

7 Human rights in policy and legislation

During the Consultation a number of options for improving the protection and promotion of human rights in the development of policy and legislation were identified. Among them were the following:

- conducting an audit of all existing federal legislation, policies and practices in order to determine their degree of compliance with human rights
- developing mechanisms for ensuring that human rights-related matters can be more readily accommodated when legislation and policy are being formulated.

These two options are discussed in this chapter.

7.1 An audit of existing federal legislation, policies and practices

The purpose of conducting an audit of all federal legislation and federal government policy and practices would be to identify any shortcomings and inconsistencies in Australia's implementation of its international human rights obligations. Once these were identified, the government should seek to amend the laws, policies and practices in question to bring them into compliance.¹ The Committee received 133 submissions expressing support for such an audit.

The Victorian Government reviewed its legislation for compatibility with the *Charter of Human Rights and Responsibilities Act 2006* before the Act came into force. The review was coordinated by the Department of Justice.² If there were to be an audit of federal legislation, policies and practices it could be done by the Federal Government—for example, under the auspices of the Attorney-General's Department or the Department of the Prime Minister and Cabinet—or it could be referred to the Australian Human Rights Commission or a parliamentary committee. An audit could be conducted as a precursor to a federal Human Rights Act or regardless of whether such legislation is enacted.

¹ For example, Law Institute of Victoria, Submission; J Debeljak, Submission; NSW Council of Social Service, Submission; Vixen Victoria, Submission; G Brandis, Submission. The LGBTI Network submitted that the Federal Government should make a commitment to review and amend laws that discriminate against lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

² Victorian Government, Submission.

Senator George Brandis SC, on behalf of the Federal Opposition, signalled that the Opposition would support such an option:

In the view of the Opposition, the protection of human rights would be better secured by express statutory words, containing their own specific protections, in a particular statute governing the issue. We favour more thoroughgoing Parliamentary scrutiny of legislation, including a comprehensive audit of existing legislation, to identify and repair gaps in human rights protection under the existing law.³

Dr Julie Debeljak supported the conduct of an audit before any federal Human Rights Act was to come into force. She noted that in the United Kingdom all government departments conducted audits for human rights compliance before the *Human Rights Act 1998* (UK) came into force. These audits identified priority areas for redress, and the results have since influenced the work of specialist human rights legal teams.⁴ She noted, however:

Unfortunately, the audit process focussed heavily on the expectation of judicial challenges to legislation, policies and practices. Rather than using the [Human Rights Act] as ‘the springboard for further steps to be taken as part of a proactive human rights policy,’ the government adopted ‘a containment strategy’ aimed at ‘avoiding or reducing successful challenges’ to policy and legislative initiatives. A more proactive approach would have increased the influence of the executive in the process of delimiting the open-textured Convention rights.⁵

Accordingly, she submitted, any audit conducted by the Federal Government should ‘[use] the opportunity to mainstream human rights rather than contain human rights’.⁶

The idea of an audit was raised mainly by lawyers, academics and people working in the human rights field. In contrast, only a small number of participants in the Colmar Brunton Social Research focus groups suggested this option; some even saw it as a possible ‘waste of time’ considering that the laws could be repealed at any time.⁷ Nevertheless, the Committee notes that an audit would probably allay the concerns of many of those who made submissions and community roundtable participants in relation to gaps in the implementation of Australia’s international human rights obligations.

The Committee recognises that such an audit would constitute a substantial task and is unlikely to be conducted in the short term. The audit would, however, present an opportunity to identify and remedy cases of inadvertent non-compliance, either

³ G Brandis, Submission.

⁴ J Debeljak, Submission.

⁵ *ibid.*

⁶ *ibid.*

⁷ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

at the time the legislation or policy was implemented or through subsequent amendment. It would also allow for reconsideration of legislation, policies and practices that have been implemented despite their obvious non-compliance.

This option would probably entail major costs for the government—in reviewing legislation, policies and practices for compliance with international human rights obligations and in developing and implementing legislation and policy in order to secure compliance. The Committee notes, however, that the review and development of legislation are already important government tasks. An audit is also consistent with the requirement that Australia implement its international human rights obligations domestically.

In view of the scale of the task, the Committee suggests that two areas be identified for priority review—the anti-discrimination framework and national security legislation.

The anti-discrimination framework

The anti-discrimination framework is one of the main mechanisms for protecting human rights in Australia. As discussed in Chapter 5, the framework has been criticised on several grounds, including its incomplete and inconsistent coverage.

During 2009 both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights recommended that Australia adopt federal legislation ‘covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination’.⁸

The Committee received 71 submissions that expressed support for strengthening or reforming anti-discrimination legislation. But, although there appears to be a degree of community support for reconsidering the framework, there are differing views about how this should be done.

Harmonisation of anti-discrimination laws

A number of submissions noted that the anti-discrimination framework is difficult to navigate, with differing protections at the federal and state and territory levels.⁹ Some suggested that the laws be harmonised.¹⁰ The Standing Committee of

⁸ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009).

⁹ For example, Disability Discrimination Legal Service, Submission; UNIFEM Australia, Submission; Office of the Tasmanian Anti-Discrimination Commissioner, Submission; Australian Human Rights Commission, Submission.

¹⁰ For example, Law Institute of Victoria, Submission; Office of the Tasmanian Anti-Discrimination Commissioner, Submission.

Attorneys-General has initiated a reform process directed at greater harmonisation of federal and state and territory anti-discrimination legislation.¹¹ Dr Belinda Smith submitted that this ‘is a good first step, but more substantive changes are required’.¹²

An equality Act

A range of submissions expressed support for the adoption of a single ‘equality Act’ to replace existing anti-discrimination statutes or at least for a public inquiry into this option.¹³ Views differed on whether an equality Act should apply across all (federal, state and territory) jurisdictions or at the federal level only, in which case it could provide a basis for future harmonisation with the states and territories.

The Committee heard that some of the advantages of an equality Act are that it would simplify anti-discrimination law, clarify that all forms of discrimination have equal status, and help individuals who have been subject to discrimination on several grounds to make their complaint more easily.¹⁴

A single Act model already operates in each state and territory, as well as in Canada and New Zealand, and is being developed in the United Kingdom.¹⁵ In 2008 the Senate Committee on Legal and Constitutional Affairs recommended a public inquiry into the merits of such an Act¹⁶, and this Committee understands that the Federal Government has been considering the proposal.

It should be noted that it is likely that a federal equality Act could be more limited in its scope than existing state and territory anti-discrimination legislation. To enact an equality Act, the Federal Government would need to rely on limited constitutional heads of power (such as the external affairs power), whereas the states and territories effectively have plenary power to enact anti-discrimination legislation.

Specific improvements to anti-discrimination laws

A number of submissions suggested specific improvements to the anti-discrimination laws. These were often raised in the context of an equality Act, although they could also be implemented in the absence of such an Act. Among the suggestions were the following:

¹¹ Standing Committee of Attorneys-General, *Communique*, 25 July 2008.

¹² B Smith, Submission.

¹³ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; LGBTI Network, Submission; WomenSpeak Alliance, Submission.

¹⁴ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

¹⁵ Australian Human Rights Commission, Submission.

¹⁶ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008), rec. 43.

- ensuring substantive rather than formal equality¹⁷, which acknowledges that sometimes groups need special assistance in order to reach a ‘level playing field’¹⁸
- focusing on positive obligations—such as an obligation to promote equality rather than merely to avoid discrimination.¹⁹ For example, legislation could require employers to take action to remedy the under-representation of certain groups²⁰
- prohibiting discrimination on a broader range of grounds, as is the case with state and territory legislation.²¹ The need to prohibit discrimination against lesbian, gay, bisexual, transgender and intersex people was often raised²², and enactment of a national sexual orientation and gender identity anti-discrimination statute was proposed²³
- revising the test for discrimination and the burden of proof to remove apparent barriers to establishing discrimination²⁴
- redressing compounded or intersectional discrimination and providing a mechanism whereby a person complaining of different forms of discrimination can have those complaints heard together²⁵
- giving the Australian Human Rights Commission stronger enforcement powers—such as the power to investigate instances of discrimination (including systemic discrimination) on its own initiative and to help individuals with their complaints, including funding litigation²⁶

¹⁷ For example, D Allen, Submission; WomenSpeak Alliance, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; B Smith, Submission; S Martin, Submission.

¹⁸ National Ethnic Disability Alliance, Submission.

¹⁹ For example, Australian Federation of Disability Organisations, Submission; NSW Council of Social Service, Submission; D Allen, Submission; Australian Human Rights Commission, Submission; B Smith, Submission.

²⁰ D Allen, Submission.

²¹ For example, Office of the Tasmanian Anti-Discrimination Commissioner, Submission; Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Commission, Submission.

²² For example, Anti-Discrimination Commission Queensland, Submission; AIDS Council of NSW, Submission; Australian Coalition for Equality, Submission; LGBTI Network, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Victorian Bar, Submission; Tasmanian Gay and Lesbian Rights Group, Submission.

²³ Tasmanian Gay and Lesbian Rights Group, Submission; LGBTI Network, Submission.

²⁴ Australian Human Rights Commission, Submission.

²⁵ For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; WomenSpeak Alliance, Submission; Law Council of Australia, Submission; Mental Health Legal Centre, Submission.

²⁶ For example, D Allen, Submission; Law Council of Australia, Submission.

- removing or amending some of the exemptions in anti-discrimination law.²⁷ For example, some submissions noted that migration decisions are exempt from the *Disability Discrimination Act 1992* (Cth)²⁸
- adopting the Senate Committee on Legal and Constitutional Affairs' recommendations in relation to the *Sex Discrimination Act 1984* (Cth).²⁹

A constitutional guarantee of equality

A number of submissions proposed that a guarantee of equality be inserted in the Constitution.³⁰ The Human Rights Law Resource Centre said this would have much symbolic power and would ensure that governments could not easily amend or overturn through legislation the right to equality.³¹

The centre noted that constitutional entrenchment and protection of equality are particularly necessary in Australia because under s. 51(xxvi) of the Constitution parliament has the power to pass laws that are detrimental to or discriminatory against the people of any race by reference to their race.³²

Given the difficulty of amending the Constitution and the need to consider carefully how an equality provision might work, the Human Rights Law Resource Centre recommended that a referendum on a constitutional equality guarantee be considered after an equality Act has been implemented.³³ The Australian Human Rights Commission proposed a national inquiry into the matter.³⁴

National security legislation

As discussed in Chapter 5, a number of submissions argued that Australia's national security legislation does not strike a suitable balance between national security and respect for human rights.³⁵ Similar concern about this was evident at a

²⁷ For example, J Goldbaum, Submission; V Ray, Submission; Australian Education Union, Submission; OUTthere Rural Victorian Youth Council for Sexual Diversity, Submission.

²⁸ For example, Novita Children's Network, Submission; Australian Federation of Disability Organisations, Submission; National Ethnic Disability Alliance, Submission.

²⁹ For example, Women's Legal Services NSW, Submission; WomenSpeak Alliance, Submission; UNIFEM Australia, Submission, citing Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

³⁰ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; A Tseng, Submission; Women's Legal Services NSW, Submission. The Australian National University National Centre for Indigenous Studies suggested inserting in the Constitution a 'right to be free from discrimination on the basis of race': ANU National Centre for Indigenous Studies, Submission.

³¹ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

³² *ibid.*, citing *Kartinyeri v Commonwealth* (1998) 152 ALR 140, 571–3.

³³ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

³⁴ Australian Human Rights Commission, Submission.

³⁵ For example, Victorian Bar, Submission; Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity, C Michaelsen), Submission; Law Council of Australia, Submission; Public Interest Law Clearing House, Submission; J Wilson, Submission; Amnesty International Australia, Submission.

number of community roundtables.³⁶ A total of 344 submissions to the Committee expressed support for dedicated legislation to respond to specific aspects of human rights—for example, in relation to national security legislation.

Overall, the Committee was made aware of considerable community disquiet about the existing national security legislation—in particular, that it does not strike a suitable balance between the need to protect Australians from harm and the need to protect individual rights and the community’s sense of ‘fair play’. A high level of support for amending national security legislation to better reflect this balance was evident.

In 2009 the UN Human Rights Committee urged the Australian Government to amend its counter-terrorism laws and practices so that they would comply with the International Covenant on Civil and Political Rights.³⁷ On 12 August the federal Attorney-General released a discussion paper dealing with a number of proposals for amendments to national security legislation. The proposals ‘seek to achieve an appropriate balance between the Government’s responsibility to protect Australia, its people and its interests and instilling confidence that our national security and counter-terrorism laws will be exercised in a just and accountable way’.³⁸ The government has also introduced into the Federal Parliament legislation to establish a National Security Legislation Monitor to conduct annual reviews of the operation of national security and counter-terrorism legislation and to extend the mandate of the Inspector-General of Intelligence and Security to cover agencies such as the Australian Federal Police.³⁹ The discussion paper deals with some, but not all, of the concerns raised during the Consultation.

In the Committee’s view the existing national security legislation gives rise to serious human rights concerns, and action should be taken to redress this. A review of national security legislation, policies and practices should form part of the Federal Government’s human rights audit.

The Committee’s findings

As discussed in Chapter 5, the Committee was informed of a range of federal legislation, policies and practices that do not adequately reflect human rights

³⁶ For example, Queanbeyan, Community Roundtable; Katherine, Community Roundtable; Busselton Community Roundtable; Alice Springs, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo Community Roundtable, Newcastle Community Roundtable, Melbourne, Community Roundtable; Cronulla, Community Roundtable.

³⁷ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009).

³⁸ Attorney-General, the Hon. Robert McClelland MP, *Media Release: national security legislation and discussion paper*, 12 August 2009.

³⁹ *ibid.*

considerations or do not fully implement Australia's international human rights obligations.

Among the examples that were mentioned over and over in submissions and community roundtables were the following:

- a federal anti-discrimination framework that does not protect a right of equality or take account of all possible areas of discrimination that receive protection in international law
- racial discrimination legislation that has been overridden by the Federal Parliament on a number of occasions in relation to Indigenous peoples
- national security legislation that is considered to reflect an improper balance between the need to protect the community from harm and the need to safeguard individual liberties
- an immigration framework that permits the indefinite detention of people who have committed no offence and appears to have resulted in serious mental harm for some of those subject to it.

The Committee also became aware of a degree of community concern about particular practices on the part of the Federal Government and its agencies that appear to fall short of Australia's human rights obligations. This included practices that led to some members of the 'Bali Nine' facing execution in Indonesia and a view that the government could have done more to assist an Australian citizen, David Hicks, while he was detained by the US Government in Guantanamo Bay.

The Committee notes that these are the 'high-profile' examples of a broader concern among many in the community. There is disquiet about an apparent 'disconnect' between the human rights obligations Australia has voluntarily assumed at the international level and its performance in implementing those obligations in domestic legislation, policy and practice. Indeed, as noted, 344 submissions to the Committee expressed support for dedicated legislation to respond to specific aspects of human rights—including national security legislation.

In the Committee's view the Federal Government should conduct an audit of all federal legislation, policy and practices to determine whether they comply with Australia's international human rights obligations and, if not, amend them so that they do comply. The Committee notes again that this would be a substantial task that is unlikely to be carried out in the short term. It is, however, a fundamental and necessary step towards ensuring that the human rights that are important to the Australian community are adequately protected and promoted.

If a federal Human Rights Act is enacted, the audit could be conducted before the legislation comes into force. Should the government decide against the introduction

of a Human Rights Act, there would be an even greater need to review the existing framework to ensure that it complies fully with Australia's international obligations.

Recommendation

Recommendation 4

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas:
 - anti-discrimination legislation, policies and practices
 - national security legislation, policies and practices
 - immigration legislation, policies and practices
 - policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

7.2 Human rights in the development of legislation and policy

It is not enough simply to deal with the existing gaps in current legislation, policies and practices: mechanisms are also needed to ensure that human rights are taken into account when policies and legislation are being formulated.

There appears to be a high level of community support for such mechanisms. In the Colmar Brunton Social Research telephone survey of 1200 people, participants were offered a range of options for human rights protection and asked whether they supported them. The options attracting most support were for 'parliament to pay attention to human rights when making laws' (supported by 90 per cent of respondents) and for 'governments to pay more attention to human rights when

they are developing new laws and policies' (supported by 85 per cent of respondents).⁴⁰

The following sections outline a variety of ways of encouraging parliament and government to 'pay attention' to human rights in the formulation of new laws and policies. The Committee notes that such mechanisms could be included as part of the framework for a Human Rights Act (as discussed in Chapter 14) or could be introduced as stand-alone measures. The discussion that follows here focuses on how they could operate in the absence of such legislation.

Human rights impact statements

One option is a requirement that all Cabinet submissions (including proposals for new or amended laws or policies) contain a 'human rights impact statement'. The statement could provide an assessment of whether a proposed law or policy is consistent with human rights and the reasons for any inconsistency. It could also note any limitation placed on a human right, as well as the limitation's purpose and justification and whether there is any less restrictive means of achieving the purpose.⁴¹ These statements could be prepared by the Minister responsible for the proposal or by a specialist unit in the Attorney-General's Department. Proposals could be assessed for compliance with all of Australia's international human rights obligations or a consolidated list of those obligations.

The ACT's Cabinet Paper Drafting Guide requires that all Cabinet submissions state whether the proposal in question is compatible with the *Human Rights Act 2004* (ACT). The Victorian Government has issued guidelines requiring that any policy or law proposals submitted to Cabinet identify any associated human rights impacts. New Zealand's *Cabinet Manual* requires that any draft legislation presented to Cabinet be certified as human rights compliant.⁴²

Sixty-one submissions to the Committee expressed support for the use of human rights impact statements.⁴³ Associate Professor Simon Evans submitted that the requirement for human rights impact statements should apply to all policy proposals 'brought forward for approval' at departmental, ministerial or Cabinet level and that an agency should be responsible for auditing the quality of such statements.⁴⁴ The New South Wales Bar Association argued that the process could be extended beyond Cabinet decision making to decisions taken by individual Ministers.⁴⁵ The

⁴⁰ Colmar Brunton Social Research, *National Human Rights Consultation—community research phase* (2009).

⁴¹ NSW Bar Association, Submission.

⁴² Department of Prime Minister and Cabinet (NZ), *Cabinet Manual 2008* (2008) 95.

⁴³ For example, Australian Human Rights Commission, Submission; S Evans, Submission; Law Council of Australia, Submission; Oxford Pro Bono Publico, Submission; NSW Bar Association, Submission; Australian Council of Social Service, Submission.

⁴⁴ S Evans, Submission.

⁴⁵ NSW Bar Association, Submission.

Australian Human Rights Commission suggested that the Commonwealth *Legislation Handbook* should require that Ministers and their departments take account of human rights when developing new laws.⁴⁶

The advantage of human rights impact statements is that they can facilitate early identification of human rights shortcomings. The ACT Human Rights Commission submitted,

In practice, [the requirement for Cabinet submissions to deal with human rights compatibility] has resulted in human rights issues raised early on in [the] policy and law development process, which provides greater opportunity for detailed consideration of the impact of proposals on human rights.⁴⁷

The Victorian Government submitted that the requirement ‘has resulted in numerous amendments to reduce adverse human rights impacts even before a policy or Bill is considered by Cabinet’.⁴⁸

Once identified, these potential adverse impacts could be resolved by departmental officers or the relevant Minister before a proposal is submitted for Cabinet approval. At the very least, Cabinet would be informed of any potential human rights implications of a proposal, in which case it could reject a proposal on the ground of non-compliance, require a Minister to amend the proposal, or approve the proposal despite its non-compliance after having made an informed decision to do so.

The Committee acknowledges that if this course of action were adopted considerable demands would be made of government and there would be significant associated costs. Included in these costs would be the costs of providing human rights training to departmental staff involved in policy and legislative development and the additional time involved in preparing statements for inclusion in Cabinet submissions. Although such training would in any case be required if many of the other reforms proposed during the Consultation were to be implemented, the Committee considers that this particular suggestion is best left to government for further consideration.

Statements of compatibility

Another option is a requirement that all Bills introduced into parliament be accompanied by a ‘statement of compatibility’, which would include an assessment of whether the Bill was compatible with human rights and a justification for any limitations imposed on human rights. The same requirement could apply to

⁴⁶ Australian Human Rights Commission, Submission.

⁴⁷ ACT Human Rights Commission, Submission.

⁴⁸ Victorian Government, Submission.

amendments proposed during parliamentary debate and to all proposed regulations being forwarded to the Executive Council or when they are tabled in Parliament.

There was broad support for the use of statements of compatibility as part of a federal Human Rights Act (see Chapter 14).⁴⁹ Like human rights impact statements, statements of compatibility could be required in the absence of a Human Rights Act: the statement could simply assess the proposed law's compatibility with all of Australia's international human rights obligations or with a consolidated list of these obligations.

Under the ACT's *Human Rights Act 2004* the ACT Attorney-General must prepare a compatibility statement for each Bill a Minister introduces into the Legislative Assembly. The Attorney-General must state whether he or she considers the Bill consistent with human rights and, if not, how it is inconsistent. Under Victoria's *Charter of Human Rights and Responsibilities Act 2006* any member of parliament who introduces a Bill (or another member acting on his or her behalf) must table a statement of compatibility when introducing the Bill. The statement must say whether the member considers the Bill compatible with human rights (and, if so, how) and, if not, the nature and extent of the incompatibility.

The United Kingdom's *Human Rights Act 1998* requires the Minister with responsibility for a Bill introduced into parliament to state whether the Bill is compatible with human rights. The New Zealand *Bill of Rights Act 1990* does not require such a statement for every Bill introduced into parliament: instead, where a Bill appears to be inconsistent with the human rights legislation, the Attorney-General must bring the inconsistent provisions to the attention of parliament.

The Victorian Government submitted that the requirement for a statement of compatibility 'has ensured that any limitations on rights are identified and explained to Parliament, and can inform any debate about the Bill'. It contended that such statements, along with the obligations on public authorities, 'have been the main drivers of cultural change across government'.⁵⁰ The ACT Government submitted that the process of preparing the statements has led to a 'dramatic increase in the dialogue within the public service about human rights related issues', which has in

⁴⁹ For example, Australian Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; Australian Council of Social Service, Submission; Castan Centre for Human Rights Law, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Law Council of Australia, Submission; R Merkel and A Pound, Submission; NSW Bar Association, Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; Public Interest Law Clearing House, Submission; Law Institute of Victoria, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Victorian Government, Submission; Baptistcare, Submission; Mental Health Legal Centre, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; N Gotzmann, Submission; Australian Human Rights Centre, Submission; Queensland Council of Social Service, Submission; ACT Human Rights Commission, Submission; Anti-Discrimination Commission of Queensland, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

⁵⁰ Victorian Government, Submission.

turn resulted in 'better policy processes and legislative outcomes'.⁵¹ Oxford Pro Bono Publico submitted that in the United Kingdom these statements have had a 'significant and beneficial effect at the early stages of legislative drafting, with attention now being systematically paid to human rights implications'.⁵²

Overall, submissions noted that statements of compatibility would contribute to the creation of a rights culture within the executive government⁵³, facilitate debate inside and outside parliament about the potential impact of new laws on human rights⁵⁴, increase transparency and accountability in law making⁵⁵, reduce the likelihood of rights being inadvertently infringed⁵⁶, and require the parliament to clearly justify any limitation of a human right.⁵⁷ The Law Council of Australia submitted:

This form of scrutiny is currently lacking within the federal Parliamentary system, which contains no formal mechanism to require Government to explain whether the proposed law complies with human rights, and if not why. Not only would this improve the accountability and transparency of the law making process, it would also act as a preventative measure by providing strong scrutiny of any new laws that purport to infringe or have the potential to infringe human rights.⁵⁸

When discussing a model for a federal Human Rights Act a number of submissions suggested that statements of compatibility should be required for all Bills (rather than government Bills only)⁵⁹ and should include reasons for the conclusion about compatibility.⁶⁰ Independent consultative committees in Tasmania and Western Australia have also recommended that any human rights Act in those jurisdictions require the government to give reasons as part of their statements of compatibility.⁶¹

The Human Rights Law Resource Centre noted that this would obviate the delays that have occurred in the United Kingdom when the Joint Committee on Human Rights has written to Ministers asking for proper reasons for their assertions of

⁵¹ ACT Government, Submission.

⁵² Oxford Pro Bono Publico, Submission.

⁵³ T Campbell and N Barry, Submission.

⁵⁴ Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁵⁵ Law Council of Australia, Submission.

⁵⁶ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁵⁷ Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁵⁸ Law Council of Australia, Submission.

⁵⁹ Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission.

⁶⁰ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission; Australian Council of Social Service, Submission; ACT Human Rights Commission, Submission.

⁶¹ A Byrnes, H Charlesworth and G MacKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 158.

rights compliance.⁶² The Victorian Government submitted that the requirement for reasons has been important in ‘ensuring the credibility and transparency of the process’.⁶³ In contrast, Associate Professor Jeremy Gans has suggested that in some cases these statements can become too complex and detailed:

Many statements of compatibility extend for several, sometimes dozens, of tightly spaced Hansard pages, incorporating all manner of rights assessments, minor and major, and including both detailed case analysis and some of the most laboured and bewildering rights talk imaginable. It is doubtful that anyone other than a handful of public servants and legal advisers ever reads a word of them.⁶⁴

Another question raised concerned whether, in the case of government Bills, the statements should be prepared by the Attorney-General or by the Minister responsible for the Bill. The ACT Human Rights Commission submitted that the former approach is ‘more rigorous and consistent’⁶⁵; the Victorian Government submitted that the latter approach ‘has ensured that there is ownership and responsibility for the Victorian Charter across the different portfolios of government’.⁶⁶

In the Committee’s view, statements of compatibility accompanied by sufficiently detailed reasons would be valuable in ensuring that human rights receive the attention they deserve in the formulation of legislation and regulations. If necessary, the legislation could be amended to avoid non-compliance. If not, the parliament would be alerted to the non-compliance and any justification for it, which would facilitate parliamentary and public debate about the potential impact and appropriateness of the measure.

Statements of compatibility should be required for all Bills introduced into the Federal Parliament, as well as all amendments debated in parliament and proposed subordinate legislation. The Committee prefers the ACT approach of having the Attorney-General prepare the statements for government Bills, considering that this would encourage a more rigorous and consistent process. Failing that, it would be preferable that statements of compatibility prepared by other departments are vetted by the Attorney-General’s Department.

A parliamentary scrutiny committee

Two hundred and two submissions to the Committee expressed support for greater parliamentary scrutiny in relation to human rights. A number of them proposed that

⁶² Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁶³ Victorian Government, Submission.

⁶⁴ J Gans, ‘Scrutiny of Bills under bills of rights: is Victoria’s model the way forward?’ (Paper presented at Australia – New Zealand Scrutiny of Legislation Conference, Canberra, 8 July 2009) 17. Associate Professor Gans is legal advisor to the Victorian Parliament’s Scrutiny of Acts and Regulations Committee.

⁶⁵ ACT Human Rights Commission, Submission.

⁶⁶ Victorian Government, Submission.

a parliamentary committee—that is, a committee consisting of members of parliament—be empowered to review Bills for their compatibility with human rights. Again, the majority of those who raised this option suggested that it be part of a human rights Act framework⁶⁷, although others pointed out that it could also be implemented in the absence of one.⁶⁸

Existing models

The Federal Parliament already has parliamentary committees that scrutinise proposed and existing legislation and matters relating to public administration and policy.

The Senate Standing Committee on the Scrutiny of Bills is required to report on whether Bills introduced into the Senate, as well as existing Acts of parliament, ‘trespass unduly on personal rights and liberties’.⁶⁹ Similarly, the Senate Standing Committee on Regulations and Ordinances is required to scrutinise regulations, ordinances and other legislative instruments that are tabled in the Senate to ensure that they do ‘not trespass unduly on personal rights and liberties’.⁷⁰

In the case of the Scrutiny of Bills Committee, at the end of each sitting week a legal adviser assesses Bills introduced into either house of parliament. The committee examines the adviser’s report within days and tables an *Alert Digest* to alert senators and members of parliament to any concerns. The Minister responsible for the Bill is encouraged to respond quickly, so that the house can debate and vote on the Bill with the benefit of the committee’s view and the Minister’s response.⁷¹

Throughout the Consultation the Committee heard doubt expressed 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 limited⁷², and how or whether to assess compliance with international human rights standards.⁷³ 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.

⁶⁷ For example, ACT Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; L Herron, Submission; Mental Health Legal Centre, Submission.

⁶⁸ For example, G Brandis, Submission; Australian Christian Lobby, Submission. In contrast, the Law Council expressed a strong view that such a parliamentary committee should not be considered a viable alternative to a federal human rights Act—Law Council of Australia, Submission.

⁶⁹ Standing Order of the Senate 24 (Scrutiny of Bills).

⁷⁰ Standing Order of the Senate 23 (Regulations and Ordinances).

⁷¹ M Tate, Submission.

⁷² Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁷³ Law Council of Australia, Submission; S Evans, Submission. See also Oxford Pro Bono Publico, Submission.

On the other hand, Harry Evans, the Clerk of the Senate, suggested during the public hearings that the two committees:

... have a considerable impact on the content of legislation. Their scrutiny discourages executive departments from attempting any major infringement of rights and liberties in the preparation of legislation. They also bring about the amendment of legislation after its introduction.⁷⁴

In the United Kingdom the Joint Committee on Human Rights consists of members from each house of parliament and has very broad terms of reference; among other things, it is required to consider ‘matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)’. The committee scrutinises government Bills for human rights compliance, carries out inquiries into human rights matters, and reviews the United Kingdom’s response to adverse human rights judgments.⁷⁵ Some of those who made submissions suggested that Australia should follow this model.⁷⁶

The ACT’s Scrutiny of Bills and Subordinate Legislation Committee reports to the Legislative Assembly on human rights considerations raised in all new Bills. In Victoria the *Charter of Human Rights and Responsibilities Act 2006* requires the Scrutiny of Acts and Regulations Committee to examine any Bill—or statutory rule, as provided for in the *Subordinate Legislation Act 1994*—and report to parliament on its compatibility with human rights. A 2007 review noted the number of cases in which the committee’s evaluation of a Bill differed from the government’s compatibility statement. In some cases the committee had raised human rights questions that had not been identified in the compatibility statements.⁷⁷

Associate Professor Jeremy Gans has noted that a particular problem for the Scrutiny of Acts and Regulations Committee is the need to assess what limits on rights are reasonable. The committee might have to make inquiries about ‘demonstrable justification’ and whether there are ‘less restrictive reasonably available’ alternatives. Professor Gans says:

Reaching firm views on such matters risks turning SARC into a government policy scrutiny committee. In practice, what prevents this is SARC’s lack of capacity to

⁷⁴ H Evans, Clerk of the Senate, Public Hearings.

⁷⁵ Joint Committee on Human Rights <www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm> at 28 August 2009.

⁷⁶ For example, T Campbell and N Barry, Submission; Australian Lawyers for Human Rights, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Centre, Submission; Australian Human Rights Commission, Submission.

⁷⁷ A Byrnes, H Charlesworth and G MacKinnon, *Bills of Rights in Australia: history, politics and law* (2009), 133.

assess policy; rather, SARC's response to these sorts of issues is either to ask for further information from Ministers or refer contentious issues to Parliament.⁷⁸

Possible options

During the Consultation the Committee became aware of the substantial support for greater parliamentary scrutiny of human rights and, in particular, a parliamentary committee that would scrutinise proposed Bills and provide to the parliament advice on their compatibility with a Human Rights Act.⁷⁹ There are two main options for remedying the situation: refining the existing system or establishing a committee specifically to deal with human rights.

Refine the existing parliamentary committee system

Refining the existing parliamentary 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. Professor Michael Tate suggested that this could include the rights contained in the Constitution, the common law and other legislation and Australia's international human rights obligations implemented in domestic law.⁸⁰ In his view, this formulation:



Reverend Father the Hon. Michael Tate AO argues for greater parliamentary scrutiny.

... has the merit of being politically uncontroversial in that it refers to the sources of law with which we are familiar. And is ambulatory: able to encompass any changes made by the electorate in referenda, by the judiciary expounding Constitutional and Common Law, by the Parliament passing legislation, or by the Government ratifying treaties incorporated into law.⁸¹

The two committees could also be given stronger powers—for example, to 'declare' rather than report incompatibility—which might give their conclusions more weight in parliamentary and community debates on proposed legislation.⁸² In Professor Tate's

⁷⁸ J Gans, 'Scrutiny of Bills under bills of rights: is Victoria's model the way forward?' (Paper presented at Australia – New Zealand Scrutiny of Legislation Conference, Canberra, 8 July 2009) 12.

⁷⁹ For example, Australian Human Rights Commission, Submission. Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission; S Evans, Submission; Human Rights Council of Australia, Submission.

⁸⁰ For example, Australian Christian Lobby, Submission; M Tate, Submission.

⁸¹ M Tate, Submission.

⁸² For example, Australian Christian Lobby, Submission; M Tate, Submission.

view, the advantage of this option is that it could be implemented quickly, with sufficient resourcing of the committee’s secretariat and legal advice capacity.⁸³

Establish a parliamentary committee specifically to deal with human rights

A number of submissions proposed the establishment of a new parliamentary committee that would focus solely on human rights.⁸⁴ It was suggested that such a committee could have a range of functions. In relation to the scrutiny of Bills and legislation, Australian Lawyers for Human Rights proposed that the committee be able to conduct public hearings and seek advice from government departments and other sources of specialised knowledge.⁸⁵ Alice Edwards and Professor Robert McCorquodale submitted that the committee should be given draft legislation before the second reading because it is at this stage that the UK Joint Committee on Human Rights has been able to usefully suggest amendments.⁸⁶ The Australian Human Rights Commission recognised that there might be cases where a Bill must be expedited through parliament, leaving insufficient time for full pre-legislative scrutiny: in this circumstance parliamentary review of the legislation should be required after a fixed period.⁸⁷ It was also suggested that the committee should have the power to review proposed and existing legislation (and subordinate legislation) on its own initiative—for example, in response to a report from an independent body such as the Australian Human Rights Commission—or following referral from either house of parliament.⁸⁸

As for other potential roles, the Human Rights Law Resource Centre proposed that the committee be able to conduct inquiries into any questions referred to it by parliament, conduct thematic inquiries into human rights matters, assist in government responses to declarations of incompatibility (under a Human Rights Act), and assist in government responses to the decisions and concluding observations of UN treaty-oversight bodies such as the Human Rights Committee.⁸⁹

Senator George Brandis SC, on behalf of the Federal Opposition, signalled the Opposition’s support for a new parliamentary committee—either a joint standing committee or a senate standing committee. It supported such a committee scrutinising Bills in the light of Australia’s international human rights obligations, noting that this would place greater emphasis on human rights ‘at the heart of the political system itself, while it is free of the potentially undemocratic consequences

⁸³ M Tate, Submission.

⁸⁴ For example, Australian Lawyers for Human Rights, Submission; T Campbell and N Barry, Submission; B Horrigan, Submission; Oxford Pro Bono Publico, Submission; A Edwards and R McCorquodale, Submission.

⁸⁵ For example, Australian Lawyers for Human Rights, Submission.

⁸⁶ A Edwards and R McCorquodale, Submission.

⁸⁷ Australian Human Rights Commission, Submission.

⁸⁸ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁸⁹ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

of placing unprecedented power to resolve essentially political questions in the hands of the judiciary'.⁹⁰

A number of submissions argued that the new parliamentary committee should be a joint committee⁹¹, which would allow both houses of parliament to contribute to the scrutiny process. Such a committee could be established by statute or by a resolution of both houses. On the other hand, in the public hearings Harry Evans, the Clerk of the Senate, was cautious about a joint committee:

The ability of the committees to bring about amendments of legislation largely depends on the lack of government control over the Senate; when the last government controlled both Houses (in July 2005 to December 2007), government legislation generally passed unamended. Joint committees are invariably controlled by the government. The Senate could be inhibited in amending legislation on civil liberties grounds when the legislation would have already been approved by a joint committee.⁹²

The Allen Consulting Group commented on the potential costs of a new parliamentary scrutiny committee:

In terms of costs associated with a scrutiny committee, these initially consist of costs accruing to the parliament associated with—recruitment of staff, new legislation clarifying the terms of reference, education about the revised committee to MPs and their advisers, education to government departments about the committee's new role, and, education to the committee members themselves and their research staff ... The committee's ongoing role requires government funding for expert advice.⁹³

The consultants considered this a low-cost option, noting that transition and ongoing costs would be 'moderate' and that it would be reasonably quick to implement.⁹⁴

The Committee notes that there would be costs associated with establishing a new parliamentary committee. On the other hand, though, if a new committee were created this would avoid overburdening existing committees, allow for the appointment of members and staff with demonstrated expertise in the area of human rights, and foster the development of expertise in human rights scrutiny. The Committee also sees value in both houses of parliament being involved in the

⁹⁰ G Brandis, Submission.

⁹¹ For example, A Coles, Submission; A Edwards and R McCorquodale, Submission; ACT Human Rights Commission, Submission; Human Rights Council of Australia, Submission; E Della Torre, Submission.

⁹² H Evans, Clerk of the Senate, Public Hearings.

⁹³ The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

⁹⁴ *ibid.*

scrutiny process and therefore feels that a joint committee would be the most suitable solution.

The Committee's findings

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.

Statements of compatibility should be required for all Bills introduced into Federal Parliament, as well as all amendments debated in parliament and proposed legislative instruments. The statements should contain reasons for the asserted compatibility or incompatibility and, in the case of government Bills, should be prepared by the Attorney-General. A Joint Committee on Human Rights should also be established to review all Bills and regulations for human rights compliance.

If a federal Human Rights Act is enacted, each of these mechanisms—the statements of compatibility and the joint committee—could be used to assess compliance with the human rights expressed in the Act. If the government decides against enacting a Human Rights Act, the mechanisms should be used to assess the compliance of proposed legislation with all of Australia's international human rights obligations or against a consolidated list of those obligations.

Recommendations

Recommendation 5

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within two years of the publication of the interim list.

Recommendation 6

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

Recommendation 7

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

