

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

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

October 2010



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1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission following the introduction of the *Human Rights (Parliamentary Scrutiny) Bill 2010* (the Bill) in the House of Representatives on 2 June 2010, and its subsequent referral by the Senate to the Australian Senate Legal and Constitutional Affairs Committee for inquiry and report.¹ The Attorney-General introduced the Bill as part of Australia's new Human Rights Framework to "enhance parliamentary scrutiny of laws for consistency with our international human rights obligations."²

The Bill lapsed after the prorogation of the Parliament and was reintroduced on 30 September 2010. The Senate referred the Bill to the Legal and Constitutional Affairs Committee for inquiry and report by 23 November 2010.

ALSWA is strongly committed to greater protection and enjoyment of human rights in Australia and supports the Bill and its expeditious passage as a step in the right direction towards improving Australia's human rights record.

ALSWA endorses the comprehensive submission and recommendations of the Human Rights Law Resource Centre (HRLRC) which discusses the definition of 'human rights', the Joint Parliamentary Committee on Human Rights (Committee) and Statements of Compatibility.³

ALSWA wishes to also highlight the need for increased and more specific mechanisms to address the ongoing factors inhibiting Aboriginal peoples'⁴ ability to enjoy fundamental human rights and freedoms. The recent report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people provides a detailed account of these factors and made numerous recommendations to overcome disadvantage and better protect the rights of Aboriginal peoples.⁵ ALSWA suggests the Australian Government immediately implement these recommendations as a more effective means of improving human rights for Aboriginal peoples.

It is not the intention of ALSWA to duplicate information contained in the HRLRC submission. This submission will provide brief information about ALSWA, then recommend how the Bill could be improved and how the Australian Government can better protect the rights of Aboriginal peoples.

¹ Further information about the Inquiry, including the text of the Bill can be found at http://www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills/index.htm, accessed 25 June 2010.

² Attorney-General, Hon Robert McClelland MP, Media Release, 'Enhancing Parliamentary Scrutiny of Human Rights,' 2 June 2010.

³ See <http://www.hrlrc.org.au/files/Human-Rights-Parliamentary-Scrutiny-Bill-Inquiry-HRLRC-Submission.pdf> accessed 25 June 2010.

⁴ Aboriginal peoples is intended to include Aboriginal peoples and Torres Strait Islander peoples.

⁵ Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur, James Anaya, A/HRC/15/ 4 March 2010.

2. About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout WA.

ALSWA aims to:

- deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout WA;
- provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people of Australia;
- ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission Into Aboriginal Deaths in Custody; and
- create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with 16 executive officers⁶ elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout WA via 17 regional and remote offices and one head office in Perth.

3. Improving the Bill

The following comments are made in addition to those raised by the HRLRC in its submission that ALSWA thoroughly endorses.

3.1 Expansive definition of human rights

ALSWA recommends the Bill be amended so that the definition of 'human rights' in Part 2, Section 3(1) include an additional sub-section (h) 'the Declaration on Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007.'

⁶ There are two Executive Officers for each of the former eight ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

3.2 Powers and Proceedings of the Committee

ALSWA notes the powers and proceedings of the Committee are to be determined by resolution of both Houses of Parliament.⁷ ALSWA recommends that:

- the Committee be adequately resourced to work in partnership with Aboriginal peoples when considering the compatibility of Bills, Acts and legislative instruments with the rights of Aboriginal peoples;
- the Committee adopt a special procedure for considering the compatibility of Bills that include an intent to legislate exclusively for Aboriginal peoples, to suspend the *Racial Discrimination Act* 1975 (Cth) or to institute a special measure;
- the Committee consider a procedure that reviews the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain free, prior and informed consent from those concerned by the Bill;
- the Committee identifies the legal aid, or Aboriginal legal aid implications of Bills, Acts or legislative instruments and how to improve access to justice in addressing these implications;
- the Committee review legislation, policies and practices that impact on Aboriginal peoples as a priority; and
- the Committee be required to consider the recommendations, comments or statements adopted by the United Nations to assist in understanding and interpreting human rights as they apply in Australia for example (but not limited to):
 - treaty body general comments;
 - treaty body concluding observations;
 - treaty body recommendations in relation to individual complaints or petitions;
 - recommendations by Special Rapporteurs; and
 - recommendations and statements from the Human Rights Council, including through the Universal Periodic Review process.

3.3 Statements of Compatibility

ALSWA recommends that any proposed Bill that impacts on the rights of Aboriginal peoples contain detailed information about the participation of Aboriginal peoples in decision-making about the purpose and impact of the Bill and the attempts made to obtain free, prior and informed consent from Aboriginal peoples directly affected by the Bill.

⁷ The Bill, s 6.

4. Targeted Measures to improve the rights of Aboriginal peoples

ALSWA maintains that more is needed to specifically address the rights of Aboriginal peoples. ALSWA was disappointed the Human Rights Framework did not include the introduction of a comprehensive, judicially enforceable Human Rights Act and notes that any process of parliamentary scrutiny is weakened without such an Act.

The Human Rights Framework makes no reference to implementing the Declaration on the Rights of Indigenous Peoples, does not include any reference to the recommendations in the Human Rights Consultation Report regarding a statement of impact on Aboriginal peoples and a framework for self-determination, nor any framework or process for implementing the recommendations made by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples ('Special Rapporteur').

ALSWA recommends the Australian Government:

- introduce a National Action Plan for the implementation of the Declaration on the Rights of Indigenous Peoples;
- identify a timeframe and indicate how it will implement the recommendations made by the Special Rapporteur;
- develop a specific, national forum for Aboriginal organisations to engage in improving human rights; and
- initiate a process of constitutional reform to recognise and better protect the rights of Aboriginal peoples, including freedom from discrimination, equality before the law, preambular recognition of Aboriginal peoples as the traditional owners of Australia and dedicated seats in Parliament for Aboriginal peoples.

5. Conclusion

The Australian Government has taken important steps towards improving human rights in Australia through its new Human Rights Framework and introduction of the Bill. ALSWA maintains that more is needed to better protect and promote the rights of Aboriginal peoples through improving the Bill to more specifically consider the rights of Aboriginal peoples, and by adopting measures that go beyond the current Bill.

ALSWA appreciates the opportunity to provide comment on this Bill and looks forward to monitoring the progress of this Inquiry.

6. List of ALSWA Recommendations

- 1) The Bill be amended so that the definition of 'human rights' in Part 2, Section 3(1) include an additional sub-section (h) 'the Declaration on Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007.'
- 2) The Committee be adequately resourced to work in partnership with Aboriginal peoples when considering the compatibility of Bills, Acts and legislative instruments with the rights of Aboriginal peoples.

- 3) The Committee adopt a special procedure for considering the compatibility of Bills that include an intent to legislate exclusively for Aboriginal peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The Committee should consider a procedure that reviews the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain free, prior and informed consent from those concerned by the Bill.
- 4) The Committee identifies the legal aid, or Aboriginal legal aid implications of Bills, Acts or legislative instruments and how to improve access to justice in addressing these implications.
- 5) The Committee review legislation, policies and practices that impact on Aboriginal peoples as a priority.
- 6) The Committee be required to consider the recommendations, comments or statements adopted by the United Nations to assist in understanding and interpreting human rights as they apply in Australia for example (but not limited to):
 - (a) treaty body general comments;
 - (b) treaty body concluding observations;
 - (c) treaty body recommendations in relation to individual complaints or petitions;
 - (d) recommendations by Special Rapporteurs; and
 - (e) recommendations and statements from the Human Rights Council, including through the Universal Periodic Review process.
- 7) That any proposed Bill that impacts on the rights of Aboriginal peoples contain detailed information about the participation of Aboriginal peoples in decision-making about the purpose and impact of the Bill and the attempts made to obtain free, prior and informed consent from Aboriginal peoples directly affected by the Bill.
- 8) The Australian Government:
 - introduce a National Action Plan for the implementation of the Declaration on the Rights of Indigenous Peoples;
 - identify a timeframe and indicate how it will implement the recommendations made by the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples;
 - develop a specific, national forum for Aboriginal organisations to engage in improving human rights; and
 - initiate a process of constitutional reform to recognise and better protect the rights of Aboriginal peoples, including freedom from discrimination and equality before the law.