



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE
Speaker (Chair), Ms Tara Cheyne MLA, Mr Shane Rattenbury MLA,
Mr Andrew Wall MLA

Submission Cover Sheet

Review of Standing Orders

Submission Number: 7

Date Authorised for Publication: 24/5/18



Joy Burch MLA (Chair)
Madam Speaker
Standing Committee on Administration and Procedure
ACT Legislative Assembly
CANBERRA ACT 2601

[by email: admin.proc@parliament.act.gov.au]

Dear Ms Burch

Review of Standing Orders

The ACT Human Rights Commission welcomes the opportunity to make a submission to the Committee's review of the current Standing Orders. We understand that the review is being undertaken pursuant to Standing Order 16, which 'requires the Committee in each term to inquire into and report on the operation of the standing orders and continuing resolutions of the Assembly with a view to ensuring that the practices and procedures of the Assembly remain relevant and reflect practices'.

Our submission addresses the Legislative Assembly's current arrangements for human rights scrutiny, and seeks to identify some of the ways in which we believe existing practices and procedures could be enhanced to reflect best practice and to improve the Assembly's engagement with human rights standards in the legislative process.

Strengthening the Assembly's oversight of human rights issues

The Legislative Assembly has a central role in the protection of human rights and freedoms in the ACT. In our ten-year review of the *Human Rights Act 2004* (HR Act),¹ we observed that the HR Act has made a genuine cultural difference to the work of the Assembly. The Act and the standards that it upholds are frequently referenced in parliamentary debates by members of the Assembly. Significantly, scrutiny reports by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) are routinely referred to in second reading debates of bills, and the committee's concerns are often cited as the basis for Government amendments to bills.

However, there remain gaps in the current scrutiny processes and several areas where we consider parliamentary oversight of human rights matters could be strengthened and broadened. Notwithstanding that some of the issues discussed below could be addressed by legislative amendment, we believe that they could just as effectively be achieved by amendment to existing standing orders and resolutions, and/or by the adoption of

¹ ACT Human Rights Commission, *Look Who's Talking*, 2014.

temporary standing orders. The latter option would be beneficial if it is considered more appropriate to trial the new practices before deciding whether to make them permanent.

(i) Human rights scrutiny of secondary legislation

Under the HR Act, the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) ('Scrutiny Committee') has no express mandate to report on the human rights issues raised by subordinate legislation. Section 38 of the HR Act only requires the Committee to 'report to the Legislative Assembly about human rights issues raised by **bills** presented to the Assembly' (emphasis added). The HR Act also does not subject regulations and other secondary legislation to the statement of compatibility requirement (s 37).

By contrast, the equivalent Victorian Scrutiny of Bills and Regulation Committee is specifically required to report on the compatibility of subordinate legislation with the Victorian Charter of Human Rights.² The Commonwealth goes further by requiring regulations and legislative instruments to be accompanied by statements of compatibility with human rights as well as being subject to human rights scrutiny by the Parliamentary Joint Committee on Human Rights.³

The present system, which exempts secondary legislation from any systematic human rights scrutiny and review, reduces the thoroughness of the ACT's legislative human rights scrutiny regime. As models in the Commonwealth and Victoria have demonstrated, such scrutiny is feasible and also necessary, given the range of amendments with serious human rights implications that can be promulgated through secondary legislation.

This deficit was recently exemplified by the failure to afford appropriate human rights scrutiny to the Crimes (Child Sex Offenders) Amendment Regulation 2017 (No 1) when it came before the Assembly. The Commission wrote to the Government and to the Scrutiny Committee to bring to their attention our concerns about the compatibility of the amendment regulation with the HR Act. We also noted that the explanatory statement for the amendment regulation was silent on its human rights implications and did not assist members of the Legislative Assembly and the public to understand the effect, background, and nature of the amendments. In response to our concerns, the Government noted that there was no requirement for an explanatory statement for a regulation to include an assessment of human rights compatibility, but said that it would consider reviewing the content of the explanatory statement if the Scrutiny Committee raised any issues about this omission. However, we understand that the Committee considered that it could not comment on the amendment regulation because it did not have an express mandate to report on the human rights issues raised by subordinate legislation. As a result, the Assembly was not apprised of those human rights concerns while the amendment regulation was still before the Assembly.

To address these deficiencies, this inquiry could consider recommending that the Assembly should provide a mandate for the Scrutiny Committee to report against the HR Act on the rights issues raised by subordinate legislation. To enable the Scrutiny Committee to

² *Subordinate Legislation Act 1994* (Vic), s 21(ha).

³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 7 & 9.

effectively perform such scrutiny, consideration should also be given to requiring the inclusion of appropriate human rights analysis in the explanatory statements for secondary legislation, similar to that which is required for bills.

(ii) Scope of existing Standing Orders

(a) Amendments moved during passage of a bill

A limitation of the HR Act is that there is no requirement to report on the compatibility of amendments introduced on the floor of the Assembly. However, it is not uncommon for amendments to be moved during the passage of a bill and sometimes these can be substantial and involve what are essentially new policies.

It is therefore welcome that Standing Order 182A seeks to close this gap by requiring amendments proposed by the Government on its own bills to be referred to the Scrutiny Committee before it can be moved.⁴ The Assembly can waive this requirement if the amendments are urgent, minor or technical, or in response to a Scrutiny Committee report.

We recommend that this requirement should be extended to amendments that are moved with respect to non-government bills as well. As was recently exemplified by the *Crimes (Intimate Image Abuse) Amendment Act 2017* (PMB) and the *Domestic Animals (Dangerous Dogs) Legislation Amendment Act 2017* (PMB), significant amendments can be moved during the passage of non-government bills, and we can see no reason why such amendments should be quarantined from appropriate human rights scrutiny by the Scrutiny Committee.

(b) Responses to committee reports

Standing Order 254A stipulates that the relevant Minister can be asked to account for the failure to respond to a committee report within four months of the report being tabled.⁵ We recommend that non-responses to committee reports on non-government bills should be subjected to the same rule as these bills have an increased significance in the context of minority government.

(iii) Extending scrutiny to cover economic, social and cultural rights

The Commonwealth scrutiny model is not limited to civil and political rights but requires statements of compatibility and systematic scrutiny by Parliament with regard to all of Australia's international human rights obligations, including economic, social and cultural rights.

This approach was recently introduced in the Northern Territory Legislative Assembly through the adoption of temporary standing orders.⁶ As a result, the NT now requires a

⁴ Temporary order adopted 26 February 2009. Adopted 22 March 2012.

⁵ Temporary order 9 December 2008. Adopted 22 March 2012. Amended 7 April 2016, 15 December 2016.

⁶ Sessional Order 12.3 (Adopted 24 August 2017 and readopted 20 March 2018), available here: https://parliament.nt.gov.au/_data/assets/pdf_file/0004/384205/Sessional-Orders-13th-Assembly.pdf.

statement of compatibility to accompany each bill and review by the Assembly's scrutiny committee for compatibility with 'human rights', as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Commission has long supported the extension of the HR Act's pre-legislative scrutiny requirements to cover all economic, social and cultural rights. In our view, following the NT's approach would represent an important extension of the Assembly's oversight of human rights issues in the legislative process. Even in the absence of statutory recognition of the full suite of economic, social and cultural rights in the HR Act, the enhancement of the scrutiny process in the Assembly in this way has the potential to offer improved protections for these rights.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner

11 May 2018