration detention), government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on people's human rights and on their social and economic situation. A significant number of PIAC's casework clients have direct experience of what it means to have human rights infringed or not respected.

PIAC has also had a specific policy focus on human rights for a number of years. Since 2003, PIAC has had a project, Protecting Human Rights in Australia, as a core area of its work. This has been a three-stage project.

- The development of a human rights education kit, *Protecting Human Rights in Australia: An Education Kit*, to provide members of the Australian community with basic information about human rights and about how

those rights are protected, the extent of and gaps in the protection, and to illustrate the importance of human rights through case studies of instances of human rights being abused or not protected.

- The development and delivery nationally of a Protecting Human Rights in Australia 'train-the-trainer' program. PIAC conducted multiple training workshops in every state and territory of Australia, targetting community educators and other workers with the capacity to use the materials with their own communities or members. PIAC delivered workshops to over 800 trainers, community workers and educators across Australia.
- The promotion of community discussion and political engagement with human rights, with a focus on achieving comprehensive human rights protection in Australia. PIAC has provided responses to the various inquiries conducted across Australia in the last five years into human rights protection. PIAC also took on the role of secretariat and convenor of the NSW Charter Group, which was a coalition of individuals and organisations in NSW committed to achieving an independent community consultation on human rights in NSW.

During the national Human Rights Consultation, PIAC conducted a range of community consultations and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take part. This included working with people experiencing homelessness, people with mental illness, Indigenous people, prisoners and former prisoners, older Australians, people with disability, and migrant women. While most of this work has been done in NSW, PIAC also worked with organisations in Tasmania to deliver several workshops in April 2009 to encourage participation.

General comments

PIAC'S position on human rights

PIAC considers it necessary to restate its position on human rights for this inquiry.

Acquired at birth, human rights belong to us all and provide standards for all people to be treated fairly with dignity and respect. The protection, promotion and fulfillment of human rights are vital to the effective removal of injustice in our society and achieving equity for people, particularly those who suffer disadvantage. They are fundamental to the maintenance of a fair, just and democratic society, and they require legal recognition to ensure that they are protected and accessible to all.

Human rights are recognised in Australia, though not for everyone, and not all the time. Indeed many of the human rights we take for granted have no protection under law.

Australia is a country that has a strong democratic tradition and a commitment to the rule of law. A comprehensive human rights law would assist in the preservation of Australia's democratic system by protecting the very rights and values that underpin it. A comprehensive human rights law would also empower citizens and the community, and help to keep governments accountable.

For these reasons, PIAC has previously recommended the establishment of a comprehensive human rights law that gives legal protection to human rights. In the short term, this would be best achieved by the introduction of a single human rights statute (referred to in this submission as a Human Rights Act) by the Federal Government, with harmonised state and territory legislation where necessary, which guarantees human rights in Australia and ensures that laws, policies and conduct are consistent with these rights.

The current inquiry

PIAC welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Committee Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010. PIAC continues to assert its primary position regarding the need for a comprehensive human rights law that gives legal protection to human rights, such as a Human Rights Act. However, PIAC acknowledges that such a measure is beyond the scope of the current inquiry, which is only concerned with the abovementioned two Bills that have been referred to the Committee.

In its submission to the National Human Rights Consultation, PIAC emphasised the importance of giving legislative force to all of the rights set out in various international agreements to which Australia is a party through ratification or accession. PIAC therefore welcomes the inclusion of seven international human rights instruments in the Bills, to be the basis for pre-legislative scrutiny and consideration of existing legislative instruments by the Parliamentary Committee in terms of legislative compatibility. However, PIAC notes that there are still some uncertainties in the coverage of the definition of 'human rights' in the Bills, as well as the omission of some key international human rights standards.

PIAC also considers that several improvements could be made to the Bills that would afford a more rigorous parliamentary scrutiny of new legislation and legislative instruments for consistency with Australia's human rights obligations. These include:

- allowing the Parliamentary Joint Committee on Human Rights greater scope to inquire into any matter relating to human rights in Australia;
- ensuring appropriate time and resources for the Joint Committee to examine Bills and legislative instruments;
- ensuring that parliamentary debate on legislation does not occur until the Joint Committee has tabled its report, unless there are exceptional circumstances which warrant parliamentary debate to proceed expeditiously;
- requiring that Statements of Compatibility are presented to the House prior to the Minister giving the second reading speech; and
- providing more detail as to what should be included in a Statement of Compatibility.

The definition of 'human rights'

Which international human rights standards?

Under clause 3(1) of the Bill, 'human rights' means the rights and freedoms recognised or declared by the following international instruments:

- the *International Convention on the Elimination of all Forms of Racial Discrimination* done at New York on 21 December 1965;¹
- the *International Covenant on Economic, Social and Cultural Rights* done at New York on 16 December 1966;²
- the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966;³
- the *Convention on the Elimination of All Forms of Discrimination Against Women* done at New York on 18 December 1979;⁴
- the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 10 December 1984;⁵
- the *Convention on the Rights of the Child* done at New York on 20 November 1989;⁶
- the *Convention on the Rights of Persons with Disabilities* done at New York on 13 December 2006.⁷

While PIAC welcomes the fact that the definition is broader than the rights and freedoms recognised in the two principal human rights conventions (the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*), there is a concern that several human rights conventions have not been included in the definition, including:

- the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951;
- the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948; and
- the International Labour Organisation conventions to which Australia is a party.

In addition, as the list of international instruments in clause 3(1) is exhaustive, it makes no provision for inclusion of other international human rights instruments to which Australia may become a party in the future. For such instruments to be included within the protective frameworks of this legislation it will be necessary to amend the legislation to include those instruments within clause 3(1).

PIAC submits that all human rights are inter-dependent and therefore indivisible. It is therefore not appropriate to have selective or piecemeal recognition of human rights in the legislation. Accordingly, PIAC agrees with the Human Rights Law Resource Centre (HRLRC) submission that clause 3(1) should include all of the human rights and freedoms contained in all human rights treaties to which Australia is a party. This should include any human rights treaties or conventions to which Australia will become a party in the future.

There may be criticism that the task of considering seven instruments will be too complex. However, in practice, the complexity of the task is diminished by the fact that only the relevant human rights instruments and

¹ [1975] ATS 40.

² [1976] ATS 5.

³ [1980] ATS 23.

⁴ [1983] ATS 9.

⁵ [1989] ATS 21.

⁶ [1991] ATS 4.

⁷ [2008] ATS 12.

provisions will be considered, in the context of a particular legislative instrument. PIAC believes it is not only a good thing in principle to include all the international human rights instruments to which Australia is a party, but that it is necessary to ensure that the particular impacts of government laws on people facing particular disadvantage due to race, gender, age, disability, etc, need to be expressly considered and understood.

How do international instruments apply to Australia?

Clause 3(2) states that the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

However, there is no guidance in the Bill, the Second Reading Speech or the Explanatory Memorandum as to the meaning of the phrase '... as it applies to Australia'.

It is submitted that the phrase should be defined to ensure that any optional protocol to which Australia is a party under the relevant international instruments to which the Bill relates, is also included within the reference to the rights and freedoms recognised or declared by an international instrument. Likewise, where Australia has explicitly made a reservation to one or more clauses within an international instrument, that clause would not be included within the reference to the rights and freedoms recognised or declared by an international instrument.

In addition, the phrase should not be construed to exclude the use of International and foreign human rights jurisprudence in interpreting the scope and content of the human rights to be considered. To ensure that this does not occur, PIAC supports the recommendation from the HRLRC that an additional provision, clause 3(3), be inserted into the Bill, which states:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in determining the scope and content of the rights and freedoms recognised or declared by an international instrument.

Parliamentary Joint Committee on Human Rights

Functions of the Joint Committee

Clause 7 of the Bill states that the Parliamentary Joint Committee on Human Rights will have the following functions:

- To examine Bills, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on those issues.
- To examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue.
- 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 the Parliament on that matter.

PIAC advocates the inclusion of a general function for the Committee to inquire into any matter relating to human rights, not just these issues. In this way, the Committee will have a parallel function to that of the UK House of Lords/House of Commons Joint Committee on Human Rights, which is able to consider matters relating to human rights in the UK, but excluding consideration of individual cases.

However, PIAC notes that, unlike the proposed Australian Committee, the UK Joint Committee is able to commence an inquiry on its own motion. PIAC submits that the requirement for a reference from the Attorney-General to conduct an inquiry into any matter relating to human rights is a significant constraint on the effectiveness of the Committee, as it will have the effect of limiting its capacity to conduct general human rights inquiries to the priorities and agendas of the Government of the day.

PIAC submits that the general human rights inquiry function of the Committee would be enhanced by providing for the Committee to conduct such an inquiry upon reference from either House of Parliament. This approach is more consistent with one of the rationales for the development of clear human rights protections: the protection against the abuse of power by government.

PIAC strongly endorses the Committee's functions to examine Bills for Acts, legislative instruments and current Acts for compatibility with human rights. However, in order to conduct such an examination in an appropriately rigorous manner, careful consideration will need to be given to the powers, proceedings and resources of the Committee. This is considered below.

Powers and proceedings of the Committee

Clause 6 of the Bill provides for all matters relating to the powers and proceedings of the Committee to be determined by resolution of both Houses of the Parliament.

PIAC submits that it is essential for the Committee to have appropriate capacity and access to relevant human rights expertise for it to be able to undertake an appropriately rigorous examination of Bills, legislative instruments and current Acts for compatibility with human rights. In particular, the Committee should have sufficient capacity to conduct a thorough examination, which goes beyond consideration of the Minister's Statement of Compatibility. Inherent in such a thorough examination is:

- the availability of sufficient time to conduct an appropriate examination of the Bills/Legislative instruments/Acts in a thorough and comprehensive manner.
- access to appropriate resources, including specialist expertise in international human rights law. PIAC notes that the UK Joint Committee a designated legal adviser who has extensive experience and expertise in international and domestic human rights law.
- the ability to invite submissions from the public and the Australian Human Rights Commission, and to conduct public hearings.

In addition, it is vital that provision be made in the Parliamentary Standing Orders to require that further Parliamentary debate on the Bill does not take place until the Joint Committee Report is available for

consideration. PIAC acknowledges that there are circumstances in which Standing Orders may need to be suspended to allow urgent debate. However, PIAC submits that such suspensions should only occur in extreme circumstances, with support from a two-thirds majority in the House in which debate is to take place.

Statements of compatibility

Presenting statements of compatibility to the Parliament

Clause 8(2) of the Bill requires a member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, to cause the statement of compatibility to be presented to that house.

There is no guidance in the Bill or the Second Reading Speech as to when the statement of compatibility is to be presented to the house. The Explanatory Memorandum states that a statement of compatibility will ordinarily form part of the explanatory memorandum of the bill.

PIAC submits that the Bill needs to specify that the statement of compatibility is to be presented to the house before giving the Second Reading Speech. PIAC submits that the Bill should include a provision similar to section 28(2) of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which states:

A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Content of Statement of Compatibility

Clause 8(3) of the Bill states that a statement of compatibility must include an assessment of whether the bill is compatible with human rights. Clause 9(2) similarly states that a statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights.

The Explanatory Memorandum indicates that no particular form has been prescribed for the statement of compatibility. It states that statements of compatibility 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 Second Reading Speech states that the statements of compatibility will ensure human rights analysis is undertaken by the executive at an early stage when developing legislation. The Speech further states that:

- The statements will alert parliament to the relevant human rights consideration in a particular bill or disallowable instrument and will inform parliamentary debate.
- The statements will contextualise human rights considerations.
- Where appropriate, statements may justify restrictions or limitations on rights where such restrictions are in the interests of other individuals or society more generally as consistent with Australia's responsibilities.

It is clear from the Explanatory Memorandum and the Second Reading Speech that the intention is for statements of compatibility to include a succinct yet comprehensive analysis of whether the bill or legislative instrument is compatible with human rights. With this in mind, PIAC submits that the Bill itself should give more detail as to what is required in a statement of compatibility. PIAC submits that clauses 8(3) and 9(2) should replicate section 28(3) of the Victorian *Charter of Human Rights and Responsibilities 2006*, which states:

A statement of compatibility must state –

- (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
- (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

PIAC submits that the nature of the examination envisaged in the Explanatory Memorandum and Second Reading Speech necessitates the development of comprehensive guidelines for legislative and policy officers across government, to enable them to make reasoned and rigorous assessments to complete statements of compatibility. These guidelines will need to include information regarding relevant interpretive communications and international and domestic human rights jurisprudence appropriate to the identified human rights to be considered under the Bill.

Conclusion

Although PIAC continues to assert the need for comprehensive protections for human rights in the form of a Human Rights Act as recommended in the final report of the National Human Rights Consultation, PIAC welcomes the current Bills as an important initiative in the progress towards more comprehensive human rights protections. In particular, PIAC welcomes the fact that the Bills adopt a more expansive definition of human rights than the relevant human rights legislation in Victoria and the ACT, by referring to Australia's obligations under seven international instruments.

PIAC submits that there are still a number of key human rights instruments to which Australia is a party, which are not included in the definition. Accordingly, PIAC submits that the definition of 'human rights' in the Bills should include all of the human rights and freedoms contained in all core human rights treaties to which Australia is a party, and also any human rights treaties or conventions to which Australia will become a party in the future.

PIAC also submits that the initiatives proposed in the Bills would be enhanced by:

- providing that international law and foreign and domestic jurisprudence be considered in determining the scope and content of the rights and freedoms recognised by an international instrument;
- providing for the Joint Committee on Human Rights to conduct an inquiry any matter relating to human rights in Australia, upon reference from either House of Parliament;

- ensuring that the Joint Committee on Human Rights has appropriate capacity and access to relevant human rights law expertise for it to be able to undertake an appropriately rigorous examination of Bills for Acts, legislative instruments and current Acts for compatibility with human rights;
- providing that further Parliamentary debate on a Bill does not take place until the Joint Committee on Human Rights Report is available for consideration, unless there are exceptional circumstances;
- providing that the Statement of Compatibility is to be presented to the House before giving the Second Reading Speech;
- providing more detail as to what is required in a statement of compatibility, namely:
 - whether, in the member's opinion, the bill is compatible with human rights and, if so, how it is compatible; and
 - if, in the member's opinion, any part of the bill is incompatible with human rights, the nature and extent of the incompatibility;
- ensuring that comprehensive guidelines are developed for legislative and policy officers across Government, to enable them to make reasoned and rigorous assessments to complete statements of compatibility.