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## **Improving Human Rights Analysis In The Legislative And Policy Processes**

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# Improving Human Rights Analysis In The Legislative And Policy Processes

Simon Evans\* – Draft 27 July 2005

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## I INTRODUCTION

In this article, I propose and evaluate two mechanisms that could be adopted to improve the protection of human rights in Australia.<sup>1</sup> These mechanisms focus on enhancing the consideration of human rights issues during the process that leads up to the enactment of legislation.<sup>2</sup> They are, first, a requirement that executive agencies prepare human rights impact statements (modelled on existing regulatory impact statements) in relation to all significant policy proposals, and, second, that an independent executive agency review the quality of these statements. These mechanisms have two principal objectives. First, they aim to *formalise* and *integrate* human rights analysis with the process of developing policy options, rather than to have human rights analysis carried out almost at the end of the policy development process when legislation is ready to be introduced into parliament. And, second, through the provision of *independent scrutiny*, they aim to ensure that the parliament has the benefit of an appropriately reasoned analysis of the human rights impact of proposed legislation, and not just a perfunctory certification that the legislation is (or is not) compatible with human rights or a low quality analysis of human rights issues prepared as an afterthought by an executive agency that is focused on its ‘core business’.

I focus on pre-legislative mechanisms for improving analysis of human rights issues for two principal reasons.

The first reason is purely pragmatic. This is the area where institutional change is most achievable. It is not likely that any Australian jurisdiction (apart from the Australian Capital Territory and perhaps Victoria) will adopt a judicially enforceable

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<sup>1</sup> For the most part I write about Commonwealth institutions and practices, but the analysis and recommendations are equally applicable to the States and Territories.

<sup>2</sup> This article considers only primary (parliamentary) legislation rather than secondary (delegated) legislation. The two types of legislation raise distinct issues because of the differences in the legislative processes and in the extent of judicial review currently available.

Bill of Rights in the short term.<sup>3</sup> There remain significant concentrations of community opposition to such measures. That opposition creates political costs for those legislators who would pursue Bills of Rights through the legislative (or referendum) process. Those costs may readily outweigh the more diffuse political benefits of supporting a Bill of Rights and may reinforce legislators' own principled or strategic opposition to them. By contrast, enhancing rights scrutiny within the legislative process might be possible without investing as much political capital. Such changes would not reallocate institutional power away from the legislature and to the courts to the same extent as a judicially enforceable Bill of Rights. The stakes involved for opponents would therefore be lower.<sup>4</sup> The changes could be achieved less formally and without triggering the same veto points that opponents could try to activate against attempts to enact a Bill of Rights. However, such changes would have disadvantages compared with a legislated Bill of Rights. The most significant is that the enhanced rights scrutiny mechanisms would not be entrenched against an executive determined on overriding rights and rights-protecting mechanisms. This suggests that scrutiny mechanisms in the process leading to the enactment of legislation should not be the *only* rights-protecting mechanisms — but it does not mean that they are without value.

The second reason for this focus reflects a major strand within the contemporary scholarly debate about the protection of human rights in democracies. There is a longstanding controversy about whether courts should be able to strike down legislation because it is inconsistent with the courts' interpretation of statements of fundamental rights.<sup>5</sup> That debate draws on a number of subsidiary debates, of which two stand out. The first is whether it is *consistent with democratic principles* for courts as non-representative institutions to exercise the power of judicial review to annul the outputs of representative legislative processes. The second is whether the courts are an *appropriate institution* for exercising this power, given their composition (a small and homogenous group of lawyers) and procedures (primarily focused on the interpretation of a text and applying it to facts presented by particular litigants). None of these debates has been resolved to general satisfaction. The debate focussed on democratic principle has identified quite pervasive disagreement about what institutional arrangements are consistent with the concept of democracy. The debate focussed on institutional capacity has revealed the need for more concrete analysis of particular institutional processes. What the debates have suggested, however, is that the courts need not be the *exclusive* site for deliberation about whether legislation is consistent with rights standards. The institutions involved in the legislative process have both a legitimate role and the capacity to consider rights

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<sup>3</sup> The proposals made here remain relevant to these jurisdictions. As will become clear later, the formal consideration of human rights issues required by the *Human Rights Act 2004* (ACT) comes late in the policy process and both the formal processes and the earlier informal processes could be augmented by the mechanisms proposed here.

<sup>4</sup> Although opposition by those involved in the legislative process should not be underestimated. It should be remembered that the Fraser Government opposed the establishment of the Senate Scrutiny of Bills Committee: Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny* (1991) 5–6, 25.

<sup>5</sup> A survey of various strands of the debate can be found, eg, in Allison Martens, 'Beyond the Counter-majoritarian Difficulty: Acknowledging the Real Dangers of Judicial Supremacy and Congressional Abdication' (Paper presented at the annual meeting of the the American Political Science Association, Chicago, 2 September 2004) and Barry Friedman, 'The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five' (2002) 112 *Yale Law Journal* 153.

issues — and even if the imperfections of the legislative process were addressed by a judicially enforceable Bill of Rights there remains value in enhancing the performance of legislative institutions in considering rights issues.

The remainder of this article proceeds in four parts. In Part II, I introduce a model of the legislative process that is then used to describe and evaluate the current mechanisms for considering rights issues in the course of the legislative process. Those mechanisms are increasingly sophisticated but are not well integrated with the policy process. In Part III, I contrast those mechanisms with the more elaborate mechanisms for analysing another set of complex and contested issues, namely the economic effects of regulation on business and competition. Those mechanisms are more fully integrated into the policy process and include independent executive review of the overall quality of the economic analysis. Part III also notes the moves to adopt similar mechanisms for analysing the impact of proposals that affect families. In Part IV, I propose that the mechanisms used in the business and competition context be adapted to enhance the consideration of rights issues in the legislative process. Finally, in Part V, I argue that these proposals achieve the objectives of formalising and integrating human rights analysis into the policy process and subjecting that analysis to appropriate independent review.

## II HUMAN RIGHTS IN THE LEGISLATIVE PROCESS

The focus of this article, then, is on mechanisms for enhancing the consideration of human rights issues during the process that leads up to the enactment of legislation. What is that process and what human rights scrutiny mechanisms currently exist?

### A *The Legislative Process*

There are many ways of describing or conceptualising the legislative process. One can choose different starting and ending points and different levels of abstraction. The choices are important. This is because how one conceptualises the legislative process affects the range of mechanisms that can be used in connection with that process for enhancing the protection of human rights.

Consider, at one extreme, a ‘black box’ model of the legislative process in which the internal workings of the process are invisible or off limits. It is not possible to enhance the consideration of human rights issues during the process that leads up to the enactment of legislation using this model. The model stipulates that the process is closed to outside influences. Virtually the only option for enhancing the protection of human rights on this model is to adopt some form of post-enactment judicial or administrative review of the outputs of the legislative process against standards articulated in a Bill of Rights.

That is an extreme model. A more common model conceptualises the legislative process in roughly these terms:

- Stage 1. introduction of proposed legislation into parliament
- Stage 2. scrutiny of proposed legislation by parliamentary committees
- Stage 3. parliamentary debate on proposed legislation
- Stage 4. enactment of legislation

Again, this model partly determines the mechanisms that can be used to enhance the consideration of human rights issues during the process that leads up to

the enactment of legislation. It directs attention to parliamentary debate and scrutiny by parliamentary committees as sites for such attention.<sup>6</sup> There is a growing and quite valuable literature that analyses the potential for these sites, in particular scrutiny committees, to contribute to consideration of human rights issues.<sup>7</sup> As a result, some of the possible strengths and weaknesses of these committees (especially in comparison with those responsible for scrutiny of delegated legislation) have been identified. (They are the subject of ongoing empirical research in a project of which this article forms a part.) The weaknesses include ‘time pressure; lack of expertise, only partly ameliorated by the employment of external experts; the difficulty of building up a coherent body of jurisprudence over time; and the ultimate subjection of its work to the vicissitudes of politics’.<sup>8</sup> In addition, they operate under even greater epistemic constraints than the courts in assessing the rights impact of (proposed) legislation — in most jurisdictions they rarely hold hearings or receive submissions and as a result their scrutiny is almost inevitably abstract rather than concrete. They approach questions of legislative policy and questions about whether infringements of rights are justified with considerable reticence.<sup>9</sup>

But perhaps the greatest weakness of parliamentary scrutiny committees (and other parliamentary processes) is one that the model of the legislative process set out above makes invisible. That model obscures just how late in the legislative process scrutiny committees become involved in considering proposed legislation. At the scrutiny stage, the executive has already decided on its policy objectives, the need for legislation to achieve those objectives, the legislative model and the concrete terms of proposed legislation. In most cases it has also, and perhaps most importantly, publicly committed itself to all of these things, often making it difficult for it to accept changes

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<sup>6</sup> Under Standing Order 24(1)(a) of the Commonwealth Senate, the Senate Scrutiny of Bills Committee is responsible for reporting on whether Bills:

- (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;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.’

There are committees with broadly similar responsibilities for scrutiny of primary legislation against rights-criteria in the New South Wales, Queensland, Victorian and ACT legislatures.

<sup>7</sup> Janet Hiebert, ‘A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny’ (1998) 26 *Federal Law Review* 115; David Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’ in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (2000) 158; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998).

<sup>8</sup> George Winterton, ‘An Australian Rights Council’ (2001) 24 *University of New South Wales Law Journal* 792, 794–5.

<sup>9</sup> Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39<sup>th</sup> Parliament: November 1998 – October 2001* (2001) 8.

without losing political face. A revised model of the legislative process incorporating some of these earlier stages in the process makes this point clearer:<sup>10</sup>

- Stage 1. policy formation, including consultation within and outside government
- Stage 2. policy approval
- Stage 3. drafting of proposed legislation to give effect to policy
- Stage 4. introduction of proposed legislation into parliament
- Stage 5. scrutiny of proposed legislation by parliamentary committees
- Stage 6. parliamentary debate on proposed legislation
- Stage 7. enactment of legislation
- Stage 8. post-enactment review and evaluation of the operation of legislation

On this revised model, the achievements of scrutiny committees in having government agree to amendments to address human rights issues are considerable and must be measured in the light of the government's significant political investment in the legislation under scrutiny. For these reasons, it may be better to see the primary contribution of scrutiny committees as working indirectly to improve the *processes that lead to* the introduction legislation being introduced into Parliament, rather than as working directly to improve the proposed legislation that comes to them for scrutiny. Various commentators have noted how policy formation and approval and legislative drafting take place in the shadow of scrutiny.<sup>11</sup> The committees' educative role, particular in those jurisdictions where the committee collects guidelines for policy makers and legislative drafters, should not be underestimated, however difficult it is to quantify.<sup>12</sup>

This expanded model of the legislative process suggests two further and related points.

First, it makes the point (if it needs making at all) that the legislative process is dominated by the Executive.<sup>13</sup> Policy formulation occurs principally in Departments and ministerial offices. Policies are approved by Cabinet or Ministers. Proposed legislation is drafted by officials on instructions from Departments or Ministers. Once drafted, it is introduced into Parliament by the Executive, at a time and in a manner chosen by the Executive for its purposes. Debate in the lower house is in accordance with the Executive's timetable and subject to its control. Often the Executive can choose when to bring into effect legislation that has been enacted by the Parliament.

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<sup>10</sup> This is not meant to represent a linear process or to suggest that any one institution has responsibility for each stage. The process is iterative and multi-centred. Policy formation often involves a repeated cycle of proposals and responses involving Ministers and their departments. Consultation with experts and affected parties may occur at that stage or at the drafting stage or only at the stage of parliamentary debate and scrutiny. The parliamentary stages may involve greater or less scrutiny by specialist or generalist committees and by the houses themselves. Post-enactment review may occur through systematic committee-based scrutiny of the administration of legislation (particularly through the Senate Estimates Committee system but also through substantive references committees); or it may be triggered by petitions, debates on matters of public importance, grievance debates or adjournment debates, or by extra-parliamentary action (not least by the news media). And it may lead to formation of new policies to meet the shortcomings revealed in the old, restarting the process.

<sup>11</sup> With regards to Canada, New Zealand, the UK and Australia, see, eg, Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?', above n 7, 163–6, 168–74.

<sup>12</sup> A point made in Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39<sup>th</sup> Parliament: November 1998 – October 2001* (2001) 8–9.

<sup>13</sup> But of course not completely controlled by the Executive if it does not have a majority in the upper house.

And, second, it suggests a small but significant reconceptualisation of the problem of human rights protection by Australian institutions. To this point, the problem has been predominantly conceptualised as enhancing the protection of human rights against the effects of legislation. The underlying, unstated, question has been similar to that considered by scrutiny committees and courts performing judicial review under Bills of Rights: ‘Does the (proposed) legislation trespass unduly on individual rights?’ That is an important question. However it is an unduly narrow one. It excludes at least three things that contribute to the overall human rights position:

- government action that takes forms other than legislation
- government *inaction* (or a government decision not to act)
- *non-government* action (which again may involve a government decision not to act)

A model that focuses only on legislation and the legislative process thus ignores the potential human rights impact of government decisions to use regulatory tools other than legislation. The impact of these forms of action on human rights can be seen as part of the problem of human rights protection by Australian institutions if the process that leads up to the enactment of legislation is reconceptualised as a specialist form of the public policy process. This reconceptualisation sees legislation as just one of many possible regulatory tools and sees the analysis of human rights issues in the legislative process as just one component of the analysis of human rights issues in the public policy process.

There are many ways of conceptualising the public policy process. Here I will follow the influential, albeit controversial, representation proposed by Bridgman and Davis.<sup>14</sup> They describe eight overlapping steps in the policy cycle: departments *identify issues* that may require government action; *policy analysis* provides information for decision makers; this leads to a *choice of policy instruments*; policy analysis is tested through *consultation* with departments and stakeholders; emerging policy has to be *coordinated* across the whole of government; eventually cabinet makes a *decision* to implement a policy (or not to do so); the policy is then *implemented* and the implementation *evaluated*. Evaluation may lead to issues being identified and the cycle restarting.

The relationship between the policy cycle and the legislative process is clear enough. Making legislation is one possible instrument that may be chosen for implementing policy developed through a policy cycle. (Others instruments include setting non-binding standards and codes, engaging in advocacy and provision of information, entering contracts, and spending money.) Compared with Bridgman and Davis’ model of the policy cycle, the expanded nine step model of the legislative

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<sup>14</sup> Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (2004) 26–8. They explain elsewhere that the policy cycle ‘is and always will be a simplified representation of the policy world, an aid to understanding. It is not offered as a theory, explaining or predicting behaviour’: Peter Bridgman and Glyn Davis, ‘What Use Is a Policy Cycle? Plenty, If the Aim is Clear’ (2003) 62(3) *Australian Journal of Public Administration* 98, 100. Nonetheless, their representation is controversial, and has been criticised for reflecting discredited rationalist/systematic approaches to policy: see H K Colebatch, ‘Policy Analysis, Policy Practice and Political Science’ (Presented to RC32 at the IPSA World Congress, Durban, 29 June — 4 July 2003) available at <<http://www.spea.indiana.edu/IPSA-RC32/IPSA.Colebatch.doc>> at 6 July 2005; Sophia Everett, ‘The Policy Cycle: Democratic Process or Rational Paradigm Revisited?’ (2003) 62(2) *Australian Journal of Public Administration* 65. What their representation does not do — and does not claim to do — is describe the processes by which political decisions are made on policy issues.

process presented above compresses the parts of the process preceding approval by Cabinet and expands the steps involved in implementation.

<b>Bridgman and Davis' policy cycle</b>	<b>The nine step legislative process as one possible embodiment of the policy cycle</b>
A. <i>identify issues</i> that may require government action	1. policy formation leading to a proposal to implement policy through legislation
B. <i>policy analysis</i> provides information for decision makers	
C. <i>choice of policy instruments</i>	
D. policy analysis is tested through <i>consultation</i> with departments and stakeholders	
E. emerging policy <i>coordinated</i> across the whole of government	
F. Cabinet makes a <i>decision</i> to implement a policy (or not to do so)	2. policy approval by Minister in Cabinet
G. the policy is <i>implemented</i>	3. drafting of proposed legislation to give effect to policy 4. legislation approved by Minister in Cabinet 5. introduction of proposed legislation into parliament 6. scrutiny of proposed legislation by parliamentary committees 7. parliamentary debate on proposed legislation 8. enactment of legislation
H. the implementation is <i>evaluated</i>	9. post-enactment review and evaluation of the operation of legislation

The comparison makes even starker the extent to which governmental processes that may ultimately bear on human rights occur prior to the point at which legislation is introduced into the Parliament and that those processes may not in fact lead to legislation being introduced. The conceptual framework provided by Bridgman and Davis reveals the need to focus not just on legislative and pre-legislative assessment of human rights impact but on the whole range of government policy decisions that may have a human rights impact.

## **B *Human Rights in the Policy Process***

At present, very few mechanisms for systematic consideration of human rights issues exist at stages in the policy process prior to parliamentary scrutiny.

In short, outside Queensland and the ACT, little explicit and systematic attention is required to be given to human rights issues at the policy formation, policy approval and legislative drafting stages. As the New South Wales Standing

Committee on Law and Justice wrote in its Report on *A NSW Bill of Rights*, '[I]legislation is prepared within bureaucracies without any measurement against human rights standards'.<sup>15</sup> Outside Queensland and the ACT,<sup>16</sup> no legislation and none of the publicly available<sup>17</sup> Cabinet Handbooks and Legislation Handbooks require officials or Ministers to consider the rights issues at the policy formation or approval stages for primary legislation.<sup>18</sup> So, for example, the Commonwealth Legislation Handbook requires Cabinet approval for

all significant policy proposals involving legislation, including any such proposal which:

- (a) represents a significant or strategically important policy initiative or commitment;
- (b) involves new expenditure or will have a significant impact on revenue;
- (c) is sensitive or controversial (whether from the perspective of Parliament or interest groups or Commonwealth/state relations); or
- (d) has significant implications for other portfolios or is not agreed to by all interested portfolios ...<sup>19</sup>

It does not, however, single out policy proposals with a rights-impact for Cabinet consideration. (It does, nevertheless, recommend that 'rules which have a significant impact on individual rights and liberties' and 'provisions conferring enforceable rights on citizens or organisations' be implemented through primary legislation rather than delegated legislation.<sup>20</sup>) Again at Commonwealth level, there are limited requirements for consultation, within government only, on rights issues at the drafting stage; but not at the earlier policy formation stage where it would be more useful.<sup>21</sup> For example, the Commonwealth Legislation Handbook requires that the Attorney-General's Department 'be consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights' and notes

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<sup>15</sup> Standing Committee on Law and Justice, Legislative Council, Parliament of NSW, 'A NSW Bill of Rights', Parliamentary Paper No 893 (2001) 115.

<sup>16</sup> I discuss the Queensland position below on p 15.

<sup>17</sup> This is an important qualification. Not all Cabinet Handbooks and Legislation Handbooks are publicly available.

<sup>18</sup> In relation to secondary legislation, drafters in some states are required to take rights issues into account: see, eg, *Subordinate Legislation Act 1994* (Vic) s 21(1)(f) and (g). Cf the position under the *Legislative Instruments Act 2004* (Cth) ss 16–17.

<sup>19</sup> Department of the Prime Minister and Cabinet, Commonwealth of Australia, *Commonwealth Legislation Handbook* (1999, incorporating update No 1 of May 2000) [4.5].

<sup>20</sup> *Ibid* 1.12(c) and (e).

<sup>21</sup> Most recently, the Commonwealth government rejected Democrat amendments (supported by the Australian Labor Party) to the Legislative Instruments Bill 2003 (Cth) that would have required rule-makers to undertake appropriate consultations with experts and affected persons when proposed *delegated* legislation would affect human rights, civil liberties, the environment and other sectors of the community: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2003, 23 647–9. The *Legislative Instruments Act 2003* (Cth), passed without amendment in this regard, is different in two respects from the Democrat proposal. First, it does not *require* consultation but only *recommends* it; second, it only does so when delegated legislation would affect business or restrict competition: see *Legislative Instruments Act 2003* (Cth) ss 17–19.

specifically the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>22</sup> and the 'instruments dealing with discrimination on the ground of sex, race or national or ethnic origin' as set out in the Schedules to domestic legislation.<sup>23</sup> But the Handbook does not specify the consequences of any such inconsistency; in particular, it does not raise the bar for approval of proposed provisions that are inconsistent with international rights instruments.

There are no formal requirements that government consult stakeholders in relation to rights issues, although s 11(1)(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) confers on the Commission the function

to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination.<sup>24</sup>

The Commission does not have a standing brief to consider proposed enactments but must depend on the request of the Minister, who is not obliged to pay any special heed to the advice he or she receives. Its essentially ad hoc interventions,<sup>25</sup> on occasions determined by the Minister, do not give it a regular, formal involvement in the legislative process.<sup>26</sup> It is not apparent how often the Minister requests such examinations. The Commission's annual reports evince a tendency to downplay, or at least not highlight, this aspect of its functions. Nonetheless there appears to be some pressure for the minister to make such requests — during the second reading speech for the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) Senator Joseph Ludwig criticised the government for, among other things, failing to request comment from the Commission on either the exposure draft or the Bill itself.<sup>27</sup>

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<sup>22</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>23</sup> Department of the Prime Minister and Cabinet, Commonwealth of Australia, *Commonwealth Legislation Handbook* (1999, incorporating update No 1 of May 2000) [6.34].

<sup>24</sup> Similar provisions apply to ascertain whether the enactment or proposed enactment is inconsistent with the *Sex Discrimination Act 1984* (Cth) or the *Disability Discrimination Act 1992* (Cth). While there is no equivalent provision under the *Racial Discrimination Act 1975* (Cth), under s 46C(1)(d) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) the Commission can examine enactments or proposed enactments to determine 'whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders'.

<sup>25</sup> David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252, 253.

<sup>26</sup> The Commission is nonetheless still able to make submissions to parliamentary inquiries and government on proposed legislation without the request of a Minister. See, eg, Legal and Constitutional Legislation Committee, Commonwealth Senate, *Inquiry into the Provisions of the Disability Discrimination Amendment Bill 2003: Submission of Human Rights and Equal Opportunity Commission* (2003) available at <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/disability/submissions/sub82.doc](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/disability/submissions/sub82.doc)> at 6 July 2005. The Annual Report concerning the financial year 2003–04 noted the Commission's input into six pieces of legislation: the Anti-Terrorism Bill (No 2) 2004 (Cth), the Migration Amendment (Judicial Review) Bill 2004 (Cth), the Sex Discrimination Amendment (Teaching Profession) Bill 2004 (Cth), the *Age Discrimination Act 2004* (Cth), the Disability Discrimination Amendment Bill 2003 (Cth) and the Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004 (Cth): Human Rights and Equal Opportunity Commission, *Annual Report 2003–2004* (2004) ch 3.

<sup>27</sup> Commonwealth, *Parliamentary Debates*, Senate, 12 May 2005, 50 (Senator Joseph Ludwig).

Queensland is an exception to this lack of attention to human rights issues in the policy process.<sup>28</sup> Cabinet submissions are required to identify, *and seek Cabinet approval for*, departures from fundamental legislative principles.<sup>29</sup> Legislative drafters must consider whether proposed legislation is consistent with Australia's international obligations and fundamental legislative principles set out in the *Legislative Standards Act*.<sup>30</sup> The Office of Queensland Parliamentary Counsel works to ensure conformity with fundamental principles by drafting a 'fundamental legislat[ive] principles standard designed as an information document for all persons preparing legislation to inform them in particular of the views of the Scrutiny of Legislation Committee'; advising departments on fundamental legislative principles; and educating departments 'to encourage compliance with FLPs by developing provisions that achieve both policy objectives and compliance with the principles'.<sup>31</sup>

The ACT also requires that human rights be considered to some extent during the policy process. Departments are *encouraged* to consult with the Bill of Rights Unit in the Department of Justice and Community Safety early in the policy process.<sup>32</sup> Although, the ACT Human Rights Commissioner does not have any express statutory role in the process at this stage, although it appears that the 'commissioner has understood that [reporting on proposed enactments] may at least be a component of the exercise'<sup>33</sup> of her function to 'advise the Attorney-General on anything relevant to the operation' of the Act.<sup>34</sup> In practice, she reports:

The number of Cabinet Submissions in the ACT is high, including not only Bills, but also policy proposals that may lead to legislative implementation. Unlike most other human rights agencies in Australia I am given access to relevant draft Cabinet Submissions and in some cases my opinion on human rights compatibility issues in draft Bills, such as enabling emergency ECT, may support the Bill being released as an exposure draft to enable further community consultation.<sup>35</sup>

All proposals that Cabinet give in principle support to legislation must contain a paragraph that identifies the human rights impact of the proposal:

The paragraph should identify which human rights issues the bill raises; whether the Department has advice and whether the proposal can be developed consistently with

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<sup>28</sup> On the normative dimension of Queensland exceptionalism, see Standing Committee on Law and Justice, Legislative Council, Parliament of NSW, 'A NSW Bill of Rights', Parliamentary Paper No 893 (2001) 22–3.

<sup>29</sup> Department of the Premier and Cabinet, Queensland, *Cabinet Handbook* (2003) [7.2.5].

<sup>30</sup> *Ibid* [7.2.4]– [7.2.5].

<sup>31</sup> Office of Queensland Parliamentary Counsel, *Annual Report 2003–04* (2002) 21.

<sup>32</sup> Bill of Rights Unit, Department Of Justice And Community Safety, ACT, *Guide to ACT Departments on Pre-Introduction Scrutiny: The Attorney-General's Compatibility Statement under the Human Rights Act 2004* (October 2004) 2, 4, available at <<http://www.jcs.act.gov.au/HumanRightsAct/Publications/PreIntroduction%20Scrutiny.doc>> at 6 July 2005.

<sup>33</sup> Peter Bayne, 'The Human Rights Act 2004 (ACT) — Developments in 2004' (2005) *Canberra Law Review* (forthcoming).

<sup>34</sup> *Human Rights Act 2004* (ACT) s 41(1)(c).

<sup>35</sup> Helen Watchirs, 'The ACT *Human Rights Act 2004*: A New Scrutiny Challenge' (Paper presented at the Ninth Australasian & Pacific Conference on Delegated Legislation and Sixth Australasian & Pacific Conference on the Scrutiny of Bills, Legislative Assembly for the ACT, 2 March 2005) 4 available at <<http://www.parliament.act.gov.au/conferences/scrutiny/watchirs.pdf>> at 6 July 2005.

the HRA. It is not necessary to provide detailed analysis of the proposed bill and all human rights law issues.<sup>36</sup>

Departments are required to seek advice from the Bill of Rights Unit on the compatibility of legislation during the drafting process. The Unit advises the Attorney-General whether each government Bill is compatible with the Act and prepares the Compatibility Statement that the Attorney-General is required to present with each Bill.<sup>37</sup> If the Bill is not compatible with the Act, it may still go forward to Cabinet for final approval but a full submission on the compatibility issues is required. Regardless of whether or not the Bill is compatible with the Act, the Cabinet submission seeking approval to proceed with the Bill as drafted 'must include a recommendation that Cabinet note the Compatibility Statement'.<sup>38</sup> In practice this statement is unreasoned and generally only one sentence long.<sup>39</sup>

In summary, then, outside Queensland and the ACT, little explicit and systematic attention is required to be given to human rights issues at early stages of the policy process, presenting the risk that decisions about how to pursue policy objectives are taken without adequate analysis of their human rights implications. It is necessary, therefore, to ask what mechanisms might be adopted to improve the attention given to human rights issues at early stages of the policy process.

### III REGULATORY IMPACT STATEMENTS AND THE POLICY PROCESS

In this Part, in order to answer the question just posed, I first turn away from the existing mechanisms for analysing human rights issues in the policy process. Instead, I consider the existing mechanisms for analysing a very different set of issues – the impact of policy proposals on business and competition. These mechanisms are well established and broadly accepted in Australian government, notwithstanding that they subject regulatory proposals to independent review against controversial criteria. I will argue later that these mechanisms can and should be adapted to the human rights context to improve the attention given to human rights issues at early stages of the policy process.

#### A *Regulatory Impact Statements as a Model for Rights Impact Statements*

In 1986, the Commonwealth Government introduced a requirement that all legislative proposals that affect business be accompanied by a Regulatory Impact

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<sup>36</sup> Bill of Rights Unit, Department of Justice and Community Safety, ACT, *Guide to ACT Departments on Pre Introduction Scrutiny: The Attorney General's Compatibility Statement under the Human Rights Act 2004* (October 2004) available at <<http://www.jcs.act.gov.au/HumanRightsAct/Publications/PreIntroduction%20Scrutiny.doc>> at 6 July 2005.

<sup>37</sup> See *Human Rights Act 2004* (ACT) s 37.

<sup>38</sup> Bill of Rights Unit, Department Of Justice And Community Safety, ACT, above n 32, 3.

<sup>39</sup> For example: 'In accordance with section 37 of the *Human Rights Act 2004* I have examined the Tree Protection Bill 2005. In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*': Jon Stanhope, ACT Attorney-General, *Compatibility Statement*, available at <<http://www.legislation.act.gov.au/updates/compatibilitystatements/CSTreeProt.pdf>> at 6 July 2005.

Statement ('RIS') that assesses the costs and benefits of the proposal.<sup>40</sup> That requirement was expanded, and compliance mechanisms were established, in 1997 as part of the Coalition Government's commitment to 'minimise the burden of regulation on business' and to foster a change in the culture of regulatory agencies necessary to achieve that commitment.<sup>41</sup> An RIS is now required for all regulatory proposals or reviews which have a 'direct or significant indirect effect on business or restrict competition'.<sup>42</sup> (The concept of regulation is broad. It includes not only primary and delegated legislation and treaties, but also other policy instruments such as 'industry codes of practice, guidance notes, industry-government agreements and accreditation schemes'.<sup>43</sup>) An RIS is now also required for all cabinet submissions that impact on small business.<sup>44</sup> The required content has also increased; they are now required to include an assessment of ecologically sustainable development impacts and a cost recovery statement.<sup>45</sup>

The broader rationale for RISs derives from a conviction that RISs 'improve government decision-making processes by ensuring that all relevant information is presented to the decision maker'.<sup>46</sup> By 'ensur[ing] that departments and agencies fully consider the costs and benefits of all viable alternatives' it becomes possible to 'choos[e] the alternative with the maximum positive impact'.<sup>47</sup> In other words, the RIS process assumes that policy making is a rational and systematic process and that improving the process improves the outcomes of that process:

Preparation of a Regulation Impact Statement (RIS) is a critical feature of the regulation making process, primarily because doing so formalises and evidences the steps that should be taken in policy formulation. It helps to ensure that options to address a perceived policy problem are canvassed in a systematic, objective and transparent manner, with options ranked according to their net economic and social benefits. The RIS embodies this analytical process.<sup>48</sup>

As such, it is a local manifestation of an international movement towards evidence-based regulation, and in particular the quantification of regulatory costs and benefits.<sup>49</sup> (A further rationale sometimes noted is that 'after the decision is made, the RIS is tabled in Parliament or may be published elsewhere, providing an open and transparent account of that decision.'<sup>50</sup>)

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<sup>40</sup> Industry Commission, 'Regulation and its Review 1995-96', Industry Commission Annual Report Series (1996) 46. Similar requirements exist in most Australian jurisdictions: Productivity Commission, 'Regulation and its Review 2002-03', Productivity Commission Annual Report Series (2003) 91-2.

<sup>41</sup> John Howard, Prime Minister, 'More Time for Business' (Statement, 24 March 1997) 67-8.

<sup>42</sup> Productivity Commission, 'Regulation and its Review 2002-03', above n 40, 9.

<sup>43</sup> Office of Regulation Review, *A Guide to Regulation* (2<sup>nd</sup> ed, 1998) A3.

<sup>44</sup> Productivity Commission, 'Regulation and its Review 2002-03', above n 40, 6.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* 10.

<sup>47</sup> John Howard, Prime Minister, 'More Time for Business' (Statement, 24 March 1997) 68.

<sup>48</sup> Office of Regulation Review, above n 43, A1.

<sup>49</sup> Scott Jacobs, 'An Overview of Regulatory Impact Analysis in OECD Countries' in OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries* (1997) 13, 16.

<sup>50</sup> Productivity Commission, 'Regulation and its Review 2002-03', above n 40, 10.

The RIS process, and the content required in RISs, follow a rational-comprehensive model of policy making, rather than a model that emphasises consensus or political horse-trading.<sup>51</sup> RISs are required to include a systematic analysis of the mechanisms by which the policy objectives could be achieved. The various mechanisms must be ranked ‘according to the net economic, social and environmental benefits’.<sup>52</sup> The RIS basic framework has seven elements:<sup>53</sup>

- The RIS must identify **‘the problem or issues which give rise to the need for action’**<sup>54</sup> (for example, a ‘social, environmental or equity goal, or ... an economic or market failure problem’).<sup>55</sup>
- It must identify **the desired objective or objectives of the regulation** in relation to the problem or issues previously identified.<sup>56</sup>
- It must identify the **regulatory and non-regulatory options** (or policy instruments) that might be employed to achieve the desired objective or objectives.<sup>57</sup>
- It must include an **‘an assessment of the impact (costs and benefits) on consumers, business, government and the community of each option’**.<sup>58</sup> This is the main section of an RIS. The cost-benefit analysis ‘should be comprehensive and include all benefits and costs, not just those of a financial nature’.<sup>59</sup> Intangible and non-monetary costs and benefits should be assessed (examples given are ‘possible changes in environmental amenity, health and safety outcomes’).<sup>60</sup> Nonetheless, there is a clear preference for using quantitative measures, and specifically economic measures, of costs and benefits in this process and a clear emphasis on financial costs and benefits.<sup>61</sup>

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<sup>51</sup> Cf OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002) 46 cited in Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 94.

<sup>52</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 6.

<sup>53</sup> Office of Regulation Review, above n 43, A2. There are variants for taxation proposals and proposals arising through the Council of Australian Governments framework.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid B1.

<sup>56</sup> Ibid A2, B1.

<sup>57</sup> Ibid A2, B2–B4.

<sup>58</sup> Ibid A2, B4–B6.

<sup>59</sup> Ibid D9.

<sup>60</sup> Ibid B4. Although those examples could be conceptualised in terms of rights, the RIS does not do so. Equally, the examples given of costs to the community — ‘an undesirable redistribution of income and wealth; reduced innovation; lower employment levels; and lower economic growth (which implies a lower standard of living)’ — are conceptualised in economic terms: *ibid* D9.

<sup>61</sup> Not least in the number and detail of the examples of financial costs and benefits compared with that for non-financial costs and benefits: see *ibid* B5–B6.

Costs and benefits should be quantified or estimation techniques should be used.<sup>62</sup> Only ‘where it is not possible to prepare a quantitative estimate’ should ‘a qualitative assessment of costs and benefits should be undertaken’.<sup>63</sup> There is a general presumption against regulation and onus on the proponent of regulation;<sup>64</sup> some costs — specifically restrictions of competition — should only be recommended if ‘the desired objective can be achieved *only* by restricting competition’.<sup>65</sup>

- It must include a **‘consultation statement’** that identifies the extent of the consultation with those who would be affected by the proposed regulation and summarises their views.<sup>66</sup>
- It must identify a **‘recommended option’** and state why it was chosen over the other options.<sup>67</sup>
- It must describe **‘a strategy to implement and review the preferred option’**, including administration arrangements and details of an ongoing review process to ensure that the regulation is removed when it is no longer justified.<sup>68</sup>

An RIS must be developed once it is decided that regulation *may* be necessary but before the policy decision to regulate is taken.<sup>69</sup> The draft RIS is circulated to other departments and agencies with the policy proposal at the coordination and consultation stage; it must accompany the Cabinet submission seeking approval for the legislation; it is included in the explanatory memorandum when proposed legislation is introduced into the Parliament.<sup>70</sup>

## B *Review of Regulatory Impact Statements*

Requiring that legislative proposals be accompanied by rights impact statements would not be novel. Such a requirement exists in one form or another in a number of jurisdictions outside Australia and exists or have been proposed in a number of Australian jurisdictions for delegated legislation. It is not necessary to draw attention to *regulatory* impact statements to make the case for *rights* impact statements (although regulatory impact statements do provide a useful model for reasoned rights impact statements as opposed to conclusory certifications of

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<sup>62</sup> Ibid B6.

<sup>63</sup> Ibid. Unless the costs and benefits are clear and the additional work involved in doing a quantitative assessment is not justified: at D6.

<sup>64</sup> Ibid D10.

<sup>65</sup> Ibid (emphasis added).

<sup>66</sup> Ibid A2, B7.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid A2, B7–B8.

<sup>69</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 10; Office of Regulation Review, above n 43, A5.

<sup>70</sup> Office of Regulation Review, above n 43, A6.

compatibility with rights). What is more significant about the Commonwealth RIS process for the purposes of this section is the quality assurance process that the Office of Regulation Review ('ORR') performs in relation to RISs.

The Office of Regulation Review is an autonomous unit within the Productivity Commission. (The Productivity Commission is an independent statutory agency within the Commonwealth executive.) Its two principal activities are to 'advise on quality control mechanisms for regulation making and review' and to 'examine and advise on regulation impact statements (RISs) prepared by Australian Government departments and agencies'.<sup>71</sup> The ORR reviews draft RISs and provides comments to departments and agencies with the expectation that the department or agency will 'progressively improve[] the document',<sup>72</sup> as it moves towards the policy approval stage and ultimately to publication of the final RIS.

The broadest measure reported by the ORR is the overall level of compliance of each agency and department with the Government's RIS requirements during the reporting year. An agency or department complies in relation to a legislative proposal if:

- 'a RIS was prepared to inform the decision maker at the policy approval stage and the analysis contained in the RIS was adequate; and
- a RIS was tabled in the Parliament or otherwise made public and the analysis was adequate.'<sup>73</sup>

The evaluative term, then, is the *adequacy* of an RIS. That is determined in relation to each RIS by reference to seven criteria that correspond to the seven sections of the basic RIS framework:

1. Is it clearly stated in the RIS what is the fundamental **problem** being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the **objectives**, outcomes, goals or targets sought by government action?
3. Is a range of viable **options** assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the **impacts** on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of **consultation**? Have the views of those consulted been articulated, including substantial disagreements. If no consultation was undertaken, why not?

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<sup>71</sup> Productivity Commission, 'Regulation and its Review 2002-03', above n 40, 75; Office of Regulation Review, above n 43, A11.

<sup>72</sup> Productivity Commission, 'Regulation and its Review 2000-01', Productivity Commission Annual Report Series (2001) 8.

<sup>73</sup> Productivity Commission, 'Regulation and its Review 2002-03', above n 40, 11.

6. Is there a clear statement as to which is the **preferred option** and why?
7. Is information provided on how the preferred option would be **implemented**, and on the **review** arrangements after it has been in place for some time?<sup>74</sup>

The ‘overriding requirement’, applied to all seven criteria, is that ‘the degree of detail and depth of analysis’ in the RIS is ‘commensurate with the magnitude of the problem and with the size of the potential impact of the proposals’.<sup>75</sup> The ORR scores ‘the nature and magnitude of the proposal (and the problem)’ on a three point scale (large, medium or small) and scores the impact of the proposal on affected parties ‘from an economy-wide perspective, having regard to both their scope and intensity’ on a two point scale (broad or narrow).<sup>76</sup> The measures on these two scales are then combined to identify the significance of regulatory proposals on a four point scale.<sup>77</sup> The ORR does not provide further details on this process but claims:

[C]ategorising regulatory proposals according to their significance and impact ... provides a better basis on which to apply the ‘proportionality rule’ — that is, the extent of RIS analysis needs to be commensurate with the magnitude of the problem and with the size and potential impacts of the proposal.<sup>78</sup>

The imprecision of the process may not matter much. As the ORR observes, quoting the OECD:

Experience makes clear that RIA’s most important contribution to the quality of decisions is *not* the precision of the calculations used, but the action of analysing — questioning, understanding real-world impacts, and exploring assumptions.<sup>79</sup>

The ORR does not review the substantive policy issues involved in the regulatory options that departments and agencies present. Instead, it ‘determine[s] if the guidelines have been followed, the level of analysis is adequate and commensurate with the impacts, and whether alternatives to regulation have been adequately considered’.<sup>80</sup> (This ostensible neutrality is, of course, controversial. The ORR clearly has its own view of ‘the essential characteristics of effective and efficient regulation’.<sup>81</sup> And claims to neutrality do not take into account the shaping effects of the process itself on the substantive policies and policy instruments that are presented for review.)

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<sup>74</sup> Ibid 12 (emphasis in original).

<sup>75</sup> Ibid.

<sup>76</sup> Productivity Commission, ‘Regulation and its Review 2003–04’, Productivity Commission Annual Report Series (2004) 12.

<sup>77</sup> Productivity Commission, ‘Regulation and its Review 2000–01’, above n 72, 7–8.

<sup>78</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 13 (footnote omitted).

<sup>79</sup> OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002) 46–7.

<sup>80</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 21, writing in the context of national cooperative regulation but stating that it applies the same approach to Commonwealth regulatory proposals.

<sup>81</sup> Ibid 53.

When the ORR began reviewing the adequacy of RISs, it applied ‘a relatively low’ standard of adequacy for RISs;<sup>82</sup> the standard was increased as decision-makers became ‘more familiar and experienced with the analytic approach required in RISs’.<sup>83</sup> The ORR has conducted training programmes for policy officers in departments and agencies in the requirements of regulatory impact assessment, particularly to enable those officers to conduct review the regulatory impact of existing legislation.<sup>84</sup>

### C *Experience with the RIS Process*

The RIS process is now relatively mature. It is part of an internationally entrenched regulatory paradigm.<sup>85</sup> It has existed in one form or another at the Commonwealth level for nearly two decades. It has been endorsed by Labor and non-Labor governments. And it has been adopted by State and Territory governments. What is its track record?

There is surprisingly little dedicated critical literature on the subject of regulatory impact analyses, beyond that concerning their ‘effectiveness’ and the methodology for measuring such effectiveness.<sup>86</sup> The use of economic analysis, particularly cost-benefit analysis, in preparing such statements, is nevertheless generally acknowledged to lead to a number of problems. In particular, regulatory impact analyses are criticised for their often narrow focus: what is ‘most conducive to economic efficiency or prosperity is not necessarily the same as [the set of laws and regulations] that best secures individual liberty, natural rights, or diverse concepts of “justice”’.<sup>87</sup> Regulatory impact analyses therefore have the capacity to ignore broader social and environmental concerns.<sup>88</sup>

A related point is that regulatory impact analysis is problematic due to its tendency to treat all relevant factors as quantifiable and the sometimes arbitrary weightings used to combine relevant factors.<sup>89</sup> Morally and ethically laden concepts

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<sup>82</sup> Ibid 11.

<sup>83</sup> Ibid.

<sup>84</sup> Productivity Commission, ‘Regulation and its Review 2000–01’, above n 72, 44; Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 77.

<sup>85</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, xv.

<sup>86</sup> The recognised obstacles to effectiveness include complexity, cost, lack of time, resistance from policy makers, lack of incentives for policy makers to comply, lack of skilled policy makers, and lack of demand for information from politicians: Jacobs, above n 49, 20–1.

<sup>87</sup> Bryce Wilkinson, ‘Evaluating Government Regulations’ (2003) 10 *Agenda* 325, 332. See also Regulatory Consulting Group, *Assessing the Contribution of Regulatory Impact Analysis on Decision Making and the Development of Regulations* (31 August 2000) 25.

<sup>88</sup> OECD, *Regulatory Reform: A Country Study of Australia*, OECD Doc OCDE/GD(96)91 (1996) 58.

<sup>89</sup> A recent illustration is provided by the RIS for the Exposure Draft of the *Local Government (Electoral) Regulations 2005* (Vic) (available at <[http://www.doi.vic.gov.au/DOI/DOIElect.nsf/2a6bd98dee287482ca256915001cff0c/6c2f3c54e97476ddca25701a00139521/\\$FILE/RIS-LGElectRegs.pdf](http://www.doi.vic.gov.au/DOI/DOIElect.nsf/2a6bd98dee287482ca256915001cff0c/6c2f3c54e97476ddca25701a00139521/$FILE/RIS-LGElectRegs.pdf)> at 6 July 2005). Regulation 37 would prevent candidates from including preference lists in the candidate statements that are sent to voters when local government elections are conducted by postal ballot. The RIS summarises its evaluation of three options — the status quo, the proposed regulation that would preclude preference information and a situation with no regulation (removing provision for candidate statements) at all — as follows. First it identifies four criteria, listed in the first column of the following table. (Note that the RIS does attempt to move beyond purely financial considerations in the first two criteria; but equally there is no mention of the restriction of the candidates’ rights of political communication.)

cannot necessarily be so easily reduced; for instance, some may consider ascribing economic value to aspects of human life and health to be offensive.<sup>90</sup> Even with less controversial topics there are significant variations in subjective understandings of what constitutes ‘good regulation’.<sup>91</sup> It has also been argued that the process is contrary to the ethos of regulators and interest groups, neither of whom are comfortable with the process of systematically making explicit the costs and benefits of each regulatory option, preferring to focus on the benefits of their preferred options and the costs of others. These understandings may also be shaped by external incentives that may conflict with measured and objective analysis; regulators may feel

Criteria	Weight	Status Quo	No Preferences	No Regulation
Assistance for voters	30%	+1 (+0.3)	0	-2 (-0.6)
Dummy candidates	30%	-3 (-0.9)	0	0
Candidate costs	20%	+1 (+0.2)	0	-1 (-0.2)
Administration costs	20%	-1 (-0.2)	0	+2 (+0.4)
<b>Weighted scores</b>		<b>-0.6</b>	<b>0.0</b>	<b>-0.4</b>

No reasoning is provided to explain the weightings given to the various criteria apart from assertions along the lines of ‘This is an important criterion and receives a weighting of 30%’ and ‘Given the potential negative consequences associated with large numbers of dummy candidates, this criterion also has a high weighting of 30%’: at 39. The options are scored against the criteria on a seven point scale: -3 where the option has ‘major disadvantages’ compared to a benchmark, -2 where it has ‘significant disadvantages’, -1 where it has ‘some disadvantages’, 0 where it has ‘little or no disadvantage or advantage’, through to +3 where it has ‘significant advantages’: at 15.

As the RIS explains:

Each option/criterion score is weighted in accordance with the percentage weightings and the weighted score is shown in brackets. The sum of all the weighted scores for each option is shown at the bottom of the table.

All scores are *relative scores*. That is, they are relative to the benchmark option, which is defined to be zero.

Options that score an overall positive (>0) are evaluated as preferable to the benchmark option, while options with a negative total weighted score (<0) are less preferable. The option with the highest score overall is the most preferred: *ibid* 15 (emphasis in original).

The final conclusion as to the preferred option therefore depends critically on the weights and scores assigned to the options in an attempt to combine the various factors. Inevitably, the weights and scores are a matter of impression and the final ‘weighted score[s]’ (which is formed by a purely mathematical combination of those weights and scores) is equally a matter of impression, notwithstanding the ostensible objectivity of the numbers.

<sup>90</sup> Regulatory Consulting Group, above n 87, 25.

<sup>91</sup> Claudio Radaelli, ‘How Context Matters: Regulatory Quality in the European Union’ (Paper prepared for Political Studies Association Conference, Lincoln, 5–8 April 2004) 9–10.

pressured by a desire not to unduly ‘slow down the process’,<sup>92</sup> or even by a unwillingness to expose the relevant Minister or Department to criticism.<sup>93</sup>

Regulatory impact analysis can also be thought of as an attempt to predict the future operation of a regulation to determine its value: such gazing into the future, in treating ‘subjective future costs and benefits as technocratic variables that can be objectively estimated’,<sup>94</sup> is inherently dangerous, although arguably unavoidable.

In addition, there is the potential for regulatory impact statements to be used by governments to validate decisions already made.<sup>95</sup> In this way the RIS/ORR may be seen as ‘replacing political accountability with a mechanistic tool’.<sup>96</sup> The ORR’s response is rather glib: ‘In OECD countries, RIA is intended to complement good decision-making, not substitute for political accountability.’<sup>97</sup>

## D *Family Impact Statements*

In addition to the RISs already discussed, family impact statements (‘FISs’) should be noted as an analytical tool used to assist in the evaluation of policy proposals in a highly contested area.<sup>98</sup> FISs have been described as a ‘tool for Cabinet to use to analyse and understand better the impact on families of new policies being considered across Government’.<sup>99</sup> FISs have been required in South Australia for cabinet submissions since 1980,<sup>100</sup> and in 1988 the NSW Government made family impact statements a requirement of all Cabinet Minutes.<sup>101</sup> Premier Steve Bracks of

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<sup>92</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 4–5.

<sup>93</sup> Regulatory Consulting Group, above n 87, 25.

<sup>94</sup> Wilkinson, above n 87, 334.

<sup>95</sup> Sarah Mosedale, ‘Regulatory Impact Assessment’ (2004) 3 *CRC Policy Brief*.

<sup>96</sup> Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 4.

<sup>97</sup> *Ibid.* On a slightly different note, Sarah Mosedale of the Centre on Regulation and Competition at the University of Manchester discusses the difficulties in transposing existing RIS frameworks to developing states. She argues that extant frameworks in developed countries assume an institutional background that may be lacking in less-developed states. Furthermore these states may have different priorities, such as poverty reduction: Sarah Mosedale, ‘Regulatory Impact Assessment’ (2004) 3 *CRC Policy Brief*. Mosedale’s suggestion is however limited to adjusting the weighting of factors in making calculations for RISs, rather than recognising any deeper structural flaws with their applicability to developing states.

<sup>98</sup> Archibald Stuart, ‘Family Impact Statements in South Australia’ (1984) 5 *Journal of Family Issues* 383, 385.

<sup>99</sup> Senator Kay Patterson, ‘Opening Address’ (Presented at the Australian Institute of Family Studies Conference: ‘Families Matter’, 9 February 2005) <[http://www.facs.gov.au/internet/minister1.nsf/content/aifs\\_families\\_matter\\_9feb05.htm](http://www.facs.gov.au/internet/minister1.nsf/content/aifs_families_matter_9feb05.htm)> at 6 July 2005. There has been sporadic interest in the idea in the US since the 1970s. While this has led to fairly extensive research on possible methodologies to be employed in preparing FISs, only a few states have bothered to implement such a requirement, with varying degrees of enforcement. In 1987, for example, President Reagan issued an executive order requiring executive agencies to evaluate proposed enactments for their impact on the family using seven criteria, yet this order was largely ignored: Theodora Ooms, ‘Taking Families Seriously: Family Impact Analysis as an Essential Policy Tool’ (Paper prepared for expert meeting, Leuven, Belgium, 19–20 October 1995, revised 14 November 1995) 3.

<sup>100</sup> Stuart, above n 98, 387–8.

<sup>101</sup> Law and Social Justice Branch, Cabinet Office, NSW, *Memorandum No 94-6: Guidelines for Family Impact Statements in Cabinet Minutes* (1 March 1994) available at <[http://www.premiers.nsw.gov.au/pubs\\_dload\\_part4/prem\\_circs\\_memos/prem\\_memos/1994/m94-06.html](http://www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1994/m94-06.html)> at 6 July 2005.

Victoria has also indicated an interest in introducing such statements.<sup>102</sup> In the 2004 Australian federal election the Howard Government made an election promise to introduce FISs for cabinet submissions. While some have attributed this to the influence of the Family First party, it should be noted that Prime Minister Howard has been enthusiastic about the introduction of family impact statements since at least the early 1980s.<sup>103</sup> It has been suggested that the Commonwealth FISs ‘will address economic factors, families’ access to services and infrastructure and the impact on the way families function and on families’ varying responsibilities’.<sup>104</sup>

In preparing family impact statements in NSW, regulators are directed to look at the types, roles and functions of families, the care of children, whether certain target groups would be disadvantaged or excluded by the proposal, and how the proposal is co-ordinated with other agencies.<sup>105</sup>

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In short, then, the RIS/ORR processes and the planned FIS processes integrate analysis of certain business impacts of regulatory proposals into the policy process and subject that analysis to independent review; the analysis carried out during policy formation is then made available to inform parliamentary deliberation. The RIS/ORR experience is not without its controversies. However, its basic structural features meet the objectives outlined above for pre-legislative consideration of human rights issues. The question then is whether it can be adapted to the human rights context. That is the subject of the next Part.

#### IV A PROPOSAL FOR FORMAL ANALYSIS OF THE HUMAN RIGHTS IMPACT OF POLICY PROPOSALS

In the previous section I described the RIS and ORR processes. Why are these processes of any relevance at all to those interested in improving the capacity of the legislative process to address rights issues?<sup>106</sup> The answer is that these processes can provide a useful model for enhancing the consideration of human rights issues in the policy process. In particular, these processes respond to two needs that arise when the policy process leads to the enactment of legislation. The first is that identified by David Kinley: the need for ‘a scheme, [under] which whilst retaining the authority of Parliament to enact legislation ... , all legislation is *both proposed and passed in the knowledge* of its likely impact (if any) on the guarantees provided in the relevant human rights instrument’.<sup>107</sup> The second is that for a scheme that forces the executive, the most powerful branch in modern government, to confront the rights-impact of its legislative proposals.

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<sup>102</sup> Jason Dowling, ‘Bracks Joins Howard in Bowing to Family First’, *The Age* (Melbourne), 10 April 2005.

<sup>103</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 1981, 2066 (John Howard).

<sup>104</sup> Patterson, above n 99.

<sup>105</sup> Law and Social Justice Branch, NSW Cabinet Office, above n 101.

<sup>106</sup> RISs occasionally address rights issues, but through a costs benefits lens. For an example, see the RIS published with the Explanatory Memorandum for the *Age Discrimination Act 2004* (Cth). Nonetheless some Bills that have a large rights impact have very small business impact and therefore do not require an RIS: see, eg, the Migration Legislation Amendment (Judicial Review) Bill 1998–2001 (Cth).

<sup>107</sup> Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’, above n 7, 163 (emphasis in original).

Accordingly, I would propose:

1. That the government require departments and agencies to prepare a Human Rights Impact Statement ('HRIS') for all policy proposals which have a direct or significant indirect (positive or negative) effect on human rights.
2. That an independent executive agency should be responsible for advising agencies and departments on human rights issues that arise in the policy process; to examine and advise on human rights impact statements; and to report to the Attorney-General or Prime Minister on the overall adequacy of departments' and agencies' human rights impact statements.

### A *Proposal 1: Human Rights Impact Statements*

This is directly modelled on the existing requirement that departments and agencies prepare RISs for other categories of policy proposal.<sup>108</sup>

Under the simplest version of this proposal, an HRIS must:

1. identify the problem or issues which *may* give rise to the need for action;
2. identify the desired objective or objectives of the action;
3. identify the policy instruments that might be employed to achieve the desired objective or objectives;
4. include an assessment of the human rights impact of each option;
5. identify the extent of the consultation with those who would be affected by the proposed action and summarise their views;
6. identify and give reasons supporting a recommended option;
7. describe a strategy to implement and review the recommended option.

In other words, an HRIS will have the same broad structure and content as an RIS *except* in part 4 where assesses the human rights impact of each option instead of the economic (cost-benefit) impact. HRISs will be required for proposals for legislative action as well as for proposals that employ other policy instruments.<sup>109</sup>

Departments and agencies should also be required over a period of years progressively to produce HRISs for existing legislative and non-legislative programmes, much like the requirement that they review the competition effects of existing regulations under the RIS process.<sup>110</sup> The HRIS should be attached to cabinet submissions (or submissions to the Prime Minister) seeking approval for proposed

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<sup>108</sup> Recall that regulation is a broad category, extending beyond legislation to include other policy instruments: see above p 17.

<sup>109</sup> The HRIS requirement is wider than the RIS requirement in that it extends to policy proposals (cf above p 9–10) that do not take the form of *regulation* (cf above p 17). For example, an HRIS should be required for spending proposals.

<sup>110</sup> See OECD, *Regulatory Reform: A Country Study of Australia*, above n 88, 8, 25–31. This would allow HRIS to evaluate the need for government action and help foster a proactive attitude to promoting human rights, rather than simply a reactive approach that assesses whether concrete legislative proposals affect rights.

measures, including regulations. It should be tabled when proposed legislation is introduced into the Parliament so that parliamentary debate can be informed by its assessment of the likely human rights impact of the proposal and its alternatives.

## **B      *Proposal 2: Review of Human Rights Impact Statements***

This proposal envisages an executive agency whose functions mirror those of the ORR. It would therefore not be limited to the scrutiny of HRISs but would include the broader role of fostering integration of human rights concerns into the policy process. Nonetheless, review of HRISs would be a key element of its work. In particular, just as the ORR reviews the adequacy of RISs and not their merits, this agency should review the *adequacy* of HRISs and not the substantive policy decisions and judgements about human rights.

Which agency should have this responsibility? One option would be to divide responsibility for review between ORR and, say, HREOC. Regulators would develop the (H)RIS as a single and integral component of the policy making process that assesses human rights impact and economic impact. Separating the HRIS from the RIS and making different bodies responsible for the review of each is not likely to be conducive to an integrated approach to policy making. It therefore seems preferable to expand the mandate of the ORR so that it reviews the adequacy of an expanded (H)RIS that includes an assessment of human rights impacts as well as economic impacts. However, the expertise of the ORR and the focus of its current approach — micro-economic review of costs and benefits — is not appropriate for a body also required to assess human rights impacts. If an expanded ORR is to assess human rights impacts as well as economic impacts it will need a home outside the Productivity Commission that can also accommodate the distinctive expertise required for human rights impact assessment.

## **C      *Refining the Proposals***

Proposal 1 meets the basic need for ‘a scheme, [under] which whilst retaining the authority of Parliament to enact legislation ... , all legislation is *both proposed and passed in the knowledge* of its likely impact (if any) on the guarantees provided in the relevant human rights instrument’.<sup>111</sup> In doing so it is not unique. Rights impact statements are already required in the ACT, Queensland, New Zealand and the United Kingdom.<sup>112</sup> These statements differ one from another in at least five dimensions:

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<sup>111</sup> Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’, above n 7, 163 (emphasis in original).

<sup>112</sup> As noted above, s 37 of the *Human Rights Act 2004* (ACT) requires the Attorney-General to prepare a statement for presentation to the legislature about the extent to which each government Bill is consistent with human rights.

Section 22(1) of the *Legislative Standards Act 1992* (Qld) requires the member who presents a Bill to the House to circulate an explanatory note that includes ‘a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency’: s 23(1)(f).

Section 7 of the *Bill of Rights Act 1990* (NZ) requires the Attorney-General to ‘bring to the attention of the House of Representatives any provision in [each government and non-government] Bill that appears to be inconsistent with any of the rights and freedoms in this Bill of Rights’.

Section 19 of the *Human Rights Act 1998* (UK) requires the responsible minister to make a statement prior to the Second Reading of each Bill ‘to the effect that in his view the provisions of the Bill are compatible with the Convention rights’ or ‘to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill’.

- **scope:** what rights are considered in assessing the rights impact of proposed legislation;
- **coverage:** whether the requirement for a rights impact statement extends beyond government bills to non-government bills and beyond bills as introduced to bills as amended in Parliament;
- **content:** whether there is a requirement for a *reasoned* statement regarding compatibility with the human rights instrument or merely for a statement, or whether there is a requirement for a broader assessment of human rights impact;
- **integration:** whether the human rights impact statement is an integral part of the policy development process or whether it is an add-on component; and
- **responsibility:** whether responsibility for preparing and presenting the statement is centralised in a particular non-portfolio Minister or Law Officer or allocated to the Minister responsible for the Bill.

The present proposal reflects or requires design decisions in each of these dimensions.

### 1) *Scope*

Should policy makers assess the human rights impact of proposals against a canonical list of specific human rights (for example, a list based on the rights contained in the *ICCPR* and *International Covenant on Economic, Social and Cultural Rights*)<sup>113</sup> or should they merely be asked to assess the extent to which proposals ‘trespass ... on personal rights and liberties’? The current mechanisms for scrutiny of legislative proposals follow both approaches — for example, the Scrutiny Committees have a broad and generic mandate; the Commonwealth Legislation Handbook directs attention to the *ICCPR* and Australia’s other treaty commitments. However, the issue is controversial. A NSW Parliamentary Committee rejected even the minimalist set of rights contained in the *Legislative Standards Act 1992* (Qld) as an ‘initiative[] which emerged from the Fitzgerald Royal Commission as part of a thorough reformation of the relationships between the different arms of government after the problems of the 1980s’; it preferred ‘the more flexible, less prescriptive approach of the Senate Committee’ which would allow for, but not require, reference to the *ICCPR* and ‘local issues which may not be explicitly considered in international instruments’.<sup>114</sup> This is a design decision, requiring broad community consultation, that is beyond the scope of this article to resolve.

### 2) *Coverage*

The core outlined above HRIS proposal applies to government policy proposals. This reflects the fact that most policy development occurs in government

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<sup>113</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>114</sup> Standing Committee on Law and Justice, Legislative Council, Parliament of NSW, ‘A NSW Bill of Rights’, Parliamentary Paper No 893 (2001) 131.

agencies and departments.<sup>115</sup> However, just as amendments to the United Kingdom Parliament's Standing Orders now require compatibility statements for non-government bills, filling a lacuna left by the *Human Rights Act 1998* (UK), the HRIS requirement should extend to non-government measures as well.<sup>116</sup> Parliament deserves to be apprised of the rights impact of all of the proposals that it considers. However, there are obvious resource implications. Non-government members do not have access to the departmental resources that Ministers have. Nonetheless, just as non-government members can access the services of Parliamentary counsel when drafting private members Bills, they could be given access to technical human rights expertise to prepare HRIS.

A potentially more difficult issue arises in relation to urgent legislation and amendments proposed in the course of parliamentary deliberation. In these situations, there may be no time for effective scrutiny, let alone preparation of an HRIS, before the legislation or amendments are considered by Parliament. Here, post-enactment review may be inevitable, just as post-enactment scrutiny by parliamentary committees is sometimes required.

### 3) *Content*

A bald statement that proposed legislation (or part of it) is or is not compatible with the relevant human rights instrument provides very little information to the Parliament or the public. Compatibility statements such as those provided in the ACT<sup>117</sup> fail to reveal whether the Attorney-General has reached the view that legislation does not infringe the protected rights at all or that it infringes protected rights but that he or she regards it as justified or proportionate to some legitimate objective. Much better that Parliament be given a reasoned statement of compatibility, as is now the practice in the United Kingdom,<sup>118</sup> or that the opinions on which statements of compatibility are based are themselves published, as is the practice in New Zealand.<sup>119</sup> Better still that Parliament have the information that would be contained in an HRIS, including information about non-legislative alternatives and why they were not preferred.<sup>120</sup>

There are a variety of established approaches to rights analysis upon which bodies making HRISs could draw. One example is the 'Oakes test'<sup>121</sup> as used by the Canadian Supreme Court to determine whether legislation is incompatible with s 1 of

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<sup>115</sup> Contrary to the ORR's view in relation to RISs, preparation of an HRIS should *not* be unnecessary simply because a 'regulation reflects a *specific* election commitment and there is no scope to consider alternative ways to meet that commitment': Office of Regulation Review, above n 43, A4 (emphasis in original). At least in the rights context, that approach is unduly deferential to the government.

<sup>116</sup> Anthony Lester, 'Parliamentary Scrutiny of Legislation under the *Human Rights Act 1998*' (2002) 33 *Victoria University of Wellington Law Review* 1, 5, 17.

<sup>117</sup> See above p 16.

<sup>118</sup> Lester, above n 116, 20–1.

<sup>119</sup> *Advice Provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the Consistency of Bills with the Bill of Rights Act 1990* (2003–) available at <<http://www.justice.govt.nz/bill-of-rights/index.html>> at 6 July 2005.

<sup>120</sup> This is not to suggest that statements of compatibility be done away with. They are important in identifying a single member of the executive who takes political responsibility for the compatibility of proposals with human rights standards. The point in the text is that they must be supplemented rather than that they be eliminated.

<sup>121</sup> See *R v Oakes* [1986] 1 SCR 103, [73]–[74].

the *Canadian Charter of Rights and Freedoms*; the proportionality analysis employed in the UK in relation to the *Human Rights Act 1998* (UK)<sup>122</sup> is another; and the approach of the United Nations Human Rights Committee in relation to individual complaints under the *First Optional Protocol to the ICCPR*<sup>123</sup> is a third. Even after drawing on these disparate influences, the analytical system would inevitably adapt to the local institutional setting over time.

That does not mean that the HRIS need be a substantial document. The HRIS methodology must be ‘flexible and administratively feasible given capacities and resources’.<sup>124</sup> As the OECD Secretariat comments in relation to RISs ‘[i]n most cases, simplicity is more important than precision ... In all cases, use of a few consistent analytical rules can greatly improve the quality of the analysis’.<sup>125</sup> There is a limit to how much information parliamentarians can absorb and use<sup>126</sup> and that may be less than the amount that departments and agencies can produce. That does not appear to have been a complaint about RISs to date, perhaps attributable to the standards that the ORR applies, requiring a level of analysis that is proportionate to the seriousness of the issues presented by the regulatory proposal.<sup>127</sup> But it will be necessary to guard against information overload and HRIS fatigue. This calls for monitoring and evaluation of the implementation of the proposal rather than its rejection out of hand.

I noted above that the key difference between RISs and HRISs will be in part 4 of the document, which contains the analysis of the impact of the policy proposal. In the first instance this reflects the different normative frameworks in which the analysis is carried out – economics and human rights respectively. That difference in normative framework leads to three methodological differences in the HRIS context as well. First, quantitative analysis will usually be inappropriate.<sup>128</sup> Second, analysis will not be focused exclusively on burdens or *restrictions* on rights although these will be significant (compare the RIS analysis of restrictions on competition or business). Thirdly, and developing this point, there need not always be a presumption against regulation and onus on the proponent of regulation.<sup>129</sup> That is clearly the case in relation to social and economic rights where government action will clearly be required in many instances to secure the progressive realisation of those rights. But even in relation to civil and political rights, regulation is often required to make rights effective — to take but one example, rights of political participation cannot be realised without regulations establishing an electoral system. HRIS analysis will

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<sup>122</sup> See David Feldman, ‘Proportionality and the Human Rights Act 1998’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 117; Nicholas Green, ‘Proportionality and the Supremacy of Parliament in the UK’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 145.

<sup>123</sup> Opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

<sup>124</sup> Jacobs, above n 49, 22.

<sup>125</sup> *Ibid.*

<sup>126</sup> In 2002–03, RISs and regulatory policy issues were discussed on 37 occasions in the Parliament: Productivity Commission, ‘Regulation and its Review 2002–03’, above n 40, 83.

<sup>127</sup> See text accompanying fn 78, above p 23.

<sup>128</sup> For reasons outlined in Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Australian Legislatures: A Research Agenda and Methodology’ (2005) (forthcoming).

<sup>129</sup> See text accompanying fn 64 on p 20.

therefore need to consider whether a regulatory proposal goes *far enough* in pursuing rights-outcomes.<sup>130</sup>

#### 4) ***Integration***

Legislative impact statements, and in particular HRISs, must be prepared as an integral part of the policy process and not as an after-the-fact formality. That is the hope of Elizabeth Kelly, a senior ACT bureaucrat and member of the consultative committee on the ACT *Human Rights Act*. She argues that the statement of compatibility will ‘institutionalise human rights considerations at the beginning of the policy process’ and observes that ‘although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt’.<sup>131</sup> Some mechanism more concrete than a mere recommendation that policy officers consult the Bill of Rights Unit or Human Rights Office during the policy formulation process<sup>132</sup> is desirable to ensure that human rights considerations are institutionalised. In the United Kingdom and New Zealand, the mechanism comes from instructions issued by the Cabinet Office. The New Zealand Cabinet Handbook requires that at the policy approval stage Ministers certify *to Cabinet* that their legislative proposals comply with relevant rights standards.<sup>133</sup> In the United Kingdom, the British Cabinet Office Guidance to Departments requires that, at the policy approval stage, ‘a general assessment’ of compatibility is provided to Ministers; and that once the Bill is drafted, ‘a more formal compatibility document is prepared by departmental lawyers in consultation with Law Officers and the Foreign and Commonwealth Office. This document is then passed to the Cabinet Legislation Joint Committee and ultimately forms the basis of the s 19 statement in each House’.<sup>134</sup>

#### 5) ***Responsibility***

The integration issue has obvious implications for who is responsible for preparing an HRIS. Responsibility for preparing the HRIS must rest with the department or agency that is responsible for the policy proposal that it accompanies. As Elizabeth Kelly points out, that helps ensure that human rights do not become the exclusive responsibility of a single reviewing agency.<sup>135</sup> That is not to say that there is no role for independent officers, such as the Attorney-General, in relation to HRISs, but should be a scrutiny or review role rather than primary responsibility for assessing the compatibility of the proposal with the relevant rights instrument.

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<sup>130</sup> This is not to say that the government’s budgetary decisions must be renegotiated because an HRIS says that, for example, the government should do more to redress indigenous disadvantage or urban homelessness. HRIS analysis takes place in the wider policy context and within the constraints imposed by it. But what an HRIS can do is identify the nature of the constraints under which policy is formulated and the rights-impact of those constraints.

<sup>131</sup> Elizabeth Kelly, ‘Human Rights Act 2004: A New Dawn for Rights Protection’ (2004) 41 *AIAL Forum* 30, 33.

<sup>132</sup> See text accompanying fn n 31. The recommendation should also extend beyond preparation of legislative proposals.

<sup>133</sup> Department of the Prime Minister and Cabinet, New Zealand, *Cabinet Manual* (2001) 69–70.

<sup>134</sup> Lester, above n 116, 4.

<sup>135</sup> Elizabeth Kelly, ‘Government in the ACT: A Human Rights Dialogue?’ (presentation at Assessing the First Year of the ACT Human Rights Act, Australian National University, Canberra, 29 June 2005).

The HRIS proposal presented here meets the pragmatic demand that I expressed at the outset, namely, that reform proposals be cautious and incremental. It builds on existing processes under which proposed legislation (and other policy instruments) is assessed against controversial criteria by an independent government agency before the legislation is considered by Parliament. At the outset, I argued for a cautious and incremental approach to enhancing rights-protection in Australia. My reasons were both principled and pragmatic. As a matter of principle, a cautious and incremental approach reflects the uncertainty about what rights-protecting mechanisms are best for Australia. As a matter of practice, such an approach was the most likely to avoid the opposition that more radical changes would elicit. Moreover, it seems entirely appropriate to model enhanced rights-protecting mechanisms on processes that already exist, at Commonwealth level and in most of the States, and that are reasonably well-integrated into the policy process from beginning to end.

### A *Subjectivity and Controversy*

What of the objection that the cost-benefit analysis<sup>136</sup> involved in the existing processes is fundamentally unlike the analysis that would be involved in analysing rights-impacts and reviewing those analyses? Undoubtedly there are significant differences and the regulatory-impact processes cannot be applied directly to analyse rights-impacts. But there is one aspect to this objection that must be disposed of at once. It is not plausible to contrast cost-benefit analysis as a transparent and objective process with rights-impact analysis as a contested and subjective processes. (It is even less plausible to contrast the analysis required by FISs with that required by HRISs.) Cost-benefit analysis involves controversial assumptions about the discount rate to apply in measuring future costs and benefits;<sup>137</sup> it often requires practitioners to attach economic values to intangibles (for example, the environment) and things many would regard as invaluable (for example, a human life) or incommensurable (for examples, rights and economic prosperity); and where practitioners are reluctant to bear the political costs of doing so they may exercise a discretion to use less rigidly quantitative analytical frameworks (in particular, the practical costs of attaching values to human life).<sup>138</sup> Rights-impact analysis will inevitably be controversial. But regulation-impact analysis (and to an even greater extent, family impact analysis) already is.

### B *Independence*

In his analysis of the work of scrutiny committees, David Kinley notes the Canadian and New Zealand requirements that the Minister of Justice or Attorney-General is to report on inconsistencies between proposed legislation and the relevant rights instrument.<sup>139</sup> He comments that both ‘lack independence, since they entrust the task of the scrutiny of Government legislation to the government’ and that ‘one cannot help feeling uneasy at the prospect of political convenience trumping scrutinizing

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<sup>136</sup> And the other economically oriented analyses such as cost assessment.

<sup>137</sup> Jacobs, above n 49, 20–1; Wilkinson, above n 87, 334.

<sup>138</sup> Regulatory Consulting Group, above n 87, 25.

<sup>139</sup> Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’, above n 7, 163–6.

probity in certain, perhaps pressing, circumstances'.<sup>140</sup> In relation to the United Kingdom he has argued that 'the only viable option [for effective scrutiny] is to establish it as part of the Parliamentary legislative process (that is, crucially, beyond the sole control of the Executive)'.<sup>141</sup>

Kinley moves too quickly from the manifest risk of inadequate consideration of rights issues *by ministers* (that is, by members of the political executive) to his conclusion that only *parliamentary* mechanisms can provide adequate scrutiny. I have noted some of the constraints on parliamentary scrutiny committees above.<sup>142</sup> Here, it is relevant to note that parliamentary scrutiny mechanisms have no guaranteed independence from the executive. Indeed, they depend critically on support from the executive to perform their function.<sup>143</sup> Executive support is needed to ensure that there are adequate resources for the scrutiny task; that adequate time is provided between introduction of proposed legislation and parliamentary debate; that Ministers respond to concerns raised by the committee; and that the committees' work feeds back into the policy process.

Kinley does not make the unrealistic demand that parliamentary scrutiny mechanisms be entirely independent of the executive; rather, he asks that they be beyond the *sole* control of the (political) executive. But if that is the relevant point, there are many executive agencies that operate independently of the political executive: the Administrative Appeals Tribunal, the Ombudsman, the Australian National Audit Office, the National Competition Council and the Productivity Commission constitute a small selection of such executive agencies whose functions include review of the actions of other parts of the executive government. The extent of their independence varies as does the mechanism by which it is achieved. None have the same constitutional guarantees of independence as the federal courts. But they demonstrate that parliamentary mechanisms are not the only option for some measure of independent scrutiny of executive action, including rights-scrutiny of proposed legislation.

Parliamentary human rights scrutiny mechanisms doubtless can play an important role, at least if they have a measure of executive support. But so too can appropriately constituted executive agencies. That leads to the question, how should an executive agency responsible for human rights scrutiny of policy proposals be constituted?

### C *Achieving Integration and Independence: Models for HRIS Evaluation*

It is necessary to distinguish between two different models of executive agencies responsible for evaluating government action: I will call them the *primary evaluation model* and the *meta-evaluation model*.

- Under the **primary evaluation model**, the independent scrutiny agency performs its own evaluation of the government action. In a rights-scrutiny context, this might mean that the independent scrutiny agency asks, 'Does this

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<sup>140</sup> Ibid 166.

<sup>141</sup> Ibid 167.

<sup>142</sup> See discussion in text above on pp 6 and 7.

<sup>143</sup> David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 112–13.

proposed legislation infringe the human right to be free from discrimination on grounds of race?’ This is the model in the ACT and New Zealand where law officers certify the compatibility of proposed legislation with the relevant rights standards.

- Under the **meta-evaluation model**, by contrast, the independent scrutiny agency performs an audit or review function — the object of its evaluation is not the government action itself but the government’s evaluation of its action. Again, in a rights-scrutiny context, this might mean that the independent scrutiny agency asks, ‘Does *the government’s analysis of whether* this proposed legislation infringes the human right to be free from discrimination on grounds of race *meet the relevant standards for such analyses?*’ This is the model in Proposal 2 of this article, where a remodelled ORR reviews the primary evaluation of rights compatibility carried out by the agency proposing the particular policy proposal.

Some current proposals for independent scrutiny of the rights-impact of proposed government action and similar mechanisms in comparable jurisdictions (all of which will explained in more detail below) can be classified according to this schema as follows:

	<b>Meta-evaluation of rights impact ...</b>	<b>Primary evaluation of rights impact ...</b>
<b>... by the courts or blended independent judicial-executive agency</b>	... by the courts under the Private Property Protection Bill 2003 (Qld)	... by an Australian Rights Council modelled on the Conseil Constitutionnel under Winterton’s proposals ... by the Courts under the reference provisions of the Canadian Charter
<b>... by an independent executive agency</b>	... by an Office of Rights Review / Office of Regulation Review under the proposals made here	... by the Attorney-General / Law Officers under the New Zealand Cabinet Procedures ... by HREOC under the HREOC Act

What follows is a description, and an assessment of the strengths and weaknesses, of these various proposals. On balance, I shall argue the preferable model for Australia appears to be meta-evaluation by an independent executive agency, as contemplated by the proposal made here.

### 1) ***Meta-Evaluation of Rights Impact by the Courts***

A useful example of the first model is provided by the Private Property Protection Bill 2003 (Qld). The Bill would have required that the government prepare

‘private property impact studies’ for all legislation ‘that has the effect of diminishing, removing or restricting a person’s rights to the lawful use or enjoyment of the person’s private property’. Impact studies would have been required to include:

- (a) a clear and specific identification of the substance of the proposed legislation and the purpose and aims of the proposed legislation;
- (b) an analysis of the extent to which the proposed legislation has the effect of diminishing, removing or restricting persons’ rights to the lawful use or enjoyment of private property;
- (c) an identification of the extent to which future development would be restricted by the proposed legislation;
- (d) an analysis and quantification of the total financial cost to private property owners of the imposition of the proposed legislation;
- (e) an analysis and quantification of the benefits of the proposed legislation, and an identification of the persons, or classes of person, to whom benefit accrues;
- (f) an examination of the alternatives to causing, through the proposed legislation, the rights any person has to the lawful use or enjoyment of the person’s private property to be diminished, removed or restricted.<sup>144</sup>

The Bill’s own legislative impact statement (a requirement of the *Legislative Standards Act 1992* (Qld), discussed above) provided the most desultory account of the Bill’s costs and benefits.<sup>145</sup> It demonstrated the potential futility of requiring a rights impact statement in the absence of some mechanism for securing compliance with the requirement: there may be no incentive for the proponent to address the rights-impact of the proposal in a substantive way. (The risk of futility is accentuated in relation to non-government Bills if the responsibility for preparing the rights impact statement is cast on the proponents of such Bills, given the limited resources of non-government members.) However, the Bill also proposed a mechanism for overcoming this risk in relation to private property impact statements. It would have provided for a court to order that a private property impact study be redrafted ‘to ensure that it includes the information required under this Act’ and to direct the department, ‘in redrafting the study, to have regard to particular evidence given by expert witness[es]’.<sup>146</sup>

Under the Bill, the court would not have been responsible for assessing the property rights-impact of the legislation affecting property rights; rather, it would have been responsible for assessing the adequacy of the private property impact statement. (The court’s jurisdiction under the Bill can be compared with the long-standing judicial review jurisdiction in relation of environmental impact statements, with the important difference that private property impact statements are prepared as a prelude to legislative action, rather than as a prelude to administrative action.)

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<sup>144</sup> Private Property Protection Bill 2003 (Qld) s 7(1).

<sup>145</sup> Explanatory Notes, Private Property Protection Bill 2003 (Qld) <[http://www.legislation.qld.gov.au/Bills/50PDF/2003/PrivPropProB03\\_PExp.pdf](http://www.legislation.qld.gov.au/Bills/50PDF/2003/PrivPropProB03_PExp.pdf)> at 6 July 2005.

<sup>146</sup> Private Property Protection Bill 2003 (Qld) s 15(1)(b) and 15(2).

Because the court's role as envisioned in the Bill was limited, the Bill escaped most of the democratic objections to judicial enforcement of rights provisions. That is not to say that the role that the Bill would have given to the court was unproblematic. It would have been an unprecedented (or at least extraordinarily unusual) external check on the parliamentary legislative process.

The practical objection to the Bill is more significant. Although the Bill would enable independent scrutiny of the rights impact statement, it would come towards the end of the policy process. There is nothing in the Bill that would require that private property impact studies be prepared as an integral component of the policy process, rather than as an additional element prepared just-in-time for tabling with the final proposed legislation. And if the review role is assigned to the courts, it is difficult to see how the external review could come any earlier in the process.

## 2) *Primary Evaluation of Rights Impact by a Judicial or Blended Judicial-Independent Executive Agency*

Professor George Winterton has proposed a mechanism that would overcome the difficulties with pre-enactment scrutiny by Parliamentary Committees (see Part II above) without giving the role wholly over to the courts.<sup>147</sup> In his view, a system that is limited to pre-enactment legislative scrutiny gives too much weight to Parliamentary supremacy and not enough to judicial enforcement of rights.<sup>148</sup> His Australian Rights Council, loosely modelled on the French *Conseil Constitutionnel*, would 'protect rights and freedoms through pre-enactment, abstract, quasi-judicial review'.<sup>149</sup> The Council's members would be former judges or 'acknowledged experts in constitutional law', chosen, like the judges of the German Federal Constitutional Court, by two-thirds parliamentary majorities.<sup>150</sup> The council would consider whether proposed legislation was compatible with a Bill of Rights or, if a Bill of Rights had not been enacted, international human rights instruments. Its procedures would be adversarial and would occur immediately before the proposed legislation completed its passage through the Parliament, after the proposed legislation had been subject to deliberation and amendment in the democratic process.<sup>151</sup> Proposed legislation would not automatically come before the Council but could be referred to the Council by legislators and perhaps by affected members of the public.<sup>152</sup> The Council would be able to recommend amendments to proposed legislation to overcome any incompatibility with the Bill or Rights or international human rights instruments.<sup>153</sup> But proposed legislation that the Council determined to be incompatible with the relevant rights standards could still be enacted, provided that a two-thirds majority of each house of the Parliament agreed.<sup>154</sup>

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<sup>147</sup> See Winterton, above n 8.

<sup>148</sup> Ibid 795.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 796.

<sup>152</sup> Ibid 796–7.

<sup>153</sup> Ibid 796.

<sup>154</sup> Ibid 797. The model would have to be different in relation to the Commonwealth Parliament, as opposed to the State Parliaments, because entrenched constitutional provisions define certain aspects of

Winterton's Australian Rights Council is an imaginative attempt to draw on the resources of international constitutional traditions to reconcile the Australian commitment to parliamentary supremacy<sup>155</sup> with the widely-shared belief that Australian parliaments do not adequately protect individual rights. But some aspects of his proposal are mysterious. Winterton identifies the first of the 'main disadvantages' of allowing judicial enforcement as follows:

[A]pplication of a Bill of Rights frequently requires balancing competing rights: the mother's right to an abortion versus the right to life of the foetus and the father's right to parenthood; the defendant's right to a fair trial versus freedom of the press; free exercise of religion versus equality; non-establishment of religion versus freedom of speech, and so on. The balancing of these rights can rarely adequately be achieved merely by neutral principled reasoning, which is what an ideal judiciary offers. It requires the input of community values, policy and public opinion; in other words, *political* considerations, which should be tailored to each application, and may vary over time. ... The political process subject, ultimately, to the ballot box is a more appropriate mechanism for resolving such dilemmas than the blunt neutrality of courts.<sup>156</sup>

If so, why is the Rights Council to base its scrutiny on a canonical list of rights, to be staffed by former judges and lawyers and to conduct its business in a quasi-judicial manner? Why is participation by non-legislators in the proceedings of the Council to be limited to those directly affected by the proposed legislation (and to be *excluded*, rather than opened to all, if this model is regarded as too court-like)?<sup>157</sup>

Putting these questions to one side, Winterton's proposal reflects a particular view of the shortcomings of Australian Parliaments in rights-protection. It focuses on the legislative outputs of parliamentary deliberation rather than on the policy process that leads to the initial proposal that the executive government puts before the Parliament. It assesses legislative outputs against rights-criteria, but does not assist the Parliament in assessing 'community values, policy and public opinion'<sup>158</sup> or in identifying options, short of the executive's legislative proposal, that would achieve the same objectives. Like the model proposed by the Private Property Protection Bill 2003 (Qld) it therefore fails to meet the objectives of the proposals made in this article.

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parliamentary procedure. The role of the Council could be advisory only, its deliberations would have to precede (rather than follow) parliamentary deliberation, and passage of rights-incompatible legislation could not be made dependent on a special majority: at 798.

<sup>155</sup> And the Australian commitment to the separation of powers. The High Court held in *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 that the High Court could not be given an advisory jurisdiction. Cf the Canadian power to refer questions of constitutionality, including compatibility with the *Canadian Charter of Rights and Freedoms*, to the Supreme Court under s 53 of the *Supreme Court Act 1985* (Canada). That power has recently been invoked in the *Reference concerning the Proposal for an Act Respecting Certain Aspects for Legal Capacity for Marriage for Civil Purposes* (the *Same Sex Marriage Reference*) [2004] 3 SCR 698.

<sup>156</sup> Winterton, above n 8, 794 (emphasis in original).

<sup>157</sup> *Ibid* 797.

<sup>158</sup> *Ibid* 794.

### 3) *Primary Evaluation of Rights Impact by an Independent Executive Agency*

As discussed above, the ACT, New Zealand and United Kingdom human rights legislation and the Queensland *Legislative Standards Act 1992* (Qld) require a member of the executive government to certify in some way the compatibility of legislative proposals with relevant rights standards. The risks of having Ministers responsible for assessing the rights impact of legislation are clearest when the assessing Minister is also responsible for the legislation, as in Queensland and the United Kingdom. The only accountability in such cases for the quality of the rights impact statement comes through the parliamentary processes. When independence is non-existent, there is a risk, the extent of which can only be assessed in light of experience, that the certification requirement is a hollow charade. The ACT and New Zealand requirements operate with one level of independence. The rights impact statement must be given by the Attorney-General rather than the responsible Minister. That the point of this requirement is that the statement be given by an independent person is reinforced by the New Zealand Cabinet Manual which requires that where the Attorney is responsible for the relevant Bill, the statement must be given by the Law Officers.

However, the extent to which either of these requirements is effective depends on the independence of the Attorney from his or her Ministerial colleagues or of the law officers from the Attorney. It is well to remember the caution sounded by the High Court in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*:

[I]t has long been widespread practice in ... Australia, both in federal and ... State governments, ... to include the Attorney-General as a member of Cabinet. In Australia, both at federal and State levels, the Attorney-General is a minister in charge of a department administering numerous statutes, is likely to be a member of Cabinet and, at least at State level, may not be a lawyer. At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.<sup>159</sup>

Attorney-General Daryl Williams sounded a similar note of caution in a 2002 speech, claiming that Australian Attorney-Generals 'are not, and cannot be, independent of political imperatives. They are not just legal advisers to the Government: they are politicians, answerable to their party colleagues, Parliament and the electorate'.<sup>160</sup>

It is unlikely that a member of the political executive can discharge an independent scrutiny role. Beyond this the function could be given to an independent statutory agency. For example, the Human Rights and Equal Opportunity Commission could be given a standing request (and the necessary resources) under s 11(e) of the Act:

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<sup>159</sup> (1998) 194 CLR 247, 262–3 (footnotes omitted).

<sup>160</sup> Daryl Williams, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations' (Lecture delivered to the Anglo-Australasian Lawyers Society (UK Branch), London, 9 May 2002) [86].

to examine ... proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination.

However, this approach still fails to achieve full integration with the policy process.

#### 4) *Meta-Evaluation of Rights Impact by an Independent Executive Agency*

In this context, the HRIS scrutiny model proposed here emerges as the only model on offer that provides sufficient independence for the political executive and integration with the policy process. It formalises, institutionalises, and specialises the review function.

It avoids delegating full responsibility for human rights analysis to regulators 'without adequate oversight' while also avoiding giving responsibility to an independent body that is so isolated from the policy cycle that the analysis is an 'academic and impotent exercise'.<sup>161</sup>

The two proposals in conjunction have the potential to provide an additional layer of scrutiny, at a timely point in the policy process, and strengthen the work already performed by the legislature in protecting and promoting human rights in Australia. That is not to suggest they are a panacea or that their implementation would be unproblematic. The experience with regulation review suggests that rights review will not result in an overnight transformation of the culture of policy formation. As the ORR wryly notes in its sixth Annual Report,

The difference between compliance at the decision-making and tabling stages for proposals introduced via Bills, especially for significant proposals, may suggest that, after five years, some Government departments still regard the RIS process as an 'add-on'.<sup>162</sup>

Equally, the experience with regulation review suggests that compliance with a rights review process may be 'poorest where it matters most'.<sup>163</sup> Some departments have relatively weak compliance with the RIS requirements and appear to regard them as an 'add on' rather than as an integral part of the policy making process.<sup>164</sup> The ORR quotes the OECD:

its degree of integration with policy decision-making is low in almost all cases. It is typically regarded as an additional procedural requirement that, at best, explains the merits of a policy decision rather than determining the decision itself. This is a certain symptom of the absence of the cultural change required within the administration to implement the regulatory policy agenda.<sup>165</sup>

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<sup>161</sup> Jacobs, above n 49, 22.

<sup>162</sup> Productivity Commission, 'Regulation and its Review 2002–03', above n 40, 17.

<sup>163</sup> Ibid 43–4.

<sup>164</sup> See ibid 23–42.

<sup>165</sup> OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002) 101–2 quoted in ibid 94.

These departments do not appear to have internalised the evidence-based approach to regulatory costs and benefits that the process is designed to inculcate. There is little reason to believe that a substantive commitment to rights-protection will be any more readily integrated into their work by these policy-makers than the substantive commitment to ‘minimise the burden of regulation on business’ has been to date. It will be necessary to provide appropriate incentives for policy-makers to work on rights impact assessment throughout the policy development process.<sup>166</sup>

However, it seems to me that such procedural changes are likely to be of marginal significance in the absence of ongoing high level political support for the HRIS initiative. This certainly has been the experience with RISs. The OECD lists political support as a key indicator for success of regulatory review processes.<sup>167</sup> Lack of political support from the Cabinet Office before 1997 seems to have meant that the then decade-old Commonwealth RIS requirement was not working effectively;<sup>168</sup> the requirement became a central element of government policy making following Prime Minister Howard’s strong support in 1997.

## VI CONCLUSION

Neither a requirement that policy makers prepare HRISs or a requirement that HRISs be scrutinized by an independent executive agency will establish a culture of human rights in Australian government. That depends on a commitment from the Executive to human rights as a yardstick by which government action is to be evaluated. However, the two requirements proposed here can be important signals of the Executive’s commitment to human rights. They are a logical extension of the existing commitment to evidence-based policy making. They do not disrupt existing institutional responsibilities and competences. They are designed to cultivate a practice of human rights interpretation and analysis in the executive<sup>169</sup> and to facilitate human rights interpretation and analysis in general. They therefore have the potential to further the fundamental democratic objective of assisting Australian legislatures to make their own assessment of the human rights impact of the governments’ proposals.

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<sup>166</sup> Cf Productivity Commission, ‘Regulation and its Review 2000–01’, above n 72, 49. One review suggested procedural mechanisms for achieving this aim: requiring a series of increasingly elaborate RISs throughout the policy process: at 49–50. Thus, in the HRIS context, the requirement might become a fourfold requirement for an initial HRIS (when considering the need for regulation), a partial HRIS (when seeking approval to work on developing regulatory proposals), a full HRIS (at the decision-making stage) and a final HRIS (at the tabling stage). The UK model of initial and subsequent statements on the compatibility of legislation with the Human Rights Act 1998 (UK) is comparable: see Lester, above n 116, 20–1.

<sup>167</sup> Jacobs, above n 49, 22.

<sup>168</sup> Law Reform Committee, Parliament of Victoria, above n 167, 140. See also OECD, *Regulatory Reform: A Country Study of Australia*, above n 88, 32–3.

<sup>169</sup> This can be contrasted with the situation in Canada, where the executive’s statutory obligation to advise Parliament when legislation may be incompatible with the *Canadian Charter of Rights and Freedoms* is framed in relation to arguments that would be made *before the judiciary*, ie whether a credible *Charter* argument can be mounted: Janet Hiebert, *Charter Conflicts: What Is Parliament’s Role?* (2002) 10. The result is a political culture that prevents proposals that would not survive judicial scrutiny from even reaching the legislature: Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2<sup>nd</sup> ed, 2001) 176–81.

