



*Submission to the National Consultation on Human Rights*

*May 2009*

### *Accountability Round Table*

#### *Submission to the National Human Rights Consultation Panel*

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We make this submission on behalf of the Accountability Round Table. This is a non-partisan organization which seeks to promote open and accountable government in Australia. Attached is a statement setting out our purposes.

All our members support the introduction nationally of comprehensive human rights legislation. We favour a model for such legislation that resembles those in the United Kingdom, New Zealand, the Australian Capital Territory and Victoria with its *Charter of Human Rights and Responsibilities Act* (the Charter). The purpose of this submission, however, is to focus attention on what we see as the benefits that will flow from the adoption of such legislation for transparent and accountable government, and informed and effective parliamentary deliberation.

At first sight, a connection between the issues raised in your reference and open and accountable government may not be readily apparent. It becomes clearer, however, when a model such as the Charter is considered.

The Charter model establishes procedures designed to ensure that any legislation put forward by government, or a member of parliament, will require a full exposure of its implications for people's fundamental human rights and the provision of reasons to the parliament should that legislation be inconsistent with them. In this regard we refer, for example, to the requirement in s.28 of the Victorian Charter in accordance with which a Minister must report to the parliament, in respect of any proposed legislation, as to whether it is compatible with the human rights contained in the Charter. A model provision in this respect might read as follows:

### **Attorney-General's statement on government bills**

- (1) This section applies to each bill presented to the House of Representatives or the Senate by a Minister or a private member and to any amendments to legislation proposed on the floor of the House.
- (2) The Attorney-General must, before the second reading of the bill, prepare a written statement (the *compatibility statement*) about the bill for presentation to the House of Representatives.
- (3) The compatibility statement must state—
  - (a) whether, in the Attorney-General's opinion, the bill is consistent with human rights; and
  - (b) if it is inconsistent, how it is inconsistent with human rights; and
  - (c) the reasons for these opinions.
- (4) If a statement is made under subsection (3)(b), the proposed Act must specify those parts of the Act that are inconsistent with human rights by stating expressly that those parts of the Act are to operate notwithstanding this Act.

The underlying rationale for such a provision is that it will require the executive government to take the human rights implications of its legislation, policy and programmes seriously. A Minister will not wish to be embarrassed by issuing a statement of compatibility only later to find that such a statement has been made in error. That, in turn, should ensure that officials and advisers taking part in legislative and policy development give adequate attention to human rights considerations. It is clear from the experience in the UK, New Zealand, the ACT and Victoria that just such an effect has occurred. Better policy and legislation is being made as a result.

In relation to the parliament two further beneficial effects may be expected. First, in Victoria for example, there is a requirement in s.30 of the Charter that the Scrutiny of Acts and Regulations Committee of the Victorian Parliament must scrutinise all bills and report to the Parliament as to whether they are compatible with human rights. Bearing in mind the range and content of the rights recognized in the Victorian Charter, this procedure will serve to inform parliamentary debate on a very wide range of legislation. As a result, it should facilitate the transparency of government

and parliamentary decision-making and the reasons for it in areas of fundamental importance to the citizens of this country. Consequently, government and parliament may be held to account more effectively. An examination of the Victorian Scrutiny of Acts and Regulations Committee's reports to date bears out this proposition. A model federal provision might be as follows:

### **Joint Standing Committee on Human Rights**

- (1) A Committee to be known as the Parliamentary Joint Standing Committee on Human Rights is to be established as soon as practicable after the commencement of this Act and after the commencement of the first session of each Parliament.
- (2) The Committee is to consist of 7 members, 3 of whom must be Senators and 4 of whom must be members of the House of Representatives.
- (3) The functions of the Committee are:
  - (a) to consider matters relating to human rights in Australia;
  - (b) to consider (and review) compatibility statements made under section xx of this Act;
  - (c) to review, within twelve months, any legislation enacted despite the Attorney-General having issued a compatibility statement expressing his or her opinion that the legislation is inconsistent with human rights;
  - (d) to consider findings of inconsistency made by courts under section xx of this Act;
  - (e) to report the Committee's comments and recommendations about the matters it has considered to each House of Parliament and to the responsible Minister;
  - (f) to present an annual report of its deliberations and conclusions to each House of Parliament and to the responsible Minister.

We submit that similar procedures should be included in any Human Rights Charter proposal that you may recommend. The splendid work of the United Kingdom Joint Parliamentary Committee on Human Rights provides a cogent example of the effectiveness of such a parliamentary review mechanism.

Secondly, under the Charter model, parliament is required to review legislation that is found by a Court to have been inconsistent with the human rights set down in the Charter. This process, which is consistent with the maintenance of parliamentary sovereignty, directs the Attorney-General upon receipt of a finding of inconsistency, to report that finding to the Parliament and then to make recommendations to the Parliament within a fixed period of time as to whether legislative amendments to rectify the inconsistency should be made. The combination of judicial scrutiny combined with parliamentary review should ensure that the human rights implications of legislation that appears inconsistent will be given final, intensive parliamentary consideration to the betterment and strengthening of human rights protection generally.

A recent meeting of constitutional experts which included Sir Anthony Mason, The Hon. Michael McHugh and the President of the Human Rights Commission, Catherine Branson QC, suggested the following mechanism to effect this purpose:<sup>1</sup>

**The Government to respond publicly if a court finds that a law is inconsistent with human rights**

If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of the Australian Parliament and require a government response.

An example of a possible process is as follows:

*The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in the Australian Parliament. The Government would be required to respond to the notification within a defined period (for example, 6 months).*

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<sup>1</sup> Catherine Branson QC, President of the Australian Human Rights Commission, Press Statement, May 6 2009.

Following the Government's response, Parliament might decide to amend the law in question to ensure its consistency with the Act. It would not, however, be required to do so.

We are of the view that these mechanisms, when taken together, would contribute substantially to strengthening both accountable government and effective parliamentary discussion and debate.

Yours sincerely,

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on behalf of;

The Hon Dr Race Mathews,

The Hon Alan Hunt AM,

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