
Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

Senate Legal and Constitutional Committee

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Table of Contents

Acknowledgement	2
Executive Summary	3
Summary of Law Council Recommendations	4
Relevant Background Developments	5
National Human Rights Consultation	5
Government's Response – Australia's Human Rights Framework	7
Senate Inquiry into Future Direction of Scrutiny of Bills Committee	7
Key Features of the Parliamentary Scrutiny Bill	9
Definition of Human Rights	9
Parliamentary Joint Committee on Human Rights	10
Statements of Compatibility	10
Statements of Compatibility for Bills	10
Statements of Compatibility for Certain Legislative Instruments	11
Consequential Provisions Bill	12
Law Council's Support for Bills	13
Law Council's Concerns	13
Implementation Challenges of Working with Seven Core Treaties	13
Scope of Human Rights Protected	13
Parliamentary Joint Committee on Human Rights	17
Prescribe General Powers of the Human Rights Committee	17
Invest Human Rights Committee with Power to Initiate Own Inquiry	19
Expand Human Rights Committee's Functions to Include Monitoring Role	19
Ensure Access to Sufficient Time and Resources	20
Encourage Robust Scrutiny of Proposed Laws and Policies	22
Statements of Compatibility	23
Preparation	23
Content	24
An Interim Measure - Expanded Mandate for Scrutiny of Bills Committee	27
Attachment A: Profile of the Law Council of Australia	28

Acknowledgement

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Executive Summary

1. The Law Council of Australia is grateful for the opportunity to comment on the provisions of the *Human Rights (Parliamentary Scrutiny) Bill 2010* ('the Parliamentary Scrutiny Bill') and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* ('the Consequential Provisions Bill').
2. The Parliamentary Scrutiny Bill will establish the Parliamentary Joint Committee on Human Rights (the Human Rights Committee) and sets out the functions and administrative arrangements for the Committee. The Human Rights Committee will examine Acts, Bills and certain delegated legislation 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.
3. The Parliamentary Scrutiny Bill also introduces a requirement that all Bills and certain delegated legislation be introduced with a Statement of Compatibility indicating compatibility or otherwise with human rights.
4. The two Bills seek to implement elements of Australia's Human Rights Framework announced by the Commonwealth Government in April 2010 in response to the report of the National Human Rights Consultation Committee.
5. The Law Council wishes to express its general support for the Bills and in particular for the establishment of the Parliamentary Joint Committee on Human Rights and the requirement that all Bills and certain delegated legislation be accompanied by Statements of Compatibility.
6. The Law Council submits that the role of the Parliamentary Joint Committee and the effectiveness of the Statements of Compatibility could be enhanced by giving further consideration to:
 - (a) the implementation challenges that may arise from the potentially broad scope of the definition of 'human rights' in clause 3 of the Parliamentary Scrutiny Bill;
 - (b) the absence of prescribed general powers for the Human Rights Committee, which contrasts with the general approach adopted for like committees in many jurisdictions;
 - (c) whether the effectiveness of the Human Rights Committee would be enhanced by providing the Committee with power to initiate its own inquiries and expanding the Committee's functions to include a monitoring role;
 - (d) the need to ensure the Human Rights Committee has adequate time and resources to perform its scrutiny function;
 - (e) the need to ensure the quality of the content of Statements of Compatibility, and to address the uncertainty surrounding their use by parliament and courts; and
 - (f) whether, as an interim measure, the Senate Scrutiny of Bills Committee's mandate should be expanded to include a reference to human rights.
7. In light of these considerations, the Law Council makes the following recommendations.

Summary of Law Council Recommendations

8. Subject to the recommendations for enhancement made in this submission, the Law Council urges the Senate Legal and Constitutional Affairs Committee to recommend the passage of the Bills.
9. The Law Council recommends that the Parliamentary Scrutiny Bill be amended as follows:
 - (a) clarify the proposed definition of 'human rights' in clause 3 by either:
 - (i) including within clause 3 a consolidated list of human rights protected in Australia; or
 - (ii) providing a reference to a consolidated list of human rights to be contained in the Regulations.
 - (b) amend clause 6 to include a non-exhaustive list of powers available to the Human Rights Committee including those powers currently available to other Joint Committees pursuant to Chapter 16 of the *Standing Orders of the House of Representatives*. The ability to seek a resolution from a House of Parliament for additional powers should remain;
 - (c) amend clause 7 to include the following functions for the Human Rights Committee:
 - (i) to inquire into any matter relating to human rights, including a matter which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter;
 - (ii) to monitor Australia's compliance with UN human rights treaties, including monitoring implementation of the Concluding Observations of UN treaty bodies;
 - (d) provide the Human Rights Committee with:
 - (i) appropriate time to consider a Bill, for example by placing a requirement upon the member introducing a Bill to ensure, as far as is reasonably possible, that the Human Rights Committee has adequate time to consider and report upon it prior to any vote being taken; and
 - (ii) the power to request and obtain relevant information from Ministers and government departments in a timely manner;
 - (e) provide, in the provisions of the Parliamentary Scrutiny Bill or the accompanying Explanatory Memorandum that, when exercising its human rights scrutiny function, the Human Rights Committee is permitted to enquire into the policy underpinning the proposed legislation;
 - (f) amend clause 8 to specifically require reasons to be given in Statements of Compatibility.
10. The Law Council further suggests that the Senate Committee on Legal and Constitutional Affairs recommend that the Commonwealth Attorney General's Department develop:

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- (a) comprehensive resources for other Commonwealth Government Departments to utilise when preparing Statements of Compatibility; and
 - (b) a workable template for Statements of Compatibility.

11. These recommendations are discussed in detail below.

Relevant Background Developments

- 12. Australia is the only western democracy without an effective federal constitutional or statutory mechanism to ensure comprehensive consideration of human rights by the Executive, the Legislature and the Judiciary.
- 13. The need for improved parliamentary scrutiny of new and existing laws for compliance with human rights has been recognised by a number of international human rights bodies,¹ as well as by a range of non-government organisations and the Federal Opposition² during the National Human Rights Consultation.

National Human Rights Consultation

- 14. On 10 December 2008 the Commonwealth Attorney-General launched the National Human Rights Consultation to seek the views of the Australian community on how human rights and responsibilities should be protected in the future.³
- 15. The Law Council actively participated in the National Human Rights Consultation in line with its Policy Statement in favour of a federal Human Rights Act,⁴ and submitted that a Human Rights Act was the best mechanism to provide comprehensive legal protection for human rights at the federal level in Australia.⁵
- 16. The National Consultation Committee provided its report and recommendations to the Attorney-General on 30 September 2009. The Attorney released the report on 8 October 2009.

¹ For example see Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, UN Doc CCPR/C/AUS/CO/5 (2009) [8]

² For example, in its submission to the National Consultation Committee prepared by Senator George Brandis SC, the Federal Opposition concluded that 'a statutory bill of rights is not the best model for advancing human rights in Australia'. The Federal Opposition submitted that a preferred mechanism for advancing human rights in Australia is through enhanced parliamentary scrutiny, based on the model proposed by Rev Fr the Hon Michael Tate AO. This model would include the establishment of a new Parliamentary Committee (either a Joint Standing Committee or a Standing Committee of the Senate), invested with the specific task of considering legislation from a human rights point of view and reporting to the Parliament on any possible incompatibilities between a bill before the Parliament and the international human rights instruments to which Australia is a party. See Senator George Brandis SC, Submission by the Federal Opposition to the National Human Rights Consultation, (June 2009); see also Fr Michael Tate, Submission to the National Human Rights Consultation, 27 January 2009.

³ The Consultation was run by an independent Committee, led by Father Frank Brennan and supported by a Secretariat in the Attorney General's Department. The Consultation enjoyed a high rate of participation from the Australian community, and received input from over 35,000 written submissions, 3 days of public hearings, 66 community roundtables and feedback from a Facebook page and online forum.

⁴ The Law Council's policy position in favour of a Charter of Rights was developed following months of consultation with its Constituent Bodies, namely the Law Societies and Bar Associations around Australia as well as the Large Law Firm Group. The Policy Statement was finalised by Law Council Directors in November 2008. The Policy Statement and related materials and submission are available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/bill-of-rights.cfm>. The Law Council's original Policy Statement referred to a federal Charter or Bill of Human Rights. The Law Council has since adopted the use of the term Human Rights Act, preferred in the National Human Rights Consultation Report

⁵ Discussed further below.

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17. Among 31 recommendations for reform, which included a recommendation for a Human Rights Act as well as recommendations that can be implemented *without* the enactment of a Human Right Act, was the establishment of a new Joint Parliamentary Committee on Human Rights.
 18. Through the consultation process, the National Consultation Committee became aware of the substantial support for greater parliamentary scrutiny of human rights.⁶ For example, the Law Council submitted that improved scrutiny of legislation for consistency with Australia's human rights obligations was urgently needed and recommended that a federal Human Rights Act be enacted to provide a framework for this scrutiny and to ensure government decision makers took human rights considerations into account.
 19. Two hundred other submissions expressed support for greater parliamentary scrutiny for human rights. A number of these submissions specifically proposed that a new parliamentary committee be established and empowered to review Bills for their compatibility with human rights protected in a Charter or Human Rights Act.⁷
 20. In light of these views, the Brennan Committee identified two possible options for reform: (1) refining the existing parliamentary committee system⁸ or (2) establishing a committee specifically to deal with human rights.
 21. Having examined both of these options and considered the costs of a new parliamentary committee,⁹ the National Consultation Committee recommended that a joint Parliamentary Committee on Human Rights be established.¹⁰
 22. The Parliamentary Committee on Human Rights recommended by the National Consultation Committee would be tasked with reviewing all Bills and relevant legislative instruments for compliance with a list of Australia's human rights obligations.¹¹
 23. The National Consultation Committee envisaged the Joint Parliamentary Committee on Human Rights operating within the framework of a Human Rights Act, which would ensure greater consideration of human rights in the development of legislation and policy and in the parliamentary process in general.¹² However, the National Consultation Committee also made it clear that statements of compatibility and the

⁶ National Human Rights Consultation Report (September 2009) p. 171.

⁷ National Human Rights Consultation Report (pp. 168-169).

⁸ The first reform option was influenced by the submission of Fr Tate (see Summary of Remarks by Rev Fr the Hon Michael Tate AO, Day Three Public Hearings, National Consultation of Human Rights, June 2009 at www.humanrightsconsultation.gov.au). It would involve amending the terms of reference of the Senate Scrutiny of Bills Committee (SBC) in order to define the rights and liberties against which the committees must scrutinise federal laws. Fr Tate suggests that such a list of rights could be drawn from the Constitution, common law, legislation and Australia's international human rights obligations as implemented in domestic law, and expressed as a list or Charter of Rights. This list of rights could be tabled by the SBC in the Senate at least twice a year and every time a change is made. Father Tate believes that after five years, this working list could be accepted as a Statutory Charter of Rights. Under this model, the SBC would also be invested with stronger powers, for example, the power to 'declare' that a proposed law or regulation was incompatible with a human right, which may give their conclusions and recommendations greater weight in public and parliamentary debates. This option was thought to be relatively quick and cheap to implement and could utilise existing secretariat and legal resources.

⁹ National Human Rights Consultation Report p. 173

¹⁰ National Human Rights Consultation Report Recommendation 7.

¹¹ National Human Rights Consultation Report Recommendation 7.

¹² National Human Rights Consultation Report pp. 174-175

Joint Parliamentary Committee on Human Rights could be implemented regardless of the enactment of a Human Rights Act.¹³

Government's Response – Australia's Human Rights Framework

24. On 21 April 2010 the Attorney General released Australia's Human Rights Framework (the Human Rights Framework). The Framework constitutes the Commonwealth Government's response to the recommendations of the National Human Rights Consultation Report (the Brennan Report).
25. The key features of the Human Rights Framework include:
 - (a) A National Human Rights Awareness Education Plan
 - (b) Improved Parliamentary Scrutiny of Human Rights through Statements of Compatibility for new legislation and a new Joint Parliamentary Committee on Human Rights
 - (c) Improved human rights compliance for the Australian Public Service (APS) through training and amendments to the APS Code of Conduct
 - (d) A new National Human Rights Action Plan
 - (e) An immediate review of Anti-discrimination laws
 - (f) A commitment to reviewing existing legislation for human rights compliance at appropriate times
26. The Attorney made it clear that the Government would not be considering the enactment of a federal Charter or Bill of Human Rights or Human Rights Act.
27. As noted above, the current Bills implement two key components of the Framework.

Senate Inquiry into Future Direction of Scrutiny of Bills Committee

28. In March 2010 the Senate Committee on Scrutiny of Bills' (SBC) began an inquiry into its future direction and role. The terms of reference of the inquiry included whether the SBC's mandate should be extended to consider human rights when scrutinising proposed laws.
29. The Law Council, with assistance from a number of its constituent bodies,¹⁴ made a written submission to the SBC, commenting on the current role and function of the Committee, and the role and function of parliamentary scrutiny committees in other Australian jurisdictions.
30. The Law Council supported the expansion of the Scrutiny of Bills Committee's mandate to include a specific reference to human rights, and made a number of recommendations designed to ensure the Committee was adequately equipped to perform this function.

¹³ National Human Rights Consultation Report pp.174-175

¹⁴ The Law Council is grateful for the assistance of the New South Wales Bar Association, the Law Institute of Victoria, the Victorian Bar Association and the Queensland Law Society in the preparation of this submission. A copy of this submission is available at www.lawcouncil.asn.au.

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31. As an alternative, the Law Council supported the establishment of a new Joint Parliamentary Committee on Human Rights, which would operate under the framework of a federal Human Rights Act. Under this framework, the primary functions of the Parliamentary Committee would be to scrutinise any bills and certain delegated legislation for compatibility with human rights, and to conduct post-legislative review if a bill is passed without time for pre-legislative review. The Committee would also be empowered to review proposed and existing legislation and delegated legislation on its own initiative, for example in response to a report by the Australian Human Rights Commission, or following a referral from either house of parliament.
 32. The Law Council further submitted that consideration should be given to broadening the mandate of the Parliamentary Committee to include functions similar to those undertaken by the UK Joint Committee on Human Rights, including the power to conduct thematic inquiries into human rights matters and assist in government responses to the decisions and concluding observations of UN treaty-oversight bodies such as the Human Rights Committee.
 33. The Law Council was invited to appear before the Scrutiny of Bills Committee to give oral evidence. However, the oral hearing was subsequently cancelled and an interim report issued by the Committee recommending that the inquiry be postponed in light of the release of the Human Rights Framework, and in particular, the Government's intention to establish a Joint Parliamentary Committee on Human Rights.¹⁵
 34. In June 2010 the Parliamentary Scrutiny Bill and the Consequential Provisions Bill were introduced into Parliament and subsequently referred to the Senate Committee for inquiry in August 2010. The Law Council made a submission to the Committee on the Bills. However, the Bills lapsed with the calling of the 2010 Federal Election in August 2010 and subsequently were not reported on by the Senate Committee. In September 2010 the Bills were reintroduced into Parliament in identical form, and are now again before the Senate Committee for inquiry. As the Bills have been reintroduced in identical form, this submission is largely based on that previously submitted in August 2010 while taking account of some recent developments.

¹⁵ The Law Council has been subsequently informed by the Scrutiny of Bills Committee that the Inquiry will reconvene following the passage of the current Bills and that participants are welcome to provide supplementary submissions. As will be discussed later in this submission, the Law Council looks forward to taking up this opportunity to raise with the Scrutiny of Bills Committee the possibility of extending its mandate to include a reference to human rights until the Parliamentary Joint Committee is established and operational following the commencement of the Bill 28 days after Royal Assent or on 1 January 2011,

Key Features of the Parliamentary Scrutiny Bill

35. As noted above, the Parliamentary Scrutiny Bill establishes a Parliamentary Joint Committee on Human Rights (Human Rights Committee) and introduces the requirement that all Bills and certain delegated legislation be introduced with a Statement of Compatibility.
36. Other than its preliminary and definitional provisions, this Bill will commence on the later of 1 January 2011 or 28 days after the Act receives Royal Assent.¹⁶
37. Clause 10 of the Bill allows the Governor General to make regulations as required or permitted to be prescribed by the Act; or as necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Definition of Human Rights

38. Both the Human Rights Committee and the Statements of Compatibility rely upon a definition of *human rights* contained in clause 3 of the Bill.
39. This clause provides that *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 (CERD);¹⁷
 - the International Covenant on Economic, Social and Cultural Rights (CESCR);¹⁸
 - the International Covenant on Civil and Political Rights; (ICCPR)¹⁹
 - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);²⁰
 - the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);²¹
 - the Convention on the Rights of the Child (CROC);²² and
 - the Convention on the Rights of Persons with Disabilities (CRPD).²³
40. Subclause 3(2) provides 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. This means, for example, that the reservations made by Australia to these Conventions continue to apply to the definition of human rights in this Bill.

¹⁶ Parliamentary Scrutiny Bill s2.

¹⁷ New York on 21 December 1965 ([1975] ATS 40)

¹⁸ New York on 16 December 1966 ([1976] ATS 5)

¹⁹ New York on 16 December 1966 ([1980] ATS 23)

²⁰ New York on 18 December 1979 ([1983] ATS 9)

²¹ New York on 10 December 1984 ([1989] ATS 21)

²² New York on 20 November 1989 ([1991] ATS 4)

²³ New York on 13 December 2006 ([2008] ATS 12).

Parliamentary Joint Committee on Human Rights

41. Part 2 of the Bill establishes the Human Rights Committee and sets out the functions and administrative arrangements for the Committee.
42. The Parliamentary Committee is to consist of ten members, five from the Senate and five from the House of Representatives.²⁴ Certain senior members of Parliament, such as Ministers, are not eligible for appointment to the Committee.²⁵
43. All matters relating to the powers and proceedings of the Human Rights Committee are to be determined by resolution of both Houses of the Parliament²⁶ and the functions of the Human Rights Committee are set out as follows:
 - (a) to examine Bills and legislative instruments that come before either House of the Parliament for compatibility with human rights and report to both Houses of the Parliament;
 - (b) to examine Acts for compatibility with human rights and report to both Houses of the Parliament;
 - (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General and report to both Houses of the Parliament.²⁷
44. The Explanatory Memorandum to the Bill explains that the major activity of the Human Rights Committee will be the examination of Bills and legislative instruments for compatibility with human rights. It further provides that the Committee will:

be able to inquire more thoroughly into bills and legislative instruments including calling for submissions, holding public hearings and examining witnesses, when it considers this appropriate.

In addition to the scrutiny function, the Committee will be able to examine Acts and conduct broader inquiries on matters related to human rights referred to it by the Attorney-General. In performing these functions, the Committee will be able to call for submissions, hold public hearings and examine witnesses.

The Committee will be able to determine the manner in which it performs its scrutiny function to ensure that reports on compatibility of bills and legislative instruments with human rights are provided to Parliament in a timely manner.²⁸

Statements of Compatibility

45. Part 3 of the Bill introduces a requirement for statements of compatibility to be prepared for all Bills and legislative instruments subject to disallowance.

Statements of Compatibility for Bills

46. Clause 8 provides that Statements of Compatibility for Bills:
 - must be prepared by the member of Parliament who introduces or is responsible for a Bill; and

²⁴ see Parliamentary Scrutiny Bill clause 5

²⁵ see Parliamentary Scrutiny Bill clause 5

²⁶ Parliamentary Scrutiny Bill clause 6.

²⁷ Parliamentary Scrutiny Bill clause 7.

²⁸ Explanatory Memorandum to Parliamentary Scrutiny Bill p. 5.

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- must contain an assessment of whether the Bill is compatible with human rights.²⁹
47. The clause does not prescribe in any further detail the particular form for Statements of Compatibility, nor does it require that reasons be given. The Explanatory Memorandum provides that:
- 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.*
48. Although subclause 8(4) provides that a Statement of Compatibility in relation to a Bill is not binding on a court or tribunal, the Explanatory Memorandum states that this provision is not intended to exclude the operation of section 15AB of the *Acts Interpretation Act 1901* which deals with use of extrinsic material in the interpretation of an Act:
- As is currently the case, courts may use extrinsic material to assist in determining the meaning of a provision in the event of ambiguity. This can include other material considered by Parliament in the passage of legislation such as accompanying Explanatory Memoranda, Second Reading Speeches and Parliamentary Committee reports. Consistent with current rules of statutory interpretation, a statement of compatibility and a report of the Joint Committee on Human Rights could be used by a court to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.*³⁰
49. Subclause 8(5) makes it clear that a failure to comply with clause 8 does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.

Statements of Compatibility for Certain Legislative Instruments

50. Clause 9 provides that Statements of Compatibility must also be lodged by the rule-maker for a disallowable legislative instrument.³¹
51. The amendments in the Consequential Provisions Bill require a rule-maker to lodge a statement of compatibility as part of the explanatory statement of a legislative instrument. The explanatory statement is then tabled with that instrument in accordance with the requirements in the *Legislative Instruments Act 2003*.
52. As with Bills, Statements of Compatibility must include an assessment of whether the legislative instrument is compatible with human rights. Such Statements of Compatibility are not binding on a court or tribunal but may be used by a court or tribunal to assist in ascertaining the meaning of provisions in a legislative instrument where the meaning is unclear or ambiguous.³² Subclause 9(4) provides that a failure to comply with clause 9 in relation to a legislative instrument does not affect the validity, operation or enforcement of the instrument or any other provision of a law of the Commonwealth.

²⁹ Parliamentary Scrutiny Bill subclauses 8(1)-(3)

³⁰ Explanatory Memorandum to Parliamentary Scrutiny Bill p. 6.

³¹ The legislative instruments to which this provision applies are those to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies.

³² See Parliamentary Scrutiny Bill subclauses 9(2)-(3); see also Explanatory Memorandum to Parliamentary Scrutiny Bill p. 6.

Consequential Provisions Bill

53. The *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* ('the Consequential Provisions Bill') amends the *Administrative Appeals Tribunal Act 1975* to include the President of the Australian Human Rights Commission as an ex officio member of the Administrative Review Council.³³ This Bill implements another initiative contained in the Human Rights Framework.
54. The Consequential Provisions Bill also amends the *Legislative Instruments Act* to provide for Statements of Compatibility for certain delegated legislation.³⁴ As explained in the Explanatory Memorandum:

*The Legislative Instruments Act sets out the process for tabling in Parliament of legislative instruments and accompanying explanatory statements. Requiring statements of compatibility to be part of the explanatory statement for disallowable legislative instruments will have the effect of applying these tabling requirements to statements of compatibility. As a result there will be complementary requirements for statements of compatibility for bills and disallowable legislative instruments: under the Legislative Instruments Act a statement of compatibility will be required to be tabled in Parliament at the time of tabling a disallowable legislative instrument, and under the Human Rights (Parliamentary Scrutiny) Act, a statement of compatibility for a bill will be required to be presented to Parliament at the time of introducing a bill.*³⁵

55. The Law Council generally supports the amendments contained in this Bill and does not intend to comment in detail on its provisions in this submission.

³³ Item 1 inserts into subsection 49(1) of the *Administrative Appeals Tribunal Act 1975*, which deals with the composition of the Administrative Review Council, a new paragraph (ba) after (b) to include as a member of the Council the President of the Australian Human Rights Commission established by the *Australian Human Rights Commission Act 1986*. Items 2 and 3 amend the other relevant provisions in the AAT Act to reflect this change in membership.

³⁴ Item 4 amends the *Legislative Instruments Act* by inserting in the definition of 'explanatory statement' (subparagraph 4(1)) a provision that if section 42 of the *Legislative Instruments Act* (disallowance) applies, an explanatory statement contains a statement of compatibility prepared under section 9(1) of *Human Rights (Parliamentary Scrutiny) Act*.

³⁵ Explanatory Memorandum Consequential Provisions Bill.

Law Council's Support for Bills

56. The Law Council wishes to express its general support for the Bills and in particular for the establishment of the Human Rights Committee and the requirement that all Bills and certain delegated legislation be accompanied by Statements of Compatibility.
57. If enacted, the Bills will establish mechanisms to improve protection of human rights in Australia, and more specifically, to ensure human rights are taken into account during the legislative process.
58. The introduction of these mechanisms is also generally consistent with the recommendations of the National Consultation Committee³⁶ and implements two key initiatives proposed in the recently announced Human Rights Framework.
59. While the purpose of these Bills is to be commended, the Law Council is of the view that the mechanisms established by the Bills could be enhanced by giving further consideration to the issues raised and recommendations made below.

Law Council's Concerns

Implementation Challenges of Working with Seven Core Treaties

Scope of Human Rights Protected

60. Clause 3 of the Parliamentary Scrutiny Bill introduces a definition of 'human rights' that includes the rights protected in the seven core international human rights treaties to which Australia is a party (listed above). Subclause 3(2) provides that the reference to the rights and freedoms contained in these treaties is to be read as a reference to the rights and freedoms as the treaty applies to Australia.
61. This definition potentially includes over 40 broadly expressed human rights encompassing a wide range of subject areas from the freedom from arbitrary detention to the right to adequate health care. It also includes rights that have been articulated in greater depth and detail, such as those rights pertaining to the elimination of all forms of discrimination against women.
62. The definition of human rights in the Parliamentary Scrutiny Bill has the potential to cover a much broader range of rights than those included in legislative and constitutional bills of rights currently in force in some jurisdictions in Australia, in New Zealand and in the United Kingdom (UK) and, unlike the lists of rights in these jurisdictions, relies directly on the language of the international treaties.
63. The potential coverage of this definition demonstrates a strong commitment to honour Australia's international human rights obligations. The Law Council welcomes the introduction of a standard of scrutiny based on these key human

³⁶³⁶ National Human Rights Consultation Report Recommendation 6: *The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the Legislative Instruments Act 2003 (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.*

Recommendation 7: *The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.*

rights instruments as a strong starting point for ensuring Australia's human rights obligations are observed throughout the legislative process.

64. Given its strong potential to facilitate effective human rights scrutiny, the Law Council is keen to ensure that the definition in clause 3 is able to be clearly understood and applied by the members of the Human Rights Committee and those responsible for preparing Statements of Compatibility.
65. As the proposed definition refers directly to the seven human rights treaties to which Australia is a party rather than a consolidated list of human rights, the Law Council is concerned that it may give rise to certain challenges when applied in practice. These challenges could include:
 - (a) A potentially large number of rights to consider
 - (i) The sheer number of rights protected in the seven core treaties has previously posed challenges for expert and experienced human rights bodies, such as the Australian Human Rights Commission (AHRC), in terms of analysing proposed and existing laws for compliance. Similar practical challenges may also face the Human Rights Committee and the public servants and Ministers responsible for preparing Statements of Compatibility that rely on this definition.
 - (b) Uncertainty surrounding the meaning and content of the protected rights
 - (i) The language used in the human rights treaties was intended for an international audience and designed to articulate commonly agreed principles drawn from the inherent dignity of the human person. As a result, these treaties may not directly translate into a set of standards against which to scrutinise legislation.
 - (ii) Ascertaining the content of a right in one of the treaties involves consideration of additional international law sources such as Concluding Observations and General Observations made by the UN human rights treaty bodies.
 - (iii) Because the list of rights protected by the seven core treaties and the way these rights and their limitations are expressed, are different from the list of rights protected in the Australian Capital Territory (ACT), Victoria, UK and other comparable jurisdictions it is unclear how they will be interpreted by the Commonwealth public service, Parliamentarians and the courts. For example, will an international law interpretation be preferred, or will an interpretation be drawn from similar rights that already enjoy some protection in Australia?
 - (c) Difficulty in assessing justifiable limits or derogations from protected rights
 - (i) Unlike the consolidated lists of rights contained in human rights legislation in the ACT, Victoria and the UK, there is no common limitation clause or proportionality test within the seven core treaties to guide decision makers as to what circumstances, if any, may justify a limitation on or derogation from a protected right. This has implications for the information and analysis included in the Statements of Compatibility and their format.
 - (d) Limited use of comparative law materials

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- (i) The use of case law or other materials from comparative jurisdictions, such as the ACT, Victoria and the UK is limited due to the difference in the way the rights have been expressed in those jurisdictions and the content of the seven core treaties.
 - (e) Need to incorporate protected rights into existing policy development guidelines and protocols
 - (i) Public servants, policy makers and parliamentarians already take a range of human rights considerations into account when developing policy and considering and debating proposed legislation. In many cases, Protocols, Handbooks and other materials guide their policy making and outline the types of considerations to which they should have regard, for example the Cabinet Handbook. In order to ensure the rights protected in the seven core treaties are taken into account during these processes, each of these materials will need to be amended to include references to a potentially much broader range of human rights concerns encompassed by the definition proposed in the Parliamentary Scrutiny Bill.
66. For these reasons, the Law Council recommends that further consideration be given to clarifying the definition proposed in clause 3 by referring to a clearly defined and comprehensible list of the human rights protected in Australia. This list could express the content of the protected rights in concise and accessible language and include a single test for determining the justifiable limitations or restrictions than can be placed on protected rights.
67. The approach of listing rights from international instruments in clear and accessible language could allow for additional rights to be listed.³⁷ Such rights could be drawn from other international instruments and human rights commitments binding on Australia, in addition to the seven human rights treaties referred to in the Bill. This could include, for example, the rights and freedoms recognised by customary international law or those contained in the *Declaration on the Rights of Indigenous Peoples*.³⁸ The advantage of a list approach is that rights from further relevant human rights treaties can be added in a way which ensures that they are expressed in a consistent format and with a common limitation clause or proportionality test.
68. The development of a consolidated list of human rights protected in Australia was recommended by the National Consultation Committee who concluded that a 'readily comprehensive list of Australian rights and responsibilities' was needed to assist in education programs and public awareness raising in respect of the protection and promotion of human rights.³⁹ The National Consultation Committee also recognised that when implementing mechanisms to ensure human rights considerations are embedded in the policy and law making process (either via a

³⁷ Three of the Law Council's constituent bodies, the Law Institute of Victoria, the New South Wales Bar Association and the New South Wales Law Society have expressed particular support for the inclusion of additional human rights within the definition in clause 3.

³⁸ The *Declaration on the Rights of Indigenous Peoples* was adopted by the Adopted by the General Assembly 13 September 2007. It was adopted with 143 countries voting in favour, 11 abstaining and 4 voting against. Australia was one of the four countries who voted against the Declaration. However, with the change of government at the 2007 Federal Election, there was been a change in position on the Declaration, and the Rudd Government indicated that Australia supports the Declaration. This position has been maintained by the current Labor Government.

³⁹ National Human Rights Consultation Report Recommendation 3, see also Recommendation 2

Human Rights Act or in the absence of such legislation) a consolidated list of human rights was a practical necessity.⁴⁰

69. This led the National Consultation Committee to recommend that the Attorney-General's Department immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. It was recommended that the list include rights from the ICCPR, as well as certain ICESCR rights such as the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education. It was recommended that this interim list be replaced with a definitive list within two years.⁴¹
70. An alternative approach to clarifying the parameters of the definition of human rights would be to amend clause 3 of the Parliamentary Scrutiny Bill to refer to a consolidated list of human rights contained in the Regulations. The Law Council submits that clarifying the definition proposed in clause 3 in this way would overcome the implementation challenges raised above and enhance the effectiveness of both the Human Rights Committee and the Statements of Compatibility by:
- (a) clearly and concisely articulating the human rights Australia is obligated to protect in language accessible to the Australian community;
 - (b) clarifying the content of the protected right by removing from the scrutiny process the many preliminary or procedural provisions of the human rights treaties;
 - (c) facilitating more meaningful comparative analysis, particularly if language closer to that employed in the ACT, Victoria and/or the UK is used;
 - (d) introducing a single limitation or proportionality test to guide decisions makers as to the circumstances under which a law may legitimately limit or derogate from a protected right;
 - (e) providing guidance as to the structure and form of Statements of Compatibility and improving the efficiency of the legislative scrutiny process; and
 - (f) reducing the scope and volume of materials needed to incorporate protected rights into existing policy development guidelines and protocols.
71. The practical benefits of using a consolidated list of human rights to inform the legislative scrutiny process can be seen by the experience of jurisdictions such as the ACT, Victoria and the UK, where processes have developed to help ensure the quality of Statements of Compatibility and the efficiency of parliamentary scrutiny committees.
72. In contrast, in jurisdictions without a consolidated list of protected rights, the quality of parliamentary scrutiny for compliance with individual rights and liberties has been variable. For example, the Senate Scrutiny of Bills Committee (SBC) is already tasked with considering and reporting on whether Bills and certain delegated legislation trespass unduly on personal rights and liberties.

⁴⁰ National Human Rights Consultation Report p. 356

⁴¹ National Consultation Committee Recommendation 5.

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73. One of the criticisms made about this component of the SBC's terms of reference is the absence of a defined list of 'individual rights and liberties', or other guidance as to how to assess whether a proposed law unduly burdens these rights. This is said to have an impact on the depth and quality of scrutiny undertaken by the committee.⁴² For example, Evans and Evans have observed:

*There is no agreed standard against which the performance of governments can be appropriately judged. There is no real mainstream to dissent from. And there is little direct discussion about human rights by most parliamentarians because only a relatively small number have the required knowledge of rights and a strong position in relation to them (be that position in favour or against).*⁴³

74. The Law Council submits that clarifying the definition of human rights in clause 3 will enhance the ability of the mechanisms proposed by the Parliamentary Scrutiny Bill to deliver the type of robust parliamentary scrutiny for compliance with human rights which is urgently needed in Australia.
75. The Law Council further submits that if the above recommendation is adopted, and a list of rights is included or referred to in clause 3 of the Parliamentary Scrutiny Bill, that this list is subject to review within two years of commencement of the legislation.⁴⁴

Parliamentary Joint Committee on Human Rights

76. While the Law Council strongly supports the establishment of a Human Rights Committee as a mechanism to promote human rights observance within the legislative process, the Council submits that its effectiveness in performing this function could be enhanced by adopting the following recommendations.

Prescribe General Powers of the Human Rights Committee

77. The powers of the Human Rights Committee are not articulated in any detail in the Parliamentary Scrutiny Bill.
78. The Law Council appreciates that the proposed provisions are intended to provide the framework for the Human Rights Committee - with the details of the Committee's staffing, processes and procedures to be determined once the Committee itself has been established.⁴⁵
79. However, the Law Council is of the view that the effectiveness of the Human Rights Committee as a mechanism designed to highlight human rights concerns in proposed or enacted laws could be enhanced by providing more guidance in the proposed legislation as to its powers and functions.

⁴² For example see Andrew Byrnes "The protection of human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament's Legislation Review Committee", [2009] UNSWLRS 43. See also NSW Bar Association Submission to National Consultation on Human Rights June 2009 pp.48-49.

⁴³ Carolyn Evans and Simon Evans, 'The effectiveness of Australian Parliaments in the Protection of Rights' Paper delivered at the Legislatures and the Protection of Human Rights Conference, Melbourne Law School, 20-22 June 2006 p. 4 p. 4

⁴⁴ This is consistent with the National Consultation Committee Report, Recommendation 5.

⁴⁵ For example, the Explanatory Memorandum provides that: *The Committee will be able to determine the manner in which it performs its scrutiny function to ensure that reports on compatibility of bills and legislative instruments with human rights are provided to Parliament in a timely manner.* p. 5.

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80. As many parliamentary committees are established in whole or part by parliamentary resolutions, it is not uncommon for parliamentary committees to lack a statutory basis for their powers. Many parliamentary committees rely upon Standing Orders for their powers. For example, other Joint Standing Committees, such as the Joint Standing Committee on Foreign Affairs, Defence and Trade, rely upon Chapter 16 of the *Standing Orders of the House of Representatives* for their powers. Similarly, the Senate Scrutiny of Bills Committee relies upon the Senate Standing Orders for its powers. The powers contained in these Standing Orders generally include the power to:
- send for persons and documents
 - move from place to place
 - meet and transact business in public or private session
 - be provided with all necessary staff, facilities and resources
 - appoint persons with specialist knowledge for the purposes of the committee and
 - authorise the broadcasting of public hearings⁴⁶
81. The Law Council is of the view that these general powers are critical to ensuring that the Human Rights Committee can fulfil its important scrutiny function in a timely and efficient manner.
82. These powers may be available to the Human Rights Committee via the application of the *Standing Orders of the House of Representatives* without requiring a specific resolution of Parliament.
83. However, given the significance of the Human Rights Committee's role and its statutory establishment, the Law Council submits that consideration should be given including these general powers in the Parliamentary Scrutiny Bill. This would ensure that the Human Rights Committee, which unlike other Standing Joint Parliamentary Committees is prescribed a specific scrutiny function by statute, is also provided with the specific powers necessary to perform these functions.
84. The Law Council also supports the recommendations of the Law Society of New South Wales to invest the Human Rights Committee with the power to:
- (a) make use of the services of a member of the public service to assist it in relation to examination of legislation (with the permission of the Minister responsible for the administration of the public service);

⁴⁶ See for example Standing Orders of the House of Representatives Chapter 16, in particular orders 234-236; Senate Standing Order 25. Similar powers are invested in parliamentary committees in other jurisdictions. For example, Joint Parliamentary Committees in Victoria, including the Scrutiny of Acts and Regulations Committee with responsibilities under the Victorian *Charter of Rights and Responsibilities 2006* ss27-30, have powers under the *Parliamentary Committees Act 2003* to: conduct hearings in public; send for persons, documents and other things; take evidence in private and engage research staff. The NSW Legislation Review Committee also has the power to conduct hearings in public and send for persons, documents and other things. See Legislation Review Act 1987 (NSW) s11. Similarly, the UK Parliamentary Committee on Human Rights *has the power to require* the submission of written evidence and documents, to examine witnesses, to meet at any time, to adjourn from place to place and to appoint specialist advisers. see Joint Committee on Human Rights, *The Committee's Future Working Practices: Twenty-Third Report of Session 2005-06* (2006)

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- (b) appoint a legal advisor or advisors who possess human rights expertise for the same purpose; and
 - (c) commission a person to investigate and report to the Human Rights Committee on any matter related to any inquiry.

85. For these reasons, the Law Council recommends that clause 6 of the Parliamentary Scrutiny Bill be amended to include a non-exhaustive list of powers available to the Human Rights Committee based on those powers described above and currently available to other Joint Standing Committees pursuant to Chapter 16 of the *Standing Orders of the House of Representatives*. The ability to seek a resolution from a House of Parliament for additional powers should remain.

Invest Human Rights Committee with Power to Initiate Own Inquiry

86. In addition to the general powers described above, the Law Council submits that the Human Rights Committee should be invested with certain additional powers to assist the Committee to perform its important scrutiny function.
87. In particular, the Human Rights Committee should be invested with the power to initiate its own inquiry into a matter relating to human rights without requiring a reference from the Attorney General.
88. Investing the Human Rights Committee with the power to initiate its own inquiries is consistent with the approach adopted in the UK,⁴⁷ and received considerable support by those individuals and organisations who made submissions on this issue to the National Human Rights Consultation, including from the Australian Human Rights Commission, the Human Rights Law Resource Centre and Australian Lawyers for Human Rights⁴⁸
89. For these reasons, the Law Council recommends that clause 7 of the Parliamentary Scrutiny Bill be amended as follows:

7. The Committee has the following functions:

...

(c) to inquire into any matter relating to human rights, including a matter which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Expand Human Rights Committee's Functions to Include Monitoring Role

90. The Law Council further submits that the Human Rights Committee be invested with a broader human rights monitoring role.
91. Under the Parliamentary Scrutiny Bill, the Human Rights Committee's functions are limited to examining Bills, Acts and certain legislative instruments for compatibility with human rights, and inquiring into any matter relating to human rights which is referred to it by the Attorney-General.
92. While this provides the Committee with a broad basis for undertaking legislative scrutiny in line with the seven core human rights treaties to which Australia is a

⁴⁷ For further information see Joint Committee on Human Rights, *The Committee's Future Working Practices: Twenty-Third Report of Session 2005-06* (2006)

⁴⁸ National Human Rights Consultation Report pp.170-1

party, it does not enable the Committee to monitor Australia's performance and implementation of its obligations under these treaties. Nor does it allow the Committee to assist the Government in its interactions with, and responses to recommendations made by, the treaty monitoring bodies, such as the UN Committee on Human Rights.

93. The Law Council is of the view that the Human Rights Committee would be well placed to assist the Australian Government in its interactions with the UN treaty monitoring bodies. When exercising its scrutiny functions under the Parliamentary Scrutiny Bill, the Human Rights Committee will develop experience and expertise at analysing how the rights contained in the seven core treaties apply in Australia. This experience and expertise would in turn prove useful when Australia is reporting on the performance of its international human rights obligations, or responding to recommendations from the treaty monitoring bodies.
94. Investing the Human Rights Committee with this broader monitoring role is also consistent with the role undertaken by the UK Parliamentary Committee on Human Rights which includes:
- undertaking thematic inquiries on human rights issues
 - reviewing Government action to deal with judgements of the UK Courts and the European Court of Human Rights where human rights breaches have been found
 - scrutinising the UK's compliance with UN human rights treaties, including monitoring implementation of the Concluding Observations of UN treaty bodies
 - providing advice on human rights treaties pre-ratification
 - conducting urgent and thematic inquiries and
 - monitoring the work of human rights institutions.⁴⁹
95. A broader monitoring role for the Human Rights Committee was also supported by a number of submissions made to the National Human Rights Consultation.⁵⁰
96. For these reasons, the Law Council recommends that clause 7 of the Parliamentary Scrutiny Bill be amended to include the following function for the Human Rights Committee:

(d) to monitor Australia's compliance with UN human rights treaties, including monitoring implementation of the Concluding Observations of UN treaty bodies.

Ensure Access to Sufficient Time and Resources

97. As noted in the National Human Rights Consultation Report, the nature of the Australian parliamentary system means that the ability of parliamentary scrutiny committees to effect legislative change and provide adequate protection of individual

⁴⁹ For further information see Joint Committee on Human Rights, *The Committee's Future Working Practices: Twenty-Third Report of Session 2005-06* (2006)

⁵⁰ National Human Rights Consultation Report pp.170-171. For example, support was expressed by the Australian Human Rights Commission, the Human Rights Law Resource Centre, Australian Lawyers for Human Rights.

rights and liberties is limited in a number of important respects, including insufficient time and resources which limit the effectiveness of committee reports.⁵¹

98. Often parliamentary scrutiny committees are required to consider and report on Bills after the second reading speech and before debate resumes. This time period can range from a few days to a few weeks, but is most likely to be relatively short particularly if the Bill's passage is a government priority. This means that often scrutiny committees are given only a few days to consider and report on Bills – even if the impact on human rights is significant. On some occasions the scrutiny process is incomplete until after the Bill has passed through parliament.⁵²
99. This can be illustrated by an example referred to by the NSW Bar in its submission to the National Human Rights Consultation relating to the *Crimes (Criminal Organisations Control) Act 2009* (the so-called 'bikie' laws). This legislation was passed less than 24 hours after its introduction.⁵³ The Legislation Review Committee was able to report only after the enactment of the legislation, and drew attention to a range of significant human rights issues that were raised by the Act.⁵⁴ These concerns related to the process by which a particular organisation was determined to be a 'declared organisation' (and the consequences of such a declaration); the making of control orders against a person who is a member of a declared organisation; and the introduction of offence provisions aimed at those who associate with a controlled member of a declared organisation.⁵⁵ The human rights unduly burdened or infringed by these provisions included the right to a fair trial and the presumption of innocence and freedom of association.⁵⁶
100. Similar experiences have occurred in Queensland, with the Queensland Law Society indicating that it is not often in a position to make submissions to the Scrutiny of Legislation Committee on provisions of Bills that impact on individual rights given the very limited time frame in which the Committee is required to consider and report on a Bill.⁵⁷
101. In addition, scrutiny committees are often reliant on the cooperation of Ministers and their respective departments for crucial information on a bill. There is a clear tension between the desire of parliamentary committees to obtain good quality information and the reluctance of the government to make this material available.⁵⁸

⁵¹ National Human Rights Consultation Report (Brennan Report) <http://www.humanrightsconsultation.gov.au> at p. 169.

⁵² For example, the passage of legislation concerning covert search warrants *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009* (NSW) which was introduced on 3 March 2009 and passed on 11 March 2009; the passage of legislation concerning public housing of persons with criminal records *Housing Amendment (Registrable Persons) Act 2009* (NSW) which was introduced and enacted by both houses on 23 September 2009. For further discussion see Andrew Byrnes "The protection of human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament's Legislation Review Committee", [2009] UNSWLRS 43. .

⁵³ The Bill was introduced into and passed by both Houses on 2 April 2009, and received assent on 3 April 2009.

⁵⁴ Legislation Review Committee, *Legislation Review Digest No 5 of 2009*, 4 May 2009. Amendments to the Act were introduced into Parliament on 6 May 2009 in the form of the *Criminal Organisations Legislation Amendment Bill 2009*, and were passed by the Legislative Assembly on 6 May 2009, and by the Legislative Council on 13 May 2009. The Legislation Review Committee reported its concerns about the content of the amendment Bill on 12 May 2009: *Legislation Review Digest No 6 of 2009*, 12 May 2009.

⁵⁵ NSW Bar Association Submission to National Consultation on Human Rights June 2009 pp.48-49

⁵⁶ Ibid pp.48-49.

⁵⁷ The Queensland Law Society has explained that in its experience, a Bill is on the table for 13 days. During this time the SLC has to consider and report on the bill. Although it regularly requests submissions from the public, in reality there are only around 4 business days to make such submissions.

⁵⁸ For further discussion of this point see Janet Hiebert, 'Rights Vetting in New Zealand and Canada' (2005) 1 *New Zealand Journal of Public Law* 63, p93-97

Often the ability of scrutiny committees to effect change in a bill, even where a clear trespass on rights or liberties is identified, is frustrated by this process.

102. The Law Council is keen to see the proposed Human Rights Committee overcome these restrictions. This could be achieved by ensuring the Human Rights Committee is provided with appropriate time to consider a Bill, with possible exceptions for emergency legislation or bills concerning public safety or other matters requiring the immediate attention of parliament. This could take the form of a requirement upon the member introducing a Bill to ensure, as far as is reasonably possible, that the Human Rights Committee has adequate time to consider and report upon it prior to any vote being taken.⁵⁹ A requirement could also be introduced to ensure that if the Human Rights Committee considers that a particular piece of legislation requires further scrutiny by way of a public inquiry, a period of time should be specified to allow the inquiry to be completed and for a report to be provided. A provision should also be made for the time to be extended if necessary.
103. The Law Council also recommends that consideration be given to investing the Human Rights Committee with the power to request and obtain relevant information from Ministers and government departments in a timely manner.

Encourage Robust Scrutiny of Proposed Laws and Policies

104. The Law Council is keen to ensure that the Human Rights Committee undertakes robust scrutiny of proposed laws and regulations for compliance with human rights that includes consideration of the policy underpinning the proposed law or regulation.
105. This approach can be contrasted to the more limited technical approach adopted by certain existing parliamentary committees also tasked with scrutiny functions. For example, the existing Senate Scrutiny of Bills Committee, and its counterparts in a number of other Australian jurisdictions, view their respective scrutiny role as limited to technical scrutiny of proposed laws and explicitly refuse to consider the policy underpinning the proposed law. These committees often refrain from making direct findings of breaches of rights or recommendations for amendments to the Bill, preferring instead to draw matters of concern to the attention of the member responsible for the Bill, and then to the parliament more broadly.⁶⁰ This approach limits their ability to influence legislative change or contribute to the political debate, even when a proposed law is clearly inconsistent with individual rights and liberties.⁶¹
106. While this more technical approach may be appropriate to certain existing committees, the Law Council is of the view that the statutory function prescribed for the proposed Human Rights Committee demands full consideration of the policy underpinning the proposed law or regulation. This more robust approach is necessary to ensure that the Human Rights Committee fulfils its role as a mechanism designed to provide protection from unjustified infringement or limitation of rights by the legislature. The Human Rights Committee should also be free to make conclusions or recommendations for amendment that go beyond requesting and receiving a response from the member responsible for the Bill.

⁵⁹ This was recommended by the NSW Bar Association Submission to National Consultation on Human Rights June 2009 pp.77-78.

⁶⁰ *The Work of the Committee during the 41st Parliament November 2004 – October 2007* available at <http://www.aph.gov.au/Senate/committee/scrutiny/work41/c04.pdf>.

⁶¹ Carolyn Evans and Simon Evans, 'The effectiveness of Australian Parliaments in the Protection of Rights' Paper delivered at the Legislatures and the Protection of Human Rights Conference, Melbourne Law School, 20-22 June 2006 p. 6-7

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107. To encourage this more in-depth form of scrutiny, the Law Council suggests that it be made clear either in the provisions of the Parliamentary Scrutiny Bill or the accompanying Explanatory Memorandum that when exercising its human rights scrutiny function the Human Rights Committee is permitted to enquire into the policy underpinning the proposed legislation.

Statements of Compatibility

108. As noted above, the Law Council strongly supports the introduction of the requirement that all Bills and certain delegated legislation be introduced with a Statement of Compatibility, which assesses whether the Bill or delegated legislation is consistent with the rights specified in clause 3.
109. However, the Law Council is of the view that the effectiveness of the Statements of Compatibility as a mechanism to integrate human rights considerations into policy and law making and to enable public and parliamentary scrutiny of the human rights implications of a law or regulation could be enhanced by giving further consideration to the following matters.

Preparation

110. Clause 8 of the Parliamentary Scrutiny Bill provides that the preparation of the Statements of Compatibility are to be the responsibility of the Minister introducing the Bill or responsible for the delegated legislation.
111. This requirement ensures that every Minister and their respective Departments and Agencies become familiar with the human rights contained in the definition proposed in clause 3 when developing government policy. This integration of human rights considerations across all areas of government is to be welcomed and encouraged.
112. However, in order to ensure the quality of Statements of Compatibility, and that human rights considerations are integrated throughout the policy making process, it will be critical that *all* government policy makers receive adequate training in order to become familiar with the rights contained in the definition proposed in clause 3 and their practical application in the Australian context.
113. As noted above, the protection and promotion of certain individual rights is already a feature of the processes and procedures designed to guide government policy making. However, the scope of the definition of human rights proposed in clause 3 and their international law heritage may not be familiar to many public servants and will require the development of specific training procedures and materials in order to ensure they are adequately understood at all levels. This is likely to be resource intensive for many Departments and Agencies who may benefit from a centralised repository of advice, such as a particular Unit within the Attorney General's Department.
114. This approach has been adopted in Victoria where the Human Rights Unit within the Department of Justice has responsibility for coordinating implementation of the *Charter of Human Rights and Responsibilities* (the Charter) and facilitating the development of a human rights culture across the Victorian Government.
115. The Human Rights Unit supports all government departments to comply with Charter requirements and ensure human rights are a key consideration in all areas of government decision-making and service delivery. The role of the Human Rights Unit includes:

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- advising the Attorney-General on Charter issues
 - designing and delivering human rights training across government and to key agencies, targeting areas most affected by the Charter
 - developing guidance material, tools and processes to integrate human rights considerations into policy development, legislative proposals, decision making and service delivery
 - supporting all government departments to assess the human rights impacts of policy proposals, and advising on legislative compatibility with the Charter to promote consistency across government
 - coordinating review of the compatibility of legislation, policies and procedures with the Charter
 - raising awareness of the Charter and promoting commitment to human rights across the public sector.⁶²
116. The Human Rights Unit has also developed a Human Rights Portal which is designed to be a comprehensive online resource for Victorian Public Servants to enable them to fulfill their obligations under the *Charter*. The Portal aims to provide human rights information for government staff who need to develop or review policy and legislation or provide legal advice on Charter issues.⁶³
117. The Law Council suggests that the Senate Committee on Legal and Constitutional Affairs recommend that the Commonwealth Attorney General's Department take steps to develop similarly comprehensive resources for other Commonwealth Government Departments to utilise when preparing Statements of Compatibility.
118. The Law Council notes that this task is likely to be resource intensive, particularly given the potential scope of the definition of human rights proposed in the Parliamentary Scrutiny Bill. This is one of the reasons why the Law Council recommends the development of a consolidated list of human rights (as discussed above).

Content

119. The quality of the Statement of Compatibility drafted pursuant to the Parliamentary Scrutiny Bill will undoubtedly hinge on the content of the Statement and in particular, the depth of analysis provided for the assessment that the proposed law or delegated legislation is or is not compatible with the rights contained in the definition proposed in clause 3.
120. Experience in other jurisdictions such as the ACT, Victoria and the UK suggests that the following factors positively influence the quality of the content of Statements of Compatibility:
- a legislative requirement to provide reasons for a Statement of Compatibility (or Incompatibility);

⁶² See Victorian Department of Justice Website Human Rights Unit page <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/about+us/our+organisation/business+area+profiles/justice+-+the+human+rights+unit>.

⁶³ The portal can be accessed at <https://humanrights.vgso.vic.gov.au/Default.aspx>

- experience and understanding of the content and application of the protected human rights;
- a clear test for the validity of limitations or derogations from protected rights;
- a prescribed form or template to guide the drafting of the Statement; and
- the use of case law or other authoritative pronouncements as to the likely scope of certain protected rights.⁶⁴

121. The Law Council is concerned that the Parliamentary Scrutiny Bill provides drafters of Statements of Compatibility with very little guidance as to the appropriate content and form of the Statements of Compatibility. There is no prescribed form for the Statements nor is there a specific requirement to provide reasons, although it may be argued that the use of the term 'assessment' in clause 8 implies that more than just a bare statement of compatibility or incompatibility is required.
122. While this non-prescriptive approach may result in "succinct assessments... containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights" as suggested in the Explanatory Memorandum, it also runs the risk that Statements of Compatibility will become merely a 'tick in the box' process.
123. Under the proposed provisions it would appear to be permissible, for example, to prepare a Statement of Compatibility for a complex and wide ranging Bill (such as the *Crimes Legislation Amendment (Serious and Organised Crime Bill 2009)*) and merely state that the Bill infringes on certain ICCPR rights and is therefore incompatible with human rights, without providing any detailed analysis or reasons for this conclusion. Such a 'bare bones' Statement of Compatibility would provide the public and the parliament with little insight as to the nature of the human rights issues involved and with little confidence that human rights considerations had been at the forefront of the policy development process.
124. Similar considerations have led independent review bodies to recommend that the ACT *Human Rights Act 2004* be amended to specifically provide a requirement to provide reasons in Statements of Compatibility issued under that legislation.⁶⁵ Such a requirement is already in force in Victoria, where there is a specific requirement to include within Statements of Compatibility reasons explaining whether or not the legislation is compatible with human rights, and if so how. Subsection 28(3) of the Victorian Charter provides that:

(3) 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.

⁶⁴ See for example VEOHRC, *First Steps Forward: The 2007 report on the operation of the Charter of Human Rights and Responsibilities* (2008); ANU ACT Human Rights Act Research Project *The Human Rights Act 2004 (Act): The First Five Years Of Operation A Report to the ACT Department of Justice and Community Safety* (May 2009) pp. 35-37.

⁶⁵ ANU ACT Human Rights Act Research Project *The Human Rights Act 2004 (Act): The First Five Years Of Operation A Report to the ACT Department of Justice and Community Safety* (May 2009) p. 37.

125. Independent review bodies have also recommended that Statements of Compatibility specifically address the relevant proportionality or limitation test relevant to the protected human right.⁶⁶

126. Jurisdictions that rely upon a consolidated list of human rights with a single limitation or proportionality tests are able to develop useful templates to guide the preparation of Statements of Compatibility and help ensure a depth of analysis. For example in Victoria, a template for Statements of Compatibility has been prepared by the Human Rights Unit of the Department of Justice and made available with instructions for use on the Human Rights Portal. This template draws its structure from the Charter itself and in particular the test in subsection 7 of the Charter which provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

127. The template guides the drafter of the Statement of Compatibility to:

- provide an overview of the Bill
- identify the human rights issues
- consider the reasonable limitations test outlined above

128. The development of such a template helps ensure consistency and quality of Statements of Compatibility. However, the potential scope of the rights encompassed by the definition proposed in the Parliamentary Scrutiny Bill and the absence of a common limitation or proportionality test to determine the circumstances in which it may be justifiable to limit or derogate from a protected human right, are likely to complicate any attempt to formulate a template for Statements of Compatibility prepared under the Bill. This is a further reason why the Law Council recommends the adoption of a consolidated list of human rights and the development of a single proportionality or limitation test.

129. In addition to emphasising the need to adopt a consolidated list of human rights, the Law Council recommends that:

- clause 8 of the Parliamentary Scrutiny Bill be amended to specifically require reasons to be given in Statements of Compatibility; and
- consideration be given to developing a workable template for Statements of Compatibility.

⁶⁶ ANU ACT Human Rights Act Research Project *The Human Rights Act 2004 (Act): The First Five Years Of Operation* A Report to the ACT Department of Justice and Community Safety (May 2009) p. 37.

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130. The Law Council is also concerned by the potential uncertainty surrounding the use of Statements of Compatibility. This potential uncertainty stems from the absence of any provisions within the Parliamentary Scrutiny Bill that prescribe the use to be made of Statements of Compatibility and the absence of any overarching legislative scheme, such as a Human Rights Act, to provide incentives for compliance with human rights and consequences for non-compliance.
131. For example, while it is anticipated that Statements of Compatibility will be relied upon by the Human Rights Committee when scrutinising bills and delegated legislation, there is no specific requirement for the Committee to take these Statements into account.

An Interim Measure - Expanded Mandate for Scrutiny of Bills Committee

132. As noted above, the Law Council strongly supports the establishment of a Human Rights Committee as the best mechanism to ensure human rights considerations are taken into account during the legislative process. The Law Council hopes that the Bills are therefore passed by Parliament as soon as possible and commence no later than 1 January 2011. In the event that the commencement of the Bills is delayed beyond this date, the Law Council suggests an expanded role for the Scrutiny of Bills Committee (SBC) as an interim measure.
133. The SBC already has a scrutiny role that involves assessing 'legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety'.^[1] Although the SBC's terms of reference do not spell out any particular human rights and refer only to provisions that 'trespass unduly on personal rights and liberties', the Law Council is of the view that this reference could be amended to include a broader list of human rights. This would enable the SBC to consider any Bill introduced to Parliament and report to the Parliament as to whether any part of the bill is incompatible with human rights, and if so, the nature and extent of the incompatibility.
134. The Law Council notes that this expanded scrutiny role for the SBC would need to be revisited following the passage of the Parliamentary Scrutiny Bill and the establishment of the Human Rights Committee. Consideration would then need to be given to ensure that there is no unnecessary overlap between the important scrutiny functions of both committees.
135. The Law Council intends to pursue these matters with the SBC directly when it takes up the invitation of the SBC to provide a supplementary submission on the future direction of the Committee.

^[1] For further background on the establishment of the committee, see *Annotated Standing Orders of the Australian Senate*, edited by Rosemary Laing, Standing Order 24 available at http://www.aph.gov.au/senate/pubs/aso/so_024.htm (accessed 10 March 2010). (accessed 10 March 2010) See also *The Work of the Committee during the 41st Parliament November 2004 – October 2007*, published on the Committee's website; *Odgers' Australian Senate Practice*, 12th edition, pp.359–60, *Australian Senate Practice*, 6th edition, pp.457–60 and the committee's publication, *Ten Years of Scrutiny – a seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills*, 25 November 1991.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.