

**SUBMISSION TO THE
LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
Regarding the
HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL 2010**

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This submission will focus on the Human Rights (Parliamentary Scrutiny) Bill 2010 ('HRPS Bill'). Although the introduction of statements of compatibility and creation and operation of a human rights specific parliamentary committee are generally supported, the HRPS Bill needs to be strengthened if such mechanisms are going to improve the promotion and protection of human rights in Australia, the dialogue about human rights between the executive and the parliament, and the transparency and accountability of the representative arms of government when making decisions about human rights and justifiable limitations to human rights.

There are numerous advantages to pre-legislative human rights scrutiny. Many of these strengths can be gleaned from a comparative analysis of pre-legislative scrutiny mechanisms in force in comparative jurisdictions, such as, Canada, the United Kingdom and Victoria. It is also through an analysis of these comparative jurisdictions that weaknesses in pre-legislative scrutiny are revealed.

STATEMENTS OF COMPATIBILITY

Canada

In Canada, the executive duty to issue a statement about the compatibility of a law with human rights is not contained in the *Charter of Human Rights and Freedoms 1982* (Can) ('*Canadian Charter*'). Rather, the Minister for Justice has a statutory reporting requirement to Parliament under the *Department of Justice Act*.¹ The Minister must certify that bills presented to Parliament have been compared with the *Canadian Charter* and any inconsistencies with the purposes or provisions of the *Canadian Charter* must be reported.

The process that precedes this certification is of interest. Once Cabinet agrees on a policy agenda, the Department of Justice drafts the legislation and makes an assessment of the implications of the proposed legislation under the *Canadian Charter*. This involves assessing whether a right is limited by the proposed legislation and, if so, the level of difficulty

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¹ *Department of Justice Act*, RSC 1985, c J-2, s 4. These obligations also apply to regulations under the *Statutory Instruments Act*, RSC 1985m c S-22: see Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8.

associated with justifying the limitation. This departmental inquiry is based on the Canadian Supreme Court's two-step approach to justifying limitations placed on rights, which is known as the *Oakes* test.² The departmental assessments range from minimal, to significant, to serious, to unacceptable risks.³ If a 'credible [*Canadian*] *Charter* argument'⁴ can be made in support of legislation, the legislation will be pursued. Where there is a serious *Canadian Charter* risk, two options exist: either a less rights-risky legislative means to achieve the policy objective will be identified and pursued, or a political decision will be made about whether to proceed with the legislation as drafted.⁵

According to a departmental employee:

The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.⁶

The Canadian ministerial reporting requirement is an important part of the dialogue about democracy and human rights. Pre-legislative scrutiny ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated *Canadian Charter* rights and articulating justifications for any limits thereto. Such assessments by the policy-driven arm of government are a vital contribution to the dialogue about rights. The executive can influence the legislative understandings of *Canadian Charter* issues with the

² See Dickson CJ in *R v Oakes* [1986] 1 SCR 103.

³ Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices* 7. See also Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12.

⁴ Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices*, 8; Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002), 10.

⁵ Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12. For a detailed analysis of the policy-making changes introduced federally and within a select number of provinces post-*Charter*, see Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501. For further analysis of the pre-legislative scrutiny process, see Spencer M Zifcak, 'The *Charter* as a Dialogue: An Analysis of Canada's Experience with the Constitutional *Charter of Rights and Freedoms*' (1988) 6 *Law in Context* 62, 66-7; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 595-600; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 3-6. For an analysis of the government's approach to *Charter* litigation and its influence over policy review, see Elizabeth J Shilton, 'Charter Litigation and the Policy Processes of Government: A Public Interest Perspective' [1992] 30 *Osgoode Hall Law Journal* 653; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 600-01; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 6-11, 17-20; Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 515-6, 522-3, 526, 528-9.

⁶ Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 603.

information and analysis contained in the pre-legislative record, particularly if the pre-legislative record contains ‘policy objectives, consultations with interested groups, social-science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and interest groups.’⁷ This capacity to influence the dialogue has motivated the Canadian executive to undertake serious pre-legislative scrutiny.⁸ Consistent and thorough pre-legislative scrutiny also ensures that the legislative drafters ‘identify ways of accomplishing legislative objectives in a manner that is more likely both to survive a [*Canadian*] *Charter* challenge and to minimize disruption in attaining the policy goal.’⁹

The greatest weakness with Canadian executive pre-legislative scrutiny is its secretive character. Understandably, the Department of Justice is reluctant to divulge precise details about rights-problematic policy objectives, assessments given by the Department of Justice, and the departmental and political responses to those assessments. In addition, cabinet deliberations are secret.¹⁰ However, this secrecy hinders a robust dialogue about rights between the executive and parliament, and undermines the transparency of and accountability for human rights decision-making. The legislature does not fully benefit from the executive assessments of policies and their legislative translations. The legislature only has access to the parliamentary report of the Minister which discloses the *outcome* of the executive pre-legislative scrutiny, not the *reasons* for such assessments. The legislature’s only access to pre-legislative deliberations is via evidence given by departmental lawyers during parliamentary committee scrutiny of proposed legislation.

The Legal and Constitutional Affairs Committee should take note that the value of pre-legislative scrutiny comes from disclosure of the *reasoning* behind the rights-(in)compatibility assessment of proposed legislation. It is this *reasoning* that discloses the executive’s perspective on the definition and scope of rights, whether proposed legislation limits the rights so conceived, and the justifications for such limitations. Without knowledge of the reasoning, the legislature does not benefit from the executive’s analysis and its distinct perspective.

United Kingdom

Similar problems beset the British pre-legislative scrutiny measures. Under section 19(1)(a) of the *Human Rights Act 1998* (UK) (*‘UK HRA’*), the Minister responsible for a bill before parliament must make a statement that the provisions of the bill are compatible with the Convention rights. If such a statement cannot be made, the responsible Minister must make a statement that the government wants parliament to proceed with the bill regardless of the

⁷ Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (McGill-Queen’s University Press, Montreal and Kingston, 2002), 10. The pre-scrutiny legislative record can be used ‘to anticipate possible *Charter* challenges and consciously develop a legislative record for addressing judicial concerns’: at 10.

⁸ Ibid 7.

⁹ Ibid 10.

¹⁰ Patrick J Monahan and Marie Finkelstein, ‘The *Charter* of Rights and Public Policy in Canada’ (1992) 30 *Osgoode Hall Law Journal* 501, 503; Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (McGill-Queen’s University Press, Montreal and Kingston, 2002) 8.

inability to make a statement of compatibility, under s 19(1)(b).¹¹ A s 19(1)(b) statement is expected to ‘ensure that the human rights implications [of the bill] are debated at the earliest opportunity’¹² and to provoke ‘intense’¹³ parliamentary scrutiny of the bill. Ministerial statements of compatibility under s 19(1)(a) are likely to be used as evidence of parliamentary intention.¹⁴

Section 19(1) statements allow the executive to effectively contribute to the dialogue about the definition and scope of the rights, as well as justified limitations thereto. Statements of compatibility allow the executive to assert *its* understanding of the rights in the context of policy formation and legislative drafting.¹⁵ However, the effectiveness of the contribution depends on many factors, including the test used by the executive to assess the compatibility of proposed legislation and the quality of the explanation given for such assessments.

In relation to the test, the Home Secretary has indicated that ‘the balance of argument’¹⁶ must support compatibility – that is, is it ‘more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court.’¹⁷

¹¹ In general, s 19(1)(a) and (b) statements are to be made before the second reading speech. Either statement must be made in writing and published in such manner as the Minister making it considers appropriate: s 19(2).

¹² United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

¹³ United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1233 (Lord Irvine, Lord Chancellor).

¹⁴ This is similar to the rule in *Pepper v Hart* [1993] AC 59.

¹⁵ Section 19(1) statements ensure ‘that someone has thought about human rights issues during the process of drafting a Bill’: David Feldman, ‘Whitehall, Westminster and Human Rights’ (2001) 23(3) *Public Money and Management* 19, 22.

¹⁶ Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). See also *The UK HRA Guidance for Departments* (2nd ed, Home Office and Cabinet Office, 2000) [36] (*UK HRA Guidance* (2nd ed)), as referred to by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] Summer *Public Law* 323, 338; Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435. Periodic “guidance” about the implementation of the *UK HRA* has been issued by the departments with responsibility for the *UK HRA* to all government departments: *The UK HRA 1998 Guidance for Departments* (1st ed, Home Office and Cabinet Office, 1998); *UK HRA Guidance* (2nd ed); *The UK HRA Guidance for Departments* (3rd ed, Lord Chancellor’s Department, 2002) (the Lord Chancellor’s Department took over responsibility for the *UK HRA* in June 2001). See David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] Summer *Public Law* 323, 338-9.

¹⁷ Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). The Home Office describes the test as ‘whether, on the balance of probabilities, the provisions of the Bill would be found compatible with the Convention rights if challenged in court’: Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [15]. Outside of government, this has become known as the ‘51 per cent rule’: Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41.

In relation to the quality of the explanation, the *UK HRA* does *not* impose an obligation on the responsible Minister to explain their reasoning as to compatibility. The White Paper did, however, indicate that where a s 19(1)(b) statement was made ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the bill.’¹⁸ During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.¹⁹ After the *UK HRA* came into operation, the Home Office indicated that a Minister ‘is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.’²⁰ Rather, s 19(1) statements should only indicate which Convention issues were considered and ‘the thinking which led to the conclusion reflected in the statement.’²¹ The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’²² During debate, the ‘Minister should be ready to give a general outline of the arguments which led him or her to the conclusion reflected in the [s 19] statement’; in particular, the Minister must ‘at least identify the Convention points considered and the broad lines of the argument.’²³

The test for s 19(1) assessments, and the lack of disclosure of the reasoning behind the assessment, raise problems both in terms of producing a robust dialogue about human rights and justifiable limits thereto, and for the transparency and accountability of public decision-making impacting on human rights.

The first problem relates to policy formation. Human rights are relevant at the policy formation stage. When forming policy, the executive either explicitly or implicitly makes assessments of the definition and scope of rights, whether proposed legislation limits the rights, and the justification of those limits. The executive’s understanding of the rights and justifiable limits thereto sets the parameters of the debate and thereby has the capacity to influence the legislature’s analysis of the issue. However, commentators have noted that it is not clear that ‘rights are being fully taken into account at the ... stage of formulating

¹⁸ United Kingdom, Rights Brought Home: The Human Rights Bill (1997) [3.3].

¹⁹ United Kingdom, *Parliamentary Debates*, House of Lords, 17 December 1998, col WA186 (Lord Williams).

²⁰ Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14]. See United Kingdom, *Parliamentary Debates*, House of Lords, 28 June 2000, Col WA80 (Lord Bassam of Brighton):

Ministers making s 19 statements will do so in the light of the legal advice they have received... However, by long-standing convention adhered to by successive Governments, neither the fact that the Law Officers have been consulted on a particular issue, nor the substance of any advice they have given on that issue, is disclosed outside government other than in exceptional circumstances.

²¹ Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14].

²² Ibid.

²³ *UK HRA Guidance* (2nd ed) [39], as cited by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 338-9. See also Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435.

proposals and instructing counsel to draft legislation’,²⁴ even though ‘this is perhaps the most important requirement of the *UK HRA*.’²⁵

This not only potentially undermines the protection and promotion of the human rights; it also means the executive is not making as complete a contribution to the human rights debate as possible. If the human rights implications of policy are not comprehensively and consistently addressed within the executive at all stages of policy and law formulation, the executive will waste an important opportunity to educate parliament about *its* understanding of the meaning and scope of rights, and the justifiability of limitations thereto.

The second problem is that s 19(1) assessments too readily assume compatibility. This appears to be due in part to the low threshold for assessing proposed legislation as compatible, and in part to political considerations. This approach to s 19(1) is unsatisfactory. Over-generous use of s 19(1)(a) statements fails to alert parliament to proposed legislation that ought to be closely scrutinised. Moreover, over-generous statements of compatibility fail to inspire a full and frank debate between the executive and parliament about Convention rights. In the end, human rights protection and promotion are compromised, there is a weakening of the dialogue about rights and justifiable limits,²⁶ and the transparency of and accountability for public decision-making is undermined.

The third problem is the lack of disclosure of the reasoning behind the executive’s s 19(1) assessment. It is the reasoning supporting the s 19(1) assessment that is most important, as the reasoning reveals the executive’s views about the definition and scope of the rights, its preferred resolution of conflicts between rights and other non-protected values, any consequential limits the proposed legislation may impose on rights, and the executive’s justification for such limits. Parliament – when scrutinising proposed legislation and passing legislation – does *not* benefit from the perspectives of the executive.²⁷

Australia

Any federal law enacting pre-legislative human rights scrutiny requirements must be drafted in such a way as to avoid these problems. In particular, any federal law must include an obligation on the executive to divulge the reasoning behind pre-legislative assessments,

²⁴ David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] Summer *Public Law* 323, 347-48. At the policy formulation and approval stage, *UK HRA Guidance* (2nd ed) requires ‘a general assessment ... not necessarily as a free-standing document, to alert Ministers to substantive Convention issues’: Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435. The formal process of s 19(1) assessment occurs only once the proposed policy is transformed into a Bill.

²⁵ Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 26.

²⁶ John Wadham, ‘The *Human Rights Act*: One year On’ [2001] *European Human Rights Law Review* 620, 624.

²⁷ This is a double-edged sword. If the reasoning behind the statement is not disclosed, the executive retain the element of surprise in any subsequent litigation involving the legislation. Conversely, non-disclosure precludes the reasoning of the executive from influencing the views of parliament and the judiciary.

including an identification of the rights considered, identification of the rights considered to be limited, and the reasoning behind any justification for such limitations. The federal law should also explicitly acknowledge the possibility of a statement of incompatibility, as well as compatibility. In its current form, the HRPS Bill 2010 does neither and must be amended.

The model legislation addressing these concerns is s 28(3) of the *Charter of Human Rights and Freedoms 2006* (Vic) ('*Victorian Charter*'). Section 28(3) explicitly acknowledges the possibility that a proposed law may be considered incompatible by requiring the executive to state whether a Bill is compatible or incompatible with human rights. Section 28(3) also imposes an obligation on the executive to state 'how [a Bill] is compatible' or 'the nature and extent of the incompatibility.' The latter obligation requires the executive to divulge the reasoning behind the assessment of a bill as compatible or incompatible, without which a statement is of little use.

I recommend the Legal and Constitutional Affairs Committee review the s 28 statements issued in Victorian to date to see the level of detailed explanation supporting the rights-(in)compatible assessments. I also recommend that the Legal and Constitutional Affairs Committee replace the wording of cl 8 with the wording of s 28 of the *Victorian Charter*. I further recommend that cl 9 be amended to reflect s 28 of the *Victorian Charter*.

Moreover, the issue of amendments to proposed legislation as a bill passes through the legislative process in both Houses of Parliament must be addressed. I recommend that an additional obligation be placed on the responsible Minister to review and, if necessary, draft a new statement of (in)compatibility for all proposed legislation subject to amendments through the legislative process.

Finally, a culture of transparency and accountability for human rights decision-making within the executive must be fostered.

See further:

- Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285, 304-05
- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135, p 153
- Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9, 26-31.

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

The creation of a parliamentary pre-legislative human rights scrutiny committee, to be called the Parliamentary Joint Committee on Human Rights, is supported. The effectiveness of this committee, however, will depend on whether its powers are adequate, and whether its processes and procedures support robust human rights scrutiny.

United Kingdom

In the United Kingdom, there is a Joint Parliamentary Committee on Human Rights (the ‘UK Committee’) – that is, a joint committee of the House of Commons and House of Lords. Its remit is to consider ‘matters relating to human rights in the United Kingdom’ and ‘proposals for remedial orders [and] draft remedial orders.’²⁸ The UK Committee has prioritised the scrutiny of proposed legislation for human rights implications.²⁹ In furtherance of this, it empowered its Chair to write to responsible Ministers ‘raising questions or concerns in the area of human rights’³⁰ for the purpose of collecting information. The UK Committee also ‘considers itself to be responsible ... for assessing whether ... “s 19 statements” have been properly made’, with this being ‘a key duty.’³¹

The UK Committee follows five general principles: it is committed to examining proposed legislation as early as possible; to seeking written ministerial responses where human rights issues appear; to seeking written commentary from non-governmental sources where appropriate; to considering, pursuing and publishing with its reports the written responses; and to taking oral evidence only in exceptional circumstances.³² The UK Committee adopts the European Court of Human Rights’ approach to assessing the compatibility of legislation.³³ It also relies on legal advice that is independent of the Government³⁴ and is currently constituted in a non-partisan manner.

The UK Committee has made a significant difference to the level of debate and scrutiny of legislation within the Parliament, although it has not necessarily resulted in major changes to legislative proposals.³⁵ Reports of the UK Committee are ‘often relied on extensively in

²⁸ This expressly excludes the power to consider individual complaints of alleged violations of the *HRA 1998* (UK) c 42. See *Homepage*, Parliamentary Committee <http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm>.

²⁹ Parliamentary Committee, House of Commons and Lords, *Scrutiny of Bills: Third Special Report: Session 2000-01* (2001) [1].

³⁰ Ibid [2].

³¹ Parliamentary Committee, House of Commons and Lords, *Scrutiny Report on Private Members’ Bills and Private Bills’: Fourteenth Report, Session 2001-02* (2002) [1]. In relation to Private Members’ Bills, the Parliamentary Committee will scrutinise these for compatibility, however, priority will be accorded to government legislation because of the limits of time and resources. Private Bills, which now must include a s 19(1) statement, will be considered by the Parliamentary Committee in a similar manner to Government Bills: at [4], [5], [22], and [23]. See also Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 445-6.

³² Parliamentary Committee, House of Commons and Lords, *Scrutiny Report on Private Members’ Bills and Private Bills’: Fourteenth Report, Session 2001-02* (2002) [2]. See Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 437, 441-45.

³³ Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 438.

³⁴ Ibid 447. This is in contrast to the Canadian Parliament, which must rely on the advice of governmental lawyers vis-à-vis rights under the *Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

³⁵ Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 438-441; Feldman, ‘Parliamentary Scrutiny’, above n 16, 341-2, 345-8; United Kingdom, *Parliamentary Debates*, House of Commons, 28

debate on the Bill to which the report relates.’³⁶ The ‘responsible Minister is usually keen to draw attention to’ reports that indicate compatibility; while critics ‘are often quick to draw attention to’ reports that question the compatibility of proposed legislation or suggest more safeguards.³⁷ Examples of this constructive debate are the Criminal Justice and Police Bill 2001 (UK) and the Anti-Terrorism, Crime and Security Bill.³⁸ The UK Committee ‘reports helped to generate pressure ... which yielded some gains ... in the form of additional safeguards for rights’³⁹ for both Bills.

Overall, the UK Committee is considered ‘a key component of the legislative process’ which has ‘strengthened the role of Parliament in scrutinising legislative proposals and administrative practices against [human rights] standards.’⁴⁰ The UK Committee enables Parliament to fulfil its constitutional roles of legislative scrutineer and law-maker, it facilitates the robust and considered parliamentary contribution to the dialogue about rights and justifiable limits on rights, and it improves the transparency and accountability of parliamentary decision-making on human rights matters. These benefits and strengths should apply equally to the proposed federal Parliamentary Joint Committee on Human Rights.

Victoria

Under s 30 of the *Victorian Charter*, the Scrutiny of Acts and Regulations Committee (“SARC”) is required to ‘consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights’ (s 30). Because SARC’s human rights jurisdiction has only existed since 1 January 2007, it is difficult to make an assessment of its work.

However, one point to note is the major difference between the Victorian and British models: the latter creates a free-standing human rights scrutiny committee, whilst the former subsumes human rights under a generalist scrutiny committee. Both committees do have specialist legal advisers.

October 2002, col 604 (Ms Jean Corston MP); United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 2002, col 604 (Mr Simon Hughes MP).

³⁶ Feldman, ‘Parliamentary Scrutiny’, above n 16, 341.

³⁷ Ibid.

³⁸ With respect to the Criminal Justice and Police Bill 2001 (UK), the Parliamentary Committee’s report was the basis of numerous challenges to the proposed legislation and several proposed amendments. Although no proposed amendments were successful, the responsible ‘Minister did give an assurance that administrative guidance would be given to meet [the] main concerns’: Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 439. With respect to the Anti-Terrorism, Crime and Security Bill 2001 (UK), the Parliamentary Committee’s views were also used by opponents to the proposed legislation during the debate. See Adam Tomkins, ‘Legislating Against Terror: The *Anti-Terrorism, Crime and Security Act 2001*’ [2002] *Summer Public Law* 205, especially 210-19; Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 439-41.

³⁹ Feldman, ‘Parliamentary Scrutiny’, above n 16, 341.

⁴⁰ Lester, ‘Parliamentary Scrutiny of Legislation’, above n 16, 437 and 433 respectively.

Australia

I strongly support the establishment of the Parliamentary Joint Committee on Human Rights as a specialist scrutiny committee, as per cl 4 of the HRPS Bill. The size of the task of human rights scrutiny should not be under-estimated, nor should the benefits that will flow from creating a specialist focus on human rights. If the aim is to better promote and protect human rights, to create a representative dialogue about human rights, and to improve transparency and accountability about human rights decision-making, a specialist scrutiny committee will be an invaluable addition to the parliamentary voice on such matters.

There are, however, three ways in which the Parliamentary Joint Committee on Human Rights must be strengthened. First, one of the strengths of the British and Victorian Committees is the independent legal adviser to the Committee. The provision of independent legal advice is vital not only because Parliament and the Parliamentary Joint Committee on Human Rights will be asked to assess the compatibility of Australian laws with Australia's international legal human rights obligations, but also because an independent legal adviser will introduce an apolitical, non-majoritarian influence within the Parliamentary Joint Committee on Human Rights. I recommend that an independent legal adviser be appointed to advise the Parliamentary Joint Committee on Human Rights.

Secondly, the language of cl 7 of the HRPS Bill 2010 should be strengthened. I recommend that rather than simply describing the functions of the Parliamentary Joint Committee on Human Rights under cl 7 ('The Committee has the following functions...'), cl 7 should use mandatory language to describe the obligations of the Committee ('The Committee must...').

Thirdly, in addition to the three obligations listed in cl 7, I recommend that the Parliamentary Joint Committee on Human Rights should be empowered to undertake "own motion" inquiries into any matter relating to human rights. This independence of inquiry will enhance the standing of the Parliamentary Joint Committee on Human Rights, the protection and promotion of human rights, and the transparency and accountability of human rights decision-making.

ASSESSING THE HUMAN RIGHTS

The definition of "human rights" under cl 3(1) of the HRPS Bill 2010 refers to the seven major international human rights treaties to which Australia is a party. I support this choice of human rights coverage.

However, the HRPS Bill 2010 fails to address how the executive (in making statements of compatibility) and the Joint Parliamentary Committee on Human Rights (in undertaking its obligations) is to assess the scope of the human rights, whether a proposed law limits a human right, and whether a limit is justifiable. As the above discussion indicated, the Canadian executive and parliament follows the lead of the Canadian Supreme Court on these issues by adopting the *Oakes* test, and the British executive and parliament follow the lead of the European Court of Human Rights and increasingly its own British jurisprudence.

I recommend that the executive and the Joint Parliamentary Committee on Human Rights be explicitly directed to consider relevant international, regional and comparative jurisprudence on these matters, including all of the materials produced by the treaty monitoring bodies

established under each of the seven treaties referred to in cl 3(1). Section 32(2) of the *Victorian Charter* is recommended as a basis for the drafting of such a provision, which provides: ‘International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.’

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