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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

Parliamentary Scrutiny and the Promotion and Protection of Human Rights

Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010

Dear Ms Dennett,

Introduction

1. ALHR welcomes the opportunity to make a submission in relation to the current inquiry of the Senate Legal and Constitutional Affairs Committee into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (**the Bills**).

About ALHR

2. ALHR was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
3. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 1700 lawyers, with active National, State and Territory committees.
4. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

5. ALHR is a member of the Australian Forum of Human Rights Organisations. It is a member of the Commonwealth Attorney General's NGO Forum on Human Rights, and the Department of Foreign Affairs Human Rights NGO Consultations.

Adoption of HRLRC submissions

6. ALHR welcomes the Bills and supports their passage through Parliament.
7. ALHR endorses and repeats the submissions of the Human Rights Law Resource Centre (**HRLRC**) entitled "Parliamentary Scrutiny and the Promotion and Protection of Human Rights, Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010" dated June 2010 (**HRLRC Submission**) and would add the following submissions.

Limitations observed from NSW experience

8. There are limitations inherent in the parliamentary scrutiny approach to the protection of human rights. Some of these limitations can be observed by reference to the Legislation Review Committee in New South Wales. The experience of this committee is described by Andrew Byrnes.¹
9. Byrnes describes the particular drawbacks of the New South Wales approach as follows:
 - a. the Legislation Review Committee fails to identify a significant number of potential human rights concerns in legislation it reviews, especially, when those concerns fall outside the scope of 'traditional' civil and political rights;²
 - b. where the Legislation Review Committee does identify human rights concerns, it often fails to carry out an analysis of the issues involved;³
 - c. the reports made by the Legislation Review Committee appear to have little impact on Parliamentary debates about legislation, and hence little impact on its final form;⁴ and
 - d. it is not uncommon for legislation to be rushed through Parliament before the Legislation Review Committee has the opportunity to report.⁵
10. The recommendations made in paragraph 21 of the HRLRC Submission go some way towards addressing these limitations by helping to create a culture in which the Joint Parliamentary Committee on Human Rights (**the Committee**) may carry out its legislative role effectively.

¹ A Byrnes, 'The protection of human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament's Legislation Review Committee' [2009] UNSWLRS 43 (Paper presented at the Protecting Human Rights Conference, 2 October 2009, Sydney), available at http://www.gtcentre.unsw.edu.au/publications/papers/docs/2009/558_AndrewByrnes.pdf and <http://law.bepress.com/unswwps/flrps09/>.

² Byrnes (n 1) 6–8.

³ Byrnes (n 1) 8–9.

⁴ Byrnes (n 1) 9–10.

⁵ Byrnes (n 1) 11–13.

One chance for protection of human rights

11. An additional limitation of the parliamentary scrutiny approach to human rights is the significant likelihood that each piece of legislation will be subject to scrutiny only once,⁶ and that scrutiny is likely to take place at a very general level. While there is great value in this approach, it is possible that some aspects of the legislation which may adversely affect human rights may be overlooked. Two particular examples of where this may occur are:
 - a. where there is a breach of human rights which only becomes apparent when the practical effect of the legislation is felt; and
 - b. where circumstances change at a point in time after the legislation is enacted.
12. While it would be possible under the Bills to request either that the Committee review the legislation again, or that the Attorney-General refer the matter to the Committee, this is unlikely to be a certain or easy way to obtain relief against a breach of human rights.
13. This limitation is alleviated to some extent by the provisions of s 7(b) and (c) of the Human Rights (Parliamentary Scrutiny) Bill 2010 and could be further alleviated if s 7 provided that the Committee may refer matters to itself. However, this limitation is inherent in the parliamentary scrutiny approach to human rights.

ALHR commends a comprehensive approach to the protection of human rights

14. In light of the limitations described above, ALHR would support a more comprehensive approach to the protection of human rights (as recommended in the 2009 Report of the Brennan Committee following the National Human Rights Consultation). ALHR welcomes the Bills as an essential part of such a comprehensive approach.

ALHR thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to make this submission.

Best regards.

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⁶ ALHR acknowledges that s 7 of the Human Rights (Parliamentary Scrutiny) Bill 2010 provides that the Committee will have the power to review Acts (s 7(b)) and inquire and report on any matter relating to human rights which is referred to it by the Attorney-General (s 7(c)). However, it seems unlikely that a piece of legislation will be reviewed a second time unless circumstances change significantly.