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Dear Committee Secretary,

Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

This submission is directed to the current inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 ("the Inquiry"). We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law. We are solely responsible for the content of this submission.

Executive summary

In the absence of any specific terms of reference for the Inquiry, this submission focuses on whether the two Bills are likely to achieve their stated aims. In particular, we note that the Attorney-General said that the main Bill,[1] is intended to "establish[] a dialogue between the executive, the parliament and ultimately the citizens of Australia", with a view to

> improve[ing] 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.[2]

With those objectives in mind, in summary our conclusions are set out below. We expand on our reasons for these conclusions in the main body of this submission.

(i) The current mechanisms for considering the human rights impact of draft legislation are inadequate and need to be clarified and strengthened.

(ii) We submit that this form of human rights scrutiny should be carried out under a more rigorous, holistic framework—ideally, under a Human Rights Act (HRA), based on the 'dialogue' model of human rights protection adopted in jurisdictions such as the

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1 Unless otherwise indicated, references to "the Bill" are to the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth).

2 Australian Parliament, *Parliamentary Debates (Human Rights (Parliamentary Scrutiny) Bill 2010 – Second Reading Spech*, 2 June 2010, 4900 (Attorney-General Robert McClelland).

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United Kingdom, Victoria, the Australian Capital Territory and New Zealand.[3] Such a HRA was recommended in the recent National Human Rights Consultation Report (NHRC Report).[4]

(iii) In the absence of a HRA, the human rights scrutiny mechanisms proposed by these Bills should be clarified in the manner set out below.

Inadequacy of the status quo and need for better parliamentary scrutiny of human rights

Currently, Parliamentary committees consider the human rights impact of draft legislation in a largely ad hoc manner. The most specific requirement is Standing Order 24(1)(a), which requires the Senate Standing Committee for the Scrutiny of Bills to report on, inter alia, whether proposed laws:

(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;

...

Standing Order 24(1)(a) provides no framework for the assessment of legislation against human rights standards. Research shows clearly that, in the absence of such a framework, parliaments sometimes give only scant attention to the human rights impact of even draconian laws.[5] Moreover, as human rights are rarely absolute, it is important to have a carefully-constructed, transparent and principled means of reconciling competing human rights, and of dealing with derogation from human rights in favour of other interests. Well-drafted anti-terrorism laws, for instance, need to strike an appropriate balance between protecting the rights of an accused terrorist, and protecting Australia from terrorist attack.

In light of these inadequacies, we endorse moves to improve the parliamentary process for considering human rights. We specifically endorse the establishment of a joint committee of both Houses of Parliament (the Joint Committee on Human Rights or JCHR), which is dedicated to this task. However, we have concerns about the way in which the Parliament proposes to introduce this reform.

Our preferred solution: enhanced parliamentary scrutiny under a HRA

We submit that the Australian Parliament should follow the recommendation of the NHRC Report to implement the measures set out in the two Bills under consideration in this Inquiry, as part of a HRA regime. Relevantly for present purposes, such a HRA would have four main elements:

(i) It would set out the human rights that are to be given special protection.

(ii) It would establish a new joint parliamentary committee to scrutinise draft laws against the rights set out in the Act itself.

(iii) It would require other laws to be interpreted consistently with protected rights, subject to parliamentary intent.

(iv) The judiciary would continue to have the final say on questions of statutory interpretation. However, where a law is incompatible with a particular right or rights, the law would not be invalidated. Instead, the law would remain operational, but the

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3 See: *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

4 See Frank Brennan et al, *National Human Rights Consultation Report* (2009).

5 See, eg, Simon Evans and Carolyn Evans, 'Australian parliaments and the protection of human rights' (2007) 47 *Papers on Parliament* 17.

court in question would have the power to issue a declaration notifying Parliament of the incompatibility.

The proposed Australian JCHR is based on a United Kingdom model. As Lord Lester of Herne Hill QC has suggested, the establishment of the UK JCHR within the *Human Rights Act* rubric has made "human rights scrutiny ... systematic, influencing the preparation of legislation in Whitehall and the legislative process itself".[6] Moreover, there are real benefits in the interaction of parliamentary and judicial scrutiny on question of human rights. For example, while noting that the UK's Joint Committee on Human Rights (JCHR) has so far given insufficient attention to this issue, Tolley argues that the JCHR's work in considering the Government's response to declarations of incompatibility is "perhaps ... its greatest contribution to the new human rights regime".[7] This stands to reason because the JCHR is in a privileged position to monitor and contribute to the legislature's part of the human rights dialogue on the most contentious issues. Such work would be impossible in the absence of a HRA, because the courts would not have a role in declaring laws incompatible with protected rights.

In short, we believe that the reforms in these Bills will be undermined by the absence of a HRA. As we have explained in detail elsewhere:

> [I]f the government proceeds with its evident policy of disaggregating the various HRA elements and introducing some or all of them independently of a HRA, it would be highly unlikely to achieve as successfully the human rights reform objectives set out in the Report or in the government's Human Rights Framework.[8]

How should human rights be considered?

The Bills propose that the new Joint Committee on Human Rights (JCHR) would have reference to the human rights contained in the seven international instruments listed in clause 3(1) of the Bill. This resembles, but is not identical to, the recommendation of the NHRC Report. The difference lies in the fact that the Report recommends that the Government publish a list of those rights (not just the international instruments) that would be applicable. For the sake of clarity, we also believe that those rights should be listed expressly.

The Bills do not provide instruction on how the proposed JCHR should carry out its functions, nor on the basis for drafting and considering the statements of compatibility that will accompany new Bills. More specifically, the Bills do not set out any principles that should be applied by the JCHR, Ministers or the Parliament more generally when considering conflicting rights or the need to derogate from certain human rights.

We submit that the Bills should be amended to clarify this position. In respect of non-absolute, or 'derogable', human rights, the NHRC Report recommends that Parliament should subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes.[9] We endorse this recommendation. The relevant Victorian provision states:

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6 Anthony Lester, 'The Human Rights Act 1998: Give Years on' [2004] *European Human Rights Law Review* 258, 262. A similar point is made by David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 94.

7 Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Policitcal Science* 41, 49.

8 Edward Santow, 'The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8, 10. The problems that would flow from introducing such a reform in the absence of a HRA are explained in detail in this article.

9 Frank Brennan et al, *National Human Rights Consultation Report* (2009), Recommendation 23.

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:
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> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[10]

Such limitations find their basis in international law,[11] and are present in legislation in other jurisdictions as well. These limitations establish a principled framework—and indeed one that is common and successful in other jurisdictions—for the balancing of competing rights, and for the compromises that sometimes need to be struck between human rights and other urgent interests.

Summary of recommendations

We submit that the JCHR would be likely to meet its key objectives only if it were introduced as part of a broader reform process involving a HRA, based on the 'dialogue' model proposed in the NHRC Report and already operating in jurisdictions such as the UK, Victoria, ACT and New Zealand. Without such a comprehensive reform, other changes to the process would be less successful.

However, prior to the Parliament introducing a HRA, we would make the following recommendations for improving these Bills:

1. We endorse the proposal to establish the JCHR to scrutinise the human rights impact of legislation. A parliamentary committee of this stature can help foster debate within Parliament, and in the public arena, about the impact of new laws on human rights.
2. The main Bill should clearly state the human rights to which the JCHR and others should have regard in this scrutiny process. That list should be based on Australia's international human rights law obligations.
3. The Bill should set out clear rules to provide a framework for human rights assessment by the JCHR and others, and especially for derogating from protected rights. Those rules should be based on accepted principles of international law, as per s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to be in contact.

Yours faithfully,

Edward Santow **Professor George Williams**

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10 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

11 See, eg, *Universal Declaration of Human Rights 1948*, Article 29(2); *International Covenant on Civil and Political Rights 1966*, Artcle 22(2).