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

via email: <legcon.sen@aph.gov.au>

Dear Ms Dennett

Inquiry into Human Rights (Parliamentary Scrutiny) Bill 2010, and Human Rights (Parliamentary Scrutiny)(Consequential Provisions Bill) 2010

Introduction

We commend the Committee for the conduct of this Inquiry and we welcome the opportunity to make this brief submission in relation to the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny)(Consequential Provisions Bill) 2010 (collectively referred to as 'the Bills').

We make this submission as in our personal capacity as independent experts interested in the protection and promotion of human rights from a range of relevant legal disciplines, including human rights, international law, refugee law, feminist law, Indigenous legal issues, law and sexuality, constitutional law, administrative law, law reform, health law, environmental law, and comparative law. We attach brief biographical information at the end of this submission.

Summary

In the following submission we make a series of recommendations which support the essential purpose of the Bills and which enhance and strengthen their operation by:

- expanding the scope of the human rights treaties referred to
- expanding the powers of the Parliamentary Joint Committee on Human Rights
- subjecting that Committee to periodic review, and
- increasing the independence and resources of the Committee.

Submission on the Bills

1. We have had the benefit of reviewing submissions to the Committee by Amnesty International Australia, Australian Lawyers for Human Rights, Human Rights Law Resource Centre Ltd, and Public Interest Law Clearing House (Vic), Inc.[1] We find much in each of these submissions with which to agree and some of our recommendations echo these submissions as a point of emphasis.
2. The establishment of a Parliamentary Joint Committee on Human Rights is a necessary but insufficient step to implement elements of Australia's Human Rights Framework announced in April 2010.[2] Subject to our concerns with the strength and scope of the Bills as explained below, the establishment of a legislative mechanism to scrutinise Bills, Acts and legislative instruments for compatibility with human rights, and to conduct inquiries into human rights matters, is an improvement on the current situation. The requirement of Statements of Compatibility is welcome. Both provisions accord with the findings and Recommendations of the National Human Rights Consultation Committee (NHRC).[3] However, those measures alone are inadequate to ensure the effective promotion and protection of human rights in Australia, for which full implementation of the recommendations of National Human Rights Consultation Committee is necessary.
3. Despite the debate in Australia about whether parliament or the courts is better placed to protect human rights, it remains true that in a liberal, democratic society, human rights serve a number of practical and instrumental purposes.[4] Human rights are a bulwark against threats to individual liberty and the basic security of the person. Human rights promote certain minimum conditions of existence worthy of human life. Human rights provide a necessary means to help guard against an arbitrary and abusive government. Without entrenched human rights there is always present a danger that a democratic society might descend into authoritarian forms of rule in which the rule of law is the rule of oppressive and undemocratic law.
4. The present Bills give limited expression to these salutary purposes of human rights. The Bills are narrowly tailored to "appropriate recognition of human rights issues in legislative and policy development" and only then "at the starting point in the development of policy and laws".[5] While this is necessary and important, it falls far short of ensuring that individual human rights in Australia are protected and that a remedy is available when rights are breached. A much more comprehensive legislative approach is required. We ***recommend*** that the passage of these Bills be accompanied by a commitment from the

[1] See Inquiry Submissions Nos 1, 6, 8 & 10.
[2] Commonwealth of Australia, *Australia's Human Rights Framework* (2010).
[3] National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (September 2009) at 165-175 (hereafter 'NHRC').
[4] Louis Henkin, *The Age of Rights* (1990), at 2-5. See further Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009), chap 1; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002). See generally, Symposium, *The Future of Human Rights in Australia* (2010) 33 UNSWLJ 1-238.
[5] Robert McClelland, Hansard (House of Reps)(2 June 2010), at 4900.

Executive that the Bills are the first step towards fully implementing the recommendations of the National Human Rights Consultation Committee.[6]

5. To this end, we ***recommend*** that the Bills provide for the public review, as part of the proposed 5 year review of the Human Rights Framework, of the adequacy of the Parliamentary Joint Committee on Human Rights in enhancing the promotion and protection of human rights in Australia, and to consider the full implementation of the recommendations of the National Human Rights Consultation Committee.

Submission on the Human Rights (Parliamentary Scrutiny) Bill 2010

6. Clause 3

Definitions – The term "human rights" is defined in the Bill[7] as the rights and freedoms recognised or declared by what the Explanatory Memorandum calls "the seven core United Nations human rights treaties" to which Australia is a party.[8] We ***agree*** with the submissions in paragraph 1 above that assert this definition is inadequate.

Additional treaties – It is clear that important human rights treaties imposing obligations on Australia are omitted from the Bill. At a minimum, we ***recommend*** that clause 3(1) of the Bill incorporate the following treaties (and optional protocols to which Australia is a party), relevant to human rights that bind Australia:

- *Convention on the Prevention and Punishment of the Crimes of Genocide*, 1948[9]
- *ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, 1948[10]
- *Convention Relating to the Status of Refugees*, 1951[11]
- *Convention relating to the Status of Stateless Persons*, 1954[12]
- *ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation*, 1958[13]
- *Protocol to the Convention Relating to the Status of Refugees*, 1967[14]
- *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers*, 1981[15]

[6] NHRC, *supra* n 3 at 378.
[7] *Human Rights (Parliamentary Scrutiny) Bill* 2010, cl 3(1).
[8] These seven core conventions are indentified as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of all Forms of Discrimination against Women*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*.
[9] [1951] ATS 2.
[10] [1974] ATS 3.
[11] [1954] ATS 5.
[12] [1974] ATS 20.
[13] [1974 ATS 12.
[14] [1973] ATS 37.
[15] [1991] ATS 7.

- *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer*, 1982[16]
- *ILO Convention (No. 159) concerning Vocational Rehabilitation and Employment (Disabled Persons)*, 1983[17]

Signed treaties - The Bill should anticipate prospective legislative compatibility treaties Australia has signed, but not yet ratified. Signing a treaty imposes binding international legal obligations Australia, the breach of which will give rise to international responsibility.[18] We ***recommend*** that signed human rights treaties not yet ratified be included in the definition of human rights.

Specifically in connection with treaties signed but not yet ratified, we ***recommend*** that the Bill be amended to require that the Parliamentary Joint Committee on Human Rights ('PJCHR') examine Acts, Bills and legislative instruments, and that on doing so it issue a statement as to whether the Act, Bill or instrument may defeat the object and purpose of the treaty.[19]

We also ***recommend*** that, consistently with the *Human Rights Act* 2004 (ACT) and *Charter of Human Rights and Responsibilities Act* 2006 (Vic), in determining the scope and content of human rights the Committee may consider international law, and the judgments of foreign and international courts and tribunals, relevant to a human right.

8. Clause 4: Parliamentary Joint Committee on Human Rights

Independence – The effectiveness of human rights bodies depends in large measure on its independence.[20] While the PJCHR must be comprised of members of Parliament, structural mechanisms should be put in place to ensure that the Committee's functions are not politicised. Accordingly, we ***recommend*** that the Bill be amended to require the PJCHR in the execution of all its functions to consult the Australian Human Rights Commission (AHRC). Such consultation will involve the preparation of recommendations by the AHRC, and members of the PJCHR will be required to have due regard to AHRC recommendations in exercising its functions.

Resources – In addition to independence, it is essential that adequate resources be provided to PJCHR and AHRC in order for the Committee to operate effectively. We ***recommend*** that passage of the Bill be supported by a

[16] [1994] ATS 4.
[17] [1991] ATS 18.
[18] Donald K. Anton, Penelope Mathew & Wayne Morgan, *International Law: Cases and Materials* (2005), at 392-97; Antonio Cassese, *International Law* (2001), at 167; *Draft Declaration on the Rights and Duties of States* (1949) ILC Report, A/925 (A/4/10), 1949, part II, [1949] *Yb Int'l L Comm* 286, at 288. Cf Ivan Shearer, "The Relationship Between International Law and Domestic Law" in *International Law and Australian Federalism* (Brian R. Opeskin & Donald R. Rothwell, eds)(1997), at 35.
[19] A requirement derived from Article 18 of the *Vienna Convention on the Law of Treaties*, [1993] ATNIF 01 (Australia accession, 06/16/1993)('VCLT'); it is widely recognised (although not entirely free from dispute) that Article 18 reflects and is binding as a matter of general international law. See eg "Secretary Roger's Report", 65 *Dept of State Bull* 684, 685 (1971)(U.S. Secretary of State expressing the view that "[a]rticle 18 . . . is widely recognized in customary international law"); Paul V. McDade, "The Interim Obligation Between Signature and Ratification of a Treaty" (1985) 32 *Neth Intl L Rev* 9-11. But see Anthony Aust, *Modern Treaty Law and Practice* 93-95 (2000).
[20] Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000), at [1.22] and [1.78].

commitment from the Executive to adequately resource the measures in it, by ensuring that the PJCHR have a dedicated, full-time human rights legal adviser as a member of staff, and that the resources of the AHRC be enhanced to enable it to carry out its role in supporting the work of the Committee.

9. Clause 7

Functions of the Committee – As currently drafted, the ambit of the Committee's functions is too narrow to enable to it have any real impact on promotion and protection of human rights in Australia. We ***recommend*** the following amendments to expand the Committee's responsibilities:

Referrals (cl 7(c)) – amend the Bill to allow for referrals as of right by: i) any member of PJCHR, ii) by the PJCHR on its own motion, and iii) all federal and state Human Rights Commissioners in Australia (including the heads of anti-discrimination and equal opportunity agencies).

Compatibility (cl 7(b)) – amend clause 7(b) to make clear that once the Bill enters into force the PJCHR has the duty to conduct a comprehensive audit of all existing legislation for human rights compliance.

Reporting (cls 7(a)(b)(c)) – (i) amend the Bill to require explicitly that the reports to both Houses of Parliament required by cl 7 (beyond Statements of Compatibility) be made public online; (ii) amend the *Acts Interpretation Act* 1901 (Cth) to make clear that these reports can be used by Courts as an interpretive aid.

Other powers – In order to genuinely engage the community in a human rights dialogue, amend the Bill to give the PJCHR power to convene public hearings, examine witnesses and call for written submissions.

Additionally, the Bill should include the power 'to monitor and report on the implementation of the Concluding Observations, Recommendations and Views of UN treaty bodies and the recommendations of the Special Procedures and the Universal Periodic Review of the UN Human Rights Council'. There are strong arguments for this, not least the government's stated commitment to engage more with international human rights mechanisms and bodies. It also acts as a safety mechanism for when the executive undertakes to ignore or disengage with treaty bodies, as happened for a period under the previous Howard government.

10. Clauses 8 and 9 – Statements of Compatibility (SoC)

Clauses 8 and 9 require that "a statement of compatibility must include an assessment of whether [a Bill or legislative instrument] is compatible with human rights". Beyond this, no guidance is provided the PJCHR. We make the following five recommendations to ensure that SoC's are meaningful.

- We ***recommend*** that the Bill be amended to require that a SoC contain a detailed explanation of the reasons for compliance or non-compliance in line with section 28(3) of the *Victorian Charter of Human Rights and Responsibilities*.
- We also ***recommend*** that the Bill requires the PJCHR to have appropriate regard to international human rights law (including

decisions by international, regional, and foreign municipal courts and tribunals, as well as treaty bodies).

- In the absence of a general limitations clause applicable to all treaties, we ***recommend*** the adoption of a test consistent with human rights charters around the world that statements of compatibility be required to justify any limitations, and that these justifications be supported by cogent and persuasive evidence. Without such a provision, the Committee will invariably be faced with a situation where the reasoning behind a limitation will remain obscure, impairing their capacity to objectively assess statements compatibility and thereby to scrutinise the actions of the executive. We suggest adopting a version based primarily on the formulation in the South African Bill of Rights (which mirrors provisions in Canada, New Zealand and Victoria), as follows:

  > "Statements of compatibility must set out how any limitation of human rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
  >
  > - the nature and importance of the right;
  > - the importance of the purpose of the limitation;
  > - the nature and extent of the limitation;
  > - the relation between the limitation and its purpose; and
  > - less restrictive means to achieve the purpose.
  >
  > Such limitations must be justified by cogent and persuasive evidence".

- We further ***recommend*** that cl 8(4) and the *Acts Interpretation Act* 1901 (Cth) be amended to make clear that a SoC can be used by Courts as one interpretive aid, along with international law, and the judgments of foreign and international courts and tribunals, relevant to a human right.
- Finally, we ***recommend*** that all SoCs be required to be made publicly available online.

11. We believe that the foregoing highlights the need for the Government to think seriously about a dedicated institutional structure outside of a Parliamentary Committee to effectively engage with and complete the important human rights work created by the Bill. It is clear that the significant time and resources needed to meaningfully execute the functions created by the Bill as it stands, much less with its suggested amendments, is probably beyond that of a Parliamentary Committee.

We trust that the matters raised here will contribute to your inquiry, and would be very happy to discuss them with you in more detail.

Yours sincerely,

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Don **Anton** teaches, researches, and advises in the areas of international law and environmental law at the Australian National University College of Law (ANU). He served for three years as Acting Director of the Australian Centre for Environmental Law and Convener of all Environmental Law Programs at the ANU. He has twice served as a Visiting Professor of Law at the University of Michigan. Anton consults regularly with government and international organizations and is currently a Fellow with the United Nations Institute of Training and Research (UNITAR) in its international environmental law program and serves on the International Law Association's Committee on the International Law on Sustainable Development. He has been a consultant to the Australian Department of Foreign Affairs and Trade, the Australian Fisheries Management Authority, the Great Barrier Reef Marine Park Authority, and the Australian Senate Committee on Environment. He has also served on the Executive Council of the Australian and New Zealand Society of International Law and was the Chairperson of the Fulbright Postgraduate and Postdoctoral Awards Selection Committee in the ACT.

Peter **Bailey** is a former Rhodes Scholar from Victoria. Since 1999 he has been an Adjunct Professor in the Faculty, after being a Visiting Fellow from 1987 to 1998. Between 1981 and 1986, he was Deputy Chairman and full-time chief executive of the Commonwealth's Human Rights Commission. His earlier career was in the Commonwealth Public Service, where he served in the Treasury and then in the Department of Prime Minister and Cabinet, becoming a Deputy Secretary in the latter in 1972. He was a full time member of the Royal Commission on Australian Government Administration 1974-76. His main research interests are in human rights law and in public law generally, particularly in the area of the law relating to government and its instrumentalities. He has published a wide number of influential human rights texts, including most recently *The Human Rights Enterprise in Australia and Internationally* (2009).

Kevin **Boreham** teaches at the ANU College of Law where he convenes International Law of Human Rights and teaches in International Law. Kevin practised as a solicitor in private practice in Canberra from 1999-2001. His first career was as an officer of the Australian Department of Foreign Affairs and Trade. He served in Australia's diplomatic missions in Colombo, Hanoi, Manila, Tehran and New York, where he was Australian Deputy Permanent Representative to the United Nations from 1987-9. Among other appointments, Kevin was Assistant Secretary, International Organisations Branch from 1992-94.

Marianne **Dickie** has worked extensively in the migration field since 1993. In 2007 Marianne began to teach in the Graduate Certificate in Migration Law and Practice at ANU and enjoyed this so much she migrated from QLD to the ACT to take up her current position as Migration Law Program Sub-Dean. Marianne worked with a community settlement group assisting Bosnian Refugees from 1994- 1995. She was a member of the board of The Rehabilitation Unit Survivors of Torture and Trauma at the Mater Hospital in Qld from 1995- 1996, worked as the immigration adviser to the Australian Democrats from 1998 to 2004 and is a qualified migration agent. Whilst working as an advisor for Senator Andrew Bartlett, Marianne visited every detention centre in Australia and in Nauru. Her worked spanned years during which some of the most contentious migration law and policy were enacted. This resulted in working on Senate Committee inquiries, and ministerial submissions.

Penelope **Mathew** holds the Freilich Foundation Chair. She has published widely in the areas of international law, human rights and refugee law. Prior to her appointment at the Freilich Foundation, Professor Mathew was a visiting professor and interim Director of the Program in Refugee and Asylum Law at the University of Michigan

Law School, where she convened the 5th Michigan Colloquium on Challenges in International Refugee Law. From 2006 – 2008, she was a legal adviser to the ACT Human Rights Commission, where she conducted the Human Rights audit of the ACT's Correctional Facilities. Professor Mathew has also taught at the ANU College of Law and Melbourne Law School, and she is a past editor-in-chief of the *Australian Yearbook of International Law*. She is a non-judicial member of the International Association of Refugee Law Judges and a member of its human rights working group. In 2008, she was presented with an International Women's Day award by the ACT government in recognition of an outstanding contribution to human rights and social justice.

Wayne **Morgan** has been an Academic Lawyer since 1990. He began teaching at Melbourne University. He has also taught at Charles Darwin University and Flinders University, joining the ANU in 2001. Internationally, he has taught at Columbia University, USA and Nan Kai University, China. He teaches a range of subjects in both international and domestic law, including International Trade Law and International Dispute Resolution. He instigated Law and Sexuality studies at Melbourne University and teaches this subject at the ANU. Wayne maintains a small anti-discrimination and human rights practice, where he advises pro-bono clients on discrimination and UN Human Rights Committee cases. He has advised on UN Communications in indigenous issues, as well as refugee and sexuality issues.

Simon **Rice** is an Associate Professor, and Director of Law Reform and Social Justice at Australian National University College of Law. He has held academic appointments in the UNSW Law Faculty where he was director of clinical programs, in the Sydney University Law Faculty, and in the Division of Law at Macquarie University. Simon has worked and researched extensively in anti-discrimination, human rights and access to justice issues, and has written, researched, trained and advocated widely on human rights issues in Australia and internationally. Simon has worked extensively in community legal centres, and has been Director of the NSW Law and Justice Foundation, President of Australian Lawyers for Human Rights, a Board member of the NSW Legal Aid Commission, and a consultant to the NSW Law Reform Commission. Since 1996 he has been a part-time judicial member of the NSW Administrative Decisions Tribunal in the Equal Opportunity Division. He is Chair of the Australian Capital Territory Law Reform Advisory Council. He was awarded a Medal in the Order of Australia for legal services to the economically and socially disadvantaged, has received a UNSW Alumni Award, and was an invitee to the Australian Government's 2020 Summit.

Kim **Rubenstein** is Professor and Director of the Centre for International and Public Law (CIPL) in the ANU College of Law, Australian National University. Kim's current research projects are at the cutting edge of the intersection between public and international law. She is the co-series editor of the Cambridge University Press series Connecting International with Public law. Her public law work spans constitutional and administrative law, and also includes her expertise in citizenship law. Her work analyses the legal status of citizen, and considered the differences between that formal notion and the broader normative understanding of citizenship as membership of a community. Her book, Australian Citizenship Law in Context (Lawbook, 2002) represents much of that core work, looking at the disjuncture between the exclusive legal notion and the more inclusive normative understanding of citizenship. In 2002-2003 she was based at Georgetown University Law Center, having won the prestigious Fulbright Senior Scholar award to study the status of nationality in an international law context. Kim initiated an international research network on feminism and constitutional law and, in 2004 and 2006 ran workshops looking at

issues of feminism and federalism with participants from the US, Canada and Australia.

Ruth **Townsend** is a lecturer in Health Law, bioethics and human rights at the Australian National University jointly in both the College of Law and School of Medicine. Ruth's teaching asks students to consider the normative intersections between the humanities, conscience, bioethics, health law and human rights and the corresponding regulation of the health professions and is currently involved in a research project examining the 'Right to Health' in Australia. Ruth has also taught in the area of Indigenous Mental Health, ethics, law and human rights. Ruth has previously worked as both a health practitioner and as a legal practitioner.

Matthew **Zagor** is a Senior Lecturer in Law at the Australian National University College of Law, and Deputy Director of the National Europe Centre. He has a degree in Religious Studies with Social Anthropology from the School of Oriental and African Studies, University of London, and an LLB from the University of New South Wales. He worked on the India desk at the International Secretariat of Amnesty International (AI), and as the refugee coordinator and government liaison officer at the Australian Section of AI. Matthew practiced as a solicitor in several community legal centres and the Commonwealth Legal Aid Commission, working primarily with migrants and asylum-seekers. As a federal public servant, he worked in the Australian Greenhouse Office, the Migration Review Tribunal, and the Attorney General's Department. He was a part-time Member on the MRT (03-06), and a Visiting Fellow at the LSE in 2006.