

HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL 2010

**SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS COMMITTEE:**

INQUIRY INTO THE HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL 2010

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INTRODUCTION

1. Following from the Report of the National Human Rights Consultation Committee, the Attorney-General, the Hon. Robert McClelland, announced that the Government would introduce a new National Human Rights Framework. The core components of that framework consisted of measures designed to improve Federal Parliament's capacity to review existing and proposed legislation for consistency with international human rights standards. To make the commitment tangible, the Attorney introduced the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* in the House of Representatives. These Bills have now been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report. These Bills reflect the recommendation of the National Human Rights Consultation Committee that:
 - a. Parliament establish a Joint Committee on Human Rights to review all Bills and regulations for human rights compliance; and
 - b. A 'statement of compatibility' be required for all Bills introduced into the Federal Parliament and that this statement assess the law's compatibility Australia's human rights obligations.
2. Liberty Victoria is profoundly disappointed that the Government chose to ignore the National Consultation Committee's recommendation that the Commonwealth Parliament enact a *Human Rights Act*, in order to provide comprehensive legal protection for the fundamental human rights of all Australians. Nevertheless, Liberty supports the introduction of these far more modest Bills as one step towards more informed parliamentary consideration and discussion of the human rights implications of all federal legislation. As the Attorney has stated in introducing the legislation, the purpose of the measures is to 'improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'. We believe this to be a worthwhile objective. In the remainder of this submission we outline our views as to how the legislation might be supplemented in order better to achieve it.

DEFINITION OF HUMAN RIGHTS

3. Human Rights are defined in s.3(1) of the Bill to include all of the human rights and freedoms enshrined in the seven core international human rights treaties to which Australia is a party. Foremost among these is the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Liberty agrees that a definition of human rights in these broad terms is appropriate. Having said that, these are long and comprehensive international instruments. The UN Human Rights Treaty Body Committees that oversee their implementation have developed an extensive jurisprudence in relation to each. Many and lengthy legal texts have been devoted to their careful elaboration. To review all Commonwealth Bills and Acts with reference to these seven international instruments and the many important rights they contain is a formidable task. This suggests that the Committee must be adequately resourced for the task. At minimum, the Committee should be assisted by an expert legal adviser drawn from the top echelons of either the legal profession or the academic community. It should be able to call upon the advice of experts, as and when required, in relation to each of the relevant human rights conventions. The Committee must also be staffed by a highly competent legal and administrative secretariat. Whether allocated by the Government or the Parliament, the Committee must also have a budget commensurate with the magnitude of the tasks which it is required to undertake.
4. The definition of human rights should also be expanded to include those human rights that are recognized in customary international law. These include, for example, the right to life; the prohibition of torture and other forms of cruel, inhuman or degrading treatment; the prohibition of arbitrary detention; the prohibition of slavery and forced labour; the principle of equality before the law; the freedoms of thought, conscience and religion; freedom of speech; the right to fair trial; and the principle of non-refoulement.

THE JOINT PARLIAMENTARY COMMITTEE ON HUMAN RIGHTS

5. The Bill establishes a Joint Parliamentary Committee on Human Rights. This is to be comprised of 5 members chosen by the House of Representatives and 5 members chosen by the Senate. It will be evident that if the Committee is to operate with the measure of independence and impartiality required for a fair examination of legislation for consistency with human rights, it is imperative that, as far as possible, its proceedings

should not be politicised. The Committee will not work well if its conclusions are driven primarily by an attachment to party rather than a commitment to principle. The likely make-up of the Committee is that in the House of Representatives, 3 positions will be allocated to the majority party in parliament and 2 positions will be allocated to the principal opposition party. In the Senate, 2 positions are likely to be allocated by the party of government, 2 positions by the principal opposition party and one position to the largest third party having, perhaps, the balance of power. This will give 5 positions to the party of government and 5 positions to parties in opposition. Parliamentary experience in Australia, particularly with Scrutiny of Acts and Regulations Committees has demonstrated clearly that these operate best and most independently where the Chair is taken not from the governing party but from one of the opposition parties. In our view, therefore, the present Bill should so provide or, alternatively, the Committees' practices and procedures should reflect this arrangement.

6. The Joint Parliamentary Committee's powers are:
 - a. To examine Bills, legislative instruments and existing Acts for compatibility with human rights and to report to both Houses as to such matters; and
 - b. To inquire into any matter relating to human rights which is referred to it by the Attorney-General.

Liberty welcomes the breadth of these powers, in particular that which relates to the Committee's capacity to report on the compatibility of existing Acts with international human rights standards. Nevertheless, the powers conferred would appear to preclude the Committee from engaging in own motion inquiries relating to thematic questions. The Joint Parliamentary Committee on Human Rights in the United Kingdom, which is empowered to conduct own motion inquiries on thematic questions, has done enormously useful work in considering the human rights implications of a diverse array of government legislation, policies and practices. Recently these have, for example, included inquiries with respect to Counter-Terrorism Policy, Human Rights and Mental Health, the Application of Human Rights Standards to Private Sector Organizations, Privacy and Data Protection, the Protection of the Rights of Children and the operation of the UK Human Rights and Equality Commission. These thematic inquiries have been the most successful aspect of the Joint Parliamentary Committee's work, resulting in

major changes in policy and extensive public education with respect to human rights issues. Consequently, Liberty believes that the Joint Committee proposed should in addition to the powers already specified be provided further with the power as in the UK:

- c. to consider any other matter concerning human rights in Australia (but excluding consideration of individual cases).
7. There is another aspect of this recommended power that should also be mentioned. The very successful Joint Committee in the UK has deployed the power to engage in a series of other important scrutiny tasks. It has, for example, undertaken the task of reviewing the UK's response to adverse human rights judgments. These are principally those of the European Court of Human Rights and declarations of incompatibility issued by higher UK courts. The Committee, however, has also begun reviewing the adverse outcomes of cases brought before the UN Human Rights Committee other UN treaty monitoring bodies. It also reviews and reports on the UK Government's actions in response to the Concluding Observations of these bodies. These activities provide a means through which the government may be brought to account domestically and through which the public may be educated as to the human rights implications of its legislation, policy and programs.
8. The Powers and Procedures of the Committee are not specified but are left to be determined 'by resolution of both Houses of Parliament'. This provision is satisfactory but we make the following further comments as to the determination of such powers and procedures. The great weakness of Scrutiny Committees of this kind has been that, given hectic parliamentary schedules, it has often been the case that Committees have had insufficient time to consider proposed legislation, and Parliament itself has had insufficient time to consider the Committee's reports on legislation. All too often Committee reports are presented in very abbreviated form to meet parliamentary deadlines and the content of such reports is insufficiently considered when parliamentary debate is truncated. All too often, final Committee reports are received only after the legislation to which they relate has been enacted. This makes it imperative that parliamentary and committee business is arranged so that adequate time is devoted to

both stages of the scrutiny process.

9. It follows, too, that if the Committee is to conduct its inquiries in a comprehensive and considered manner, it should possess the power to call for submissions, convene public hearings, examine witnesses, and call upon expert legal and policy advice. Further, hearings should be conducted in public, as far as possible, so that there is the maximum opportunity for members of the media and the public to observe and comment on Committee deliberations and decisions.

STATEMENTS OF COMPATIBILITY

10. The Bill provides in s.7 that a member of Parliament, including a Minister, who proposes to introduce a Bill for an Act in either House of Parliament must issue a statement of compatibility in relation to the Bill. The statement of compatibility must include ‘an assessment of whether the Bill is compatible with human rights’. This raises the question as to what will constitute an adequate and appropriate assessment. In the early years of the operation of the UK Human Rights Act, the Government thought it sufficient simply to say that the Minister concerned believed that legislation proposed was compatible or incompatible without specifying the reasons for that view. This is clearly inadequate. To be effective as a means of strengthening the capacity of the Parliament to review proposed legislation, a statement of compatibility must be accompanied by a clear analysis of provisions in a Bill that may limit human rights and the reasons for determining whether any such limit is consistent or inconsistent with the human rights to which it relates. The Attorney-General provided useful guidance in this regard when introducing the Bill when he declared that compatibility statements ‘should assist in explaining the purpose and intention of legislation, to contextualize human rights considerations, and where appropriate, justify restrictions or limitations on rights in the interests of individuals or society more generally’.
11. Ideally the practice which has developed in New Zealand should be adopted whereby a Minister introducing legislation that may trespass upon human rights tables, as a supplement to the compatibility statement, the legal advice provided to him or her for determining the compatibility question. In addition, to make the requirement to issue statements of compatibility as effective as possible in guiding government policy and

legislative drafting, statements of compatibility should be tabled with draft legislation when legislative proposals reach the Cabinet for initial consideration. There they might also constructively be accompanied by a human rights impact statement to further inform the Cabinet's deliberations.

12. Finally, to facilitate parliamentary consideration of the human rights implications of legislation, statements of compatibility should be tabled as early as possible to allow for meaningful parliamentary discussion. It would be desirable, therefore, for compatibility statements to be tabled with the Second Reading Speech and Explanatory Memorandum provided for a Bill. The statement, and the reasons for determining compatibility, will then also be available for public consideration prior to consideration and enactment of the legislation.

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