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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

***Re: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the
Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010***

Thank you for the opportunity to comment on the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (the Bills).

The establishment of the Parliamentary Joint Committee on Human Rights, rather than the introduction of a Human Rights Act, is broadly consistent with ACL's desired approach to human rights, whereby the determination of human rights primarily resides with the people through their elected parliamentary representatives. ACL believes the Committee and the requirement of affixing statements of compatibility to all new bills introduced into the parliament, will act as useful and hopefully effective checks on the decisions of the executive and the processes of the bureaucracy.

The framework of the proposed Human Rights Committee, however, departs from that suggested by ACL in its June 2009 submission to the National Human Rights Consultation. In that submission ACL endorsed the proposal of Rev Prof the Hon Michael Tate AO, who suggested the existing function of the Senate Scrutiny of Bills Committee to report to the Senate whether bills "trespass unduly on personal rights and liberties" could easily be expanded to:

declaring whether proposed or existing legislation trespasses unduly on personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government and incorporated into law.

ACL's concern with the departure from this earlier proposal is twofold. Firstly, the Parliamentary Joint Committee on Human Rights appears to make redundant the important feature of the Scrutiny of Bills Committee to examine whether bills "trespass unduly on personal rights and liberties". The

new Human Rights Committee therefore appears to place some doubt and confusion over the future role of the Scrutiny of Bills Committee.

Secondly, the definition of 'human rights' proposed in the Bills does pose some potential problems, although slight from ACL's perspective. There is the possibility that the seven key international human rights instruments which constitute the Bills' definition of 'human rights' may come to be interpreted as the only source of human rights in Australia. This would create, in all but name, a de facto Human Rights Act that lists arbitrarily and absolutely the rights Australians hold.

A further problem with the definition of human rights in the bill is that it creates a difficult hierarchy of rights that de-emphasises domestic sources of rights. This is troublesome because it negates the very good work of parliaments past to negotiate and pass legislation which balances rights in a way that is reflective of the unique cultural circumstances of Australia. The definition of human rights in the Bills regards with more esteem the statements of international bodies than Australian parliamentary law, our own common law tradition and even the Constitution.

ACL is supportive of human rights considerations being given a greater prominence in law-making processes, but the way that 'human rights' is framed in those processes should give greater prominence to the fine tradition of respecting human rights that has already developed in Australia than is currently proposed. This is why ACL again endorses the position of Rev Prof the Hon Michael Tate AO, who has already written to the Committee to restate his recommendation that the definition of human rights should:

cover personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.¹

ACL agrees with Rev Prof Tate that such a definition of human rights is more politically acceptable than the framework proposed because it is more inclusive and reflective of the way that human rights have come to be expressed and understood in Australia throughout its democratic past and present.

The only other minor concern that ACL wishes to express about the content of the Bills relates to the anticipated structure of the Human Rights Committee. Given that the Committee will be made up jointly of members of both houses, ACL would wish to see that the Committee is not dominated by the Government, which obviously holds a numerical advantage in the House of Representatives. Likewise, the composition of the Committee should respect minority party interests from the Senate, but in a way that is representative of their influence in the parliament.

Broadly, ACL is supportive to the way in which human rights will be given a greater prominence in the decision-making processes of the executive, including the bureaucracy, and the legislature. The adoption of a Joint Committee on Human Rights and statements of compatibility is consistent with a parliamentary approach to human rights scrutiny, which respects the democratic tradition of allowing the people, via their elected and accountable representatives, to determine the content of human rights, and indeed values to be held in community.

¹ Rev Prof Michael Tate AO submission to the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Consequential Provisions) Bill 2010 Inquiry, 2010

It is ACL's view that the approach to human rights scrutiny contained in the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 will strengthen respect for human rights in Australia in a meaningful way. ACL would just ask that the Senate Legal and Constitutional Affairs Committee put its mind to how the Parliamentary Joint Committee on Human Rights would be composed, its administrative roles and functions, and how its mandate affects that of the Senate Scrutiny of Bills Committee into the future.

ACL also asks that this Committee give some consideration to the recommendation of making the proposed definition of human rights in the Bills more inclusive of the way human rights has already come to be understood and expressed in Australian law.

Thank you for your consideration of our views.

Yours sincerely,

Lyle Shelton
Chief of Staff