24 June 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 Institute of Australia (RoLIA),¹ I write to make a secondary submission on the Committee's reference re the future direction and role of the Scrutiny of Bills Committee (SSBC). RoLIA has read the interim report published 12 May 2010 on your website and would like to bring to your attention the apparent overlooking of the issue of the rule of law.

Whilst RoLIA recognises the value of human rights issues being examined by the new Joint Committee, we would like to ensure that the separate and equally important issue of 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."

RoLIA notes that the Human Rights (Parliamentary Scrutiny) Bill 2010 was introduced into parliament by the Attorney-General on 2 June 2010. Accordingly, the inquiry into the future of the Senate Scrutiny of Bills Committee is to resume. The Committee will need to consider the future of the SSBC without human rights treaties obligations as a method of scrutiny.

The proposed Joint Committee investigates the conflict of laws with 'human rights', the definition of which is actually quite limited, to rights under several specifically identified international instruments. This definition does not specifically include rights under the rule of law, although some rights under the rule of law are enshrined in treaties (Article 14, International Covenant on Civil and Political Rights, stipulates the fundamental rule of law objective that all persons are equal before courts and tribunals). The rule of law is a far wider concept of which human rights is only a part, a development of the requirements under the rule of law.

¹ Formerly The Rule of Law Association of Australia, name changed 9 June 2010.
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 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)."

The International Commission of Jurists, at the New Delhi Congress (Declaration of Delhi) in January 1959, defined the modern rule of law as:

1. The state is subject to the law.
2. Governments should respect the rights of the individual under the rule of law and provide effective means for their enforcement.
3. Judges should be guided by the rule of law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the rule of law and insist that every accused is accorded a fair trial.

While the proposed Joint Committee will take some of the workload, the rule of law provides for wider rights and requirements than those under the international instruments, and there will certainly be other considerations that are still required of legislation. RoLIA would like to see the crucial work of the SSBC continue, with an especial 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 a 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 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). Following this, legislation should be checked against the rule of law or it runs the risk being declared unconstitutional and invalid by a court. The SBCC is in a perfect position to conduct these checks. As Chief Justice Robert French said in his 2009 speech 'Adding Value to Lawmaking', regarding 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 suggested by Andrew Murray. This could diminish the 'paper tiger' view of the SSBC that some apparently hold.2

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 Griffits on (02) 9251 8000.

Yours sincerely

Richard Gilbert
Chief Executive Officer
Rule of Law Institute of Australia

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2 See Andrew Murray, ‘The contribution specialist legislative scrutiny committees can make to better governance’ presented Tues 7 July at the 2009 Australia-New Zealand Scrutiny of Legislation Conference; repeated in Andrew Murray’s submission to the Inquiry into the future direction and role of the Scrutiny of Bills Committee, March 2010.
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.
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.

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.

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.

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.

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

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.

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.

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.