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Parliamentary Scrutiny and the Promotion and Protection of Human Rights

**Submission to the
Senate Legal and Constitutional Affairs Committee:
Inquiry into the
Human Rights (Parliamentary Scrutiny) Bill 2010**

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the enhanced legal protection of human rights at the local, national, regional and international levels; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction

1. On 2 June 2010, the Attorney-General introduced the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 in the House of Representatives. The Bills comprise key elements of the Government's new 'Human Rights Framework' and have been referred by the Senate to the Legal and Constitutional Affairs Legislation Committee for inquiry and report.
2. The Human Rights Law Resource Centre welcomes these Bills and supports their expeditious passage.
3. The Human Rights (Parliamentary Scrutiny) Bill 2010 establishes a Joint Parliamentary Committee on Human Rights, to be comprised of five members of the House of Representatives and five Senators, with two primary functions:
 - (a) first, to 'examine' Bills, legislative instruments and existing Acts 'for compatibility with human rights and to report to both Houses of Parliament on that issue';¹ and
 - (b) second, to 'inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of Parliament on that matter'.²
4. The Bill also introduces a requirement that each new Bill introduced to parliament be accompanied by a Statement of Compatibility which includes an 'assessment of whether the Bill is compatible with human rights'.³ This requirement also extends to certain legislative instruments.⁴
5. For the purposes of both the Joint Committee and Statements of Compatibility, 'human rights' means those human rights and fundamental freedoms contained in the seven core international human rights treaties to which Australia is party.⁵
6. The Bill gives effect to the finding of the National Human Rights Consultation Committee that:⁶

¹ Human Rights (Parliamentary Scrutiny) Bill 2010, ss 7(a) and (b).

² Human Rights (Parliamentary Scrutiny) Bill 2010, ss 7(c).

³ Human Rights (Parliamentary Scrutiny) Bill 2010, s 8.

⁴ Human Rights (Parliamentary Scrutiny) Bill 2010, s 9.

⁵ Namely, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of all Forms of Discrimination against Women*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*.

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.

7. Reflecting this finding, the NHRC Committee recommended that:
 - (a) parliament establish a 'Joint Committee on Human Rights to review all Bills and regulations for human rights compliance';⁷ and
 - (b) a 'statement of compatibility be required for all Bills introduced into the Federal Parliament' and that this statement 'assess the law's compatibility with Australia's human rights obligations'.⁸
8. The UN Human Rights Committee – a body of independent international human rights experts – has similarly recently recommended that Australia establish a mechanism to consistently ensure the compatibility of domestic law with the *International Covenant on Civil and Political Rights*⁹ and establish appropriate procedures to implement views of the Committee in individual cases.¹⁰
9. Consistent with these findings and recommendations, in introducing the legislation, the Attorney-General stated the purpose of the measures is to 'improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.¹¹
10. This submission considers the features which each of the measures should possess in order to best fulfil this purpose.

⁶ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 174.

⁷ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 168-75, [Recommendation 7].

⁸ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 165-68, [Recommendation 6].

⁹ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [8].

¹⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [10].

¹¹ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010.

2. Definition of ‘Human Rights’

2.1 Recognition of All Human Rights in All Human Rights Treaties

11. It is appropriate and imperative that ‘human rights’ be defined, as they are in s 3(1) of the Bill, to include *all* of the human rights and freedoms enshrined in *all* of the core international human rights treaties to which Australia is a party.
12. Comprehensive recognition and protection of rights is vital because human rights are interdependent and indivisible. The enjoyment of many rights is contingent on, and contributes to, the enjoyment and reinforcement of other human rights.¹² Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation.

2.2 Recognition of Customary International Human Rights Law

13. In addition to providing that ‘human rights means the rights and freedoms recognised or declared by the [seven core] international instruments [to which Australia is party], s 3(1) should further provide that ‘human rights’ includes ‘the rights and freedoms recognised by customary international law’, such norms being binding on Australia and a critical component of our international human rights law obligations.¹³

2.3 Use of International and Foreign Human Rights Jurisprudence

14. The HRLRC also considers that s 3 should be amended by inserting s 3(3) to provide that, in determining the scope and content of ‘human rights’, ‘proper consideration be given to international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals’.¹⁴
15. This would encourage and enable both policy-makers and parliamentarians to draw on extensive and illuminating international and comparative human rights jurisprudence.¹⁵ This

¹² United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993). See also Office of the High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3;.

¹³ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003), 562. See also *Restatement (Third) of Foreign Relations Law of the United States* (1986) s 702.

¹⁴ Section 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is expressed in similar terms.

¹⁵ For a discussion of the benefits of drawing on such jurisprudence, see *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [201] (per Bell J): ‘The rationale of s 32(2) is not parliamentary intention to enact legislation

direction would also be consistent with and complement the principle that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels.¹⁶

3. Joint Parliamentary Committee on Human Rights

3.1 Functions of the Committee

16. Parliament, including through the work of parliamentary committees, has a critical role to play in promoting and protecting human rights¹⁷ and discharging Australia's legal obligation to respect, protect and fulfil human rights.¹⁸
17. As discussed above, the Bill establishes a Joint Parliamentary Committee on Human Rights with two primary functions under s 7:
 - (a) first, to 'examine' Bills, legislative instruments and existing Acts 'for compatibility with human rights and to report to both Houses of Parliament on that issue'; and
 - (b) second, to 'inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of Parliament on that matter'.
18. In the HRLRC's view, the functions conferred under s 7 should be expanded to include the power 'to inquire into any matter relating to human rights which is referred to it by resolution of either House of Parliament'. This would enhance the independence and effectiveness of the Committee and ensure that its capacity to conduct thematic inquiries is not solely determined by the Government of the day.
19. Additionally, the Committee's functions conferred under s 7 should be expanded to include the power 'to monitor and report on the implementation of the Concluding Observations, Recommendations and Views of UN treaty bodies and the Recommendations of the Special Procedures and the Universal Periodic Review of the UN Human Rights Council'. This would enhance parliament's capacity, and assist to discharge its obligation, to play an active role in monitoring, overseeing and following up on the implementation of recommendations and

in conformity with international law, but the utility of referring to international law and judgments in understanding the relevant human right and how it may be reflected in or influence the interpretation of the statutory provision'.

¹⁶ See *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 421E; see also *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 433 [25] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

¹⁷ Commonwealth Human Rights Initiative, *The Parliamentary Committee as Promoter of Human Rights* (2007) 3.

¹⁸ Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [4].

decisions of international human rights mechanisms.¹⁹ At present, the Australian Parliament does not play any such institutionalised role and further, as far as the HRLRC is aware, there is no comprehensive, coordinated departmental policy or approach to responding to and implementing such recommendations or decisions. Such a function would give further substance to the Government's commitment in the new Human Rights Framework to respect and engage constructively with the international human rights system.²⁰ As the UK Joint Committee has stated of its treaty monitoring function, it

serves a wider purpose of directing domestic parliamentary and public attention to the extent to which the Government's policy is in accordance with the provisions of those human rights treaties by which the Government is bound in international law, stimulating debate about the treaties themselves and the human rights principles which they embody. By focusing attention on the implications of each of these treaties in each reporting round we would also hope proactively to influence the Government in its policy stance as it prepares to submit its next periodic report to the monitoring body.²¹

3.2 Powers and Proceedings of the Committee

20. The powers, proceedings and modalities of the Committee are to be 'determined by resolution of both Houses of Parliament'.²²
21. In the HRLRC's view, in determining the Committee's powers and working methods, Parliament should have regard to the following considerations:
- (a) First, the Committee should be given broad and permissive powers. The broad mandate and modalities of the UK Joint Committee on Human Rights, recommended by the Council of Europe as an example of best practice in parliamentary human rights scrutiny, is one of its key strengths.²³ The Committee has been described as 'central'

¹⁹ It is notable in this regard that the UK Joint Parliamentary Committee on Human Rights has, among its functions, the monitoring of government responses to judgments of the European Court of Human Rights and recommendations of the UN human rights mechanisms: see, eg, Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (15th Report of Session 2009-10) (available at www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf). Further information about the work of the Committee is available in their 2008-09 Annual Report at www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/20/2002.htm.

²⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [10].

²¹ Joint Committee on Human Rights, *The Committee's Future Working Practices: Twenty-Third Report of Session 2005-06* (2006), [65] at <http://www.parliament.the-stationery-office.com/pa/jt200506/jtselect/jtrights/239/239.pdf>.

²² Human Rights (Parliamentary Scrutiny) Bill 2010, s 6.

²³ Inter-Parliamentary Union, *Parliament and Democracy in the Twenty-First Century* (2006) 160.

and 'influential' to the enterprise of human rights in the political and parliamentary process.²⁴ Canada has a similarly effective Senate Standing Committee on Human Rights, with a broad mandate of 'matters relating to human rights generally'.²⁵

- (b) Second, the Committee should 'screen' all Bills that come before parliament, but, as with the UK Committee, focus its inquiries and reports on those Bills which raise prima facie human rights concerns (including those Bills or types of laws which have been identified as doing so by UN human rights bodies, the Australian Human Rights Commission and reputable human rights NGOs). This will ensure that the work of the Committee is appropriately targeted.
- (c) Third, in assessing and reporting on the human rights compatibility of legislation, the Committee should consider Statements of Compatibility (together with other extrinsic materials), but should conduct its own rigorous, evidence-based independent analysis to ensure effective scrutiny of Bills. It should also consider relevant international and foreign human rights jurisprudence.²⁶
- (d) Fourth, the Committee must have the power to call for submissions, convene public hearings and examine witnesses. This is imperative if the Committee is to achieve the objectives of 'facilitating an "increased level of community engagement" with the parliamentary dialogue and "playing a key role in influencing the accessibility and utility of this dialogue"'.²⁷
- (e) Fifth, procedures and practices must ensure that the Committee is given sufficient time to conduct inquiries and produce reports so as to enable community engagement and actually inform parliamentary debate in a meaningful way.²⁸ This is particularly important where a Bill raises major human rights issues, limits or intrudes on human rights in a significant way, or is developed urgently or hastily.²⁹

²⁴ David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 115.

²⁵ See http://www.parl.gc.ca/common/Committee_SenHome.asp?Language=E&Parl=40&Ses=2&comm_id=77.

²⁶ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 96.

²⁷ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 71.

²⁸ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 94. See also Victorian Parliamentary Debates, Legislative Assembly, 4 February 2009, 119.

²⁹ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 94, 96.

- (f) Sixth, it is critical that the Committee have an adequately resourced secretariat with the requisite international human rights law experience and expertise. At a minimum, it should have a dedicated, expert international human rights law adviser.
- (g) Seventh, the Committee should play a role in giving effect to the Government's commitment to a 'review of legislation, policies and practices for compliance with the seven core UN human rights treaties'. In order to do this, the resolution should make clear that the reference to 'Acts' in s 7(b) 'includes a reference to policies and practices associated with Acts'.

4. Statements of Compatibility

4.1 Purpose of Statements of Compatibility

22. The Bill provides at s 8 and s 9 that a statement of compatibility must be prepared in respect of Bills for an Act and for certain legislative instruments. As the Victorian Scrutiny of Acts and Regulations Committee has stated:³⁰

The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.

23. Statements have the further benefit of enhancing transparency and accountability in policy making and legislative development.³¹

4.2 Assessment of Compatibility with Human Rights

24. The Bill provides that statements of compatibility should 'include an assessment of whether the Bill [or legislative instrument] is compatible with human rights'.³² It is, however, silent on the nature, scope and detail of this assessment.
25. If Statements of Compatibility are to fulfil their purpose of 'improving parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development', they should have the following features:

³⁰ Scrutiny of Acts and Regulations Committee, *Alert Digest* 11 (14 September 2009) 3.

³¹ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 97-9.

³² Human Rights (Parliamentary Scrutiny) Bill 2010, s 8(3) and s 9(2).

- (a) First, human rights should be considered, and Statements of Compatibility prepared, early in the policy development process. As the Australian Human Rights Commission has stated, 'to be truly useful, these statements must assist policy and legislative development from the outset, rather than being treated as an administrative requirement that is simply added on at the end stage of preparing a Bill.'³³
- (b) Second, Statements must be reasoned and include detailed and rigorous analysis of the human rights issues and interferences raised by a Bill. Statements of Compatibility should explain limitations in a rigorous and evidence-based manner which demonstrably justifies the intrusion on rights. This will be a challenge because the seven core human rights treaties do not include a general limitations clause unlike, say, s 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) or s 1 of the *Canadian Charter of Rights and Freedoms 1982*. The best approach as a matter of practice may be for Statements to set out (a) whether and how a Bill limits human rights and (b) where human rights are limited, whether and how such limitations are 'reasonable limits under law which can be demonstrably justified in a free and democratic society'. This formulation is very similar to that contained in s 1 of the *Canadian Charter* which requires that any impairment of rights (a) be for a 'pressing and substantial' purpose; (b) be proportionate and rationally connected to the purpose; and (c) impair human rights as little as possible. Limitations on rights should be justified by 'cogent and persuasive' evidence.³⁴ The Attorney-General's media release accompanying the Bill contained useful guidance in this regard, stating that Statements should 'assist in explaining the purpose and intent of legislation, to contextualise human rights considerations, and where appropriate, justify restrictions or limitations on rights in the interests of other individuals or society more generally'.³⁵
- (c) Third, Statements should not be too long, legalistic or technical as this will detract from their utility in informing parliamentary dialogue about rights. Neither, however, should they be too brief or cursory. The detail and length of Statements should be commensurate with the human rights implications of the proposed legislation or legislative instrument. Commenting on the Statement of Compatibility tabled with the

³³ Australian Human Rights Commission, 'Human Rights Bill Should Strengthen Protections for All Australians', Media release, 2 June 2010.

³⁴ See, eg, *R v Oakes* [1986] 1 SCR 103, 138 (per Dickson CJ). See also *R v Momcilovic* [2010] VSCA 50, [143] (per Maxwell P, Ashley and Neave JJA); *DAS v Victorian Equal Opportunity and Human Rights Commission* [2009] VSC 381, 147 (per Warren CJ).

³⁵ The Hon Robert McClelland MP, Attorney-General, 'Enhancing Parliamentary Scrutiny of Human Rights', Media release, 2 June 2010.

Sex Offenders Monitoring Amendment Bill 2009 (Vic), the Victorian Equal Opportunity and Human Rights Commission stated:

the statement of compatibility accompanying the legislation was relatively brief, particularly with regard to its examination of whether the relevant limitations on human rights were reasonable and demonstrably justified in accordance with section 7 of the Charter. As was observed in the course of debate on the Bill, parliament should give proper consideration to matters raised by Bills involving deprivation of liberty, no matter who is being deprived of their liberty. Such legislation should only be enacted after the parliament and the community have had the opportunity to reflect upon its implications. Essential to this process of reflection is ensuring that statements of compatibility articulate and explain the rationale for concluding that limitations on human rights are reasonable.³⁶

Keeping Statements of Compatibility succinct but adequately reasoned will be a particular challenge given that the compatibility analysis is to take account of the seven core human rights treaties, rather than, say, just civil and political rights as is the case under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). The best way to achieve this may be for Statement to confine the discussion to those rights which are actually *limited* by a Bill or a provision thereof, rather than to include a discussion of all those rights which are merely *engaged* by the proposed legislation.

- (d) Fourth, given the extensive international and comparative human rights jurisprudence from which Australia can draw, it would be useful for guidelines on the preparation of Statements to specify that, in considering the scope and content of the seven core human rights treaties, 'proper consideration be given to international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals'.³⁷
- (e) Finally, to have the greatest impact and accessibility, Statements of Compatibility should be tabled with the Second Reading Speech and Explanatory Memorandum of a Bill and also included in Hansard. This will ensure that they meaningfully inform parliamentary dialogue and debate and are accessible to the public.

³⁶ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 97.

³⁷ As discussed above, this would also be consistent with and complement the principle that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels: see *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 421E; see also *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 433 [25] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).