



Australian
Human Rights
Commission

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Inquiry into the future direction and role of the Senate Scrutiny of Bills Committee

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Australian Human Rights Commission Submission
to the Senate Scrutiny of Bills Committee

19 March 2010

Table of Contents

1	Introduction.....	3
2	Summary	3
3	Recommendations.....	4
4	The mandate and operation of the Senate Scrutiny of Bills Committee ...	4
5	How could enhanced parliamentary scrutiny of human rights be achieved?	6
5.1	<i>Establishment of a dedicated parliamentary human rights committee.</i>	6
5.2	<i>Improving the existing parliamentary committee system</i>	9
6	How do parliamentary human rights committees operate in other jurisdictions?	11

1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Scrutiny of Bills Committee regarding its Inquiry into the future direction and role of the Senate Scrutiny of Bills Committee.
2. In this submission, the Commission specifically addresses Terms of Reference 1(a), 1(c) and 2, regarding:
 - 1(a) whether its powers, processes and terms of reference remain appropriate;
 - 1(c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth;
 - (2) ... the role, powers and practices of similar committees in other jurisdictions
3. The Commission discussed the role of parliamentary committees in protecting and promoting human rights in some detail in its submission to the National Human Rights Consultation.¹ This submission draws on that earlier work.

2 Summary

4. Pre-legislative scrutiny for compliance with Australia's international human rights obligations is one of the building blocks of a good system of human rights protection. It is an important means of reducing the risk that legislation breaches fundamental human rights.
5. Pre-legislative human rights scrutiny should require Members of Parliament to consider how legislation may affect human rights before the proposed legislation is put to a vote. The human rights implications of any proposed measure should be clearly identified. They could then be debated openly in Parliament.
6. The Senate Scrutiny of Bills Committee performs an important pre-legislative scrutiny role in ensuring that proposed legislation does not violate certain minimum standards for the protection of personal rights and liberties. The current Inquiry addresses whether those minimum standards, and the Committee's powers in respect of those minimum standards, continue to be appropriate in modern Australian society and whether the Committee should undertake an additional role in relation to the human rights obligations applying to the Commonwealth.
7. The Commission considers that the Senate Scrutiny of Bills Committee under its current mandate is not able to adequately scrutinise proposed legislation for the Commonwealth's compliance with its human rights obligations. The Commission

¹ Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), paras. 27, 146-8, 243, 342, 348-64, and Recommendation 13. At http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC_complete.pdf (viewed 15 March 2010).

is particularly concerned about the lack of clarity as to what ‘rights and liberties’ should be examined by the Committee.

8. The Commission’s preferred option for ensuring adequate pre-legislative human rights scrutiny is the establishment of a specialist parliamentary human rights committee.
9. However, if a specialist committee is not established, the Commission recommends that the role of the Senate Scrutiny of Bills Committee be expanded so that it is required to scrutinise compliance of proposed legislation with all of the human rights set out in the international human rights treaties to which Australia is a party.
10. The Commission further recommends that the Senate Scrutiny of Bills Committee be adequately resourced to undertake this task.

3 Recommendations

11. The Australian Human Rights Commission recommends:

Recommendation 1: A parliamentary Human Rights Committee should be established to review the compatibility of proposed legislation with Australia’s human rights obligations, as set out in the international human rights treaties to which Australia is a party.

Recommendation 2: If a specialist parliamentary Human Rights Committee is not established, the terms of reference of the Senate Scrutiny of Bills Committee should be amended to require examination of the compliance of proposed legislation with human rights, as set out in the international human rights treaties to which Australia is a party.

Recommendation 3: If the human rights scrutiny role of the Senate Scrutiny of Bills Committee is enhanced, the Committee should be adequately resourced to fulfil this role.

4 The mandate and operation of the Senate Scrutiny of Bills Committee

12. The general terms of reference of the Senate Scrutiny of Bills Committee require the Committee to consider whether bills that come before the Parliament ‘trespass unduly on personal rights and liberties’.² This requirement is also contained in the relevant Senate Standing Order.³ The Senate Scrutiny of Bills Committee has played a valuable role in monitoring whether proposed legislation unduly infringes on rights and liberties.

² Senate Scrutiny of Bills Committee, Terms of Reference, at <http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm> (viewed 11 March 2010).

³ Senate Table Office, *Standing Orders and other Orders of the Senate* (2006), Standing Order 24, pp 21 – 2. At http://www.aph.gov.au/senate/pubs/standing_orders/standingorders.pdf (viewed 11 March 2010).

13. However, the Committee is given no guidance on which rights and liberties it should consider, or how they should determine when those rights can be justifiably limited.
14. When the Committee determines whether legislation trespasses unduly on personal rights and liberties they generally consider whether the legislation might:
- have a retrospective and adverse effect on those to whom it applies;
 - not only operate retrospectively, but its proposer (invariably the Government) might treat it as law before it is enacted – usually from the date the intention to legislate is made public; this is often referred to as legislation by press release;
 - abrogate the common law right people have to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved;
 - reverse the common law onus of proof and require people to prove their innocence when criminal proceedings are taken against them;
 - impose strict liability on people when making a particular act or omission an offence;
 - give authorities the power of search and seizure without requiring them to obtain a judicial warrant prior to exercising that power;
 - abrogate legal professional privilege; or
 - directly affect fundamental entitlements such as the right to vote.⁴
15. The Commission considers this to be a narrow conception of personal rights and liberties. According to Senator Andrew Murray, this focus only evolved from ‘a combination of history and precedent’.⁵
16. The Commission is aware of a range of concerns about the mandate and operation of the Senate Scrutiny of Bills Committee. The Commission shares the concerns heard by the National Human Rights Consultation about:

the capacity of these existing committees to engage in comprehensive human rights scrutiny. It was said there is a lack of formal guidance about which rights and liberties the committees should consider, how the committees should determine whether those rights and liberties have been justifiably limited, and how or whether to assess compliance with international human rights standards. Concern was also expressed about the Scrutiny of Bills Committee’s lack of ‘teeth’, the limited time frame available to it for scrutinising Bills, and the fact that the committee’s response is not always available before the parliamentary debate.⁶

⁴ Senate Scrutiny of Bills Committee, *The Work of the Committee during the 41st Parliament November 2004 – October 2007* (2008), p 15. At <http://www.aph.gov.au/senate/committee/scrutiny/work41/report.pdf> (viewed 11 March 2010).

⁵ Senator A. Murray, *Parliamentary Committees and the Protection of Rights: a Partial Evaluation*, (Paper for the International Conference on Legislatures and the Protection of Human Rights, Melbourne, 20-21 July 2006) p 6. At <http://cccs.law.unimelb.edu.au/index.cfm?objectId=9E065F87-1422-207C-BAC23913D7DB519D> (viewed 15 March 2010).

⁶ Commonwealth of Australia, *National Human Rights Consultation Report*, September 2009, p 169.

17. The limitations of the Senate Scrutiny of Bills Committee are also outlined by Simon Evans and Carolyn Evans, who generally argue that human rights scrutiny of legislation 'is ad hoc and unsystematic and as a result is highly variable in its scope and intensity'.⁷
18. Evans and Evans found that the Senate Scrutiny of Bills Committee comments on one-half to two-thirds of the *International Covenant on Civil and Political Rights* issues raised by legislative proposals.⁸ They have also concluded that the Committee's 'approach is narrowly focused on civil liberties issues and its coverage is far from complete'.⁹
19. In summary, Evans and Evans argue that while scrutiny committees can act expeditiously to provide an initial assessment of some rights impacts of bills:
- the scrutiny committees tend to restrict their focus to civil liberty issues
 - the scrutiny committees rarely express a concluded view on bills or a clear position as to whether a bill trespasses unduly on rights and freedoms
 - the impact of scrutiny can be hard to identify.¹⁰
20. The Commission also notes that the extent to which the Senate Scrutiny of Bills Committee is resourced has an impact on the scope of its work. This issue is discussed further below at paragraphs 45 and 46.

5 How could enhanced parliamentary scrutiny of human rights be achieved?

5.1 Establishment of a dedicated parliamentary human rights committee

21. The Commission's submission to the National Human Rights Consultation noted that there are a number of parliamentary committees in Australia with special areas of expertise. However, there is no specialist committee focused on examining the human rights implications of proposed laws.¹¹ The Commission's preferred approach is the establishment of a parliamentary committee dedicated to the examination of bills for their compatibility with human rights.
22. The National Human Rights Consultation report ultimately recommended the establishment of a Joint Committee on Human Rights:

Recommendation 7: The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative

⁷ S. Evans and C. Evans, 'Australian parliaments and the protection of human rights' (2007) 47 *Papers on Parliament* 17, 25.

⁸ S. Evans and C. Evans, note 7, p 26.

⁹ S. Evans and C. Evans, note 7, p 26.

¹⁰ S. Evans and C. Evans, note 7, p 28.

¹¹ Australian Human Rights Commission, note 1, para 147.

instruments for compliance with the interim list of rights, and, later, the definitive list of Australia's human rights obligations.¹²

23. The Commission's view is that a parliamentary Human Rights Committee (such as the Joint Committee on Human Rights, as recommended in the National Human Rights Consultation report) should be permanent and dedicated to conducting human rights scrutiny. This would produce a better result than simply expanding the role of existing legislative scrutiny committees, because it would enable the Committee to build special expertise in analysing human rights issues.¹³

24. According to the Allen Consulting report commissioned by the National Human Rights Consultation, a specialist human rights committee would be a low-cost option, its transition and ongoing costs would be moderate, and it could be reasonably quickly established.¹⁴

25. **Recommendation 1:** A parliamentary Human Rights Committee should be established to review the compatibility of proposed legislation with Australia's human rights obligations, as set out in the international human rights treaties to which Australia is a party.

26. The Commission submits that a parliamentary Human Rights Committee should:

- have broad functions
- be adequately resourced
- accompany the adoption of a national Human Rights Act.¹⁵

27. The Commission recognises that if a dedicated parliamentary human rights committee is established, the Senate Scrutiny of Bills Committee could continue to play an important role in identifying bills which raise human rights issues. The Committee could either seek the advice of the human rights committee, or refer legislation to the human rights committee for more intensive consideration.

(a) *A parliamentary Human Rights Committee should have broad functions*

28. The parliamentary Human Rights Committee should consider each bill introduced into Parliament and inquire into whether the bill is consistent with the Human Rights Act.

29. A Human Rights Act would guide the parliamentary committee on the rights that it should consider when conducting these functions. It would also provide guidance on how to assess whether a limitation upon a right could be justified.

30. The Committee should report its findings to Parliament before Parliament is due to vote on the bill in question.

¹² Commonwealth of Australia, note 6, p 175.

¹³ Australian Human Rights Commission, note 1, para 350.

¹⁴ Commonwealth of Australia, note 6, p 173.

¹⁵ Australian Human Rights Commission, note 1, paras 348-62.

31. The parliamentary Human Rights Committee could also inquire into any questions referred to it by Parliament.

32. A parliamentary Human Rights Committee could adopt broad terms of reference similar to those used in the UK, which enable the UK Joint Committee on Human Rights (JCHR) to consider ‘matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)’.¹⁶ The JCHR undertakes a wide range of other functions including:

- examining existing laws on an ad hoc basis
- examining pre-legislative documents (for example, Green Papers)
- monitoring implementation of the human rights legislation
- monitoring the work of human rights commissions
- monitoring the government’s human rights policy.¹⁷

(b) A parliamentary Human Rights Committee should be adequately resourced

33. The Committee should be provided with adequate resources and time to be able to properly assess the human rights implications of proposed legislation. The Commission acknowledges that the demands and complexities of legislative programs can be difficult to manage. However, it is important that every effort be made to ensure that all aspects of pre-legislative scrutiny are conducted appropriately.

(c) A parliamentary Human Rights Committee should accompany the adoption of a national Human Rights Act

34. The Commission acknowledges the view that human rights protections in Australia could be improved by strengthening parliamentary committees, without a Human Rights Act.

35. However, the Commission believes that parliamentary committees alone cannot ensure comprehensive human rights protection.

36. A Human Rights Act would provide guidance to the parliamentary committee as to what rights it should consider, and a framework for assessing proposed limitations upon rights.

37. Further, improving the way human rights are considered in the legislative process is only one of many reforms required to develop a culture of respect for human rights in government. All levels of government, including government agencies

¹⁶ See, for example, Parliament of the United Kingdom of Great Britain, *Joint Committee on Human Rights*. At http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrabout.cfm (viewed 2 June 2009).

¹⁷ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), p 21.

and other public authorities, need to consider human rights in decision-making. A Human Rights Act is a comprehensive way of ensuring that this occurs.

5.2 Improving the existing parliamentary committee system

38. If a dedicated parliamentary Human Rights Committee is not established, the Commission considers that enhancing the mandate and role of the Senate Scrutiny of Bills Committee would improve pre-legislative human rights scrutiny. This would be achieved by:

- expanding the range of rights that the Committee should consider
- providing adequate resources for an enhanced scrutiny role.

(a) Expanding the range of rights that the Committee should consider

39. The report of the National Human Rights Consultation observed that improving the existing parliament committee system would:

involve amending the terms of reference of the Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances in order to define the personal rights and liberties against which the committees must scrutinise federal laws.¹⁸

40. Rev Prof Michael Tate AO, in his submission to the National Consultation, argued that the terms of reference of the Senate Scrutiny of Bills Committee should be clarified to:

indicate that it encompasses personal rights and liberties whether recognised or expressed under the Australian constitution, in the Common Law, in Statutes of Parliament or in Treaties ratified by the Government of Australia and incorporated into law.¹⁹

41. The Commission agrees that the terms of reference of the Senate Scrutiny of Bills Committee should be clarified.

42. The capacity of the Senate Scrutiny of Bills Committee to adequately scrutinise proposed legislation for compliance with Australia's human rights obligations would be enhanced if the term 'rights and liberties' was replaced with the term 'human rights', clearly defined. The Commission agrees with Evans and Evans that 'terms of reference that identify rights more explicitly would link the scrutiny process more explicitly to the worldwide jurisprudence on civil and political rights and provide more structure and robustness to the identification of rights issues and analysis of whether limitations on rights could be justified'.²⁰

¹⁸ Commonwealth of Australia, note 6, p 171.

¹⁹ M. Tate, *Submission to the National Human Rights Consultation*, available at http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Publicsubmissions_SubmissionstotheNationalHumanRightsConsultation (viewed 11 March 2010).

²⁰ C. Evans and S. Evans, *The effectiveness of Australian parliaments in the protection of rights* (Paper for the Legislatures and the Protection of Human Rights Conference, Melbourne, 20-21 July,

43. The term ‘human rights’ should include those rights set out in the major international human rights treaties to which Australia is a party, namely the:

- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *International Covenant on Economic, Social and Cultural Rights*
- *International Covenant on Civil and Political Rights*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*
- *International Labor Organisation Treaty 111.*

44. **Recommendation 2:** If a specialist parliamentary Human Rights Committee is not established, the terms of reference of the Senate Scrutiny of Bills Committee should be amended to require examination of the compliance of proposed legislation with human rights, as set out in the international human rights treaties to which Australia is a party.

(b) *Providing adequate resources for an enhanced scrutiny role*

45. The Commission considers that if the Senate Scrutiny of Bills Committee is to adequately scrutinise legislation for compatibility with international human rights standards it should be adequately resourced to undertake this role.

46. The Commission agrees with Simon Evans’ conclusion that:

The Committees need resources to make scrutiny effective: a guarantee of adequate time to review and seek responses from government before legislation comes on for debate; research and specialist advisory capacity; and members committed to the task of scrutiny ...²¹

47. **Recommendation 3:** If the human rights scrutiny role of the Senate Scrutiny of Bills Committee is enhanced, the Committee should be adequately resourced to fulfil this role.

2006), p 6. At <http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/international-conference/conference-papers-and-presentations/index.cfm> (viewed 15 March 2010).

²¹ S. Evans, *Submission to the National Human Rights Consultation*, at http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Publicsubmissions_SubmissionstotheNationalHumanRightsConsultation (viewed 11 March 2010).

6 How do parliamentary human rights committees operate in other jurisdictions?

48. In other jurisdictions, parliamentary human rights committees have effectively scrutinised the human rights compliance of proposed legislation. They have made a positive contribution to parliamentary consideration of the impact of law on fundamental human rights. The Commission considers that in particular there is much to learn from the operation of the JCHR in the United Kingdom.

49. The JCHR was established in 2001, and is made up of twelve members each of whom must be a member of either the House of Commons and the House of Lords.

50. As mentioned above, the Terms of Reference of the JCHR are to consider:

- (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
- (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
- (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments).²²

51. The JCHR conducted a review of its operations in 2006 and as a result has moved to a broader human rights dialogue which involves all facets of the government and the wider community. It is scrutinising fewer bills than previously, holding more thematic inquiries and reporting on proposed laws prior to their introduction into Parliament.²³ It is at this stage that the JCHR has been able to usefully suggest amendments.

52. The model of the JCHR has been recommended by the Council of Europe for other member states.²⁴

53. Murray Hunt, the legal advisor to the JCHR, has outlined the valuable role of the JCHR in allowing some members of the legislature to develop expertise on human rights matters, particularly since debate amongst politicians is important

²² Parliament of the United Kingdom of Great Britain, *Joint Committee on Human Rights*, http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrabout.cfm (viewed 11 March 2010).

²³ Joint Committee on Human Rights, *23rd Report of Session 2005-06: The Committee's Future Working Practices*, p3-4. At <http://www.parliament.the-stationery-office.com/pa/jt200506/jtselect/jtrights/239/239.pdf> (viewed 15 March 2010).

²⁴ The Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, *Parliamentary scrutiny of the standards of the European Convention of Human Rights*, October 2009. At <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuJurEN.htm> (viewed 16 March 2010).

when undertaking the balancing exercise of determining whether the interference of a law with a right is justified.²⁵

54. The Commission believes that establishing a dedicated parliamentary Human Rights Committee with similarly broad functions would enhance the Parliament's capacity to ensure the protection of fundamental human rights within Australia.

²⁵ M. Hunt, *The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia* (Paper presented to Australian Human Rights Commission, 17 February 2009). At http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html (viewed 15 March 2010).