Presentation to the Senate Modernization Committee

The Senate and the Canadian Charter of Rights and Freedoms

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There are 4 broad reforms that should be considered to ensure a more transparent approach to the Charter of Rights and Freedoms by the Minister of Justice, as well as to modernize the role of the Senate in respect to rights-based scrutiny and the legislative process.

1. Change the Minister of Justice's reporting duty in regard to the Charter of Rights and Freedoms from simply allowing a **statement of incompatibility** (SOI) to also require a **statement of compatibility** (SOC) for all government bills modelled after the approach in the Commonwealth of Australia. For private members' bills (PMBs), the Minister of Justice should be required to review all PMBs that progress past second reading. Because PMBs have a higher probability of being found incompatible with the Charter of Rights, as the Department of Justice does not assist in the preparation of PMBS, a revised section 4.1.1. of the Department of Justice Act should retain the ability of the Minister of Justice to issue a statement of incompatibility in this context.

2. Establish a dedicated parliamentary committee with the sole mandate to receive and review statements of compatibility, and to issue an independent assessment of Charter compatibility of all government bills, and all PMBS that progress past second reading. This committee should be a joint committee of the Parliament of Canada modelled after the Joint Committee on Human Rights (JCHR) in the United Kingdom and the Parliamentary Joint Committee on Human Rights (PJCHR) in Australia.

   In the Canadian context, this joint committee should be structured in a similar fashion to the recent Special Joint Committee on Physician Assisted dying – a joint committee of both houses where the government did not control a majority of committee members.

   This proposed joint committee could be named the Joint Scrutiny Committee on Human Rights (JSCHR). Such a committee would require the appointment of a full-time legal advisor to assist it in reviewing statements of compatibility submitted by the Minister of Justice, and to draft independent assessments of compatibility of all government bills and PMBS that progress past second reading.

3. Amend section 4.1.1 of the Department of Justice Act to place a statutory requirement on the Minister of Justice to respond to Charter compatibility assessments produced by the JSCHR when a bill is reintroduced into the House of Commons at third reading. In the case of government bills where the JSCHR disagrees with the Minister of Justice's statement of compatibility, the

Minister of Justice should be required to submit a second report when reintroducing the bill at third reading that addresses the compatibility disagreement between the Minister's SOC and the JSCHR's assessment.

In this respect, a compatibility disagreement would see the Minister of Justice make two reports to the House of Commons under a revised section 4.1.1 of the DOJ Act – at first reading, when a government bill is introduced, and at third reading once the JSCHR has finalized its independent assessment of Charter compatibility and reported to the House of Commons. The second report should see the Minister of Justice address the compatibility disagreements raised by the JSCHR before the third reading vote.

4. Rethink the legislative relationship between the two Houses of Parliament. Unlike Australia and the United Kingdom, the Parliament of Canada lacks a constitutional mechanism to resolve legislative disagreements between the Senate and the House of Commons. This weakness of this institutional limitation is evident in two high profile government bills amended by the Senate of Canada in recent years: medial assistance in dying (Bill C-14); and secondly, liberalizing the application process for the establishment of safe injection sites (Bill C-37).

   Canada therefore requires the creation of **procedures** to resolve legislative disagreements between the two Houses of Parliament modelled after Australia – a joint sitting of both houses under section 57 of the Australian constitution – or the creation of a **principle** such as the Salisbury Doctrine that exists in the United Kingdom.

1 – The Duty to Report: The Minister of Justice and Section 4.1.1 of the Department of Justice Act

The reporting duty under section 4.1.1 of the Department of Justice Act places a statutory obligation on the Minister of Justice to (1) review all government bills for compatibility with the Charter of Rights and Freedoms, (2) to determine if there are any Charter inconsistencies in government bills before the House of Commons and (3) report any inconsistencies to the House of Commons at the first convenient opportunity.

As constituted, section 4.1.1 requires the Minister of Justice to issue a **statement of incompatibility**. To date, the Minister of Justice has never made a section 4.1.1 report to House of Commons, despite the Supreme Court of Canada invalidating nearly 50 statutes passed by the Parliament of Canada since 1982.

Simply put, the present construction of section 4.1.1 is unworkable and must be reconstituted.

Statements of Compatibility and Incompatibility

Statements of compatibility (SOC) should have two main components and should provide a reasoned justification for concluding that a government bill is consistent with the Charter of Rights. Further, the Minister of Justice should present a SOC to the House of Commons when any minister introduces a government bill at first reading. Finally, SOC should be publically accessible and available on the Department of Justice's website, similar to the practice in New Zealand where all statements of compatibility and statements of incompatibility are available on the Ministry of Justice website.

A SOC should not, however, simply assert that a government bill is compatible with the Charter of Rights, which is the practice in the Australian Capital Territory. Instead, a SOC should be a reasoned report by the Minister of Justice that (1) outlines which rights and freedoms (if any) are engaged by the proposed legislation and (2) in the case that the Minister of Justice concludes that such an engagement results in the limitation of a right or freedom, on what basis the Minister of Justice believes that the limitation is 'demonstrably justified in a free and democratic society' and thus saved by section 1 of the Charter.

In regard to statements of incompatibility involving PMBs introduced at second reading, the Minister of Justice would provide a reasoned report why, in the Minister's opinion, the PMB doe not represent a reasonable limitation of a protected right or freedom.

On their own, statements of compatibility will not solve the practical and constitutional difficulties of the current Charter certification process that requires the Justice Minister to report *against* government bills by issuing a statement of incompatibility.

For the Minister of Justice's reporting duty to have an impact on the parliamentary process and to allow for Charter-based scrutiny, changes to Parliament's committee structure would need to be introduced in tandem with changes to the Minister of Justice's reporting duty as a statement of compatibility.

What is needed is the establishment of a stand-alone parliamentary committee that, first, receives the statements of compatibility introduced by the Minister of Justice in

regard to government bills, secondly, scrutinizes these statements of compatibility, and finally, issues an independent assessment to Parliament whether, in fact, the committee agrees with the report issued by the Minister of Justice that a bill is compatible with the Charter of Rights and Freedoms, or any statutory document such as the Canadian Bill of Rights.

2 – A Joint Scrutiny Committee on Human Rights (JSCHR)

It would be incorrect to suggest that Canada does not have a parliamentary committee that is tasked with the consideration of human rights issues. The Standing Joint Committee of Regulations is required to determine whether any regulation or statutory instrument 'is not in conformity with the Canadian Charter of Rights and Freedoms or the 1960 Canadian Bill of Rights'.

This committee was established in 1971 and its mandate was expanded in 1982 with the passage of the Charter of Rights. However, this Standing Joint Committee is limited to the review of regulations and does not assess whether government bills are consistent with the Charter of Rights or the Canadian Bill of Rights.

With the exception of New Zealand, which is a unicameral parliament, the practices in the United Kingdom and Australia have been to establish joint parliamentary human rights scrutiny committees. A review of these Westminster approaches to rights-based scrutiny is provided below.

The United Kingdom

In the United Kingdom, the Joint Committee on Human Rights (JCHR) is chaired by an opposition member from the House of Commons, and is composed of 12 members, based on party standings in the Lords and the Commons. As Prime Minister David Cameron heads a majority government, the Conservative Party has a majority of the members on the JCHR, yet a member of the Labour Party chairs it. The current chair of the JCHR is former interim leader of the Labour Party and cabinet minister, Harriet Harmon.

The role of the JCHR is to provide Parliament with an independent assessment of the section 19 statement attached to all government bills, as required by the *Human Rights Act* 1998 before second reading of a bill. Under section 19 of the *Human Rights Act* 1998, a minister proposing a bill must inform Parliament whether a bill is compatible with the *Human Rights Act*, or failing this, whether the minister considers the bill to be incompatible.

Thus, the JCHR conducts an independent review of government bills and assesses whether they are, in fact, compatible with the *Human Rights Act* 1998. Therefore, Parliament has the opportunity to consider two human rights reports submitted when a government bill is introduced: the ministerial report under section 19 of the *Human Rights Act* 1998, and the report issued by the JCHR when it completes its assessment of the human rights implications of the same government bill.

Australia

In Australia, the *Human Rights (Parliamentary Scrutiny) Act 2011* establishes a 10 member Parliamentary Joint Committee on Human Rights (PJCHR) drawn equally from the House of Representatives and the Senate, and is chaired by a government member from the lower house. Similar to the JCHR, this committee is based on party standings in Parliament, and the government of Prime Minister Malcolm Turnbull, which is a majority coalition of the Liberal and National parties, has a majority of members on the PJCHR.

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a member introducing a bill to attach a statement of compatibility 'in the explanatory statement relating to the legislative instrument' but notes that 'A statement of compatibility prepared under subsection (1) is not binding on any court or tribunal.' Further, 'A failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.'

New Zealand

New Zealand is an outlier, as it is a unicameral parliament that does not have a dedicated parliamentary committee that reviews legislation for its consistency with the *New Zealand Bill of Rights Act* 1990. The *New Zealand Bill of Rights* does not require a member to attach a statement of compatibility to a bill introduce into the House of Representatives. Instead, the Ministry of Justice and the Crown law Office conduct 'Bill of Rights Act' (BORA) vetting on all bills, and post these assessment of compatibility on the Ministry of Justice website.

However, the Attorney General must make a statement of incompatibility to the House of Representatives under section 7 of the *New Zealand Bill of Rights* 1990, where the Attorney General believes 'any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.' All section 7 reports are published on the Ministry of Justice website and on the parliamentary website.

Because New Zealand does not have a dedicated parliamentary committee to review bills from a rights perspective, this is the general responsibility of all Select Committees that have 'subject matter' mandates. However, three Select Committees – the Law and Order Select Committee, the Justice and Electoral Select Committee, and finally, the Social Services Select Committee – receive the vast majority of statements of incompatibility issued by the Attorney General under section 7, and act as defacto BORA scrutiny committees

Why a Joint Scrutiny Committee and not a Committee of the House of Commons?

Given the current debate surrounding the Canadian Senate, why is it preferable to have a Charter scrutiny committee constituted as a Joint Committee of both Houses of Parliament and not simply a Standing Committee of the House of Commons?

There are essentially three reasons why a human rights scrutiny committee should *not* be a committee of the House of Commons: first, the normal composition of the House of Commons as majority government; second, the rules governing the composition of committees under the Standing Orders of the House of Commons; and finally, the intense partisanship of the House of Commons that would undermine the effectiveness of rights-based scrutiny involving government bills.

Committees of the House of Commons are based on party standings. As majority government is the norm in Canada, the United Kingdom and Australia, a committee located in the lower house would be controlled by the government, either through the election of committee chairs or the allocation of committee membership along party lines.

The only mandate that a human rights scrutiny committee would have is to scrutinize government bills and determine their consistency with rights instruments such as the Charter of Rights. This is the principal reason why a rights-based scrutiny committee should not be located in the lower house of parliament, where the vast majority of government bills originate, and where the lower house is dominated by the governing party.

If located in the House of Commons, a standing committee would be under the control of the government, as a member of the governing party would most likely be elected as chair, and a majority of the members would be from the government caucus. The natural inclination of this committee, as constituted, would be to accept

ministerial conclusions on compatibility and would not engage in substantive review of the bill in question
This is challenge that any parliamentary committee faces, given that party standings in Parliament determine the composition of committees, and majority government is generally the norm in the Westminster systems under consideration. Indeed, parliamentary committees are only as effective as their composition, and tend to be less effective when a committee is chaired by a government member and composed of a majority from the government caucus.

Scrutiny of Acts and Regulations Committee of the Parliament of Victoria

On two occasions, I have been an invited guest and observed the workings of parliamentary scrutiny committees in Australia. In June 2005, I observed the Standing Committee for the Scrutiny of Bills in the Australian Senate, and in February 2008, I was an invited guest of the Scrutiny of Acts and Regulations Committee (SARC) at the Parliament of Victoria in Melbourne, Australia.

I will confine my remarks to SARC, as Victoria and the Australian Capital Territory are the only Australian jurisdictions that have statutory bills of rights. In Victoria, the statutory instrument is the *Victorian Charter of Human Rights and Responsibilities Act 2006*. Under the Victorian Charter, section 28 calls for a reasoned statement of compatibility, as it requires the member introducing a bill to certify it consistency with the Victorian Charter *and* establish 'how it is compatible.' Thus, a reasoned statement of compatibility has potentially two parts: the reasons why a bill is considered compatible with rights and freedoms, and secondly, failing this, why the bill is considered a reasonable infringement on protected rights or freedoms.

Similar to section 19 of the UK's Human Rights Act 1998, a member can also attach a statement of incompatibility when a bill is considered inconsistent with rights and freedoms.

Section 30 of the Victorian Charter places a statutory responsibility on SARC to review all bills and report any inconsistencies to Parliament. As a committee, SARC predates the introduction of the Victorian Charter, and simply had its mandate augmented by the introduction of the Charter in 2006.

SARC is a seven member Joint Committee of the Legislative Assembly and the Legislative Council that is chaired by a member of the government caucus with the party standings during the current parliament: Australian Labour Party (4), Liberal Party (2) and National Party (1). As SARC reflects party standings in Parliament, the

Australian Labour majority government in Victoria has a majority of the committee members on SARC.

As a guest of SARC, I observed the functioning of a Joint Committee chaired by a government member where a majority were drawn from the government caucus. What I observed leads me to conclude that the composition of a scrutiny committee, and who chairs the committee, are vital decisions that determine whether a parliamentary committee can properly scrutinize a statement of compatibility issued by a cabinet minister that involves a government bill.

During the SARC meeting in February 2008, the committee reviewed a statement of compatibility issued by a Labour government minister. In this particular statement, the minister did not report any Charter inconsistencies – in effect, the minister contended that the bill did not engage any protected rights, and did not require a justification of consistency based on the reasonable limits clause in section 7 of the Victorian Charter.

In reviewing the ministerial statement of compatibility, SARC divided sharply along party lines – the majority of its members from the Australian Labour Party supported the statement of compatibility submitted by the Labour government minister, and the opposition parties rejected it, arguing that the bill was both a violation of the Victorian Charter and an unreasonable limit under section 7.
Based on this experience, and after a thorough review of all ministerial statements of compatibility issued between 2007 and 2010, I concluded that SARC had rarely, if ever, challenged a ministerial statement of compatibility, and the dialogic promise of this parliamentary bill of rights had yet to be realized.

My broader argument was published in the *Australian Journal of Political Science* 46:3 (2011), 257-278, and explores the 'difficult dialogue' between SARC and the Cabinet that had emerged under the Victorian Charter in the 3-year time period investigated.

What are the lessons to be drawn from SARC as a Joint Committee charged with rights-based scrutiny?

- A rights-based scrutiny committee is only effective if its members act independently and are freed from the party Whip when assessing statements of compatibility.

- A member of the opposition must chair a rights-based scrutiny committee, as this provides the ability to call witnesses and conduct hearings that may challenge ministerial certification.

- A rights-based scrutiny committee must be a Joint Committee because of the advantages that upper houses poses as scrutiny chambers that do not exist in lower houses.

The Value of Upper Houses as Scrutiny Chambers

Upper houses are less partisan and this is for a number of important reasons. In the case of the Australian Senate, which is the only elected upper house under consideration, Senators serve for 6-year terms, whereas members of the House of Representatives have a three-year term. The longer term allows Australian Senators to focus on policy work, as opposed to constituency work, and has produced a more collegial body because of the longer periods between elections.

A longer term is not enough to produce a less-partisan chamber, and there are additional characteristics of upper houses that support the establishment of a Joint Committee in Canada with responsibility for rights-based scrutiny.

Although the House of Lords is composed of appointed and hereditary Lords, it is a less partisan chamber than the House of Commons because of balanced party representation where no party has a majority in the Lords (see current standings here). While the Conservatives are a majority in the House of Commons, the Conservatives in the Lords only number 251 out of 822 members (31%), followed by Labour (213 or 26%) and a crossbench of 179 members (22%).

In the United Kingdom as in Australia, 'crossbench' is the term for independent members or those from very small parties such as the Greens in Australia. The Australian Senate is based on the Single-Transferable-Vote system (STV), whereas the House of Representatives uses Preferential Voting (PV). This has produced the following notable characteristic similar to the relationship between the Houses of Parliament in the United Kingdom: a majority party generally controls the lower house, whereas the Australian Senate is rarely composed of a majority of government members.

In the current Senate of 76 members, the Coalition of Liberals and Nationals led by Prime Minister Malcolm Turnbull has 33 members (43%); the Australian Labour Party has 25 Senators (33%) and a crossbench of 18 members (24%). The Green Party is the largest contingent of crossbenchers at 10 Senators.

In truth, a rights-based parliamentary scrutiny committee would be most effective if it were located solely in an upper house, given that the government rarely controls a majority of the members, and a government bill considered incompatible by this

committee would have to be responded to in a thoughtful and constructive way because government members are generally in the voting minority.

In Canada, because of the democratic deficit that exists in an unelected Senate, a human rights scrutiny committee cannot be a committee solely of the appointed upper house, and would need to be established as a Joint Scrutiny Committee.

However, given the approach of the Trudeau Liberals to the Senate, while in opposition and in government, the conditions for a less partisan and more independent chamber may exist that would benefit right-based scrutiny by the proposed Joint Scrutiny Committee on Human Rights – first, the decision in January 2014 to remove all Senators from the Liberal caucus, and secondly, the appointment process announced as part of the Minister of Democratic Institutions mandate letter to 'Bring forward a proposal to create a new, non-partisan, merit-based process to advise the Prime Minister on Senate.'

As of January 2014, Canada now has a large number of crossbenchers in the Senate, and the new appointment process may result in a less partisan body. With the appointment of 22 non-partisan appointments to fill the Senate vacancies, 28 former Liberal Senators and 10 independents, a potential cross bench of 60 Senators in the 105-member chamber is a strong possibility.

Perhaps for the first time in many generations, the Senate can perform its role, independently, as a chamber of sober second thought, which would be to the benefit of rights-based scrutiny by a Joint Committee charged with this responsibility.

The Structure of a Joint Scrutiny Committee on Human Rights

As the main task of this committee will be to assess the statements of compatibility issued by the Minister of Justice in regard to government bills, the experience of SARC suggests that a committee chaired by a member of the government and based upon party standings in Parliament will be less than effective as a scrutiny committee.

There is a real danger that, if the Joint Scrutiny Committee is based upon party standings in the Parliament of Canada, it will divide along party lines when assessing statements of compatibility, with government members support the report issued by the Minister of Justice, and the opposition parties rejecting the statement of compatibility. In such a scenario, the opposition members would be outnumbered and out-voted, and the Joint Scrutiny Committee would simply accept the Minister of Justice's statement of compatibility without proper consideration.

Composition

Appointing a government member as chair creates real challenges for the effectiveness of a scrutiny committee, as the New Zealand experience also demonstrates. As we found in our recent book – Janet L. Hiebert and James B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom*, Cambridge: Cambridge University Press, 2015 – despite the minority status of many governments under the Mixed Member Proportional (MMP) electoral system in New Zealand, as well as the Standing Orders of the House of Representatives that committee membership should reflect party standings, the government generally had majority control – either on its own or in partnership with its 'supply and confidence' partners – of the critical committees that reviewed the section 7 reports under the New Zealand Bill of Rights Act (NZBORA) issued by the Attorney General.

We concluded that rights-based scrutiny in New Zealand proved to be less than effective; despite the Attorney General reporting that government bills appeared inconsistent with the NZBORA on 32 instances between 1990 and 2014.

The limited ability of Select Committees in New Zealand to amend legislation to ensure compliance, once the Attorney General reported inconsistencies to the House of Representatives, occurred for a number of practical *parliamentary* reasons:

- Select Committee chairs from the governing caucus tended to have ministerial ambition, and clearly understood that challenging the compatibility of government bills or amending bills to ensure greater compatibility would undermine their career ambitions;

- Select Committees chaired by a government member that reviewed the vast majority of section 7 reports (Justice and Electoral, Law and Order, and Social Services) were composed of a majority of government members, despite the minority status of most governments under MMP.

  As voting occurred along party lines, committee members from the governing party always passed government bills despite the Attorney General issuing a statement of incompatibility under section 7 of the NZBORA. Thus, party-political considerations dominated Select Committees, and the scrutiny mandate was of secondary importance.

- Parliamentary scrutiny committees are only as effective as their composition. If the governing party constitutes an overall majority on a scrutiny committee or

> the lower house of Parliament, statements of incompatibility or committee disagreements with ministerial certifications of compatibility will have little or no impact on the bill in question.

Like the Standing Committee on Public Accounts in the Parliament of Canada, a member of the opposition should chair the Joint Scrutiny Committee on Human Rights. The JSCHR should not reflect party standings in Parliament, members of the governing party should be in the minority, and crossbenchers from the Senate should be appointed to ensure that the committee has an independent composition or component.

The structure of the committee is essential to ensure that Parliament receives an independent assessment of Charter compatibility when the Joint Scrutiny Committee reviews a government bill to ensure that it does more than simply endorse the report issued by the Minister of Justice.

The ideal chair of this committee is a former government minister from an opposition party: in effect, an individual that understands the machinery of government that produces government bills, and a person that is independent from the government caucus with an important profile in Parliament.

As I indicated previously, the current chair of the JCHR in the UK is the ideal profile for the chair of the proposed Joint Scrutiny Committee on Human Rights: the current chair of the JCHR, Harriet Harman, is a former Labour minister from the Blair and Brown governments, as well as the former interim Leader of Her Majesty's Most Loyal Opposition and interim Labour leader.

Staffing the Joint Scrutiny Committee on Human Rights

Creating a Joint Scrutiny Committee is important. Properly staffing the JSCHR is of vital importance to allow it to properly assess the statements of compatibility issued to Parliament by the Minister of Justice.

In the United Kingdom, the JCHR employs a full time legal advisor and an assistant legal advisor to support the committee in scrutinizing government bills and to assess their compatibility with the *Human Rights Act 1998*. As well, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament appoints a Human Rights Advisor that performs a similar role.

In the research conducted for *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom*, one issue we noted was the resistance by departmental officials

and government ministers to the vetting of statements of compatibility by scrutiny committees and their legal advisors.

This occurred for a very practical reason – a team of policy officers and legal officials within the bureaucracy developed the statement of compatibility presented by the government minister, whereas a single legal advisor attached to a scrutiny committee generally authored the assessment of the statement of compatibility. In effect, because of the organizational resources devoted to developing the policy and ensuring that it was, in the minister's opinion compatible, government officials were generally sceptical about the quality and thoroughness of the rights-based scrutiny performed by parliamentary committees supported by a handful of legal advisors.

This highlights the need to properly staff scrutiny committees to overcome bureaucratic and ministerial resistance to parliamentary committees tasked with rights-based scrutiny.

To provide some organizational context to this scepticism, the Human Rights Law Section at the Department of Justice in Ottawa employs 28 legal counsels, and the Legal Service Unit at Health Canada has 41 legal counsels. With the exception of the Department of Foreign Affairs, every government department has, within its organizational structure, a Legal Service Unit that is staffed by lawyers from the Department of Justice roughly the size of Health Canada's.

Within the House of Commons, the Office of the Law Clerk and Parliamentary Counsel has 7 Parliamentary Counsel (Legal) and 4 Parliamentary Counsel (Legislation). Every parliamentary committee has a Procedures Clerk who relies on the Office of the Law Clerk and Parliamentary Counsel for legal and constitutional advise on bills before it.

For the 42nd Parliament, 1st session, there are 25 Standing Committees of the House of Commons that are supported by the 11 members of the Office of the Law Clerk and Parliamentary Counsel.

The potential for departmental and ministerial scepticism toward the work of the proposed Joint Scrutiny Committee on Human Rights exists in the Canadian context. This scepticism could be addressed in several ways:

- Adopt the practice of the JCHR in the United Kingdom and appoint a full-time legal advisor with an international reputation in the area of public law or public policy. The first legal advisor of the JCHR between 2000 and 2004 was David Feldman, Professor of Law at the University of Cambridge. Professor Feldman

has served as a Judge of the Constitutional Court of Bosnia and Herzegovina (2002-10) and as a Vice-President of the Court (2006-09);

- Alternatively, significantly increase the size of the Office of the Law Clerk and Parliamentary Counsel Office to support the scrutiny activities of the Joint Scrutiny Committee on Human Rights, as well as the work of all parliamentary committees.

3 – Ministerial Responses to the Joint Scrutiny Committee on Human Rights

- The principal lesson of the experience with rights-based disagreements between scrutiny committees in the United Kingdom, New Zealand, and Australia and the ministry is the following – if the ministry or ministerial designate such as the Minister of Justice is not statutorily required to respond to compatibility disagreements between the Minister and the scrutiny committee, the ministry may not respond to the rights-based scrutiny committee before a bill is passed into law.

- To address this, it is recommended that the Department of Justice Act be amended to require the Minister of Justice to submit a second report to the House of Commons at third reading of a bill when the scrutiny committee disagrees with the Minister of Justice's SOC. Similar to the initial statement of compatibility submitted by the Minister of Justice at first reading, the second report should be a reasoned response to the JSCHR submitted to the House of Commons before a bill is sent for a third and final vote.

4 – Resolving Legislative Disagreements between the Senate and the House

On February 15, 2016, it was reported in *The Hill Times* that Liberal Senators expelled by Justin Trudeau believe that the Trudeau government will have a difficult time passing its legislative agenda in the Upper House (see Tough times ahead for Trudeau Libs in Senate, say Liberal Senators).

Justin Trudeau wanted to ensure an independent, non-partisan chamber by expelling all Senators from the Liberal caucus. It appears that these former Liberal Senator intend to advance his desire for the Senate to be an independent scrutiny chamber. This may be a case of 'be careful what you whish for' on the part of the Trudeau Liberals.

The situation facing the Trudeau Liberals in the Senate, while unique, is not without comparison, as majority governments in other Westminster systems rarely control both houses of parliament:

- In **Australia**, a majority government constituted in the Lower Houser of Parliament rarely controls a majority of the seats in the Senate because of the single-transferrable voting system based on proportional representation used in the Upper House. In the current Australian Senate, the Coalition composed of the Liberal Party and the National Party is the largest caucus, but a minority with 33 out of 76 seat, or 43.4% of the voting members in the Senate;

- In the **United Kingdom**, a majority government that resides in the House of Commons will not, because of the changes affecting the composition of the House of Lords introduced by the Labour government of Tony Blair, control a majority of the members of the House of Lords. While the Conservative party of David Cameron heads a majority government in the Commons, Conservative Peers in the House of Lords number 250 out of 816, or 30.6% of the peers.

This is where the comparisons end, unfortunately. This leads me to conclude that a whipped vote is more about how the Trudeau approach to the Senate has backfired more than it is about fidelity to the Charter of Rights, as I will explain below.

Senate reform without a game plan beyond expulsion

In all three Westminster parliamentary democracies considered – Canada, Australia, and the United Kingdom – there is a real possibility that the government's legislative agenda proposed in the lower house of parliament may be denied by the upper house.

Unlike Canada, these remaining parliamentary democracies have constitutional principles to break deadlock between the houses of parliament (Australia) or have developed constitutional doctrines which allow the government that resides in the lower house to have its legislative agenda agreed to by the upper house (the United Kingdom).

While the *Constitution Act*, 1867 and 1982 provides two mechanisms to resolve deadlock between the two houses of parliament, they are not practical and would not provide any resolution to potential Senate refusal to pass a government bill:

1. In regard to constitutional amendments, section 47(1) limits the Senate's blocking power to simply a 180 day delay:

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

2. Additionally, section 26 allows the Queen, on the recommendation of the Governor General (who simply acts on the recommendation of the Prime Minister), to increase the size of the Senate by four or eights members:

Addition of Senators in certain cases

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

Australia and double-dissolution elections

The *Constitution of the Commonwealth of Australia* enacted in 1900 anticipated deadlock between the two houses of parliament, perhaps because each chamber has always been elected and can argue that it possesses a democratic mandate to justify its actions.

Under section 57 of the *Constitution of the Commonwealth of Australia*, the Governor General, at the request of the Prime Minister, and providing that a 'trigger event' exists, can call a double-dissolution election for both houses of parliament:

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within

> six months before the date of the expiry of the House of Representatives by effluxion of time.

Section 57 also provides for a way to resolve a conflict between the two houses of parliament that may not be resolved by a double dissolution election – the ability of the Governor General to call a joint sitting of the House of Representatives and the Senate to pass the measure in question by a simple absolute majority:

> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
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> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

The United Kingdom and the Salisbury Doctrine

The unwritten nature of the constitution of the United Kingdom has resulted in constitutional change through parliamentary conventions or doctrines agreed to by the two houses of parliament. For the present discussion, the Salisbury Doctrine is important, as it suggests a possible solution to the Senate conundrum that has been authored the Trudeau Liberals.

The discussion of the Salisbury Doctrine provided on the Westminster parliamentary website is the following:

> The Salisbury Doctrine, or "Convention" as it is sometimes called, emerged from the working arrangements reached during the Labour Government of 1945-51, when the fifth Marquess of Salisbury was the Leader of the Conservative Opposition in the Lords. The Convention ensures that major

> Government Bills can get through the Lords when the Government of the day has no majority in the Lords. In practice, it means that the Lords does not try to vote down at second or third reading, a Government Bill mentioned in an election manifesto.

A Canadian equivalent to the Salisbury Doctrine is necessary, given that the Trudeau government does not have a Senate caucus. However, even if it did exist in Canada, it would not have applied to physician-assisted death, or the current impasse over the rules governing the establishment of safe-injection sites under the Controlled Drugs and Substances Act currently before Parliament as Bill C-37.

Conclusion

Creating a more transparent process for reporting Charter incompatibilities to Parliament, as well as rights-based scrutiny by the House of Commons and the Senate are urgently needed. In this brief, I have attempted to provide a comprehensive assessment of the distinct parts of a revised Charter reporting and scrutiny regime, and the place of the Senate within this process.

Ultimately, the best approach is the creation of a permanent Joint Committee with equal membership drawn from the House of Commons and the Senate, modelled after the Special Joint Committee on Physician-Assisted Dying established to review Bill C-14 (Medical Assistance in Dying).