

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) BILL 2010

Outline

This Bill, together with the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, implements the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010. The Human Rights Framework outlines a range of measures to further protect and promote human rights in Australia. It reflects the key recommendations of the National Human Rights Consultation Committee which undertook extensive public consultation on the promotion and protection of human rights in Australia.

Part 1 of the Bill deals with preliminary matters including commencement and definitions. The Bill will define 'human rights' as the rights and freedoms recognised or declared by the seven core United Nations human rights treaties as they apply to Australia. These treaties are:

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural 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, and
- Convention on the Rights of Persons with Disabilities.

Part 2 of the Bill establishes the Parliamentary Joint Committee on Human Rights (the Committee) and sets out the functions and administrative arrangements for the Committee.

The Committee will have the functions of examining Acts, bills for Acts and legislative instruments for compatibility with Australia's human rights obligations and reporting to both Houses of Parliament. It will also inquire into, and report to Parliament, on matters relating to human rights referred to it by the Attorney-General.

Part 3 of the Bill introduces a requirement for statements of compatibility to be prepared for all bills and legislative instruments subject to disallowance. A statement of compatibility must assess whether the bill or legislative instrument is compatible with the human rights in the seven core United Nations human rights treaties.

For bills, preparation and presentation to Parliament of a statement will be the responsibility of the Minister or private member or Senator responsible for the bill. For legislative instruments, the amendments in the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 will require a rule-maker to lodge a statement of compatibility as part of the explanatory statement of a legislative instrument. The explanatory statement is then tabled with that instrument in accordance with the requirements in the *Legislative Instruments Act 2003*.

Part 4 of the Bill deals with miscellaneous matters and enables the Governor-General to make regulations.

The Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 contains the consequential amendments to the Legislative Instruments Act relating to statements of compatibility. It also contains amendments to the *Administrative Appeals Tribunal Act 1975* to include the President of the Australian Human Rights Commission as an ex officio member of the Administrative Review Council, as announced under the Human Rights Framework, and related amendments.

Financial Impact Statement

The items in this Bill have no financial impact on Government revenue.

Part 1 – Preliminary

Clause 1: Short title

Clause 1 provides that when the Bill is enacted, it is to be cited as the *Human Rights (Parliamentary Scrutiny) Act 2010*.

Clause 2: Commencement

Sections 1-3 will commence on the day the Act receives Royal Assent. Parts 2, 3 and 4 of the Bill will commence on the later of 1 January 2011 and 28 days after the Act receives the Royal Assent.

Clause 3: Definitions

Clause 3 defines the key terms used in the Bill. The term ‘human rights’ is defined in the Bill as the rights and freedoms recognised or declared by the seven core United Nations human rights treaties as that treaty applies to Australia. The treaties are:

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural 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, and
- Convention on the Rights of Persons with Disabilities.

The term ‘rule maker’ has the same meaning as in the *Legislative Instruments Act 2003*.

Part 2—Parliamentary Joint Committee on Human Rights

Clause 4: Parliamentary Joint Committee on Human Rights

Clause 4 provides that as soon as practicable after commencement of the first session of each Parliament, a Joint Committee on Human Rights is to be appointed according to the practices of the Parliament.

Clause 5: Membership of the Committee

Clause 5 sets out the administrative arrangements for the establishment of the Committee and for the appointment of members according to the practices of Parliament. This clause is consistent with provisions for the appointment of other statutory committees such as the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, the Parliamentary Joint Committee on the Australian Crime Commission and the Parliamentary Joint Committee on Corporations and Financial Services.

The Committee will consist of ten (10) members of Parliament, five (5) members of the House of Representatives, to be appointed by that House, and five (5) members of the Senate, to be appointed

by the Senate. A Minister, President, Speaker, Deputy-President or Chair of Committees cannot be appointed to the Committee and will cease to be a member of the Committee if he or she obtains one of these offices after their appointment. Either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Committee appointed by that House.

Clause 6: Powers and proceedings of the Committee

Clause 6 requires all matters relating to the powers and proceedings of the Committee to be determined by resolution of both Houses of Parliament.

Clause 7: Functions of the Committee

Clause 7 sets out the functions of the Committee which are:

- to examine Bills for Acts and legislative instruments for compatibility with human rights
- to examine Acts for compatibility with human rights, and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General.

The Committee is to report on each of these matters to both Houses of Parliament.

The Committee will examine bills and legislative instruments and report to both Houses of Parliament on compatibility with human rights as defined in clause 3. This is primarily a traditional scrutiny function and will be the major activity of the Committee. The Committee will also be able to inquire more thoroughly into bills and legislative instruments including calling for submissions, holding public hearings and examining witnesses, when it considers this appropriate.

In addition to the scrutiny function, the Committee will be able to examine Acts and conduct broader inquiries on matters related to human rights referred to it by the Attorney-General. In performing these functions, the Committee will be able to call for submissions, hold public hearings and examine witnesses.

The Committee will be able to determine the manner in which it performs its scrutiny function to ensure that reports on compatibility of bills and legislative instruments with human rights are provided to Parliament in a timely manner.

Part 3—Statements of compatibility

Clause 8: Statements of compatibility in relation to Bills

Clause 8 sets out the requirements for preparation of statements of compatibility for bills and presentation of statements to Parliament. The clause does not prescribe a particular form for statements of compatibility but provides that a statement of compatibility must include an assessment of whether the bill is compatible with human rights as defined in clause 3. Statements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.

The member responsible for the bill must cause the statement of compatibility to be prepared. The statement of compatibility must be presented to the House or the Senate (as appropriate) by the member of Parliament who introduces the bill, or another member acting on his or her behalf. A statement will ordinarily form part of the explanatory memorandum for the bill.

Subclause 8(4) provides that a statement of compatibility in relation to a bill is not binding on a court or tribunal. This provision is not intended to exclude the operation of section 15AB of the *Acts Interpretation Act 1901* which deals with use of extrinsic material in the interpretation of an Act.

As is currently the case, courts may use extrinsic material to assist in determining the meaning of a provision in the event of ambiguity. This can include other material considered by Parliament in the passage of legislation such as accompanying Explanatory Memoranda, Second Reading Speeches and Parliamentary Committee reports. Consistent with current rules of statutory interpretation, a statement of compatibility and a report of the Joint Committee on Human Rights could be used by a court to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.

Subclause 8(5) provides that a failure to comply with this clause does not affect the validity or operation or enforcement of the Act or any other law of the Commonwealth.

Clause 9: Statements of compatibility in relation to certain legislative instruments

Clause 9 sets out the requirements for preparation of statements of compatibility for legislative instruments subject to disallowance under the Legislative Instruments Act. A statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights as defined in clause 3. As with bills, statements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislative instrument on human rights.

The rule-maker for a disallowable legislative instrument must cause a statement of compatibility to be prepared in respect of that legislative instrument.

The note under subclause 9(1) refers the reader to section 4 of the Legislative Instruments Act and explains that the statement of compatibility must be included in the explanatory statement for a legislative instrument to be prepared by the rule-maker. The Legislative Instruments Act sets out the process for tabling legislative instruments and accompanying explanatory statements. Amendments to the Legislative Instruments Act to include a requirement for statements of compatibility for a disallowable legislative instrument to form part of an explanatory statement prepared by the rule-maker of that instrument are contained in the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010.

Subclause 9(3) provides that a statement of compatibility in relation to a legislative instrument is not binding on a court or tribunal. This provision is not intended to exclude the operation of section 15AB of the Acts Interpretation Act. Consistent with current rules of statutory interpretation, a statement of compatibility in relation to a disallowable legislative instrument could be used by a court to assist in ascertaining the meaning of provisions in a legislative instrument where the meaning is unclear or ambiguous.

Part 4—Miscellaneous

Clause 10: Regulations

This clause enables the Governor-General to make regulations as required or permitted by the Bill, or as necessary or convenient in order to give effect to the Bill.