Responses to Issues Raised by the Senate Legal and Constitutional Committee at the Hearing of 4 November 2010 on the *Human Rights (Parliamentary Scrutiny) Bill 2010*

This written summary responds to questions and issues raised by the Senate Legal and Constitutional Committee at its public hearing on the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 on 4 November 2010.

1. Definition of 'human rights'

The Bill defines human rights by reference to 7 international instruments but omits any reference to the significant body of human rights enshrined in Australian legislation, the common law or the Constitution. Do you consider this to be a defect?

- It is appropriate that the Bill define 'human rights' by reference to the 7 core instruments for at least 3 reasons:
    - First, Australia has ratified each of the treaties enumerated in s 3(1) of the Bill and has legal obligations to take all necessary legal and administrative steps to respect, protect, promote and fulfill the rights therein. At a minimum, this requires the establishment of effective legislative development and scrutiny processes to ensure that Australia's domestic laws are not inconsistent with Australia's international human rights obligations.
    - Second, the 7 core instruments establish a comprehensive framework of core minimum standards, not ceilings or aspirations, against which Australian law should be measured and with which Australian law should comply. There is substantial evidence that both pre-legislative and parliamentary scrutiny of legislation through a human rights lens can result in laws that are more adapted, proportionate, responsive and effective.
    - Third, one of the benefits of referencing international instruments is that it encourages policy makers and parliamentarians to draw on and consider international and comparative human rights jurisprudence and learnings. Such jurisprudence and learnings do not, of course, bind Australian policy makers and parliamentarians, but can be illuminating and instructive.
- In any event, we do not consider that the current definition of 'human rights' excludes reference to or consideration of relevant Australian law. Section 3(1) provides that 'human rights means the rights and freedoms recognised or declared by the following [7] international instruments'. To the extent that Australian law – whether legislation, the common law or the Constitution – enacts or enshrines those rights and freedoms, such law will be plainly

relevant to the task of scrutiny. If this Committee is concerned that this ability and intent is not sufficiently clear, the concern could be addressed simply by:

- Replacing the word 'means' in s 3(1) with 'includes' and inserting a sub-section stating that 'Human rights also includes human rights not included in these instruments but that arise or are recognised under Australian law'.

- It is not appropriate that the Bill define 'human rights' by reference to Australian domestic law *alone* for at least 4 reasons:
    - First, while Australian law does protect many human rights, there remain gaps and deficiencies in the framework, meaning that legislative scrutiny would not be as comprehensive or systematic as that which should occur under the 7 core treaties.
    - Second, the way in which Australian law recognises rights is through a very complex patchwork of federal, state and territory laws, the common law and judicial decisions, and both express and implied constitutional rights. The 7 international instruments, on the other hand, document human rights in a clear and accessible way that is better adapted to the bureaucratic task of legislative development and the parliamentary task of legislative scrutiny.
    - Third, defining 'human rights' by reference only to Australian law would mean, in effect, that Australian law is scrutinised against Australian law. In our view, this is a rather circular task unlikely to produce many of the benefits of more rigorous scrutiny against a comprehensive, internationally agreed framework.
    - Fourth, defining 'human rights' by reference only to Australian law or leaving it undefined may involve the Committee unnecessarily duplicating the mandate and functions of the Senate Scrutiny of Bills Committee, which is tasked to consider whether a Bill 'trespasses unduly on personal rights and liberties'.

Should the definition of 'human rights' be expanded to cover instruments such as the Declaration on the Rights of Indigenous People, the Refugees Convention, or the ILO Conventions?

- While we would be content to leave the definition of human rights in its present form, we consider it could be strengthened by:
    - Replacing the word 'means' in s 3(1) with 'includes', to allow for the evolutionary nature of human rights and to enable consideration of human rights instruments that may not be enumerated in s 3(1) but are relevant to the proposed law; and
    - Providing that 'human rights' includes 'the rights and freedoms recognised by customary international law', such norms being binding on Australia and a critical component of our international human rights law obligations.
- Although we do not have a strong view on the issue, we do not consider it necessary to explicitly include additional instruments in the definition, such as the Declaration on the

Rights of Indigenous People, the Refugees Convention, the ILO Conventions or the various Optional Protocols, for 3 key reasons:

- First, most, if not all, of the rights enumerated in the ILO Conventions and Refugees Convention are covered by rights in the 7 core instruments.
- Second, while the Declaration is a seminal instrument that should guide the development and interpretation of Australian law and policy, it is not legally binding and does not have the legal status or carry the legal obligations of the 7 core treaties.
- Third, the task of scrutiny risks becoming too complex if the assessment of compatibility is against too many instruments.

Do you agree that human rights are deeply contested and that what are fundamental human rights to one person are not fundamental to others?

- Fundamental human rights are those rights which are recognised and enshrined in the 7 core treaties. That is a principle of international law and around which there is broad international consensus. The overwhelming majority of states would accept for example, that the right to a fair hearing or the right to freedom of religious belief, are fundamental human rights, even if they do not always respect those rights in practice.
- Where disagreement arises, it tends not to be as to the existence or content of human rights, but rather whether a particular law, policy or practice breaches a human right. And here, as with all areas of law, context is everything and case-by-case analysis is important. Further, in the area of human rights, a margin of appreciation is given to each state to determine the application and limitation of rights.
- None of this is to suggest that human rights are empty vessels. They have significant substantive and normative content and one of the great advantages of giving due consideration to the judgments of domestic, foreign and international human rights courts and tribunals is to learn from how those bodies have applied human rights to situations or experiences that may be apposite or analogous to our own.

Do you agree that the rights of the unborn child are fundamental human rights?

- International human rights law recognises that unborn children have some human rights.
- The rights of unborn children, however, as with many human rights, are not absolute. What the jurisprudence and expert commentary (see, eg, Manfred Nowak, *CCPR Commentary* and Joseph, Schultz and Castan, *ICCPR: Cases, Commentary and Materials*) make clear is that the rights of unborn children must be appropriately balanced against others' human rights, such as the rights of the mother to health, life, respect for physical and mental integrity and freedom from ill-treatment. Thus, a medically or socially indicated termination will be compatible with human rights, whereas genetic engineering or experimentation on the unborn child would plainly not be compatible.

Do you agree that the right to freedom from retrospective taxation is a human right?

- The right to freedom from retrospective taxation is not explicitly recognised as a human right in any of the 7 treaties. There are, however, rights in those treaties – such as the right to equality before the law and a fair hearing – which may be relevant to retrospective taxation and which any laws operating retrospectively, should be developed and scrutinized having regard to.

2. Statements of Compatibility

What is the need for Statements of Compatibility? What would be lost by deleting Part 3 from the Bill?

- In our view, Statements of Compatibility are central to the enterprise of human rights scrutiny and improving parliamentary engagement with, and hence legislative protection of, human rights.
- Statements of Compatibility have the benefit of:
    - ensuring that human rights are properly considered when Bills are developed;
    - enhancing transparency and accountability in policy making and legislative development; and
    - informing, but certainly not limiting or proscribing, parliamentary debate, including the deliberations of the Joint Committee.
- Statements of Compatibility will aid, inform and expedite the Committee's work, providing Committee members with a detailed statement of the executive's rationale, purpose and human rights considerations, but will not fetter the Committee's role or powers, with the Committee free to critique or depart from such Statements.

What is the legal status of a Statement of Compatibility?

- Statements of Compatibility do not have any special or extraordinary legal status.
- Statements of Compatibility, like any other extrinsic material, such as a Second Reading Speech, do not give rise to any legal claims or causes of action. As section 8(4) of the Bill provides, a Statement is not binding on any court and tribunal and, moreover, as s 8(5) sets out, the absence or inadequacy of such a statement does not 'affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth'.
- Like other parliamentary documents and extrinsic materials, such as a Second Reading Speech, Statements of Compatibility may be relevant to the interpretation of legislation in so far as, in accordance with ss 15AA and 15AB of the *Acts Interpretation Act*, they are relevant to ascertaining the purpose of an Act and the meaning of a provision. In so far as they do

this, they reinforce the sovereignty of parliament by further clarifying parliament's purpose and intent in legislation.

What is the effect of Item 4 of Schedule 1 of the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill?

[At page 14, Senator Brandis asked a question about the legal effect of Item 4 of Schedule 1 of the Consequential Provisions Bill, which amends the *Legislative Instruments Act 2003,* suggesting it gives Statements of Compatibility a particular legal status or effect.]

- Item 4 of Schedule 1 of the Consequential Provisions Bill does not give Statements of Compatibility a particular legal status or effect. All the Item does is amend the definition of 'Explanatory Statement' in s 4 of the *Legislative Instruments Act 2003* in relation to disallowable legislative instruments such that an explanatory statement in respect of such an instrument must contain a statement of compatibility prepared under s 9(1) of the Human Rights (Parliamentary Scrutiny) Bill.

3. <u>Duplication of role of Senate Scrutiny of Bills Committee</u>

Would the Committee duplicate the work of the Senate Scrutiny of Bills Committee and, given the mandate of that Committee, what is the need for another Committee?

- In our view, the mandate and function of the Joint Committee would complement that of the Scrutiny of Bills Committee and, in so doing, strengthen parliamentary engagement with, and scrutiny of, human rights. Our view seems to be consistent with that of the Scrutiny Committee itself, as articulated in the submission of Senator Coonan.
- The Scrutiny of Bills Committee is tasked to 'examine all bills which come before the Parliament and report' to the Senate on whether a bill 'trespasses unduly on personal rights and liberties'. This is an important and ambitious task. The Committee rarely conducts public hearings or invites evidence from witnesses. It focuses primarily, if not exclusively, on those rights and liberties that are recognised under Australian law, being a corpus of rights which intersects with human rights but certainly does not entirely overlap with them. The Scrutiny of Bills Committee is chaired, appropriately, by an Opposition Senator.
- The Joint Committee, on the other hand, is specifically tasked to examine and report on the compatibility of proposed laws with international human rights norms and standards. In so doing it will fulfil an important and explicit role in discharging Australia's international human rights law obligations. Its status as a joint committee means that both Houses of Parliament will input into and benefit from its deliberations, thereby developing a stronger understanding and culture of human rights. We would certainly expect that the Joint Committee would conduct public hearings and call for and receive evidence from witnesses.
- The Joint Committee also, unlike the Scrutiny Committee, has an inquiry function. This will enable the Committee to take an active role in the development and oversight of human rights-compliant law, policy and practice.

4. The role of lawyers

Will the subject matter of the Committee make it unduly reliant on lawyers?

The Committee is ideally placed to consider the application of human rights principles to Australian law and policy.

As set out in our submission, it is important that the Committee receive advice and assistance from advisers with expertise in international human rights law, just as it is imperative that the Secretariat for the Standing Committee on Economics have expertise in economic policy and the Secretariat for the Joint Committee on Intelligence and Security have expertise in that subject matter.

The need for legal advice does not, however, consign the Committee to rubber-stamping legal opinions. The primary role of any legal adviser to the Committee is likely to be the provision of advice on the content of any human rights that are engaged by the legislation. Armed with this knowledge, the Committee is then tasked with the question of whether any limitation of those rights is reasonable, necessary and proportionate in the circumstances. In many respects, this is a question of policy rather than of law, and therefore a question which members of the Committee are best placed to understand and answer.

5. Submission by WA Government / Attorney-General Christian Porter

The Western Australian A-G, Christian Porter, on behalf of the WA Government, has made a submission to the effect that the Bill poses 'serious legal, constitutional and federalism difficulties'. What is your response to these concerns?

In our respectful view, the 'serious legal, constitutional and federalism difficulties' associated with the Bill according to the WA Government are, at best, misconceived and, at worst, mischievous. The problems raised in that submission, may we say, become progressively more absurd.

- First, the Human Rights (Parliamentary Scrutiny) Bill is an important but modest improvement to Australia's human rights architecture. It requires that policy makers and parliamentarians consider and report on the human rights implications of proposed legislation, but in no way constrains parliamentary power or confers any enforceable or justiciable rights. The characterisation of the Bill as a 'back door Charter' is simply absurd.
- Second, the Bill does not explicitly require policy makers and parliamentarians to consider relevant international and comparative jurisprudence when preparing statements and reports. In our view, the Bill should encourage consideration of relevant international and comparative human rights jurisprudence. Such jurisprudence is not, of course, binding but, as with any field of human endeavour, it can only be a useful to look to and learn from foreign experience. Australia should not, as the WA A-G seems to suggest, aspire to be a human rights island.
- Third, we can see no separation of powers issue arising where a parliamentary committee examines existing legislation. Legislation, once enacted, should not be set in stone but regularly reviewed and modernised as necessary, including where that legislation

disproportionately interferes with human rights. It is an extraordinary proposition for the WA A-G to make, as he seems to, that parliament, through its committees, has no role to play in this process of review and modernisation and that such a function should be abrogated to courts and bodies such as law reform commissions.

- Fourth, it is misconceived to assert that the Bill somehow upsets the balance of power between the Commonwealth and the states by enabling the Committee to consider state issues which may arise under the treaties. The Commonwealth Constitution sets out the powers of the Commonwealth, including the power to legislate on external affairs under s 51(29). The WA A-G may not like the external affairs power or the scope with which it has been interpreted by the High Court, but this Bill has no bearing whatsoever on the nature and extent of the power or the likely circumstances in which it will be invoked.
- Fifth, the WA A-G refers to an article by James Allen which appeared in *The Australian* on 18 June 2010 which, in turn, suggests that by referencing international human rights instruments and, by implication, the jurisprudence of international human rights bodies, the Bill will result in Australia somehow abrogating sovereignty to those bodies. In fact, the contrary proposition is true; by involving the Australian parliament directly in a dialogue about international human rights laws and jurisprudence, Australia's domestic dialogue has the potential to inform and shape the international dialogue in a way which more deeply reflects Australian concerns and values. This is an expression of Australian sovereignty, not an abdication of it.
- Finally, we note that the so-called 'serious concerns' expressed by Christian Porter must be somehow unique to WA, as they find no support in the submissions of the Tasmanian Government (Sub 52), the Victorian Government (Sub 54) or the Queensland Government (Sub 57).
    - The Queensland Government, for example, 'welcomes the establishment of a Parliamentary Joint Committee on Human Rights as an important measure in ensuring the further protection and promotion of human rights in Australia'.
    - Similarly, the Victorian Government states that 'Victoria's experience is that the system of parliamentary scrutiny of proposed legislation for compatibility with human rights adopted in the Victorian Charter has enhanced transparency and accountability and strengthened our parliamentary democracy. It has ensured careful consideration of human rights as an important factor in debates about new policy and legislation, while recognising and reinforcing the principle of parliamentary sovereignty.'

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