‘Enhanced scrutiny of human rights: Of parliament, pigs and lipstick’

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Stream 1: ‘Human Rights Protection: the non-adversarial approach’

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Introduction

The 2009 National Human Rights Consultation, led by Father Frank Brennan AO, recommended a detailed template of human rights law reform. At the centre of that template is a proposal for a national Human Rights Act (HRA), based on the ‘dialogue model’ of statutory bills of rights. The Brennan Report also recommended a suite of further reforms to legislation such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth), to public education and to the training of public servants.

The Brennan Report did not present the Government with a universally-accepted option to amend Australia’s human rights regime. In particular, Attorney-General Robert McClelland emphasised his concern that the headline reform, a HRA, was divisive.[2] On this basis alone, the Government announced, in its response to the Brennan Report, that many of the more ambitious reforms would not be pursued in the short- or medium-term. Instead, the Government’s *Human Rights Framework* foreshadowed only one major legislative reform: to establish a new form of parliamentary scrutiny of draft laws against human rights standards.[3] Legislation to bring this about was recently introduced into the Commonwealth Parliament.

While some of its recommendations are controversial, the Brennan Report disclosed a widespread desire in the Australian community for human rights reform. That desire was recognised to some degree by both major political parties, and also in the wider community. There was, without doubt, a clear mood for *change*. Something about the Government’s response to the Brennan Report brings to mind Barack Obama’s memorable statement, made during the 2008 presidential election campaign, in which he criticised his Republican opponent for seeking to co-opt Obama’s change-themed election slogan. Obama said:

> John McCain says he’s about change, too—except for economic policy, health care policy, tax policy, education policy, foreign policy and Karl Rove-style politics. That’s just calling the same thing

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2 Robert McClelland, ‘Launch of Australia’s Human Rights Framework’ (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010), 3.

3 Australian Government, *Australia’s Human Rights Framework* (2010), 1, 11.

> something different. You can put lipstick on a pig; [but] it's still a pig. You can wrap an old fish in a piece of paper called change; it's still going to stink after eight years.[4]

This provokes a crucial question: will the federal Government's reform package lead to significant, positive change in Australia's approach to human rights; or will we just be left with a lipstick-smeared pig? This paper seeks to address that question by considering three related questions:

(i) What is the Government trying to achieve with this new legislation?
(ii) Is there a need to make reforms in the area that the legislation will cover?
(iii) Will this legislation be likely to achieve the Government's aims?

What reforms does the Government propose?

On 2 June 2010, the Attorney-General introduced two Bills into the House of Representatives.[5] According to the Attorney-General, the main Bill—ie, the Human Rights (Parliamentary Scrutiny) Bill 2010—is intended to "establish[] a dialogue between the executive, the parliament and ultimately the citizens of Australia", with a view to

> improv[ing] parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development.[6]

The Bill seeks to achieve this objective in two ways. First, it will establish a new committee of both Houses of Parliament called the Joint Committee on Human Rights (JCHR), which will be responsible for scrutinising draft legislation against human rights standards. Secondly, it will require Bills and certain draft subordinate legislation to be accompanied by a 'statement of compatibility'. Such a statement will "include an assessment of whether the Bill is compatible with human rights".[7] While not binding on a court, the intention of this provision is to assist in the interpretation of legislation that might have a deleterious impact on human rights,[8] and to decrease the likelihood of unintended infringements of human rights.

Prior to the calling of the 2010 federal election, the two Bills had been referred to the Senate Standing Committee on Legal and Constitutional Affairs. While the Committee was due to report on 17 August 2010, and it would have been within its powers to continue the inquiry notwithstanding the fact that an election had been called for 21 August 2010, the Committee decided to discontinue this particular inquiry.[9] Assuming

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4 Quoted in Jeff Zeleny, 'Feeling a Challenge, Obama Sharpens His Silver Tongue', *New York Times* (10 September 2008), A20.

5 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (Cth).

6 Australian Parliament, *Parliamentary Debates (Human Rights (Parliamentary Scrutiny) Bill 2010 – Second Reading Spech*, 2 June 2010, 4900 (Attorney-General Robert McClelland).

7 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cl 8(3).

8 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), 4-5.

9 Emails from Julie Dennett (Secretary, Senate Standing Committee on Legal and Constitutional Affairs) to Edward Santow, 8 July 2010, 23 July 2010, 6 August 2010, 12 August 2010. Note: in an earlier draft of this paper, citing Ms Dennett, I stated that "in the event that an election is called before 17 August, Senate practice is to cease all pending inquiries". This statement was ambiguous and might have indicated that the Senate Committee lacked the power to continue its

that the Government is returned at the next election without a majority in the Senate, and assuming that it opts to re-introduce these two Bills, there remains a question whether the Bills are likely to pass in the Senate. At least one Opposition Senator, Julian McGauran, has indicated concern with the Bills;[10] something to which I will return later in this paper. The Greens and independent Senators have not stated their position.

Proposal for an Australian Joint Committee on Human Rights

Response to inadequacies in the status quo

While there is currently no single parliamentary committee that has sole responsibility for considering the human rights impact of draft legislation, such considerations arise from time to time, albeit in an ad hoc manner. The most specific exhortation on a federal parliamentary committee to consider human rights 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;
> ...

However, as I have argued elsewhere, there are many problems with this ad hoc system generally, and Standing Order 24(1)(a) specifically.[11] For instance, the parliamentary committees are given no instruction as to *which* human rights should be taken into account. Just as importantly, the current system does not set out *how* draft laws should be assessed against human rights standards. Human rights are rarely absolute, and it is often necessary to reconcile competing rights or rights that compete with other compelling interests. Such defects can contribute to a situation in which scant attention is given by Members of Parliament to the human rights impact of even draconian laws.[12]

To some extent, the Human Rights (Parliamentary Scrutiny) Bill 2010 will improve this situation. The advent of a joint parliamentary committee, dedicated to the consideration of human rights, will make human rights scrutiny a more systematic process. Similarly, the attempt to define the term 'human rights', though imperfect, will remove at least some of the serendipity that now exists, wherein some rights are considered by parliamentary committees but others are seemingly forgotten. Nevertheless, as I will explain, I doubt that the structural inadequacies in the present system will be properly rectified by the new Bill.

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inquiries after the calling of an election. As explained above, this is not the case, and I apologise to Ms Dennett and any readers of the earlier draft who were misled.

10 See Susanna Dunkerley, 'Govt told to scrap human rights changes', *The Age* (5 July 2010).

11 See especially: Edward Santow, 'The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8, 26-27.

12 See, eg, Simon Evans and Carolyn Evans, 'Australian parliaments and the protection of human rights' (2007) 47 *Papers on Parliament* 17.

Problems with the Australian JCHR

The idea for an Australian JCHR came from a committee of the same name in the UK Parliament. However, the Westminster committee differs in many key respects from the mooted Canberra counterpart. Most obviously, the UK's JCHR was introduced as part of a far more comprehensive human rights reform package that included the *Human Rights Act 1998* (UK). That is, the UK's JCHR is given a defined role in an integrated system of human rights protection that involves all three arms of government. This leads to three key differences between the operation of the UK's joint committee and Australia's.

First, while the UK's HRA specifies which particular human rights are to be given special protection, the Australian committee will be instructed to consider "the rights and freedoms recognised or declared" in seven key international instruments, such as the *International Covenant on Civil and Political Rights*. This general reference to the rights set out in those instruments does nothing to adapt those rights to Australian legal conditions. It also lacks the clarity and simplicity of setting out clearly a list of rights in the Bill itself.

Secondly, under a HRA, laws must be interpreted consistently with protected rights, subject to parliamentary intent. The courts supervise this interpretive process, determining the authoritative meaning of legislation. If Parliament disagrees with a particular judicial interpretation, it can amend the law in question. This promotes what is known as a 'constitutional dialogue', whereby Parliament and the courts each have a distinct role to play in rights protection.[13] While Parliament retains the final say, with the courts denied the power to invalidate any legislation that is incompatible with human rights, this system gives Parliament the benefit of the courts' interpretation of laws as they arise in practice through legal disputes. That is, by interpreting laws as they apply in 'real life', the courts are able to offer a more practical perspective than Parliament is capable of, given the necessarily abstract or hypothetical analysis that Parliament must undertake. Shorn of its moorings to a HRA, the Australian JCHR will be unable to participate in the constitutional dialogue that is central to the role played by its UK cousin. The Australian committee will only consider laws in the abstract, and will not derive the assistance of judicial interpretation of those laws.

Thirdly, the Australian JCHR is not given any instruction in how to deal with the inevitable conflicts between rights, or with other competing interests. This transposes a major weakness from the current system of parliamentary scrutiny into the new one. Whether or not the Government introduces a HRA, I would argue that the Bill should be amended to follow the recommendation in the Brennan Report. That is, in respect of non-absolute, or 'derogable', human rights, the Report recommends that Parliament should

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13 The term 'constitutional dialogue' was coined in the Canadian context, but has been co-opted more broadly to describe the operation of statutory bills of rights elsewhere. See: Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75; Edward Santow, 'The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8, 13-14.

subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes.[14] 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:
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> (a) the nature of the right; and
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> (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
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[15]

Such limitations find their basis in international law,[16] and are present in legislation in other jurisdictions as well. These limitations establish a principled framework—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.

Statements of compatibility

The obligation to accompany draft primary legislation with a statement of compatibility attaches to the Member of Parliament introducing the relevant Bill, or the person responsible for any applicable subordinate legislation.[17] The statement of compatibility requirement derives from a recommendation in the Brennan Report.[18] The Brennan Report was itself influenced by this feature of some dialogue-model HRAs. In particular, the respective human rights statutes of the UK, Victoria and the ACT all contain a similar provision.

Liberal Party Senator Julian McGauran opposes this Bill largely because of the statements of compatibility feature. He explained his concerns as follows:

> The Bill will fundamentally change the way in which laws are passed in Australia. Every law will be scrutinised against the declarations of the UN and every Minister will be obliged to write the law according to UN charters. UN treaties will effectively be merged into Australian law possibly opening up a direct appeal process to UN bodies such as the Human Rights Council for every piece of law. What seems to be an innocuous and non-controversial Bill may well transform our whole legislative system... Australia is a signatory to numerous UN Human Rights treaties. These treaties can be an important underlying reference point for drafting laws in our country. However these treaties should not carry legal weight in our domestic laws and nor should the UN be handed like authority to our Parliament.[19]

There are several points here that merit further analysis. First, the honourable Senator suggests that UN treaties will somehow merge into Australian law, leading to the possibility of direct appeals to UN bodies for every piece of law. This is impossible. As

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14 Frank Brennan et al, *National Human Rights Consultation Report* (2009), Recommendation 23.

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

16 See, eg, *Universal Declaration of Human Rights 1948*, Article 29(2); *International Covenant on Civil and Political Rights 1966*, Artcle 22(2).

17 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cls 8(1), 9(1).

18 See Frank Brennan et al, *National Human Rights Consultation Report* (2009), Rec's 6 and 26.

19 Senator Julian McGauran, 'Labor's Hidden Agenda for De Facto Bill of Rights' (Press release, 5 July 2010).

McHugh J stated in *Dietrich*, and as the High Court has made clear on many subsequent occasions, the only way that international law can become part of Australian law is by direct incorporation of the *provisions* of the relevant international instrument.[20] Mere reference to the instrument is not enough.

Prima facie, this might appear to rule out the Senator's second prediction (that there will be direct appeals to UN bodies for every piece of law). But, in fact, this prediction might not be so far-fetched. Under international law, in order to bring a matter to a UN body such as the Human Rights Committee, an applicant must first exhaust all domestic remedies. This means that the applicant must show that Australian courts cannot provide a remedy under existing laws.[21] This usually involves the applicant going through the entire appellate process, but an individual does not need to do so where there is no local remedy.[22] The Human Rights (Parliamentary Scrutiny) Bill 2010 expressly provides that statements of compatibility are *not* binding on a court or tribunal.[23] That is, by the Government ensuring that such statements are non-justiciable, at least theoretically, matters might be brought directly to the UN committee system, by-passing the Australian judicial system. However, there are obvious impediments of cost and time in taking this route. Moreover, such UN committees lack determinative powers. While on numerous occasions the Human Rights Committee has found Australia to be in serious breach of its human rights obligations, the Australian Government has frequently ignored these findings, and can do so with impunity.[24]

Next, Senator McGaurin believes that the Bill will mean that "every Minister will be obliged to write the law according to UN charters". However, I believe that this statement is apt to mislead. The Bill expressly provides that failure to submit an adequate statement of compatibility—or indeed failure to submit any statement of compatibility at all—will *not* affect the validity of the law in question.[25] In other words, Ministers who do not wish to analyse the human rights impact of a draft law over which they are responsible can simply opt out of the whole process. Furthermore, a statement of compatibility involves merely "an assessment of whether the Bill is compatible with human rights".[26] As has been seen in other jurisdictions, this does not prevent Ministers from introducing legislation that they believe impinges on human rights. Rather, it simply urges them to identify such impingements, so as to encourage open parliamentary and public debate about the relative merits of such an unusual move.

Finally, with respect, the Senator's general conclusion that statements of compatibility would "transform our whole legislative system" and produce some kind of "de facto Bill of Rights" is patently false. I say so with a touch of melancholy, because I personally

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20 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

21 See, eg, *Ambatielos Arbitration (Greece v United Kingdom)* (1956) 23 ILR 306.

22 See the discussion in Markus Schmidt, 'United Nations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2010) 391, 412.

23 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cls 8(4), 9(3); Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), 5.

24 Hilary Charlesworth, *Human rights: Australia versus the UN* (2006), 3.

25 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cls 8(5), 9(4).

26 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cls 8(3), 9(2).

support a HRA (albeit not a clandestine or de facto one). None of the indicia of a statutory or constitutional bill of rights is present in the regime established in this Bill. There will be no obligation on the Government, or anyone else, to comply with the human rights referred to in the Bill. There is no provision anywhere in the Bill that would allow a court to invalidate legislation it deems incompatible with human rights. Indeed, the courts are not even empowered to consider this as a free-standing question. A Minister who fails to submit a statement of compatibility does not risk her legislation being called into question.

In fact, the only impact that this Bill will have on the judiciary is to provide further assistance to the courts in interpreting Parliament's intended meaning of legislation for which there is a statement of compatibility.[27] This is an exceptionally modest departure from the status quo. I think it highly unlikely to give rise to the prognostications suggested by Senator McGaurin. However, perhaps the more relevant question is: will it make any difference in practice? The answer will depend entirely on the extent to which the JCHR and individual parliamentarians take these matters seriously, and are willing to engage in constructive debate on the human rights impact of draft laws.

Conclusion

The two Bills, which were before Parliament at the time that the 2010 federal election was called, represent an incrementalist approach to human rights reform. To be clear: these Bills are in no way radical departures from the status quo, and they do not represent a HRA Trojan horse.

There is merit in the proposal to consolidate responsibility for human rights scrutiny into a single joint parliamentary committee. Similarly, there are likely to be some benefits in statements of compatibility, as they will help to make consideration of human rights part of the established system of policy formation and legislative drafting. However, in my view, these proposals will be unlikely to address the structural problems, identified in the Brennan Report, in relation to Australia's human rights practice. Only a more comprehensive reform template would be likely to achieve this goal.

[27] See Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), 5.