Attorney General; Minister for Corrective Services

Our ref: 35-09844

Committee Secretary
Senate Legal and Consitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

I understand that the Senate Legal and Constitutional Committee has received a reference to inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 (Clth) and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (Clth). I also understand that these Bills have been introduced into the House of Representatives and that the Senate Committee has requested submissions by 9 July 2010 and is due to report on 17 August 2010.

I would appreciate it if you would treat this letter as a submission and forward it to the members of the Senate Legal and Constitutional Committee.

The Commonwealth Attorney General's second reading speech indicated the Human Rights (Parliamentary Scrutiny) Bill 2010 (Clth) proposes to implement two measures, namely "statements of compatibility on human rights" and a "Joint [Commonwealth] Parliamentary Committee on Human Rights". In particular, that Bill and the second reading speech suggest that this proposed Commonwealth Committee "will examine and report to parliament on compatibility of bills and legislative instruments with Australia's human rights obligations under ... seven human rights treaties". Those seven treaties are:

- International Convention on the Elimination of All Forms of Racial Discrimination 1965;
- International Covenant on Civil and Political Rights 1966;
- International Covenant on Economic, Social and Cultural Rights 1966;
- Convention on the Elimination of All Forms of Discrimination against Women 1979;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;
- Convention on the Rights of the Child 1989; and
- Convention on the Rights of Persons with Disabilities 2006.

This proposed Commonwealth legislation involves several important legal, constitutional and federalism issues. In my view all of these issues will adversely effect fundamental and basic principles of representative majoritarian parliamentary democracy. In addition, if implemented, this proposed Commonwealth legislation will impose on Australians laws, rights and principles created in international forums and enforced by international committees. Inevitably, this will undermine what Australians consider should be the appropriate balance, for example, between rights, responsibilities and obligations and rights and law and order issues. In my view, Australia's human rights record, which in addition to its practical aspects also includes Commonwealth and State human rights legislation (for example, the Equal Opportunity Act 1984 (WA)) is superior to many countries that, for example, participate in UN treaties and implementation committees.

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1984 (WA)) is superior to many countries that, for example, participate in UN treaties and implementation committees.

An initial major question is whether the Commonwealth Government, having clearly indicated to the Australian people that it has decided not to propose or pursue a Commonwealth Human Rights Act or Charter, is now via this Bill proposing to achieve this same Human Rights Act objective by a more indirect and circuitous route using this Bill. Indeed, the Commonwealth Attorney General's "Foreward" to Australia's Human Rights Framework (April 2010) expressly acknowledged that "[w]hile there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of [a Human Rights Act or Charter]". Given the Joint Committee's proposed functions, which include examining Bills, legislative instruments and enacted Commonwealth Act for compatibility with the above seven treaties, and the proposed requirements for "statements of compatibility" of Bills and legislative instruments with the above seven treaties, this appears to be what, despite Australians' concerns, will in fact and in law eventuate if this Bill is enacted.

A second issue is whether in performing the above functions the Committee and compatibility statement will be required to or necessarily have to take into account not only the text of the seven treaties but also the interpretation and application of such texts, for example, by various UN Committees (such as the UN Committee under the Torture Convention). Indeed, I understand that it has already been suggested by some commentators that, for example, European Court of Human Rights case law, doctrines and principles may also be taken into account. Of course, like arguments which led to former Commonwealth Governments terminating appeals to the Judicial Committee of the Privy Council, the same situation of foreign bodies, courts and committees determining, formulating or adjudicating on Australian laws appears to be being replicated under this Bill. That is, at the very time when, for example, under the Australia Acts 1986 (Clth & UK), Australia, at both Commonwealth and State levels, has severed its residual constitutional links with the United Kingdom, new links requiring the application of law generated overseas are being forged and implemented by this Commonwealth proposal.

Thirdly, clause 7(b) of the Human Rights (Parliamentary Scrutiny) Bill 2010 (Clth) proposes that the Joint Commonwealth Parliamentary Committee has, in addition to examining Bills, the function of examining "Acts for compatibility with [the above seven treaties]". That is, the task of the Committee will include examining existing and future Commonwealth legislation in the light of the above seven treaties and their interpretation and application by foreign courts, tribunals and committees. The inclusion of enacted Commonwealth legislation, in my view, not only contravenes separation of powers issues by having a parliamentary committee examining existing legislation rather than a Bill which proposes to amend or appeal existing legislation. It also clashes with and impinges upon the roles and functions that independent statutory authorities, such as the Australian Human Rights Commission, and the Courts have in relation to treaties, including the above seven treaties. For example, there are several High Court cases dealing with the relationship between treaties and Australian domestic legislation. For example, several High Court Justices have indicated that treaties, including human rights treaties, have a role to play in the interpretation of legislation and, indeed, there are some views that treaties (or international law more generally) has some role in constitutional interpretation. The Bill would in my view, inappropriately and unnecessarily intrude into these areas which are being developed by the Courts.

A fourth issue concerns the relationship between the clause 7 functions of the Parliamentary Committee and the Statements of Compatibility that are required, under clause 8, to accompany a Bill introduced into the House of Representatives or the Senate. Such a statement must assess whether the Bill is compatible with the above seven treaties. Given the clause 7 and 8 requirements there appears to be an obvious possibility that an incompatibility

statement may indicate that there is compatibility between the Bill and the seven treaties and the Joint Committee may agree. However, after the Bill has been enacted and becomes legislation another Joint Committee which subsequently decides to consider this legislation may reach an opposite conclusion. Of course the reverse is also a possibility. This scenario, especially when added to the proceeding point, indicates the incongruous nature of this legislative proposal.

A fifth issue concerns clause 7(c) which enables the Commonwealth Attorney General to refer to the Joint Commonwealth Parliamentary Committee "any matter relating to [the above seven treaties]". Given the Commonwealth Parliament's legislative powers, including the external affairs power in section 51(29) of the Commonwealth Constitution, this clause would enable the Committee to consider whether, for example, any State legislation, activity or practice did not conform to the requirements in those treaties. If the Committee concluded that there was not conformity, then that conclusion might form the basis for the Commonwealth Government and Commonwealth Parliament to endeavour to use constitutional powers to override the States' legislation or practices. Although the States might be able to make submissions to the Committee, in fact and in law, the whole process would be dominated by the Commonwealth and its utilisation of those treaties. In my view this would undermine not only the on-going relationship between the States and the Commonwealth. It would also erode the political and legal basis of Australia's federal system. Federalism is an essential component of our democratic and constitutional system of checks and balances which, for example, maintains the division of powers which in turn protects Australians against the threat to their rights which is inherent in any movement towards centralisation of control or power.

Finally, I trust that the Committee is aware of commentary, such as that contained in the article by Professor James Allan "UN rights views slip in the back door" (Friday 18 June 2010) Australian pages 33-34, which clearly articulates other serious legal, constitutional and federalism difficulties with this proposed Commonwealth legislation.

Yours sincerely

Christian Porter MLA
ATTORNEY GENERAL; MINISTER FOR CORRECTIVE SERVICES

cc Hon Colin Barnett MLA, Premier

25 JUN 2010