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

This submission is directed to the current inquiry into the future direction and role of the Scrutiny of Bills Committee ("the Inquiry"). I am writing this submission in my capacity as a Senior Lecturer at the Faculty of Law, University of New South Wales, and as Director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law. I am solely responsible for the content of this submission.¹

Introduction

The terms of reference for this Inquiry ask, inter alia, “what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth”? This submission responds to that question. In summary, I argue that the current mechanism for considering the human rights impact of legislation should be clarified and strengthened. In particular, I submit that this form of human rights scrutiny should be carried out under a more rigorous, holistic framework—ideally, under a Human Rights Act (HRA), based on the ‘dialogue’ model of human rights protection adopted in jurisdictions such as the United Kingdom, Victoria, the Australian Capital Territory and New Zealand.² Such a HRA was recommended in the recent National Human Rights Consultation Report (NHRC Report).³

Relevantly for present purposes, such a HRA would have the following elements:

   (i) It would set out the human rights that are to be given special protection.

(ii) It would establish a new joint parliamentary committee to scrutinise draft laws against
the rights set out in the Act itself.
(iii) It would require other laws to be interpreted consistently with protected rights, subject
to parliamentary intent.
(iv) The judiciary would continue to have the final say on questions of statutory
interpretation. However, where a law is incompatible with a particular right or rights,
the law would not be invalidated. Instead, the law would remain operational, but the
court in question would have the power to issue a declaration notifying Parliament of
the incompatibility.

Currently, Parliamentary committees consider the human rights impact of draft legislation in a
largely ad hoc manner. The most specific requirement is Standing Order 24(1)(a), which
requires the Senate Standing Committee for the Scrutiny of Bills to report on, inter alia,
whether proposed laws:
(i) trespass unduly on personal rights and liberties;
(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative
powers;
(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
...

In the remainder of this submission, I outline a number of problems with this mechanism, and
propose solutions to those problems.

**Which human rights should be considered?**
Under the current system, the Committee is not guided as to which human rights should be
considered in this process of pre-legislative scrutiny. Presumably, it is intended that the
Committee should have reference to those human rights listed in international treaties to which
Australia is a party—most notably, the *Universal Declaration of Human Rights*, the
*International Covenant on Civil and Political Rights* and the *International Covenant on
Economic Social and Cultural Rights*. However, in the absence of any specific guidance on this
matter, it is unclear which rights are of greatest importance in Australia, and therefore, in need
of protection from unnecessary impingements in draft legislation.

The NHRC Report recommends that enhanced parliamentary scrutiny of human rights should
occur with reference to a publicly-accessible list of protected rights, set out either in a HRA or
another public document.

**Framework for human rights assessment**
Standing Order 24(1)(a) provides no framework for the assessment of legislation against human
rights standards. Research shows clearly that, in the absence of such a framework, parliaments
sometimes give only scant attention to the human rights impact of even draconian laws. Moreover, as human rights are rarely absolute, it is important to have a carefully-constructed, transparent and principled means of reconciling competing human rights, and of dealing with
derogation from human rights in favour of other interests. Well-drafted anti-terrorism laws, for

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4 This point was made in submissions by Professor George Williams and myself to the House Standing
Committee on Procedure’s *Inquiry into the effectiveness of the House Committees* (2009), available at
<www.aph.gov.au/house/committee/proc/committees2/subs.htm>. As at writing, the Committee’s report
for this Inquiry has yet to be tabled in Parliament.

5 See, eg, Simon Evans and Carolyn Evans, ‘Australian parliaments and the protection of human rights’
instance, need to strike an appropriate balance between protecting the rights of an accused terrorist, and protecting Australia from terrorist attack.

In respect of non-absolute, or ‘derogable’, human rights, the NHRC Report recommends that Parliament should subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes. I would endorse this recommendation. The relevant Victorian provision states:

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

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Such limitations find their basis in international law, and are present in legislation in other jurisdictions as well. These limitations establish a principled framework—and indeed one that is common and successful in other jurisdictions—for the balancing of competing rights, and for the compromises that sometimes need to be struck between human rights and other urgent interests.

**Parliamentary scrutiny under a Human Rights Act**

As noted above, I submit that enhanced parliamentary scrutiny in respect of human rights should take place under the rubric of a HRA. The evidence from the United Kingdom suggests a number benefits flow from such an approach. First, parliamentary debate in the UK, as in Australia, has long involved consideration of human rights. However, as Lord Lester of Herne Hill QC has suggested, the establishment of the JCHR within the Human Rights Act rubric has made “human rights scrutiny ... systematic, influencing the preparation of legislation in Whitehall and the legislative process itself”.

Secondly, there are real benefits in the interaction of parliamentary and judicial scrutiny on question of human rights. For example, while noting that the UK’s Joint Committee on Human Rights (JCHR) has so far given insufficient attention to this issue, Tolley argues that the JCHR’s work in considering the Government’s response to declarations of incompatibility is “perhaps ... its greatest contribution to the new human rights regime”. This stands to reason because the JCHR is in a privileged position to monitor and contribute to the legislature’s part of the human rights dialogue on the most contentious issues. Such work would be impossible in the absence of a HRA, because the courts would not have a role in declaring laws incompatible with protected rights.

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7 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).
Preservation of parliamentary supremacy

An oft-cited concern with introducing enhanced parliamentary scrutiny of human rights under a HRA rubric is that this might undermine parliamentary supremacy. However, this concern seems misplaced. The Australian Parliament has shown itself to be unafraid to substitute its own view—even on questions that have a human rights or moral dimension—for those of the courts. For instance, Parliament responded to the High Court decisions in *Mabo*12 and *Wik*13, establishing land rights for Indigenous people, by passing new legislation that set parameters around and limited these judicially-articulated rights.14

The fact that Parliament, and especially the party forming government, is likely to face pressure to amend a law that a court finds incompatible with human rights is no bad thing. It has been suggested that where Parliament repeals or makes any amendment in response to a judicial declaration of incompatibility, this constitutes undesirable deference by the legislature to the judiciary.15 If Parliament’s response were always immediately to repeal the impugned law, this might suggest that judicial decisions exert an intolerable pressure that the parliament has no real capacity to resist. However, this has not been the experience in HRA jurisdictions. While the UK Parliament has responded to all declarations of incompatibility issued in the decade since the *Human Rights Act* was introduced, the response has often been nuanced. Take the decision in *A and others v Secretary of State for the Home Department* [2004] UKHL 56, concerning legislation under which terrorist suspects were detained without trial. The UK Parliament responded to the judicial declaration of incompatibility in this case not by repealing the impugned detention provisions outright, but by replacing them with a ‘control order’ regime, which was designed to achieve the original counter-terrorist objective without impinging so far on protected rights.16

Summary of recommendations

I submit that crucial to improving how the Scrutiny of Bills Committee considers the human rights impact of legislation is the introduction of a HRA, based on the ‘dialogue’ model proposed in the NHRC Report and already operating in jurisdictions such as the UK, Victoria, ACT and New Zealand. Without such a comprehensive reform, other changes to the process would be less successful.

However, prior to the Parliament introducing a HRA, I would make the following recommendations for improving the operation of the Scrutiny of Bills Committee:

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15 See, eg, James Allan, ‘What’s Wrong about a Statutory Bill of Rights?’ in Julian Leeser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rigths* (2009) 83, 93.

16 See *Prevention of Terrorism Act 2005* (UK).
1. Legislation should be introduced that sets out the human rights to which the Committee should have regard in its scrutiny process. That list should be based on Australia’s international human rights law obligations.

2. Clear rules should be provided to the Committee to provide a framework for human rights assessment, and especially for derogating from protected rights. Those rules should be based on accepted principles of international law, as per s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

3. Scrutiny of the human rights impact of legislation should be carried out by a dedicated joint parliamentary committee. A parliamentary committee of this stature can help foster debate within Parliament, and in the public arena, about the impact of new laws on human rights.

If you have any questions relating to this submission, or if I can be of any assistance to the Consultation Committee, please do not hesitate to be in contact.

Yours faithfully,

Edward Santow