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# Human Rights (Parliamentary Scrutiny) Bill 2010 – Supplementary Submission

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## **Senate Committee on Legal and Constitutional Affairs**

**11 November 2010**

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## Introduction

On 5 November 2010 the Law Council of Australia, represented by Mr Nicholas Cowdery AM QC and Ms Sarah Moulds, appeared before the Senate Committee on Legal and Constitutional Affairs to give evidence at the Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 ('the 2010 Bill') and the Human Rights (Consequential Amendments) Bill 2010.

This appearance followed the making of a written submission to the Inquiry, dated 25 October 2010.

During the course of the oral hearing, the representatives of the Law Council undertook to take on notice three questions that resolve into two, both posed by the Hon Senator Guy Barnett.

The following submission endeavours to respond to those questions.

Should the Committee have any further matters with which the Law Council could assist, please contact Sarah Moulds on [sarah.moulds@lawcouncil.asn.au](mailto:sarah.moulds@lawcouncil.asn.au) or 02 6246 3754.

## Questions on Notice

Whether the Law Council's proposed list of 'human rights' would include rights such as the right to freedom of religion, the right to freedom of speech, the right to life, and in particular, the rights of the unborn?

As explained in the Law Council's written submission, the Council is of the view that the effectiveness of the 2010 Bill could be enhanced by amending the proposed definition of 'human rights' in clause 3 - which currently refers to seven core human rights treaties to which Australia is a party - by either:

- including within clause 3 a consolidated list of human rights protected in Australia; or
- providing a reference to a consolidated list of human rights to be contained in the Regulations.

The Law Council advocates for this change on the grounds that the proposed definition in clause 3 may make it difficult for the proposed Joint Parliamentary Committee on Human Rights ('the Human Rights Committee') to isolate the particular human right it is tasked with considering and to apply a consistent test of proportionality when determining whether the particular law unduly infringes on that right. Amending the definition to include a list of rights and a single proportionality or limitation test in this way would not necessarily limit the scope of rights to be considered, but would greatly assist both those responsible for preparing Statements of Compatibility and the Committee to identify the standard against which they are analysing the proposed law.

A number of Senators were interested in how such a list of rights would be articulated and what rights would be included.

The Law Council believes that the definition of 'human rights' in clause 3 of the 2010 Bill should include, at a minimum, those rights protected under the *International Covenant on Civil and Political Rights* ('the ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('the ICESCR') – which would include the right to life (Article

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6(1) ICCPR);<sup>1</sup> the right to freedom of religion (Article 18 ICCPR)<sup>2</sup>, and the right to freedom of speech (Article 19(2) ICCPR).<sup>3</sup> The Law Council acknowledges that it may also be appropriate to include other specific human rights, such as those contained in the *Declaration on the Rights of Indigenous Peoples*.

Precisely how these rights are articulated in a list would require further consideration by the Commonwealth Government and possibly further consultation with the community, however guidance could be drawn from a number of sources, including:

- the key text of the human rights Conventions themselves;
- the way these rights (and the justifiable limitations on these rights) have been expressed in Australian jurisdictions for example, under the Victorian Charter of Human Rights and Responsibilities or other like jurisdictions, such as the United Kingdom; and
- the recommendations made following the National Human Rights Consultation in 2009, which include, for example, the recommendation that regardless of whether a Human Rights Act is adopted, the Commonwealth Government should formulate a list of human rights protected in Australia. Suggestions were made in the report as to which rights should be contained in such a list.<sup>4</sup>

The Law Council suggests that the proposed Human Rights Committee could be assisted in its understanding and application of the listed rights by drawing upon jurisprudence from within Australia, and other jurisdictions that have developed a body of law around the meaning and scope of these rights.

The Law Council has not developed a view as to whether the articulation of a right based on the right to life in Article 6 of the ICCPR would extend to provide particular protections for the rights of the unborn. However, the Law Council notes that at least at the international level, the right to life in Article 6 of the ICCPR has generally not been interpreted in this way.

Article 6 of the ICCPR has a strong focus on the arbitrary deprivation of life by the State, and in particular, the use of capital punishment – as is reflected in paragraphs (2) to (6). When interpreting and applying the right to life in Article 6 and similarly worded provisions, international courts and tribunals have generally not addressed the difficult philosophical issue of when life begins, and have instead focused on the meaning of the language used in the Article itself. The UN Human Rights Committee's General Comment on Article 6 makes it clear that the right to life should not be applied narrowly,<sup>5</sup> but this has not led the Committee to specifically extend the right to life to the unborn. Many jurisdictions,

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<sup>1</sup> Article 6(1) of the ICCPR provides : "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

<sup>2</sup> Article 18(1) of the ICCPR provides: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

<sup>3</sup> Article 19(2) of the ICCPR provides: "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

<sup>4</sup> National Human Rights Consultation Report (2009) Recommendation 3. A copy of this report is available at [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads).

<sup>5</sup> See for example, Human Rights Committee, [General Comment No 6](#) (1982), para 5.

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including Australian jurisdictions, have generally held that the right to life commences at birth and does not extend to a foetus.<sup>6</sup>

The Law Council further notes that in the Australian Capital Territory, where the right to life is protected by section 9 of the *Human Rights Act* 2004 (ACT), subsection 9(2) specifically provides that this right applies from the time of birth. The equivalent provision in the Victorian *Charter of Human Rights and Responsibilities* (section 9) is not directly qualified; instead, a separate savings provision (section 48) provides that nothing in the *Charter* affects any law applicable to abortion.

Whether the Law Council has a response to the concern of the Western Australian Attorney General at page 3 of his written submission, regarding the potential impact of the Parliamentary Joint Committee on Human Rights inquiries on the States and Territories?

During the course of the hearing, the Hon Senator Barnett drew the Law Council's attention to the written submission provided to the Senate Committee on Legal and Constitutional Affairs by the Hon Christian Porter MLA, Attorney General and Minister for Corrective Services in Western Australia ('the WA Attorney').

Particular attention was drawn to page 3 of the WA Attorney's submission, which raises the following concerns in relation to clause 7(c) of the Bill which enables the Commonwealth Attorney General to refer to the Human Rights Committee any matter relating to the seven human rights Conventions currently listed in clause 3 of the Bill. The WA Attorney's submission provides:

*Given the Commonwealth Parliament's legislative powers, including the external affairs power in section 51(29) of the Commonwealth Constitution, [clause 7(c)] 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 relationships 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.*

Senator Barnett asked whether the Law Council had considered this matter, and if so whether the Council shared the WA Attorney's concerns.

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<sup>6</sup> For example, the Canadian courts have indicated that a foetus is not a person under the Canadian Charter: *Borowski v Canada* (Attorney General) (1987) 37 DLR (4th) 731m Sask CA (Canada); *Tremblay v. Daigle* [1989] 2 S.C.R. 530. Traditionally, the UK courts have found that a foetus has no legal status: *Paton v. British Pregnancy Advisory Service Trustees* [1978] 2 All ER 987. A similar position has been adopted by the South African courts: *Christian Lawyers Association of South Africa v Minister of Health* 1998 (11) BCLR 1434. The European Commission of Human Rights and the Human Rights Committee have avoided making pronouncements on whether the right to life extends to a foetus, leaving it to the discretion of individual States parties as to whether and when the right applies to unborn life. .

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The Law Council respectfully does not share the concerns raised by the WA Attorney.

The Law Council acknowledges that the Commonwealth may have the power, under s51(xxix) of the *Commonwealth Constitution* (external affairs), to override a law of a State or Territory that is inconsistent with a right contained in a Convention to which the Commonwealth is a party.

The scope of this power, or the Commonwealth Parliament's determination to exercise this power, exists independently of the 2010 Bill or the creation of the proposed Human Rights Committee.

As indicated in both the Explanatory Memorandum and the Ministers Second Reading Speech, the primary role of the Human Rights Committee is to provide parliamentary scrutiny of all proposed *Commonwealth* laws and certain delegated legislation for their compliance with certain human rights.

By extending the Committee's function to include inquiring into a matter of general human rights concern upon the direction of the Attorney, the 2010 Bill simply provides a forum for human rights matters to be considered by the Commonwealth Parliament.

If the Commonwealth Attorney General utilised this provision and asked the Human Rights Committee to inquire into whether any State legislation or practice did not confirm to the requirements of the seven human rights treaties listed in clause 3 – as suggested in the WA Attorney's submission – this would simply provide an additional forum for the Commonwealth Parliament to consider and discuss inconsistencies between a particular State or Territory law or practice and Australia's international obligations, as it can already do independently of this Bill.

Such discussions may already occur in a range of fora, including a number of existing Parliamentary Committees. For example, the Joint Standing Committee on Foreign Affairs, Defence and Trade can already consider and report on a range of matters, including human rights matters, as may be referred to it by either House of the Parliament, the Minister for Foreign Affairs, the Minister for Defence or the Minister for Trade.<sup>7</sup>

As with existing Parliamentary Committees, it would remain entirely within the discretion of the Commonwealth Government and Commonwealth Parliament to act on any finding or recommendation made by the Human Rights Committee, or to proceed in an entirely different manner. The power of the Commonwealth to utilise the external affairs power in section 51(xxix) of the Constitution, or any other constitutional avenue available to override the State or Territory law, would simply be a matter that the Committee may or may not address in its recommendations; but the decision to act on the recommendation would be for the Government and ultimately the Parliament in the same way as any decision to make any law based on the external affairs power.

In making these observations, the Law Council notes that open discussion of Australia's compliance with its international human rights obligations by its elected representatives should generally be welcomed as a constructive development.

While it is possible for some particular human rights issues to be explored by existing Parliamentary Committees, currently there is no specific mechanism that provides

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<sup>7</sup> <http://www.aph.gov.au/house/committee/jfadt/ESTABL.HTM>, chapters 16 and 17 of the *Standing Orders of the House of Representatives*.

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comprehensive legislative scrutiny of proposed or existing Commonwealth laws with human rights standards. The proposed Human Rights Committee would help fill this gap and ensure that the Commonwealth Parliament is alerted to proposed or existing provisions that unduly infringe upon a range of fundamental rights and freedoms held by the individual.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.