THE UNIVERSITY OF MELBOURNE

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

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

13 July 2010

Dear Secretary

Thank you for the opportunity to make a submission in relation to the Human Rights (Parliamentary Scrutiny) Bill 2010.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies and staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

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Executive Summary

1. We welcome the commitment of the Federal Government to engage with its obligations under international law and its commitment to human rights by:

    (i) legislating to establish a Joint Committee on Human Rights (JCHR) that would:

        i. scrutinise all Bills and Acts for compatibility with human rights; and
        ii. inquire into any matter relating to human rights which is referred to it by the Attorney General;

    and

    (ii) requiring that a Statement of Compatibility accompany any Bill introduced into a House of Parliament.

2. We believe that these measures if implemented properly with adequate resourcing have the potential to make a contribution to the protection of human rights in Australia.

3. However we have serious reservations about the potential effectiveness of these measures as defined in the Bill. There are three principal bases for our concerns:

    (i) the sheer magnitude of the task involved in scrutinising all existing and proposed legislation against Australia's obligations under international human rights law;

    (ii) the absence of adequate and appropriate processes within the Bill to mitigate some of the challenges associated with the level of scrutiny which the Bill purports to achieve; and

    (iii) the limited mandate of the JCHR which is limited to scrutiny of legislative proposals.

4. More specifically we are concerned that:

    (i) The definition of human rights in the Bill (which will determine the scope of human rights scrutiny, both by members responsible for Statements of Compatibility and by the JCHR) is partial and incomplete.

    (ii) Even on the current definition of human rights, the obligations of members responsible for Statements of Compatibility and of the JCHR in carrying out its scrutiny task are extraordinarily onerous.

    (iii) There is no guidance in the Bill about how members responsible for Statements of Compatibility and the JCHR are to determine:

i. the content of any particular human right; and
ii. whether any interference with a right can be justified.

(iv) With respect to the Joint Committee on Human Rights (JCHR):

i. There is no guidance in the Bill as to the process by which the JCHR is to arrive at an understanding as to the content of a particular right and whether any interference with a right can be justified;
ii. There is no acknowledgement within the Bill or second reading speech as to how the new procedures will impact on existing Committee procedures within the Federal Parliament;
iii. The JCHR is empowered only with respect to legislative proposals and is unable to assess the performance of the executive against human rights standards or to respond to the human rights issues that emerge after the enactment of legislation or the making of legislative instruments;
iv. There is no assurance that the Committee will have adequate time to consider Bills and report on them to Parliament, at least with respect to ordinary, non-urgent legislation.

(v) With respect to Statements of Compatibility:

i. There is no express requirement that a Statement of Compatibility accompany a Bill and any *amendments* to a Bill;
ii. There is no definition of what is meant by 'an assessment' for the purposes of a Statement of Compatibility.

(vi) There is no acknowledgement within the Bill or second reading speech as to the resource implications required to develop a necessary level of human rights competence within the JCHR or those public authorities that will assist members of Parliament in the preparation of a Statement of Compatibility.

(vii) There is no provision for a review as to the effectiveness of the measures in the Bill.

5. We therefore make the recommendations set out below.

Submission

The Definition of Human Rights

Section 3(1) of the Bill defines human rights as those recognised or declared by the seven 'core' human rights treaties to which Australia is a party. This definition is problematic for two reasons:

1. The definition does not fully reflect Australia's obligation at international law:

    (i) The list of treaties in section 3(1) is not a comprehensive list of the international human rights instruments to which Australia is a party as it excludes several of the Optional Protocols to these treaties to which Australia is also a party. For example, it excludes the Optional Protocol to the Convention on the Rights of the Sale of Children, Child Prostitution and Child Pornography which was ratified by Australia on 8 January 2007.

    (ii) The list of treaties in section 3(1) does not include those international treaties to which Australia is a party and which impact directly on human rights. Treaties that fall within this category include, for example, the *Convention Relating to the Status of Refugees 1951*, which was ratified by Australia on 22 January 1954 and the numerous conventions of the International Labour Organisation to which Australia is a party. Importantly the ILO Conventions will be directly relevant to ascertaining the precise meaning of articles 6, 7 and 8 of the International Covenant on Economic Social and Cultural Rights which deal with work related entitlements.

    (iii) The definition of human rights does not make any reference to the various declarations and resolutions that have been adopted by the United Nations General Assembly on human rights and which Australia has adopted or affirmed. The most notable exclusion is the Universal Declaration of Human Rights but there are others such as the United Nations Declaration on the Rights of Indigenous Peoples which was affirmed more recently by the Federal Government. Although these instruments do not impose direct obligations on Australia under international law, they are often relevant to understanding the meaning of the rights under the core human rights treaties.

On 21 April 2010 the Attorney General Robert McClelland and the Minister for Foreign Affairs Stephen Smith affirmed the Government's commitment to its international human rights obligations as part of the launch of Australia's human rights framework.[1] This commitment cannot be piecemeal and selective if it is to be genuine and effective. Moreover it cannot ignore the obligation which Australia has under article 26 of the *Vienna Convention on the Law of Treaties 1969* to ensure that:

[1] Media Release dated 21 April 2010.

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

A genuine commitment to scrutinise all Bills and existing legislation to ensure compatibility with Australia’s international obligations will require the proper consideration of more international instruments than the seven core human rights treaties to which Australia is a party.

2. The bill gives insufficient guidance to the Committee on how it is to perform its scrutiny task especially given (a) the scope of the issues covered by international human rights treaties *and* those other international treaties that impact on human rights; and (b) the unsettled meaning of many human rights.

    (i) First, the Bill does not identify how the Committee and the relevant Ministers should determine the content of a human right. This creates the risk that the nature of the interpretative task will be so great that the Committee or responsible Minister may not consult relevant sources or that its views as to the meaning of a particular right will be selected from international law or other jurisdictions without proper consideration as to the cogency of the reasoning underlying such decisions and views.

    (ii) Second, the Bill does not offer a process to enable the Committee to identify promptly and efficiently the key human rights issues that arise under a particular Bill or Act.

3. In order to address the concerns in relation to: (a) the range of human rights proposed for scrutiny under the Bill; (b) how the content of particular human rights is determined; and (c) the process for efficiently and effectively identifying the human rights implications of a Bill or Act, we recommend:

Recommendation 1

That the definition of human rights under clause 3(1) of the Bill should be amended to include:

- *the Optional Protocols to the core human rights treaties where Australia is a party to those Optional Protocols;*
- *the Convention relating to the Status of Refugees 1951;*
- *the Conventions of the International Labour Organisation to which Australia is a party.*

Recommendation 2

That the following sub-section should be inserted into clause 3 of the Bill to provide a methodology for determining the meaning of a human right:

> *In determining the meaning of a human right, the Committee may give proper consideration to:*

(a) international law;[2]

(b) any resolutions or declarations of the United Nations General Assembly that are relevant to the meaning of a human right;[3] *and*

(c) *the decisions, views and comments of international, regional and domestic courts and other human rights bodies, tribunals or institutions.*

In determining the meaning of a human right, the Committee may also consider the opinions and views about human rights found in other materials containing the opinions and views about human rights including but not limited to academic writings.

4. Clauses 7, 8 and 9 each require an assessment whether a Bill or legislative instrument is compatible with human rights. The seven international instruments take subtly different approaches to this question. The differences will likely add to the complexity of the scrutiny function without any significant advantages. It would be preferable to have a single test for compatibility, as under most modern rights instruments.

Recommendation 3

That a new clause provide that a Bill or Act is to be taken to be compatible with a derogable human right if it imposes only reasonable limits that can be demonstrably justified in a free and democratic society.

Recommendation 4

That the following sub-clause be inserted into Part 2, clause 6 of the Bill in relation to the powers and proceedings of the Committee, to provide a mechanism for bringing the human rights implications of a Bill or Act to the attention of the Committee:

The Committee must where reasonably practicable encourage and give proper consideration to submissions in relation to any matter under its consideration.

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[2] The reference to international law is intended to ensure that interpretation takes into account the ordinary rules of treaty interpretation under the Vienna Convention on the Law of Treaties and the more specific rules regarding interpretation of human rights treaties. These include non-restrictiveness; the effectiveness principle; dynamic interpretation; and the margin of appreciation. See John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1. It also allows for a consideration of international obligations under other treaties that may inform or indeed conflict with human rights treaties and any relevant customary human rights law.

[3] This is included because (a) Australia has invariably adopted or affirmed these declarations, and (b) resolutions may not be included within the definition of international law under art 38 of the Statute of the International Court of Justice.

The Enormity of the Task

5. Even on the Bill's current definition of human rights, the obligations of members of Parliament in preparing a Statement of Compatibility and of the Joint Committee on Human Rights in carrying out its scrutiny task are so onerous that there is a question whether the approach to human rights protection proposed in the Bill is practicable, except in the most perfunctory sense.

6. The number of Bills and legislative instruments vary from year to year, but is always considerable. Members of the Committee will be aware that the Parliament passed 248 Acts in 2009. Each would now require a Statement of Compatibility and some level of explicit scrutiny against human rights by the Joint Committee on Human Rights.

7. An additional 395 legislative instruments were adopted in 2009. Each would also now require a Statement of Compatibility and some level of explicit scrutiny against human rights by the Joint Committee on Human Rights.

8. Meaningful consideration of the human rights implications of Bills and legislative instruments is time consuming, requiring a detailed understanding of the provisions of the Bill or legislative instrument, of how the Bill or legislative instrument will operate in a practical setting, and a close analysis of how this limits human rights. It will also require an understanding of the policy rationale for the Bill or legislative instrument (and supporting evidence) so that it is possible to determine whether any limits on human rights are demonstrably justified by the policy rationale. It will be almost impossible to ensure that either the Statements of Compatibility or parliamentary scrutiny will have sufficient depth in these circumstances.

9. We have suggested that this Bill will only achieve its aims if the definition of human rights is expanded. However, this will make the already onerous task imposed by the Bill even more considerable. It is important that this be recognised before the Bill is enacted and appropriate commitments given that resources will be adequate to the task. (In particular, effective scrutiny could not be achieved if the Joint Committee on Human Rights were only allocated a single adviser as proposed in at least one submission.) It would be a great pity if the promise of the Bill is undone because resources are not adequate to the task of effective scrutiny.[4] We therefore recommend:

Recommendation 5

> That the Joint Committee on Human Rights receives the resources required to perform the time consuming and complex task of scrutinising Bills and Acts for compliance with human rights standards and conducting inquiries referred to it.

[4] We suggest below some ways in which the task of the Committee in particular can be supported.

The Joint Committee on Human Rights – relationship with other Committees

10. There are currently two Standing Senate Committees that have roles that substantially overlap with that proposed by the Bill: the Regulations and Ordinances Committee and the Scrutiny of Bills Committee.

11. Under the standing rules of the Senate, the Regulations and Ordinances Committee is required to scrutinise each instrument to ensure:

    (a) that it is in accordance with the statute;
    (b) that it does not trespass unduly on personal rights and liberties;
    (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
    (d) that it does not contain matter more appropriate for parliamentary enactment.

12. The Scrutiny of Bills Committee reports to the Senate in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise:

        (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.

13. Similar committees operate in most State Parliaments.

14. The current parliamentary committees including the two Senate Committees refer to a variety of sources when determining what 'trespass unduly on personal rights or liberties' means but have not traditionally placed much reliance on international human rights treaties or other international law sources.

15. It is not clear whether the proposed JCHR would replace or supplement the existing Senate Committees. If it were to replace these committees, a single ten member committee will be taking the place of two (already busy) six person committees (and thus a small number of people will be carrying out a larger and more complex task).

16. The new JCHR would also need to ensure that it deals with some of the non-human rights law matters currently dealt with by the current committees (such as consideration of whether a matter in a regulation would be more appropriately dealt with by legislation or whether an Act inappropriately delegates legislative power). These matters are currently not within the functions of the proposed

committee (see clause 7). These long-established procedures should not be jeopardised by a scheme of this kind.

17. While these committees have overlapping functions, there are distinct advantages in scrutiny by Senate Committees, given the additional roles performed by the existing committees. We therefore recommend:

Recommendation 6

> That the existing Senate Committees continue along with the proposed Joint Committee on Human Rights.

18. To safeguard the independence of the JCHR either the Bill or the way in which it is implemented should require that there be five government members and five non-government members. Additional protection would be added by requiring that the chair of the committee be a non-government member.

Recommendation 7

> The JCHR should include five government members and five non-government members (including the Chair).

19. Regardless of whether these recommendations are accepted, the task of the JCHR and its approach to its role is likely to be quite different to that adopted by the current Senate committees. Given that it will have a specific mandate to look at the compatibility of legislation and legislative instruments for compliance with a wide range of substantive human rights, the JCHR will only be effective if it is able to engage with more substantive and policy-oriented decisions and to make clearer recommendations about what is required for compliance with human rights than the current committees. There is a danger that this will strain bipartisanship and make the committee less effective.[5] However, as the experience of both the United Kingdom and Victoria demonstrates, the task is possible with good will and adequate resources. Consideration should be given to assisting new members of the committee with some training in human rights if members of the JCHR

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[5] Janet Hiebert, in an important analysis of the operation of the current system ('A Hybrid Approach to Protecting Rights' (1998) 26 *Federal Law Review* 115) has noted that committee members interviewed for her research

> insist that in the process of evaluating bills for rights violations, they do not, and will not, pass judgment on whether the policy is warranted. Not only is this distinction between identifying rights violations and assessing the merits of a policy a fundamental characteristic of how committees operate, but committee members suggest that the system would break down if the committee ever crossed this conceptual line. Committee members and legal advisors suggest that if the committee proffered political assessments of whether policies are justified, the committees would cease to be effective. Not only would they simply mirror partisan divisions within parliament, they would frequently produce minority or dissenting reports, which would diminish their capacity to put pressure on the government to justify or revise problematic clauses.

In order to overcome these problems, the committees noted when rights had been infringed but made no judgement as to whether the infringement was justified. However, such a judgement may well be called for under the new system.

wish for such training. Empirical work carried out by Carolyn Evans and Simon Evans has demonstrated that many parliamentary committee members felt uncertain about their ability to engage in human rights analysis, particularly those who were not trained as lawyers.

Recommendation 8

That the JCHR be resourced to provide training in human rights scrutiny for new members.

Statements of Compatibility

20. The Statements of Compatibility required by the Bill can play a useful role in helping to turn the minds of those in government to the human rights implications of their proposals, particularly when consideration is given to the statements early in the policy development process.

21. In addition, the Minister's second reading speech for the current Bill identifies the need for effective dialogue, between Government and Parliament, within the Parliament, and with the Australian people about the human rights implications of legislation. We entirely support this proposition.

22. There are, however, several issues that need to be taken into account in order for the statements to be effective:

    (iii) Statements of Compatibility should be required for any substantive proposed amendment to a Bill (even if such statements may not be able to be introduced at precisely the same time as the Bill). Experience in New Zealand has shown that the amendment process is one of the stages in which legislation is vulnerable to the inclusion of poorly thought out additions that can have serious implications for human rights. For the same reason, legislation that undergoes substantial amendment after it has passed though the joint committee process should be returned to the committee to determine if it wishes to make any further points with respect to amendments.

Recommendation 9

Clause 8 of the Bill should be amended to provide that references to a Bill in that clause include an amendment to a Bill.

(iv) If the promise of effective dialogue about the human rights impact of *all* Bills is to be realised, there should be resources set aside for assistance in developing statements for private members' Bills.

Recommendation 10

The Committee should note the need for government to support the preparation of Statements of Compatibility for private members' Bills.

(v) It follows that Statements of Compatibility should identify the ways in which Bills and legislative instruments are (or are not) compatible with human rights and the reasons (including any relevant evidence) for this conclusion. Unreasoned Statements of Compatibility do not support effective dialogue.

Recommendation 11

Clause 8 of the Bill should be amended to include a new subclause that provides "An assessment included under [subsection 8(3)] must include reasons for its conclusions and reasons for preferring those conclusions to any reasonably open alternative conclusions, and refer to any relevant evidence."

The Joint Committee on Human Rights – an incomplete mandate

23. The functions to be conferred on the JCHR by clause 7 are limited and incomplete if the proposed Act is to be effective in achieving the objectives articulated in the Minister's second reading speech. Those objectives included, in particular, establishing a dialogue between the legislative and executive branches of government and the people of Australia about compliance with Australia's human rights obligations. However in its current form the Bill is deficient in several respects:

    (i) it fails to provide any mechanism for assessing the compliance of the executive with human rights;
    (ii) it provides no mechanism for the JCHR to respond to human rights issues that emerge after the enactment of legislation and legislative instruments; and
    (iii) there is no mechanism by which the operation and effectiveness of the processes established under the Bill can be reviewed.

24. First and most obviously, there is no attempt in the proposal to assess compliance of executive action with rights standards, whether the executive acts pursuant to statute or in the exercise of inherent executive power. This is an odd omission, as experience elsewhere shows that human rights problems often stem from executive rather than legislative action. The only gesture in this direction in this legislation is the appointment of the President of the Human Rights Commission to the Administrative Review Council. Without substantive legislative change, however, this procedural change cannot improve the scrutiny of executive action by reference to human rights.

25. Secondly, clause 7 currently limits the JCHR to an essentially reactive role, in which it responds to legislative proposals. Inevitably, it will be required to examine Bills and legislative instruments in a very short timeframe. This omits important aspects of the human rights dialogue – and limits the capacity to ensure

that "the business of government as a matter of practice and culture considers how its legislation impacts on the rights of the people of Australia."

26. It is notoriously difficult to reliably anticipate the compliance of legislation with rights standards in the absence of a concrete case. This is the premise on which Australian courts insist on concrete, rather than abstract judicial review. The facts in *Davis v Commonwealth* (1988) 166 CLR 79 illustrate the difficulty. There, the High Court held (in effect) that the refusal of the Bicentennial Authority to allow an indigenous group to print T-shirts using certain expressions controlled by the Act infringed freedom of speech (and indicated the absence of a head of power to support the Act). It may be doubted whether either a Statement of Compatibility or a parliamentary committee would have identified this difficulty on the face of the legislation, in the absence of plaintiffs seeking to engage in legitimate protest during the bicentennial year.

27. Thirdly, both of these problems are compounded by the hollow format of much Commonwealth legislation. Partly because of a shortfall in legislative power to pursue the policies that it wishes to pursue, much Commonwealth legislation is based on a power to spend, whether in the form of grants to the States or otherwise. In these circumstances, legislation typically prescribes relatively few rules and confers extensive and largely unscrutinised discretion on the executive branch. The Higher Education Funding Act 1988 (Cth) is one of many cases in point, conferring considerable discretion on the Minister to set the terms on which funding is provided to each University, with relatively little guidance from the empowering legislation. Non-compliance with human rights standards pursuant to legislation of this kind will not be captured by the present proposal.

28. Finally, there are ways in which the proposal might have unintended consequences, which in the longer term would be disadvantageous to human rights protection. One concerns the interpretive principles presently used by Australian courts in deciding whether legislation overrides common law rights. In applying the principle of legality, in particular, the courts look (inter alia) for 'a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30]. In these circumstances, it may not be to the point that a Statement of Compatibility does not bind the courts, as the Bill provides; indeed, it would have been constitutionally impossible for it to do so. It is quite conceivable that a statement by the government that it is aware of the breach but proposes to proceed with the legislation in any event might preclude the application of the principle of legality in circumstances in which, under current arrangements, the court might have held that the legislation was not sufficiently clear.

29. The following recommendation is modelled on one of the terms of reference of the UK Parliament's Joint Committee on Human Rights. It has allowed the UK JCHR to examine systemic and structural issues about the protection of human rights, and issues about the protection of human rights *in practice* that are not revealed by a single-minded focus on the terms of Bills and Acts. It would allow the JCHR to consider and report also on the views and recommendations of international human rights Committee bodies, Special Rapporteurs and other UN

bodies to the extent that they affected human rights in Australia, ensuring effective dialogue with the Australian people about these views and recommendations.

Recommendation 12

That clause 7 be amended to confer on the JCHR the function "to consider and report on matters relating to human rights in Australia (but excluding consideration of individual cases)".

30. The JCHR should also be able to enquire into and report on the operation, effectiveness and impact of the processes established under the Bill. (Compare section 55(1)(e) of the *Australian Crime Commission Act* 2002 (Cth) which confers on the Parliamentary Joint Committee on the Australian Crime Commission the duty "to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question".)

Recommendation 13

That clause 7 of the Bill be amended to include the following functions:

- to monitor and to review the production and presentation of Statements of Compatibility under the Act;
- to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter connected with the performance of functions under the Act to which, in the opinion of the Committee, the attention of the Parliament should be directed; and
- to inquire into any question in connection with its functions which is referred to it by either House of the Parliament, and to report to that House upon that question.

31. Finally, if the Committee is to operate effectively, it is likely to require the full suite of powers normally conferred on Committees by resolution of the House (as contemplated by clause 6), including the powers listed in *Odgers Guide to Australian Senate Practice*:

- to send for persons and documents (that is, to summon witnesses and require the production of documents);
- to move from place to place;
- to take evidence in public or private session;
- to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives; and
- to appoint subcommittees.

32. These are matters for the Houses after the Bill is enacted rather than matters for recommendation at this stage.

Review

33. There is no provision in the Bill to require a review of the operation or effectiveness of the measures provided for in the Bill.

34. We have suggested above that clause 7 of the Bill be amended to include additional functions that would enable the JCHR to review the performance of functions under the Act, including the preparation and presentation of Statements of Compatibility and the JCHR's own operations.

35. In addition, it would be desirable if the preparation of Statements of Compatibility were subject to ongoing independent systemic review in the same way that regulatory impact statements are subject to review by the Productivity Commission.[6]

Recommendation 14

> The Committee recommend to government that administrative arrangements be made for ongoing independent systemic review of the preparation of Statements of Compatibility by the Australian Human Rights Commission.

[6] This case is made in detail in Simon Evans, 'Improving Human Rights Analysis In The Legislative And Policy Processes' (2005) [2006] 29 *Melbourne University Law Review* 665-703, available at http://www.austlii.edu.au/au/journals/MULR/2005/21.html.