



ACTU Submission to the Senate Legal and
Constitutional Committee on the
Human Rights (Parliamentary Scrutiny) Bill 2010

9 July 2010

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Introduction

- 1) The Australian Council of Trade Unions (ACTU) is the peak council for organised labour in Australia. Unions affiliated to the ACTU cover all sectors of the economy, across all states and territories, representing more than 1.8 million workers. The ACTU is an affiliate of the International Trade Union Confederation, a body established to promote and defend workers' rights and interests globally through international cooperation.
- 2) The ACTU welcomes the opportunity to make this submission to the the Senate Legal and Constitutional Committee on the *Human Rights (Parliamentary Scrutiny) Bill 2010*.
- 3) Our submission reflects our experience supporting workers to attain safe, secure and rewarding employment in Australia and internationally. Our comments reflect the union movement's commitment to ensure that all human rights, including workers' rights which are recognised at the United Nations and International Labour Organisation as human rights, are promoted and protected in Australia.

- 4) In 2009, the National Human Rights Consultation found that:

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.¹

- 5) In the same year, the United Nations Human Rights Committee, in its Concluding Observations, recommended the establishment of a 'mechanism to consistently ensure the compatibility of domestic law with the Covenant [International Covenant on Civil and Political Rights].'²

¹ National Human Rights Consultation, *National Human Rights Consultation – Report*, Canberra: Attorney-General's Department, September 2009, 174.

² Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/f (2009), 2

- 6) The *Human Rights (Parliamentary Scrutiny) Bill 2010* proposes the introduction of a Statement of Compatibility and a Parliamentary Joint Committee on Human Rights. The proposal adopts aspects of the United Kingdom model which seeks to 'instil in both lawmakers and policymakers a self-regulatory approach to their work such that they automatically consider the human rights implications of what they do, and act accordingly.'³
- 7) The ACTU welcomes the Bill as an important step towards the better protection of human rights in Australia. However, we would like to suggest two ways of improving the Bill, namely:
 - i) By capturing the full scope of internationally protected human rights;
 - ii) By capturing superior human rights protections that are already contained in Australian law.
- 8) We also make some comments in relation to procedural issues, including the preparation of Statements of Compatibility, the role of the bureaucracy and the functioning of the Parliamentary Joint Committee on Human Rights.

Capturing the full scope of internationally protected human rights

- 9) The *Human Rights (Parliamentary Scrutiny) Bill 2010* defines human rights as 'the rights and freedoms recognized or declared' in the text of the following seven United Nations (UN) Conventions:
 - i) International Covenant on Civil and Political Rights (ICCPR)
 - ii) International Covenant on Economic, Social and Cultural Rights (ICESCR)
 - iii) Convention on the Elimination of All Forms of Discrimination Against Women
 - iv) International Convention on the Elimination of all Forms of Racial Discrimination
 - v) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 - vi) Convention on the Rights of the Child
 - vii) Convention on the Rights of Persons with Disabilities.

³ D. Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead', *Public Law Review*, Vol 10 (1999), 254.

- 10) Our first suggestion for improving the Bill is to ensure that the definition of human rights captures the full scope and meaning of the internationally protected rights that are listed in the seven treaties. We are concerned that the current definition of human rights by reference to the bald text of these instruments fails to comprehensively capture the meaning of these rights.
- 11) To develop a more constructive and effective definition of internationally protected human rights, the ACTU recommends that the definition of human rights proposed be broadened to capture:
 - i) The interpretations of the text of the instruments by the respective treaty supervisory bodies – for example, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee; and
 - ii) The work of UN specialist agencies – such as the International Labour Organisation (ILO) in relation to workers' human rights.

The role of the Treaty Supervisory Bodies in Understanding the Meaning of Conventions

- 12) The seven UN conventions listed in the *Human Rights (Parliamentary Scrutiny) Bill 2010* are high-level documents that succinctly list a range of human rights. As a result, the conventions do not comprehensively explain every aspect of the rights listed. Therefore, it is important that policymakers and the committee draw on the human rights jurisprudence of the respective treaty supervisory bodies to understand the content, scope and applicability of the human rights listed.
- 13) For example, freedom of association is a fundamental human right stated in Article 8 of the ICESCR and Article 22 of the ICCPR. Article 8 of the ICESCR outlines the right to form a trade union and to join a trade union of your choice for the protection of your economic and social interests, as well as the right of trade unions to function freely. Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions.

- 14) However, freedom of association is more than the right to join and be a member of a union. It needs to be understood as a 'bundle of rights and freedoms'⁴ that includes the incidents of membership and rights which give effect to the freedom of association.
- 15) For example, the CESCR and the HRC have both found the right to collective bargaining to be an integral element of the broader right to freedom of association despite the ICESCR and the ICCPR not explicitly stating collective bargaining as a right.⁵
- 16) If the Bill does not permit reference to be made to the interpretations of supervisory bodies then there is a risk that the real meaning of important human rights will be truncated or lost.

The importance of the specialised agencies

- 17) The work of the specialised agencies of the UN are crucial in understanding the content and meaning of the human rights listed in the seven UN conventions. In many cases, these agencies were instrumental in bringing the instruments into existence; in other cases, they have a dedicated role to play in the interpretation and enforcement of those treaties.
- 18) This is particularly the case in relation to workers' rights; the internationally protected human rights of workers simply cannot be understood without reference to the work of the ILO. The ILO, which was created in 1919, is the specialist agency of the UN established to promote and protect the rights of workers. Through a tripartite framework, the organisation seeks to bring decent work and livelihoods, job-related security and better living standards to the people of both developing and developed countries.

⁴ B Creighton, 'Freedom of Association' in R. Blanpain and C. Engels (eds.), *Comparative and International Labour Law and Industrial Relations in Industrialized Market Economics* (7th ed.), Alphen aan den Rijn: Kluwer, 2001, 227.

⁵ See 2001 Concluding Comment on Korea, E/C.12/1/Add.59 (9.5.2001), para 39; 2001 Concluding Comment on France, E/C.12/1/Add.72, para. 29. For the HRC, see 1999 Concluding Comment on Canada, CCPR/C/79/Add.104 (30-3-1999), para 25; 1999 Concluding Comment on Chile, CCPR/C/79/Add.104 (30-3-1999), para. 25; and 1999 Concluding Comment on Costa Rica, CCPR/C/79/Add.107, para 17. For discussion, see Patrick Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in Richard Alston (ed) *Labor Rights as Human Rights*, New York: Oxford University Press, 2005, 60, 72-73.

- 19) In 1944, the ILO adopted the Declaration of Philadelphia which outlines the fundamental principles on which the Organisation is based, in particular: labour is not a commodity; freedom of expression and of association are essential to sustained progress; and poverty anywhere constitutes a danger to prosperity everywhere. Furthermore, the Declaration confirmed a commitment to a number of rights including collective bargaining, non-discrimination, decent work, a living wage, and health and safety at work.⁶
- 20) Importantly, these principles predate the establishment of the UN and the adoption of the seven UN conventions. When the drafters of the UN conventions, especially the ICCPR and the ICESCR, were considering the rights of workers, it was their explicit intention to draw on the law of the ILO.
- 21) This is clearly reflected, for example, in Article 8(3) of the ICESCR and Article 22(3) of the ICCPR, both of which defer to the ILO as the specialist agency on labour rights. The articles state that nothing shall authorise state parties to ILO Convention 87 to take legislative measures that would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that convention.
- 22) Deference to the work of the ILO is also current practice on the part of the CESC. When applying Article 8(1)(d) of the ICESCR on the right to strike, the CESC has drawn upon and adopted ILO standards.⁷ The ILO's Committee on Freedom of Association has emphasised that the right to strike is an essential aspect of freedom of association, guaranteed not only by Conventions 87 and 98 but also by the ILO Constitution.⁸ This view has been adopted by the ILO's Committee of Experts on the Application of Conventions and Recommendations.⁹

⁶ General Conference of the International Labour Organisation, *Declaration of Philadelphia*, Philadelphia: ILO, 1944.

⁷ Concluding Observations: Trinidad and Tobago 17/05/2002 E/C.12/1/Add.80, paras. 35 and 43; and Concluding Observations: Bulgaria 9/12/99 E/C.12/1Add.37, para.16

⁸ ILO Committee on Freedom of Association, *Freedom of Association: Digest of Decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed.), Geneva: ILO, 2006.

⁹ Committee of Experts on the Application of Conventions and Recommendations, *General Survey on Freedom of Association and Collective Bargaining*, Geneva: ILO, para. 175 and 179.

- 23) As such, the ACTU calls for the definition of human rights proposed in the Bill to include a reference to the work of the ILO when determining the definition, scope and applicability of workers' rights.
- 24) This is especially important in relation to freedom of association: that right is more fully spelled out in the ILO's *Freedom of Association and Protection of the Right to Organise Convention, 1984 (No.87)* and *Right to Organise and Collective Bargaining Convention, 1949 (No.98)* (both of which have been ratified by Australia).
- 25) However, the referral to the ILO's work should not exclusively consider the text of conventions. Like the UN treaty bodies, the respective treaty bodies of the ILO have developed comprehensive and important work that interprets the human rights outlined in the ILO conventions. For example, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have developed a comprehensive and sophisticated jurisprudence on the nature and extent of the bundle of rights summarised by freedom of association, an internationally recognised fundamental freedom.¹⁰

Capturing the Australian Context

- 26) Our second suggestion for improving the Bill is to capture cases where Australian law either extends internationally protected human rights, or else gives local context to the meaning of those rights.
- 27) For example, the seven UN conventions protect people against discrimination on the basis of race, colour, sex, religion, disability, political opinion, national extraction or social origin.
- 28) In Australia, however, the law goes further and also protects people from discrimination (in the workplace) on the grounds of sexual preference, age and/or family or carer's responsibilities.¹¹ The ACTU submits that these clear extensions of rights should also be protected.

¹⁰ See for example, CFA, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed.), Geneva: ILO, 2006.

¹¹ Fair Work Act with Regulations and Rules, Sec 351(1)

- 29) Similarly, we submit that where Australian law or practice (including collective bargaining) gives local meaning to internationally protected human rights, this local law and practice should be expressly recognised.
- 30) For example, the ICESCR provides for a right to 'just and favourable conditions of work'. This has little meaning in the abstract, but has concrete sense in the Australian context. Since Federation, our tradition of compulsory conciliation and arbitration has established and protected a system of just and favourable wages and conditions of work in Australia. These standards have largely been continued under the Fair Work Act, including through modern awards and the National Employment Standards.
- 31) For example, under Australian law, employees have specific rights to fair minimum wages (through the award system), reasonable working hours (normally 38 hours per week), adequate rest and leisure (including four weeks' annual leave each year), protection from unfair dismissal, and so forth.
- 32) We submit that this local practice should be recognised, or at least referred to, when trying to understand what internationally protected human rights mean, in an Australian context.

Procedural issues

- 33) The ACTU takes this opportunity to raise a number of procedural considerations relating to Statements of Compatibility, the role of the bureaucracy and the work of the Parliamentary Joint Committee on Human Rights.

Statement of Compatibility

- 34) The preparation of the statement of compatibility by the relevant Member of Parliament is an important assessment of a Bill's compatibility with Australia's international human rights obligations.
- 35) The utility of the statements of compatibility will be diminished if the nature of the statements is too legalistic. This draws on the experience of New Zealand where the

Attorney General is required to report to the House of Representatives on the possible conflict of Bills with the Bill of Rights. Such reports have not facilitated political debate as a result of their likeness to dense legal briefs and their technical focus.¹²

- 36) Thus, statements of compatibility should concisely summarise consistency with Australia's human rights obligations; provide background on how concern for rights influenced the content and choice of legislative means; and outline any restrictions on rights that the Bill may include and why they are characterised by the government as justified and permissible. This is the necessary information the parliament requires to determine whether proposed legislation is reasonable and warranted from a rights-based perspective.

The Role of the Bureaucracy

- 37) The requirement that the relevant Member of Parliament prepare a statement of compatibility to accompany a Bill when presented to the parliament is an important prompt to the minister and the bureaucracy to consider consistency with human rights obligations throughout every stage of a Bill's development. If understood in this regard, statements will be useful as they will 'assist policy and legislative development from the outset, rather than being treated as an administrative requirement that is simply added on at the end stage of preparing a Bill.'¹³
- 38) The role of the bureaucracy in incorporating human rights analysis as a central component in the preparation and drafting of a Bill is particularly important because once a Bill is presented to Parliament, there are limited opportunities (given political realities) to amend the substance of a Bill.
- 39) The practice adopted within Australia should ensure that human rights analysis is considered throughout the drafting stage. This draws on the experience of the United

¹² See J.L. Hiebert, 'Interpreting a Bill of Rights: The importance of legislative rights review', *British Journal of Political Science*, Vol.35 (2005), p.235-255. For discussion of the importance of UK government reporting not only making statements of compatibility but also explaining 'why the proposed action should, nevertheless, be constructed as a proportionate response'; see J.L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?', *International Journal of Constitutional Law*, Vol.4 No.1 (2006), pp.1-38.

¹³ Australian Human Rights Commission, 'Human Rights Bill should strengthen protections for All Australians', *Media Release*, 2 June 2010.

Kingdom, a leader in the practice of human rights scrutiny. The Cabinet Office has developed a *Guide to Legislative Procedures*. It requires an assessment of possible inconsistencies that may arise with human rights obligations during the policy approval stage and an analysis of the implications of the Bill for human rights obligations once the first draft has been prepared. The Guide states that:

It should be standard practice when preparing a policy initiative for officials in individual departments, in consultation with their legal advisers, to consider the effect of existing (or expected) European Convention on Human Rights jurisprudence of any proposed legislative or administrative measure.¹⁴

- 40) The ACTU welcomes the announcement by the Government to invest in a human rights education and training program for the Commonwealth public sector, including the development of a toolkit and guidance materials.¹⁵ We encourage the Government to adequately resource this training to ensure that policy and legal officers are adequately up-skilled in the area of human rights.
- 41) In circumstances where high level human rights legal advice is required, appropriate protocols should be established to ensure this advice is sought and provided by the Attorney-General's Department.
- 42) We also submit that it is crucial that the bureaucracy consult with civil society and human rights organisations when preparing policy and reference materials for internal use.

The Function of the Committee

- 43) Although the statement of compatibility prepared by the relevant Member of Parliament places the onus of proof on the member to demonstrate consistency with Australia's international human rights obligations, the establishment of a Parliamentary Joint Committee on Human Rights is of equal importance. A committee performs an important role ensuring the integrity of the bureaucratic processes, enhancing

¹⁴ Cited in D. Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead'.

¹⁵ Department of the Attorney-General, *Australia's Human Rights Framework*, Canberra: Attorney-General's Department, April 2010, 3.

government accountability by strengthening parliamentary scrutiny of the consistency of Bills with human rights obligations, and promoting discussion and debate on human rights.

- 44) In this role, the Committee is to inform parliament of the human rights implications of the legislation it may enact. It is an important step in case the government's self-policing process falls short.
- 45) The ACTU notes that the functions of the Committee outlined in the *Human Rights (Parliamentary Scrutiny) Bill 2010* includes:
- i) Examining Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights
 - ii) Examining Acts for compatibility with human rights
 - iii) Inquiring into any matter relating to human rights which is referred to it by the Attorney-General
- 46) The human rights scrutiny and compatibility function of the Committee should be broadened to enhance the role, independence and effectiveness of the Committee. Wider functions should include:
- i) Assessing and reporting on any human rights matter referred to it by resolution of either House of Parliament
 - ii) Analysis of any thematic inquiries identified by the Committee as important areas with human rights implications
 - iii) Scrutiny of compliance with UN human rights treaties, including monitoring the implementation of the Concluding Observations and recommendations of UN treaty bodies

Power and Proceedings of the Committee

- 47) Consistent with current Commonwealth Standing Orders, the Committee should have the power to call for witnesses to attend committee hearings and for documents to be produced.

- 48) Documents that the committee can request should include public submissions as well as access to records that explains the government's assumptions about relevant human rights concerns and the assessment of the implications of Bills for Australia's human rights obligations.
- 49) It is important that the Committee develop a standard analytical framework to use when assessing the compatibility of Bills with Australia's human rights obligations.
- 50) For the Committee to be effective and meet expectations, the committee should be adequately resourced including the appointment of a full-time human rights specialist to support the work of the Committee as a necessary minimum.
- 51) Adequate time will also influence the effectiveness of the Committee. Procedures should ensure that the Committee is provided with sufficient time to assess (and report on) the human rights compatibility of Bills and undertake independent inquiries into thematic human rights areas.
- 52) The impact of the Committee's work will be partly determined by the Parliament providing sufficient time to examine, assess and debate Bills. Drawing on the learnings from the Senate Standing Committee for the Scrutiny of Bills, further mechanisms need to be considered to ensure parliamentarians take into account the concerns raised by the Committee.¹⁶
- 53) One option is to require debate upon a Bill take into account the Committee's comments before debating the content of the Bill. Alternatively, a requirement could be introduced that requires a Bill that raises a number of concerns with the Committee be automatically referred to the relevant portfolio standing committee for further consideration.¹⁷

¹⁶ 'Ten Years of Scrutiny', *A seminar to mark the 10th anniversary of the Senate Standing Committee for the Scrutiny of Bills*, Canberra, November 1991.

¹⁷ Ibid.

Conclusion

- 54) Australia has a wide range of obligations to respect and promote human rights arising from multilateral human rights instruments. These rights encompass civil, political and economic, social and cultural rights. This obligation extends to workers' human rights outlined in the human rights instruments of the UN and comprehensively developed in ILO Conventions.
- 55) Any consideration of the extent to which Australian law currently protects human rights and of the extent to which such rights could be better protected must take into account these obligations. Everyone within Australia's jurisdiction is entitled to strong protection of these fundamental rights.