

9 July 2010

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

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

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. It is the experience of VLA that the lives of its clients would be improved if legislation were carefully considered through a human rights lens prior to being enacted. This approach reduces the risk that legislation will impact on people unfairly. For this reason, VLA welcomes the introduction of the *Human Rights (Parliamentary Scrutiny) Bill 2010 (Bill)* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, and takes this opportunity to make a brief submission about the Bill.

Content of the Bills

VLA endorses and reiterates the submission made by the Human Rights Law Resource Centre (HRLRC) in respect of the Bills, which is dated June 2010. VLA draws the Committee's particular attention to the following key concerns.

1. Definition of 'human rights' at section 3(1) of the Bill
 - a. VLA endorses the HRLRC's recommendation that the definition of 'human rights' should encompass the human rights and freedoms enshrined in 'all of the core international human rights treaties to which Australia is a party', or words to that effect. This will ensure that the Joint Committee on Human Rights can consider all core human rights treaties to which Australia is, or may become, a party.
 - b. VLA further recommends that the definition of 'human rights' explicitly include the rights and freedoms contained in the *Declaration on the Rights of Indigenous Peoples*.¹ This would ensure that particular consideration is given to legislation that affects Indigenous Australians, giving practical effect to the Australian Government's formal support for the Declaration, and the Government's

¹ Adopted by UN General Assembly Resolution 61/295 on 13 September 2007

commitment to “work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians”.²

2. Powers of the Joint Committee on Human Rights (JCHR)

- a. VLA submits that the JCHR would be enhanced if section 7 of the Bill were amended so as to confer the JCHR with the power to do the following.
 - i. Inquire into any matter relating to human rights which is referred to it by resolution of either House of Parliament, in addition to matters referred to it by the Attorney-General. This would enhance the democratic nature of the JCHR and ensure that it is able to consider matters of significant public interest.
 - ii. Monitor and report on the concluding observations, recommendations and views of the UN treaty bodies and the recommendations of the UN Special Procedures and Human Rights Council Universal Periodic Review. This would ensure that the considerable efforts of the Australian Government, UN experts and NGOs in UN human rights processes are given due consideration.

3. Functions of the JCHR

- a. VLA notes that the JCHR’s procedures are to be determined by resolution of both Houses of Parliament.³ VLA recommends that the following considerations be taken into account by the Parliament, in determining the JCHR’s procedures.
 - i. It is appropriate that the JCHR be conferred the power to call for submissions and convene public hearings. This is necessary to ensure that the JCHR can draw on the coalface experiences of organisations such as VLA, and obtain a clear understanding of the human rights implications of the legislation that it scrutinises. Such consultation can also assist Parliament to pass legislation that is efficient, as well as fair, by highlighting potential ambiguities and unintended consequences.
 - ii. The JCHR should be clear about its capacity to consider public submissions and testimony. For example, the JCHR should expressly limit the length of public submissions to certain inquiries if it does not have the time or resources to consider longer submissions in full.

4. Statements of compatibility with human rights

- a. Statements of compatibility should be required to state whether a Bill limits any human rights and, if so, whether such limitation is demonstrably justified. It is essential that statements of compatibility contain reasoned and evidence-based assessments of any restrictions that are imposed on human rights and freedoms in order to make a valuable contribution to public debate. VLA supports the HRLRC’s comments in this regard at page 8 of its submission.

Need for the Bills

² Hon Jenny Maklin MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Canberra, 3 April 2009.

³ Human Rights (Parliamentary Scrutiny) Bill 2010, s 6.

Unfortunately, VLA regularly sees clients who are personally and unfairly affected by legislation. This unfairness is sometimes the result of anomalies in the legislation's text and sometimes due to a failure to recognise the importance of human rights in interpreting and applying legislation. Examining legislation according to international human rights standards can help to avoid anomalies in the text and unfair application of legislation.

VLA notes that one of the submissions lodged to date suggests that the Bills will “*impose on Australians laws, rights and principles created in international forums and enforced by international committees*”.⁴ With respect, VLA takes the view that the consideration of legislation in the context of Australia's human rights obligations by the democratically elected Commonwealth Parliament is an exercise, not an abrogation, of Australia's sovereignty. The examination of legislation with reference to human rights standards would, in VLA's view, appropriately reflect Australia's commitment to robust parliamentary democracy. It would also provide a form of 'quality control' of the legislation passing through the Parliament.

The case studies below highlight how human rights could be better acknowledged and protected through the scrutiny of legislation..

Case study 1: Australian Citizenship Act

The *Australian Citizenship Act* previously allowed the Minister a broad discretion to grant citizenship to a child. The discretion allowed the Minister to grant citizenship to a child even where the child was not a permanent resident, and/or had not lived in Australia for a significant period as a permanent resident. This meant that a child of foreign parents, who had lived in Australia his whole life, who was a "typical Australian boy", and who was at risk of psychological harm if forced to leave Australia, could apply to the Minister for citizenship (see *SNMX and MIAC* [2009] AATA 539). This recognised Australia's obligations under the *Convention on the Rights of the Child* to consider the best interests of the child in such circumstances. Amending legislation recently removed this power from the Minister, and such a child could not be recognised as a citizen, no matter how compelling his personal circumstances. Scrutiny of the amending legislation for compliance with human rights standards might have avoided the creation of such a gap.

⁴ Submission of the Attorney-General of Western Australia, 25 June 2010

Case study 2: Social security legislation

Due to amendments to the *Social Security Act* in 2006, some women who were receiving parenting payments before the amendments are no longer eligible for parenting payment benefits if they leave the relationship – even an abusive relationship. In effect, such women are penalised for leaving the relationship. The legislation creating this anomaly puts Australia in breach of its obligations under the *Convention on the Elimination of All Forms of Discrimination against Women*. If properly scrutinised, this hardship for women and breach of Australia's international obligations might have been avoided.

I would be pleased to answer any questions that the Committee may have about this submission.
Please feel free to contact me on .

Yours faithfully

KRISTEN HILTON

Director
Civil Justice, Access and Equity