

8 July 2010

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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

Dear Ms. Dennett,

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

The Arts Law Centre of Australia (**Arts Law**) is grateful for the opportunity to provide input on the above legislation. We write to express our support for the submission made in June 2010 by the Human Rights Law Resource Centre (**HRLRC**) entitled "Parliamentary Scrutiny and the Promotion and Protection of Human Rights"¹ (**submission**), in response to the Human Rights (Parliamentary Scrutiny) Bill 2010 (**Bill**) and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010.

¹ Human Rights Law Resource Centre, *Parliamentary Scrutiny and the Promotion and Protection of Human Rights – Submissions to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010*, June 2010 (available at <http://hrlrc.org.au/files/Human-Rights-Parliamentary-Scrutiny-Bill-Inquiry-HRLRC-Submission.pdf>).

While Arts Law welcomes the introduction of the Bill in principal, we are disappointed that the Australian Government has not enacted the National Human Rights Consultation Committee Report's² recommendation for the development of a national human rights act. While not a complete solution we hope the Bill will assist in maintaining and promoting the protection of human rights in Australia.

Although we support improved human rights protection of all Australians, our advocacy focus is on those rights which are applicable to artists, including the right to freedom of expression, the right to protection of Indigenous Cultural and Intellectual Property (**ICIP**), and the right of artists to have adequate access to the legal system, information and other forms of assistance.

About the Arts Law Centre of Australia

Arts Law was established in 1983 and is the national community legal centre for the arts in Australia. Arts Law provides legal advice, publications, education and advocacy services each year to over 6000 Australian artists and arts organisations operating across the arts and entertainment industries.

1. Limitations of the Bill

As the submission indicates, there are inherent limitations in the proposed parliamentary scrutiny approach to human rights protection and it is necessary to more adequately define some of the features of the Bill. We have expanded on our concerns below.

1.1 Definition of 'Human Rights'

Arts Law supports the HRLRC recommendation that the definition of 'Human Rights' in the Bill be expanded to include "the rights and freedoms recognised by customary international law"³. Further we urge the government to include in the definition the rights comprised in the UN Declaration on the Rights of Indigenous Peoples⁴. This declaration was endorsed by the Government in 2009 and states in Article 31 that;

² National Human Rights Consultation Committee, *National Human Rights Consultation Committee Report*, 9 September 2009 (available at: <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>).

³ Human Rights Law Resource Centre, *op cit*.

⁴ United Nations, *UN Declaration of the Rights of Indigenous Peoples*, 2007 (available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁵

There is currently inadequate protection of ICIP in Australia, and the inclusion of this convention and declaration in the Bill's definition of human rights would increase transparency of the effects of new laws on Indigenous culture and heritage.

We applaud the government on its inclusion of the International Covenant on Civil and Political Rights (**ICCPR**) in the Bill's definition of human rights. We are optimistic this will result in parliamentary consideration of the impact of proposed laws on freedom of expression, a right which we believe is imperative for all Australians, in particular artists. Despite this we encourage the government to further widen its definition of human rights to take into account the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁶ which Australia became party to in 2009. As the UNESCO convention states in article 2;

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed⁷.

The inclusion of this convention would further ensure critical examination of the potential impact of new legislation on freedom of expression.

1.2 Powers of the Joint Parliamentary Committee (Committee) on Human Rights

Furthermore, Arts Law agrees with the HRLRC's recommendation (at 3.1) that the Committee on Human Rights should be vested with the power "to inquire into any matter relating to human rights which is referred to it by resolution of either House of Parliament"⁸, rather than being limited to matters referred to it by the Attorney-General. This would enhance the independence of the

⁵ United Nations, *op. cit.*

⁶ UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, (available at: <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>)

⁷ *Ibid.*

⁸ Human Rights Law Resource Centre, *op. cit.*

Committee because the matters referred to it would be representative of a variety of political positions.

2. Statements of Compatibility

2.1 Form, scope and level of detail

Arts Law strongly supports the HRLRC's concern (at 4.2) at the Bill's silence on the form, scope and detail of analysis to be contained in Statements of Compatibility and its recommendation (at 4.2) that "human rights should be considered, and Statements of Compatibility prepared early in the policy development process"⁹. Compatibility statements should aim to assist in the development of policy and legislation which accords with the core human rights treaties to which Australia is a signatory, rather than being used as a tool to justify departure from those rights. In order for parliamentary scrutiny to be as effective as possible we agree that the form of the statement should follow the model outlined by HRLRC in paragraph 25b, being 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'¹⁰.

2.2 Physical and intellectual access

Furthermore as the HRLRC have noted in (at 4.2), "to have the greatest impact and accessibility, Statements of Compatibility should be tabled with the Second Reading Speech and Explanatory Memorandum provided for a Bill"¹¹. In order for these statements to be effective the public needs to be able to physically access, and consider, these statements prior to the enactment of new legislation. In addition Statements of Compatibility need to be intellectually accessible to the community, using language which the submission notes (at paragraph 25c) should not be "too long, legalistic or technical"¹². Arts Laws' very broad client base includes individuals who are physically or intellectually disabled, culturally and linguistically diverse (**CALD**), and those living remotely in Indigenous communities. It is imperative for the statements to be effectively communicated to the community in an appropriate form in order to achieve their

⁹ Human Rights Law Resource Centre, *op. cit.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

aim of establishing “a dialogue between the parliament and citizens of Australia”¹³.

2.3 Enforceability

It is unclear from the Bill the extent to which the Statements of Compatibility can be enforced. Subclause 8.5 of the Human Rights (Parliamentary Scrutiny) Bill 2010 states “a failure to comply with this clause [statements of compatibility in relation to Bill] does not affect the validity or operation or enforcement of the Act or any other law of the Commonwealth”. If the Bill is to be effective in its goal of increasing the awareness of both “the executive in proposing legislation and the parliament in considering legislation” of the “impact of laws on the rights of citizens”¹⁴, it is imperative that Statements of Compatibility be mandatory and that legislation which does not comply for want of a statement of compatibility not be enforceable.

Conclusion

While Arts Law welcomes increased parliamentary scrutiny of new laws, we urge you to consider our concerns in relation to the Bill, as outlined above and by the HRLRC submission.

Further information

Please contact Robyn Ayres or Suzanne Derry if you would like us to expand on any aspect of this submission, verbally or in writing. We can be contacted at
or at the following postal address: 43-51
Cowper Wharf Rd. Woolloomooloo NSW 2011.

Yours faithfully

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Suzanne Derry
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¹³ McClelland, R., *Human Rights (Parliamentary Scrutiny) Bill 2010 – Second Reading Speech* (available at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-06-02/0009/hansard_frag.pdf;fileType=application%2Fpdf)

¹⁴ McClelland, *op cit*.