

Committee Secretary  
Senate Standing Committee for the Scrutiny of Bills  
PO Box 6100  
Parliament House  
Canberra ACT 2600



8 April 2011

Dear Committee Secretary,

### **Inquiry into the future direction and role of the Scrutiny of Bills Committee**

The Public Interest Advocacy (PIAC) welcomes the opportunity to comment on the above inquiry by the Senate Standing Committee for the Scrutiny of Bills (the Committee). In summary, PIAC submits that the Committee should adopt a more rigorous and structured approach to the scrutiny of the impact on human rights of draft legislation. PIAC further submits that the Committee's role in relation to human rights should complement the role of the Joint Committee on Human Rights (JCHR), proposed in the Human Rights (Parliamentary Scrutiny) Bill 2010.

### **Background to the current inquiry**

PIAC notes that the terms of reference of the similar inquiry by the Committee in 2010 asked "what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth". PIAC further notes that the terms of reference to the current inquiry do not ask this specific question. Instead, the current terms of reference are more general. Relevantly, they seek comment on:

- (1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to whether its powers, processes and terms of reference remain appropriate.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.

PIAC remains especially interested in the Committee's role in considering human rights. For this reason, this submission focuses solely on this issue – something that is clearly within the ambit of item (1) of the terms of reference.

PIAC acknowledges that the Government has now introduced the Human Rights (Parliamentary Scrutiny) Bill 2010. Most significantly, this Bill would establish a new committee of both Houses of Parliament, the JCHR. It would also require the preparation and table of statements of compatibility in respect of new Bills and some subordinate legislation. Statements of compatibility would constitute an executive assessment of whether the relevant draft law complies with 'human rights', as defined in the Human Rights (Parliamentary Scrutiny) Bill 2010 itself.

As reflected in its submission to the relevant Senate Legal and Constitutional Affairs Committee inquiry, PIAC strongly supports the Human Rights (Parliamentary Scrutiny) Bill 2010. In its submission to the *current* Inquiry, PIAC argues that the Scrutiny of Bills Committee should have a complementary role in considering the human rights impact of new Bills.

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### **PIAC's experience in this area**

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

Much of PIAC's substantive work involves human rights. This includes work on privacy, discrimination, freedom of information, detention (including immigration detention), government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on people's human rights and on their social and economic situation. A significant number of PIAC's casework clients have direct experience of what it means to have their human rights infringed or not respected.

During the National Human Rights Consultation, PIAC conducted a range of community consultations and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take part. This included working with people experiencing homelessness, people with mental illness, indigenous people, prisoners and former prisoners, older Australians, people with disability, and migrant women.

### **A more rigorous system for considering human rights**

Currently, Parliamentary committees consider the human rights impact of draft legislation in a largely ad hoc manner. The most specific requirement is Standing Order 24(1)(a), which requires the Senate Standing Committee for the Scrutiny of Bills to report on, inter alia, whether proposed laws:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- ...

PIAC believes that there are a number of problems with the current system for parliamentary scrutiny of human rights. First, the Committee is not guided as to which human rights should be considered in this process of pre-legislative scrutiny. Presumably, it is intended that the Committee should have reference to those human rights listed in international treaties to which Australia is a party—most notably, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*.

However, in the absence of any specific guidance on this matter, it is unclear which rights are of greatest importance in Australia, and therefore, in need of protection from unnecessary impingements in draft legislation. Moreover, for the sake of consistency, it would be logical for the Standing Orders to define the term 'rights and liberties' consistently with the definition of human rights proposed in the Human Rights (Parliamentary Scrutiny) Bill 2010.

Secondly, Standing Order 24(1)(a) provides no guidance as to *how* the Committee should assess draft legislation against human rights standards. Research shows clearly that, in the absence of such a framework, parliaments sometimes give only scant attention to the human rights impact of even draconian laws.<sup>1</sup> Moreover, as human rights are rarely absolute, it is important to have a carefully-constructed, transparent and principled means of reconciling

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<sup>1</sup> See, eg, Simon Evans and Carolyn Evans, 'Australian parliaments and the protection of human rights' (2007) 47 *Papers on Parliament* 17.

competing human rights, and of dealing with derogation from human rights in favour of other interests. Well-drafted anti-terrorism laws, for instance, need to strike an appropriate balance between protecting the rights of an accused terrorist, and protecting Australia from terrorist attack.

In respect of non-absolute, or ‘derogable’, human rights, the National Human Rights Consultation (NHRC) Report recommends that the Commonwealth Parliament should subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes.<sup>2</sup> PIAC endorses this recommendation. Subsection 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Such limitations find their basis in international law,<sup>3</sup> and are present in legislation in other jurisdictions as well. These limitations establish a principled framework—and indeed one that is common and successful in other jurisdictions—for the balancing of competing rights, and for the compromises that sometimes need to be struck between human rights and other urgent interests. Moreover, this framework does not require a legislated bill or charter of rights to provide useful guidance to the Committee.

### **Complementarity with the proposed JCHR**

The proposed JCHR would have a mandate that is related to, but distinct from, the Committee’s role under Standing Order 24(1)(a). That is, the proposed JCHR is envisaged as the Parliamentary Committee with primary responsibility for considering the legislative impact on human rights, and will do so especially by reference to evidence it receives – both from within the Executive arm of government (statements of compatibility will be especially important in this regard) and from outside government (by way of evidence given to the JCHR by stakeholders with an interest in the JCHR’s inquiry). As a committee of both Houses of Parliament, it can be expected to take an active role in the process of debate from an early stage.

By contrast, this Committee is a specialist committee of the Senate. As such, its role is generally to take a different approach to this task. The Committee ordinarily does not invite evidence from witnesses and is generally chaired by an Opposition Senator. This promotes a different, but valuable, perspective on human rights issues.

Having said this, there is also some inevitable overlap between the respective roles of these two committees. As the Senate Legal and Constitutional Affairs Committee noted, such overlap is common and unlikely to be problematic:

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<sup>2</sup> Frank Brennan et al, *National Human Rights Consultation Report* (2009), Recommendation 23.

<sup>3</sup> See, eg, *Universal Declaration of Human Rights 1948*, Article 29(2); *International Covenant on Civil and Political Rights 1966*, Article 22(2).

[P]arliamentary committees are often required to perform their functions in a manner that prevents unnecessary duplication and accords comity to the activities of other committees.<sup>4</sup>

PIAC shares the confidence in that Report that the JCHR and this Committee “will identify and develop constructive means of operating in tandem, and effectively manag[e] any such interaction”.<sup>5</sup>

### **Summary of recommendations**

In sum, PIAC makes the following recommendations for improving the operation of the Scrutiny of Bills Committee:

1. The Standing Orders should be amended to provide a definition of ‘human rights’ that is consistent with the definition in the Human Rights (Parliamentary Scrutiny) Bill 2010.
2. Clear rules should be provided to the Committee to provide a framework for human rights assessment, and especially for derogating from protected rights. Those rules should be based on accepted principles of international law, as per s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
3. The Committee’s role in respect of human rights should be complementary to that of the proposed Joint Committee on Human Rights.

Yours sincerely



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<sup>4</sup> Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, January 2011, [3.125].

<sup>5</sup> Ibid.