



PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

HUMAN RIGHTS COMPATIBILITY: PARLIAMENTARY SCRUTINY AND HUMAN RIGHTS IN AUSTRALIA

**Remarks delivered by the Chair, Mr Harry Jenkins MP, to the NSW Bar Association
Human Rights Committee Professional Development Seminar**

Thursday 28 February 2013

These remarks provide an overview of the role of the committee in the protection of human rights and its work to date. The intention is to outline the approach the committee has taken to overcoming some of the challenges it faces in enhancing consideration of human rights in the legislative process.

I would like to begin by thanking the Human Rights Committee of the New South Wales Bar Association for inviting me to speak to you this afternoon. Since becoming Chair of the Parliamentary Joint Committee on Human Rights I have had a number of opportunities to speak to a variety of audiences. I have found each of those experiences valuable and instructive. Valuable as a means of raising awareness of the work of the committee, and instructive for the variety of feedback and perspectives I gather on each occasion.

This afternoon I will focus on the committee's role in elevating the consideration of human rights in the legislative process, some of the challenges it faces and how it is working to overcome those challenges.

ROLE OF THE COMMITTEE

The committee was established in March 2012 as part of a concerted effort to enhance the understanding of, and respect for, human rights in Australia and to ensure that human rights are explicitly taken into account in the legislative process.

The committee has responsibility for examining and reporting to the Parliament on the compatibility of bills and legislative instruments with Australia's international human rights obligations. It has the ability to examine existing legislation and conduct broad inquiries into matters relating to human rights as referred to it by the Attorney General.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* to mean the rights and freedoms recognised or declared by the seven key international human rights treaties ratified by Australia.

It will not surprise you that the committee found the apparent breadth of its functions and the definition of human rights quite daunting from the outset.

We were concerned that we did not possess the expertise to deal with the diversity and complexity of human rights issues that would come before us and we were concerned that the enormity of the committee's workload would make it difficult to rigorously scrutinise legislation within a time frame that would be of assistance to our parliamentary colleagues.

The committee was very fortunate early on to receive advice from a number of individuals and organisations with expertise and experience in international human rights law and the scrutiny of legislation. Through our discussions with them we were encouraged to identify a clear and legitimate role for parliamentarians in the analysis of the human rights implications of legislation and to feel optimistic about our ability to add value to the legislative process.

The committee recognised that, together with the Executive Government, we were embarking on a process of cultural change, but not necessarily stepping into uncharted territory. The Commonwealth Parliament has a long history of considering human rights and the committee follows a number of similar human rights committees in other parliaments.

It may be true that the Parliament has not always approached this task with a high degree of rigour, sophistication or commitment. It has certainly not always employed the language of human rights. A key role of the committee is to assist the Parliament and encourage the Executive to consider human rights in a more systematic, rigorous and consistent way. The committee recognised that this would be an evolutionary process as we all come to grips with the meaning and scope of Australia's human rights obligations and how to apply these obligations in our work.

At the same time we came to appreciate that the committee was not intended to be a quasi-judicial body. The committee recognises that if it is to encourage our

fellow parliamentarians, and thousands of public servants, to become engaged in the consideration of human rights, we need to interpret rights in a way that makes them real and effective.

The committee's deliberations must be underpinned by a sound understanding of the human rights principles engaged by legislation and a robust interpretation of Australia's human rights obligations as expressed in the seven human rights treaties.

By way of a crucial aside, the committee considers itself extremely fortunate to have engaged Professor Andrew Byrnes as its external legal adviser. He brings significant knowledge and experience to the task and his expertise, together with the human rights expertise available to the committee through its secretariat, provides the committee with a solid foundation upon which to base its work.

However, the committee recognises that questions of human rights compatibility are not answered solely by reference to international law and jurisprudence. At heart they are about the practical impact of legislation and the extent to which a proposed limitation on rights is justifiable. The key questions to ask are:

- Does the legislation address some compelling social purpose?
- Is there a rational connection between the proposed limitations and the objectives of the legislation?

- Can we be confident that the proposed limitation will be implemented in a way that is reasonable, necessary and proportionate?

These are questions that parliamentarians, and public servants, are very well positioned to answer. The committee therefore hopes to facilitate the evaluation of human rights issues by discussing rights in clear language that is meaningful to both lawyers and non-lawyers alike.

Whilst I am not totally unbiased, the committee's reports to date are, for the most part, clearly expressed. We do not always hit the mark. The demands of the legislative program and the volume of legislation conspire to make this is an area where the committee must continue to be vigilant.

STATEMENTS OF COMPATIBILITY

Another aspect of the committee's work that calls for vigilance is the consideration of statements of compatibility.

Statements of compatibility are central to efforts to elevate the consideration of human rights in the development of policy and legislation.

Since 4 January 2012, each new bill and disallowable legislative instrument must be accompanied by a statement of compatibility. As well as being an obvious starting point for the Parliament's consideration of human rights in the legislative process, the committee considers that statements of compatibility

have the potential to significantly increase transparency and accountability in the development of policy and legislation.

Earlier I indicated that the committee recognises that this is an evolutionary process. From the outset the committee has adopted what it hopes is a constructive approach to statements of compatibility. The committee has set out the following expectations regarding statements of compatibility:

- Statements should read as succinct, self-contained documents capable of informing debate within the Parliament.
- They should contain an assessment of the extent to which the legislation engages human rights.
- Where limitations on rights are proposed, the committee expects the statement to set out clear and adequate justification for each limitation and demonstrate that there is a rational and proportionate connection between the limitation and a legitimate policy objective.

The committee considers that the preparation of a statement of compatibility should be the culmination of a process that commences early in the development of policy. Statements of compatibility should reflect the assessment of human rights that took place during the development of policy and the drafting of the legislation. They should not be drafted after the fact and retrofitted to the legislation.

Finally, best practice suggests that statements of compatibility should accompany all bills and instruments, whether they fall within the requirements in the Act or not.

The fact that legislation predates the requirement for a statement of compatibility, or is exempt from that requirement, does not prevent the committee from considering its human rights compatibility. In such circumstances the committee will write to the proponent of the legislation and invite them to provide information regarding the human rights compatibility of the legislation.

While statements of compatibility provide a starting point for the committee's work, the committee does not accept statements at face value. The committee looks beyond the stated intention of the legislation to consider the likely practical effect of the legislation. The committee seeks to understand whether decisions to limit rights are evidence based. Where further information is required to determine this, the committee will write to the proponent of the legislation seeking further information to assist its consideration of the legislation.

The committee has considered 119 bills and 860 legislative instruments to date and has sought further information in relation to 41 bills and 26 instruments. The committee has sent advisory letters in relation to a further 299 instruments

where the statements of compatibility have fallen short of the committee's expectations.

The requirement to produce a statement of compatibility is having tangible results. It is clear that government agencies and Ministers are gradually getting better at thinking about human rights impacts as part of the legislative process and this is starting to be reflected in the statements that come before the committee.

The committee generally receives prompt and detailed responses to its requests for further information and we are hopeful that in time a more comprehensive level of analysis will be provided in statements from the outset. The committee remains optimistic that its efforts are increasing the consideration of human rights in the development of policy and legislation.

THE COMMITTEE'S APPROACH TO THE CONSIDERATION OF LEGISLATION

One of the toughest challenges that the committee faces is undertaking its work and drawing it to the attention of the Parliament in a timely way. From its earliest days, the committee has recognised that the potential volume of bills and legislative instruments, together with the realities of the sitting pattern, could potentially frustrate its efforts to find an effective voice within the Parliament.

While the committee has established a regular scrutiny and reporting cycle based on the sitting patterns for both chambers, the committee has also sought to exploit opportunities to respond flexibly to the needs of the Parliament.

Central to this approach is the recognition that concerns about incompatibility with human rights are most likely to arise in the implementation of the legislation. It is rare for a bill to be blatantly incompatible on its face. The committee therefore needs to gain a clear understanding of the practical application of legislation in the shortest possible time frame.

Equally important is the recognition that consideration of the human rights implications of legislation is not solely the responsibility of this committee. The committee appreciates that its work intersects with the work of other parliamentary committees and that it can usefully leverage off this shared responsibility.

INTERACTION WITH OTHER PARLIAMENTARY COMMITTEES

In a statement to the House at the end of last year, I said that in 2013 the committee would focus on working more effectively with other parliamentary committees, particularly where they have been charged with examining particular bills and instruments. It is the committee's aim to draw the attention of other committees to the work of this committee in a timely way. At the same

time, the committee continues to closely monitor the work of other committees so that it can draw on this in its own work.

There are two important reasons for the committee approaching its work in this way:

- First, it makes effective use of resources both within and outside the Parliament; and
- Second, determining the human rights implications of legislation is frequently complex and sometimes contentious. It makes sense to examine legislation from a variety of angles and shed as much light as possible on how the legislation works and how this will interact with Australia's human rights obligations in practical terms.

The committee has taken three important steps in this regard since the resumption of the Parliament this year. It has redoubled its efforts to establish clear and regular communication with other parliamentary committees, by stepping up its practice of writing to House and Senate committees drawing attention to its reports.

At the same time, the committee has decided that it will endeavour to expedite its own consideration of bills and instruments where this may assist the work of other committees. The committee brought forward its consideration of the Australian Sports Anti-Doping Authority Amendment Bill 2013 to ensure that the Senate Rural and Regional Affairs and Transport Legislation Committee, to

which the bill has been referred for inquiry and report by 12 March 2013, would have the benefit of the committee's comments early in its own consideration of the bill.

Finally, the committee resolved to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Exposure Draft of the Human Rights and Anti-discrimination Bill 2012. The committee's intention in providing its initial views on this draft legislation prior to its formal introduction into Parliament was purely to contribute in a timely way to the debate on these important reforms while amendments to the exposure draft are under consideration. Without binding the committee, this is an approach it may consider adopting with regard to future parliamentary inquiries into exposure draft legislation.

PRIORITISING THE COMMITTEE'S WORK

To assist the committee to identify legislation that might usefully be considered expeditiously or in greater detail, the committee has begun to prioritise its work by categorising legislation into three groups according to the level of human rights scrutiny it would appear to require:

- legislation that does not appear to raise human rights concerns;
- legislation that potentially raises human rights concerns; and

- legislation that raises human rights concerns that the committee considers requires closer examination.

The first category includes legislation that the committee is satisfied does not appear to raise human rights concerns. Such legislation may well engage human rights: it may have the potential to promote rights or limit rights. However, the committee has been able to satisfy itself that the implementation of the legislation is unlikely to give rise to human rights concerns.

In many cases, such legislation has been accompanied by a statement of compatibility and other supporting documentation that clearly sets out the objective of the legislation and provides adequate justification for any proposed limitations. This is not always the case and, while the committee may be satisfied that the legislation does not warrant further scrutiny, it may write to the proponent in an advisory capacity regarding its expectations for statements of compatibility.

The second category includes legislation for which the committee determines that, before it can form a view on the compatibility of the legislation, further clarification is required from the Minister or proponent of the legislation.

The committee sets out its consideration of such legislation in its report and identifies those aspects of the legislation that give rise to human rights concerns together with any additional information the committee may require.

Finally, some legislation raises human rights concerns of such significance or complexity that the committee may decide to examine it more closely, either individually or as part of a package of related legislation.

The committee has adopted this approach to its examination of the *Stronger Futures in the Northern Territory Act 2012* and the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related bills and instruments. The committee aims to complete its examination of both packages of legislation shortly.

While the committee's examination of legislation may extend beyond its consideration by the Parliament, the committee considers that in some cases there is significant value in exploring human rights principles and their application in an Australian context even after legislation has been passed.

There are two key benefits to this approach.

First, it enables the committee to assess human rights compatibility on the basis of an understanding of the complete legislative package.

Second, it enables the committee to contribute to a broader understanding of thematic human rights issues while still maintaining a practical focus.

Where the committee examines specific legislation in detail, it may hold public hearings and publish its conclusions in a stand-alone report. The committee's

examination of the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, reflected in its Fourth Report of 2012, is an example of this.

CONCLUSION

In closing, I acknowledge the committee's debt to those who provided constructive advice and encouragement at the start of this journey. Through our discussions with them we came to appreciate the significant challenges before us and recognise that not only was there a clear and legitimate role for parliamentarians in the analysis of human rights but that the task was achievable.

The advice and good will extended to the committee by so many equipped it to learn from the experience of other human rights scrutiny committees and begin to formulate its own, distinctly Australian, approach to its task, particularly in the area of economic, social and cultural rights where it is breaking new ground.

I take this opportunity to recognise my colleagues on the committee. They have brought significant commitment and energy to our work and have shown a preparedness to act as parliamentarians rather than politicians in their consideration of human rights principles. The committee's collegiate and objective approach to its work has allowed it to rise above the misgivings of those early months and make sure strides in elevating the consideration of human rights.