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Ms J Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600
Email: LegCon.Sen@aph.gov.au

Dear Ms Dennett,

Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010

Thank you for the opportunity to make a submission to the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Human Rights (Parliamentary Scrutiny) Bill 2010. Thank you also for the short extension of time in which to lodge this submission.

The Human Rights Council of Australia welcomes and fully supports the proposal to establish a Parliamentary Joint Committee that will have as one of its functions the scrutiny of new primary and delegated legislation for compatibility with human rights recognised or declared by the seven international instruments specified in clause 3(1) of the Bill, namely:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- the Convention on the Rights of the Child (CROC); and
- the Convention on the Rights of Persons with Disabilities (CRPD).

The Council also fully supports the proposed new Committee having the other functions set out in clause 7 of the Bill, specifically:

- to scrutinise existing primary legislation for compatibility with human rights; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney General, and to report to both Houses of the Parliament on that matter.

In its submission to the National Human Rights Consultation dated 15 June 2009, the Council recommended the establishment of a Parliamentary Joint Committee for the purpose of scrutinising bills for their compliance with human rights obligations. The Council notes that the report of the National Human Rights Consultation adopted such a recommendation (Recommendation 7).

While the Government's decision to not accept the Brennan Committee's recommendation for a federal Human Rights Act was disappointing, the establishment of the proposed Parliamentary Joint Committee on Human Rights will nevertheless be a very significant step forward for better protecting and promoting human rights in Australia.

It is particularly pleasing that the rights to which the Parliamentary Joint Committee must have regard when performing its functions are *all* of the rights expressed and declared in the relevant international instruments listed in clause 3(1) of the Bill, as distinct from merely a selection of some of these rights. This will serve to remind the federal legislature that, at international law, Australia has an obligation to observe and respect all rights that are the subject of international treaties to which Australia is a party. This is very welcome.

In the case of economic, social and cultural rights under the ICESCR, notwithstanding the concept of progressive realisation, Australia has an obligation to not delay in working towards full realisation. Further, where a significant number of individuals are deprived of daily essentials such as food, housing and a basic education, the obligation to ensure protection of the right is immediate (see: Committee on Economic, Social and Cultural Rights, General Comment 3, (1990), UN Doc E/1991/23, paras 9-10). The Bill in its present form will enable the Parliamentary Joint Committee to notice instances in which statutes or disallowable instruments do not comply with these obligations under the ICESCR. This is to be applauded.

Consistent with the report by the Brennan Committee (Recommendation 13) and the Council's submission to that Committee, it is submitted that the definition of "human right" in clause 3(1) of the Bill be expanded to include rights and freedoms recognised or declared by the Declaration on the Rights of Indigenous Peoples. On 3 April 2009 the Federal Minister for Families, Housing, Community Services and Indigenous Affairs the announced the Australian Government's support for the Declaration. It is acknowledged that the rights expressed in the Declaration on the Rights of Indigenous Peoples are not legally binding. In this way, the rights expressed in the Declaration differ from the rights expressed in the international instruments specified in clause 3 of the Bill. It is submitted, however, that the legal status of the rights in the Declaration should not preclude Parliament from being required to give consideration to whether rights expressed in the Declaration are being protected and promoted. It is well documented that Australia's indigenous peoples are among the most disadvantaged within the Australian community. It would be a very positive step

towards the Government's objective of "closing the gap" and reducing the disadvantage of Australia's indigenous peoples were it to add the Declaration to the list of instruments that help to define what is meant by a "human right" for the purposes of the Bill, in spite of the different legal status of the Declaration.

It is further submitted that the Convention Relating to the Status of Refugees be included in the list of international instruments within the Bill's definition of "human right". Australia acceded to the Refugee Convention on 22 January 1954. It contains some important rights, for example, that a refugee shall have free access to the courts of law on the territory of all Contracting States (Article 16(1)). Australia is obliged to observe these and other obligations set out in the Convention. Refugees are a most vulnerable group of people. The fact of their statelessness means that they are necessarily in a more difficult position than most when it comes to achieving full recognition of and observance of their human rights. Importantly, the Refugee Convention sets out minimum standards that all States Parties to the Convention must observe.

The scrutiny process that the Bill will establish, if applied to the Refugee Convention, will ensure that Federal Parliament is kept properly informed when legislative measures (including legislative instruments) may offend against the Convention. This will help to ensure better public policy making in relation to refugees. Very often the public debate in relation to refugees is shifted or skewed away from the effect that a proposed law or policy may have on refugees toward the effect that the law or policy may have on those who arrange for the passage of refugees from their country of origin to their country of asylum. While the Council does not condone the acts of those who put the lives of refugees at risk in this way, it is vital that sight not be lost of the effect of law and policy on the refugees themselves. Adding the Refugee Convention to the international instruments to which regard must be had by the Parliamentary Joint Committee will very significantly assist in ensuring that appropriate standards are observed when Federal Parliament is considering legislation relating to refugees.

In addition to the Refugee Convention and the Declaration on the Rights of Indigenous Peoples being included in the list of international instruments incorporated into the definition of "human right" in clause 3(1) of the Bill, provision should be made for additional international instruments to be added by regulation. For some time now, non-government organizations, including the Council, having been advocating for Australia to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Migrant workers are at risk of their human rights not being fully observed and protected, particularly when difficulties are encountered with their employers. The Council hopes that the Government will act to ratify this Convention in the near future. If and when this occurs, there should be provision within the Bill for the Parliamentary Joint Committee scrutiny function to be extended to rights recognised by the Migrant Workers Convention. More generally, there should be flexibility to extend the definition of "human right" to include other rights expressed or declared in treaties entered into or other international instruments endorsed by the Australian Government including International Labour Organisation Conventions.

The Human Rights Council welcomes not only the functions to be performed by the proposed Parliamentary Joint Committee; it also welcomes the proposals contained in the Bill that will require the preparation and tabling of statements of compatibility. As the Senate Select Committee may already be aware, there are similar provisions in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In particular, section 28 of the *Charter* provides:

- (1) *A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.*
- (2) *A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.*

Note: The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

- (3) *A statement of compatibility must state—*
 - (a) *whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and*
 - (b) *if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.*
- (4) *A statement of compatibility made under this section is not binding on any court or tribunal.*

Section 28 of the *Charter* needs to be construed in its proper legislative context. In particular, it needs to be read with and having regard to section 1(2), which provides:

The main purpose of this Charter is to protect and promote human rights by—

- (a) *setting out the human rights that Parliament specifically seeks to protect and promote; and*
- (b) *ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and*
- (c) *imposing an obligation on all public authorities to act in a way that is compatible with human rights; and*
- (d) *requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and*

- (e) *conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human rights and requiring the relevant Minister to respond to that declaration.*

The opening words of section 1(2) define the purpose of statements of compatibility within the context of the *Charter*, namely, to protect and promote human rights.

From the jurisprudence that is developing in Victoria in relation to the *Charter* (see, in particular, *R v Momcilovic* [2010] VSCA 50) it is emerging that a statutory provision will be incompatible with the *Charter* if, in the first instance, after an application of ordinary principles of statutory construction (including, eg, the principle of legality) and section 32(1) of the *Charter* (which requires, as far as possible, that statutes be interpreted in a way that is compatible with human rights), the provision infringes a right specified by the *Charter*. The next step of the inquiry is to determine whether the infringement is such that it cannot be demonstrably justified under the general limitation provision in section 7(2) of the *Charter*. Section 7(2) provides:

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—

- (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*
- (e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

The first stage of the inquiry as to whether a statutory provision infringes rights specified in the *Charter* requires a consideration of relevant international jurisprudence including, for example, relevant General Comments by the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights. It may also be relevant to consider, for example, the jurisprudence of the European Court of Human Rights and the jurisprudence of the *Human Rights Act 1998* (UK). (See *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646.)

Like the *Charter*, the Bill will require a statement of compatibility to “include an assessment of whether the Bill is compatible with human rights” (clause 8(3)). A similar obligation will extend to disallowable instruments (clause 9(2)). The Bill does not specifically define what is meant by the expression “statement of compatibility”. Nor does it define the concept of “compatibility”. This is perhaps not surprising when regard is had to the *Charter*; no such definitions are contained in the *Charter*.

However, unlike the *Charter*, the Bill does not contain a statement to the effect that the purpose or object of a statement of accountability is to protect and promote human rights. Also, unlike section 28(3)(b) of the *Charter*, there is no requirement in the Bill for a statement of compatibility to include a statement indicating or describing the nature and extent of the incompatibility.

The Council submits that consideration be given to amending the Bill so as to include an objects provision or some other equivalent statement about the purposes of the Bill. This provision should make it clear that the purpose of the Bill is to promote and protect human rights. This will help to guide those preparing statements of compatibility.

The Council also submits that, consistent with the *Charter*, statements of compatibility should, as far as possible, include a description of the nature and extent or the degree and type of incompatibility. Reasons should be given for why a legislative measure infringes an internationally recognised and declared human right, particularly where it has already been adopted or endorsed by the Australian Government. This will assist both the Parliament and the Parliamentary Joint Committee in making an assessment as to whether the measure is justified for proper policy reasons.

The Council further notes that, unlike the *Charter*, the concept of compatibility in the Bill is not made subject to a general limitation provision of the kind that appears in section 7(2) of the *Charter*. It is clear from the Victorian jurisprudence that whether the general limitation provision applies is integral to the question whether a statute is incompatible with the *Charter*. It would appear to the Council that the absence of a general limitation provision from the Bill will necessarily mean that whether a federal statute or legislative instrument is compatible with a right declared or expressed in one or more of the human rights instruments specified in clause 3(1), must be assessed and considered by reference to relevant principles of statutory construction and, importantly, international jurisprudence and rules of international law. Whereas it may have been possible under the *Charter* to rely upon the general limitation provision so as to avoid the consequence of a statute being incompatible with the *Charter*, the same relief will not be available under the Bill for federal legislation. Under the Bill, if, at international law, a federal statute or disallowable instrument infringes a right declared under any of the instruments referred to in clause 3(1) of the Bill, then it will be incompatible with human rights the subject of the Bill. It will not be possible to avoid the infringement by relying upon any equivalent to section 7(2) of the *Charter*.

It is acknowledged that some relief similar to the general limitation provision in section 7(2) of the *Charter*, may be found at international law. The well-established principle of proportionality might permit for some relief in relation to the way in which a particular right is applied. Such principles, however, do not necessarily have universal application to all human rights the subject of the Bill. For example, the principle of proportionality may not be available at international law if the right under consideration is an absolute right from which derogation is not permitted, eg, the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (ICCPR, Article 7).

Whether the principle of proportionality is available or not, it seems clear that international human rights jurisprudence will be very important in assessing whether a statute or legislative instrument is compatible with a “human right” as defined by clause 3(1) of the Bill. The Human Rights Council welcomes and strongly endorses this development. It will serve to better ensure the universality of human rights and the development a single cohesive human rights jurisprudence. It will ensure that through the statement of compatibility measures provided for in the Bill and the scrutiny function to be performed by the Parliamentary Joint Committee, Federal Parliament is kept apprised of the full impact of federal statutes and disallowable instruments against the benchmarks set by the international human rights system.

Please do not hesitate to contact me if the Council can be of any further assistance to the Senate Select Committee’s inquiry. I may be contacted on _____ or by email at _____

Yours sincerely

Andrew Naylor
Chairperson
Human Rights Council of Australia Inc.