

2 July 2010

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

Dear Secretary:

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

Thank you for the opportunity to make submissions to the Committee's Inquiry into these Bills.

In summary, DDLC strongly supports these Bills in principle. However, we propose that a number of amendments be made to the principal Bill that would better ensure that its objectives will be achieved. We also consider it important that the Consequential Provisions Bill is amended to make explicit what the strategic policy purpose of this measure is.

Human Rights (Parliamentary Scrutiny) Bill 2010

Definition of 'human rights'

Subject to the following comments, DDLC supports the proposed definition of 'human rights' incorporated into the Bill, and views it as essential that the Bill incorporates such a definition.

However, reference only to those core human rights treaties to which Australia is currently a party unnecessarily and undesirably 'time-locks' this Bill. Australia is not currently a party to all core human rights treaties and the process of human rights treaty development is ongoing. We therefore propose that the Bill be amended to permit the Attorney-General to 'declare' additional human rights instruments as falling within the definition of 'human rights' should Australia become a party to additional human rights treaties in future. The provision we have in mind is broadly equivalent to that provided in s 47 of the Australian Human Rights Commission Act 1986.

International statutory law is not the only source of 'core' human rights law. We view it as essential that the definition of human rights incorporated into the Bill explicitly include customary international human rights law. Apart from ensuring that existing customary human rights law that is currently not also codified is capable of being recognised, this would assist in ensuring that the definition of human rights incorporated into the Bill does

not become time-locked against future developments in customary international human rights law.

There may be compelling reasons why, in specific instances, the Australian Government would wish to recognise international human rights instruments of lesser status to the core human rights treaties as falling within the definition of human rights for the purpose of this Bill. For example, the United Nations Declaration on the Rights of Indigenous Peoples is not a core human rights treaty and is not currently within the Bill's definition of human rights. In our view it ought to be, as none of the other treaties deals in any substantial way with the specific rights of indigenous peoples. In our view the Bill ought to therefore also include provision for the Attorney-General to declare, in appropriate circumstances, 'other human rights instruments' as falling within the definition of human rights. In this respect, we note that the current Australian Government, on its election to office, had no specific legal avenue to fulfil its pre-election promise to recognise this Declaration in circumstances where the previous Australian Government had declined to do so at the time of its adoption. The power to declare the Declaration as a human rights instrument under a Bill such as this would have been an extremely powerful means of doing so.

Finally, in relation to this issue, we believe it is important that the definition of human rights explicitly provides that in determining the scope and content of a human right, proper consideration must be given to relevant international law and jurisprudence, including the judgements of domestic, foreign and international courts, tribunals and other appropriate bodies.

Powers and proceedings of the Joint Parliamentary Committee on Human Rights

Paragraph 6 of the Bill provides that the powers and proceedings of the Committee are to be determined by both Houses of the Parliament. It is a plenary provision. While we would not wish the Bill to limit Parliament's capacity to determine the powers and proceedings of the Committee, we do view it as strongly advisable that certain powers and procedural arrangements are made explicit so as to ensure that the Committee is capable of fulfilling its role. These matters might be conceptualised as the Committee's 'essential' powers and administrative arrangements. Key issues in this regard are the Committee's capacity to effectively scrutinise legislation, which necessarily requires that it have sufficient time, resources and available supporting expertise to perform its role, as well as the ability to target and prioritise its work.

We also view it as essential that the Bill establishes the expectation that Parliament will ensure that the Committee has supporting specialist expertise available within its secretariat in relation to each and all of the core treaties that fall within the definition of human rights. In this respect we express the concern that the human rights of persons with disability have historically been neglected by 'mainstream' human rights approaches and therefore require specific expertise and emphasis.

Additionally, the Committee ought to be reposed with specific powers that will ensure

that it is capable of fulfilling its inquiry functions. At a minimum these powers ought to include the power to conduct public inquiries and consultations, the power to communicate with, and take evidence from human rights experts, including representatives of international human rights organisations and bodies, and the power to compel and examine witnesses.

Consequently, we propose that a new sub-paragraph be incorporated into paragraph 6 of the Bill, that is framed into the following terms:

“Without limiting this provision the Parliament shall ensure that the Committee:
Has sufficient time, resources, powers and expertise available to it to adequately perform its role in respect of each and all of the human rights instruments set out in or declared pursuant to section 3(1) of this Act;
Has a general power to target and prioritise its work so as to ensure effective and efficient scrutiny of human rights issues;
Has the power to undertake public inquiries, and conduct public consultations in the performance of its functions;
Has the power to communicate with, and take evidence from, any person it thinks fit, including international human rights experts and representatives of international human rights bodies;
Will, as far as possible, conduct proceedings in public, whether in Parliament or at any other location determined by the Committee; and
Has the power to compel and examine witnesses.

Functions of the Joint Parliamentary Committee on Human Rights

We support the proposed functions of the Committee incorporated into the Bill but believe that the Committee ought to be reposed with a number of additional functions.

First, we propose that paragraph 7(c) of the Bill be amended to provide that the Committee has the function of ‘inquir[ing] into any matter relating to human rights which is referred to it by the Attorney-General, or either or both houses of Parliament,...’ We do not believe it is appropriate, given the important Parliamentary function performed by the Committee, that the power of referral is limited to the Attorney-General of a sitting government.

Second, we propose that the Committee ought also to be reposed with the power to ‘examine, monitor and report on Australia’s reports to international human rights bodies, and on the implementation of observations, recommendations, and views published by such bodies in relation to such reports or other matters.’ Such a power would ensure that Parliament – through the Committee and more generally – and not only Executive Government, is appropriately engaged in monitoring the respect, protection and fulfilment of Australia’s solemnly accepted human rights obligations.

Third, we propose that the Committee have the broad function of raising the awareness and building the capacity of the Australian Parliament in relation to human rights scrutiny

through activities such as information sharing, education, and promoting dialogue on human rights issues. It cannot be assumed that all Parliamentarians will have the requisite expertise to effectively apply human rights principles in the policy development process, or to provide effective human rights related scrutiny of legislation. The Committee ought to be viewed as playing an important role in building Parliament's institutional capacity to do so.

Finally with respect to this issue, we propose that paragraph 7 include a clarifying provision to the effect that the Committee's function is not limited to the consideration of Commonwealth laws or Bills of the Commonwealth Parliament, but may include consideration of any law or proposed law of the Commonwealth or a State or Territory, and any policy, practice, act or omission of the Commonwealth or a State or Territory. In particular, this will be an important adjunct to the power we propose for the Committee in relation to the monitoring of reports to, and recommendations arising from, international human rights bodies. However, such a provision would also reflect the reality that many human rights issues that ought properly to be before the Committee involve areas of joint Commonwealth and State responsibility. This is especially the case, for example, in relation to the human rights of persons with disability, as these are enunciated in the Convention on the Rights of Persons with Disabilities.

Statements of compatibility

We support the proposed requirement for a 'statement of compatibility' to be prepared in relation to Bills and specified legislative instruments. However we propose a number of amendments to the proposed provisions that would ensure that this function is genuine and substantial, rather than merely formal and perfunctory.

First, we propose that paragraphs 8 and 9 of the Bill are both amended to incorporate a requirement that a statement of compatibility detail the measures taken in the development of the Bill or legislative instrument to ensure, as far as possible, its compatibility with human rights. These measures ought to include the public consultation that has been undertaken in the development of the Bill. Such a requirement would assist in ensuring that human rights are taken into account in a substantial way in the development of policy and legislation, and not merely after the policy or legislation has been formulated. Early consideration of human rights is likely to produce policy and legislation that is more compatible with human rights.

Second, paragraphs 8(3) and 9(3) also to be amended to require statements of compatibility to incorporate a '....considered assessment of whether the Bill/legislative instrument is compatible with human rights, having regard to each of the human rights recognised under s 3 of this Act, and to the judgements of domestic, foreign and international human rights courts, bodies and tribunals.'

Third, in order to ensure that the Parliament is able to provide effective scrutiny of Bills and legislative instruments, it is essential that statements of compatibility are tabled at the same time as the Second Reading Speech and Explanatory Memoranda, or the legislative

instrument and any associated materials. To ensure this occurs we propose that paragraphs 8 and 9 of the Bill are amended to include this as an explicit requirement.

Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

While we think the principal measure incorporated into this Bill – the appointment of the President of the Australian Human Rights Commission as an ex-officio member of the Administrative Review Council – is a worthwhile measure, the Bill currently provides no guidance as to the function that this is intended to serve. We view this as undesirable. The President ought to be provided with an explicit mandate for this appointment. For example, the Bill might include an object or a preamble to the effect that this measure is to ‘ensure (or enhance) effective consideration of human rights in the oversight of government administration.’

For completeness, we also note that Item 4 of Schedule 1 ought to be amended, for the reasons set out above, to incorporate a requirement that a statement of compatibility:

detail the measures taken in the development of the Bill or legislative instrument to ensure, as far as possible, its compatibility with human rights.
is tabled at the same time as a disallowable instrument and its associated explanatory statement.

I am authorised to say that People with Disability Australia endorses these submissions.

Thank you again for the opportunity to make these submissions. We would welcome the opportunity to elaborate upon our submissions if this would be of assistance.

Yours sincerely

signed

PHILLIP FRENCH
Director