RULE OF LAW
INSTITUTE OF AUSTRALIA

18 March 2011

Ms Toni Dawes
Committee Secretary
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600
By email: scrutiny.sen@aph.gov.au

Dear Ms Dawes

Submission re inquiry into the future role and direction of the Senate Scrutiny of Bills Committee

On behalf of the Rule of Law Institute of Australia (RoLIA), I write to make a submission on the Committee's reference re the future direction and role of the Scrutiny of Bills Committee (SSBC). We thank you for your letter dated 10 March 2011 and are pleased to contribute to the inquiry. RoLIA has previously made a submission to the earlier inquiry on this topic, containing points which we continue to consider relevant and so have attached as **Annexure A.**

RoLIA has been a very strong supporter and interested observer of the Scrutiny of Bills Committee, so much so that we have issued a media press release congratulating them on their work in ensuring that our laws uphold the rule of law (**Annexure B**).

RoLIA notes that the *Human Rights (Parliamentary Scrutiny) Bill* 2010 was introduced into parliament by the Attorney-General on 2 June 2010, and reintroduced into the 43rd Parliament on 30 September 2010. The Bill is yet to pass the Senate, with Second Reading moved on 24 November 2010.

Whilst RoLIA recognises the value of human rights issues being examined by the Committee system, we would like to ensure that the separate but equally important rule of law is not forgotten. As former High Court Chief Justice Gleeson said, "it [the rule of law] is the assumption that underlies the political process that makes our system of government work in practice."

The proposed Joint Committee will investigate the conflict of proposed legislation with 'human rights', the definition of which is limited to rights under several specifically identified international instruments. Although some rights under the rule of law are reflected in certain instruments (eg. Article 14, International Covenant on Civil and Political Rights, which stipulates that all persons are

equal before courts and tribunals), the definition of human rights surprisingly does not include all aspects of the rule of law.

The Bill defines human rights as:

> "***human rights*** means the rights and freedoms recognised or declared by the following international instruments:
>
> (a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 19 1965 ([1975] ATS 40);
> (b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS;
> (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
> (d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
> (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
> (f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and
> (g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12)."

In a lecture given in 1999 to the St James Ethics Centre, Sir Ninian Stephen identified four of the principles embodied in the rule of law, namely:

1. "that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen";

2. "that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective role so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase";

3. "that there should be ready access to the courts of law for those who seek legal remedy and relief"; and

4. "that the law of the land, which rules us, should be certain, general and equal in its operation".

In an address to the International Legal Services Advisory Council Conference on 20 March 2003, Chief Justice of New South Wales, the Honourable J J Spigelman AC, said:

> "A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures, are inconsistent with each of these objectives.

> "Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and an outcome. Predictability requires a process by which the outcome is directly related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome."

The rule of law provides for fundamental rights and values not addressed by the international instruments referred to in the definition of human rights. Accordingly, RoLIA would like to see the crucial work of the SSBC continue, with a special focus on upholding the rule of law.

RoLIA reiterates the recommendations detailed in our submission of 6 April 2010, namely that:

1. The SSBC should be given more resources in order to deal with the increased volume of legislation;
2. The Senate should agree on a revised mandate for the SSBC which includes a broader charter that spells out the various rights which good laws should embody and/or respect. Please see the attachment to our first submission and also provided with this submission, which contains proposed text for Standing Order 24; and
3. Community input becomes an integral feature of the new terms of reference.

RoLIA is strongly in favour of rights and requirements under the rule of law being included in Standing Order 24. The draft Standing Order 24 we have prepared includes these rights and requirements.

The Australian Constitution is framed on the assumption of the rule of law, and the rule of law can be used for its interpretation (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J). Ipso facto, all legislation should be scrutinised against the rule of law or it runs the risk being declared unconstitutional and thereby invalidated by the courts. The SSBC is in the best position to provide this check and balance. As Chief Justice Robert French said in his 2009 speech 'Adding Value to Lawmaking', in relation to the SSBC, "It is obviously far better to address problems of unintended legislative overreach, doubtful expression or impact on basic rights and freedoms at the pre-enactment stage, than to rely upon the mitigating effects of judicial interpretation."

The Committee could also be responsible for drafting and moving amendments based on its findings, or at the very least including them in their report, as has been suggested by former Senator, Andrew Murray.

Finally, we thank the Committee for its engagement and contact on this matter. Should you need any further information please contact RoLIA researcher, Ms Lydia O'Keeffe on (02) 9251 8000.

Yours sincerely

Richard Gilbert
Chief Executive Officer
Rule of Law Institute of Australia

ATTACHMENT A

24 Scrutiny of Bills

(1) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate. The Committee may on its own volition also report to the Senate on any draft bill or Act of Parliament.

(2) The Committee shall report if a bill, draft bill or Act:

(a) is contrary to the rule of law by:

(i) permitting any person to be detained, punished or subject to loss of liberty or property except by proper legal process;

(ii) conferring an immunity to any person from court proceedings or prosecution or not subjecting all persons to the same laws;

(iii) being ambiguous or not drafted in a sufficiently clear and precise way;

(iv) not being capable of compliance except by the imposition of unreasonable burdens, and if any provision is to operate retrospectively that there is adequate justification;

(v) preferring administrative or ministerial discretions to objective legislative tests;

(vi) making rights and liberties, or obligations that are dependent on administrative discretion, without the discretion being sufficiently defined and subject to judicial review;

(vii) allowing for the delegation of administrative power in inappropriate cases and to inappropriate persons;

(viii) not providing for the civil rights, obligations and liabilities of all persons to be ultimately determined by a court, and not providing that for the criminal rights, obligations and liabilities of all persons to be determined by an ordinary criminal court;

(ix) restricting ready access to the courts for those who may seek a legal remedy; and

(x) interfering with the independence of the judiciary, the courts or the legal profession.

(b) is inconsistent with the principles of natural justice;

(c) reverses the onus of proof in criminal proceedings without adequate justification;

(d) confers power to enter premises, and search for or seize documents or other property, other than with a warrant issued by a judge or other judicial officer;

(e) does not provide appropriate protection against self-incrimination;

(f) adversely affects rights and liberties without adequate justification;

(g) has insufficient regard to Aboriginal tradition and Island customs;

(h) does not respect the right to privacy;

(i) prevents the exercise of legislative power from being subject to parliamentary scrutiny; and

(j) is otherwise of concern to the Committee for any reason.

(3) The Committee, for the purpose of reporting upon a bill or Act may:

(i) seek submissions and oral evidence from members of the public on Bills before the Committee, and also on draft bills which the Government intends introducing into the Senate;

(ii) publish submissions relevant to its terms of reference and in accordance with Senate Standing Orders applicable to the Senate Standing Committees;

(iii) consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate; and

(iv) obtain specialist legal advice (subject to the approval of the President of the Senate) to allow the Committee to make informed decisions on the Bills under consideration.

(4) The Committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators.

(5) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and any minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the Committee shall be determined by the Senate.

(6) The Committee may appoint sub-committees consisting of 3 or more of its members, and refer to any such sub-committee any matters which the Committee is empowered to consider.

(7) The Committee shall elect as chairman a member appointed to the Committee on the nomination of the Leader of the Opposition in the Senate.

(8) The chairman may from time to time appoint a member of the Committee to be deputy chairman, and the member so appointed shall act as chairman of the Committee when there is no chairman or the chairman is not present at a meeting of the Committee.

(9) When votes on a question before the Committee are equally divided, the chairman, or the deputy chairman when acting as chairman, shall have a casting vote.

(10) The Committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet in private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

ANNEXURE A: Initial Submission

Rule of Law Association of Australia

6 April 2010

Ms Toni Dawes
Committee Secretary
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

Dear Ms Dawes

Submission re inquiry into the future role and direction of the Senate Scrutiny of Bills Committee

On behalf of the Rule of Law Association of Australia (RoLAA), I write to make a submission on the Committee's reference re the future direction and role of the Scrutiny of Bills Committee (SSBC). RoLAA applauds the Committee for initiating a reference for a review of its scope and operations, as this presents a major opportunity for renewal and reinvigoration of parliamentary scrutiny of legislation which may present a threat to the rule of law in Australia.

RoLAA is an independent non-profit association formed to uphold the rule of law in Australia. RoLAA was established in September 2009 with the following objectives:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Sir Ninian Stephen identified four of the principles which are embodied in the spirit of the rule of law when he said:

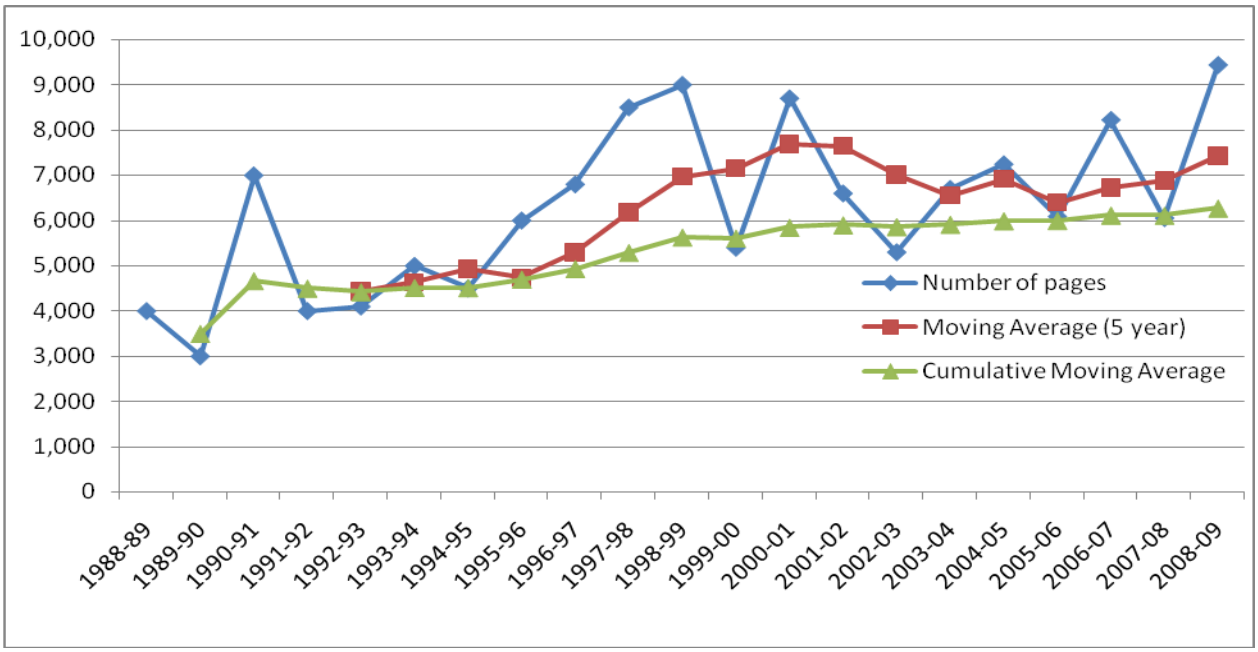
> "The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the second is that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective role so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase; the third is closely associated with the second, it is that there should be ready access to the courts of law for those who seek legal remedy and relief; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation." *(Source: 1999 Annual Lawyers Lecture St James Ethics Centre)*

The Hon Justice J J Spigelman, Chief Justice of the NSW Supreme Court, and also Patron of RoLAA, said of the rule of law:

> "A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures, are inconsistent with each of these objectives.
>
> Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and an outcome. Predictability requires a process by which the outcome is directly related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.
>
> Improper influence, whether political pressure or bias or corruption, distorts all of these objectives. So, of course, does incompetence and inefficiency." *(Source: Address at International Legal Services Advisory Council Conference 20 March 2003)*

RoLAA believes that the SSBC has established a strong reputation for upholding the rule of law in its legislative scrutiny procedures. However, the pressures and demands on the Committee have increased markedly since it last reviewed its procedures in 1991, and since the Committee first met in 1981. For example in the 2008-2009 financial year about 9,400 pages of new Acts were passed by the Federal Parliament. Yet in the 10 years from 1929 to 1939 there were only 2,425 pages of new Federal Acts passed. Now, every 3 months the Federal Parliament passes more legislation than in the whole of the 10 years from 1929-1939. Data which RoLAA has received from the Office of Parliamentary Counsel also shows a very significant increase in work load for the Committee in terms of weight of legislation by page which successive Governments have introduced during the period 1990-2010.

Number of pages of Commonwealth Bills introduced into Commonwealth Parliament in financial years 1988-89 to 2008-09



(Source: OPC Annual Reports)

RoLAA estimates that for every page of parent legislation an additional ten pages of regulations is generated. Typically, each year the Senate tables about 2,500 regulations under its disallowance powers. As each legislative instrument is on average about 50 pages in length, regulations alone generate approximately 75,000 pages in new laws annually.

The volume of legislation referred to in preceding paragraphs presents the following challenges to the rule of law:

- The Parliament needs to have efficient and effective scrutiny arrangements to ensure that rights and liberties are not transgressed by the flood of new bills and instruments. Currently, the Committee is handling more than twice the load of scrutiny with the same number of senators, Committee staff and researchers/advisers as it had when established thirty years ago;
- Over-delegation of power to regulatory agencies, especially when wide discretion for enforcement is conferred, heightens the need for more intense parliamentary scrutiny of key enforcement agencies; and
- Increasingly, individuals will need to pursue and pay for legal advice so as to ensure that they comply with the law – or if they cannot afford advice their response could be one of apathy and/or disrespect for the law.

A new charter for the SSBC

RoLAA submits that the Senate, as the house of review, is well placed constitutionally and institutionally to implement an enhanced scrutiny of legislation function. The non-partisan and widely acknowledged work of the Regulations and Ordinances Committee (since 1932) and the Scrutiny of Bills Committee (since 1981) provides strong evidence for the Senate retaining this important function. Senate Committees are best placed to balance the need to conduct broad community consultation with the need to deal with matters which might involve points of fine legal detail.

The Senate should agree on a revised mandate for the Senate Scrutiny of Bills Committee which includes a broader charter that spells out the various rights which good laws should embody and/or respect. To this end RoLAA has prepared a revised Standing Order 24 which is Attachment A to this letter.

RoLAA notes that the original terms of reference, for the Senate Standing Committee on Constitutional and Legal Affairs to inquire into and report on Scrutiny of Bills (Parliamentary Paper 329/1978) included an expanded list of rights and liberties. Further, the Committee's report (November 1978) weighed up the advantages and disadvantages of an expanded list:

> 'Whilst a list of specific criteria would provide a ready-made checklist of potentially offensive provisions for the guidance of drafting authorities, practical considerations such as the difficulty of expressing criteria with the required degree of precision and the serious omission which might occur in an itemised list, are telling arguments against specificity of more general criteria.' (page 8 of the Committee's report)

Accordingly, the Committee concluded that the terms of reference should be restricted to just three criteria, and hence it elected to not spell out the personal rights and liberties which should be respected in legislation under the rule of law or otherwise.

Since the tabling of the 1978 Scrutiny Report in the Senate and the establishment of the SSBC in 1981, the Queensland Parliament has passed the *Legislative Standards Act* 1992. Inter alia this Act includes general as well as spelt-out legislative principles 'under the rule of law' (section 4(1)). RoLAA is not aware that these provisions have in any way caused the problem of omission that the 1978 Report identifies under the legal maxim *expressio unius est exclusio alterius* (omission from an extensive list are more likely to be viewed as deliberate exclusions than omissions from a more

limited list - page 9). If the SSBC should encounter a matter which does not fall under the expanded list of rights and liberties to be protected it can resort to the general provision which is also included in the RoLAA draft Standing Order 24 in the widest possible terms. The checklist provides a rigour which will assist SSBC deliberations and allow the community and the Parliament to be better informed on the standards for good legislation.

The Senate should also agree on its SSBC having a more open and inclusive modus operandi and that community engagement is a feature of its new terms of reference. Accordingly, the Committee's terms of reference should incorporate procedures which give the community greater input into the scrutiny process. Importantly, if community input is to be sought the time frame for consideration of bills will need to be extended. One way of ensuring that there is not a legislative 'log jam' is that draft bills also be referred to the Committee.

Finally, we thank the Committee for its engagement and contact on this matter. Should you need any further information please contact RoLAA's CEO, Mr Richard Gilbert on (02) 9251 8000.

Yours sincerely

Malcolm Stewart
Vice-President
Rule of Law Association of Australia

ATTACHMENT A

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RULE OF LAW

INSTITUTE OF AUSTRALIA

8 March 2011
For immediate release

media release

RoLIA commends Senate Scrutiny of Bills Committee for upholding the rule of law

RoLIA applauds Senate Standing Committee for the Scrutiny of Bills on its assiduous reporting of potential breaches of important rule of law principles, bringing them to the attention of the Senate and relevant Ministers. In this regard the Committee's recent reports on the National Vocation Education Training Regulator Bill 2010 and the National Vocation Education Training Regulator (Transitional Provisions) Bill 2010 are especially noteworthy, and should be widely read. These Bills were covered in Alert Digest No.1 of 2011 and elaborated on in the Committee's Second Report of 2011.
The following issues were identified and discussed:

(a) Insufficient definition of powers;

(b) Natural justice issues;

(c) Inappropriate delegation of power;

(d) Unjustified penalties;

(e) Trespass on rights and liberties;

(f) Retrospectivity of provisions; and

(g) Henry VIII clauses.

RoLIA CEO, Richard Gilbert said "any Legislation which gives rise to these fundamental rule of law issues needs to be amended by the Senate and agreed to by the Government in the lower house. RoLIA supports the SSB Committee in its endeavours to ensure that legislation complies with the rule of law. RoLIA also encourages the Senate Education, Employment and Workplace Relations Legislation Committee to give due consideration to recommending changes to these Bills so as to address any critical rule of law issues" Mr Gilbert concluded.
The reports can be found at the links below-

Second Report of 2011:
http://www.aph.gov.au/senate/committee/scrutiny/bills/2011/b02.pdf

Alert Digest No.1 of 2011:
http://www.aph.gov.au/senate/committee/scrutiny/bills/2011/b02.pdf

For further information please contact RoLIA CEO Richard Gilbert on 0417 247 998.