

**Submission
No 10**

OPERATION OF THE LEGISLATION REVIEW ACT 1987

Organisation: Australian Human Rights Commission (AHRC)
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The Chair
Legislation Review Committee,
Parliament House
Macquarie Street
Sydney NSW 2000

By email: Legislation.Review@parliament.nsw.gov.au

Dear Chair,

Inquiry into the operation of the *Legislation Review Act 1987 (NSW)*

The Commission welcomes the opportunity to make comments in relation to the above inquiry. Our comments speak only to the federal arrangements regarding human rights scrutiny. We are happy to further information by way of oral evidence.

Federal arrangements re legislative scrutiny for compatibility with human rights

The Australian Government established the Parliamentary Joint Committee on Human Rights (PJCHR) in March 2012.¹ The PJCHR analyses bills and legislative instruments introduced into federal Parliament for compliance with human rights. It then reports its findings to Parliament. Since August 2012, the PJCHR has produced over 65 reports to Parliament assessing over 960 bills.²

The *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* requires each bill, regulation and ordinance introduced into Parliament to be accompanied by a statement of compatibility with 'human rights', defined as the seven core international human rights instruments to which Australia is a party.³

1. International Convention on the Elimination of all Forms of Racial Discrimination
2. International Covenant on Economic, Social and Cultural Rights
3. International Covenant on Civil and Political Rights
4. Convention on the Elimination of All Forms of Discrimination Against Women
5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Rights of Persons with Disabilities

The PJCHR's scrutiny task is to determine whether a legislative measure limits human rights and, if so, whether it does so justifiably under international human rights law. To be justifiable, the PJCHR requires that the measure be prescribed by law, be in pursuit of a legitimate objective, be rationally connected to its stated objective, and be proportionate to achieve that objective.⁴ The PJCHR's starting point in carrying out its assessment is the statement of compatibility.⁵

There are many parliamentary scrutiny committees and processes operating at the federal level,⁶ but only the PJCHR expressly considers Australia's international human rights obligations. The Commission considers that it therefore represents an important extension of existing parliamentary rights review mechanisms and that all Australian jurisdictions should similarly incorporate consideration of Australia's international human rights obligations into their legislative review processes.

To that end, the Commission notes that the Northern Territory Legislative Assembly has recently introduced a legislative scrutiny process that draws heavily on the federal approach. The NT now requires a statement of compatibility to accompany each bill and review by a scrutiny committee for compatibility with 'human rights', as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).⁷ It appears that existing legislative review committees will carry out the new scrutiny function.

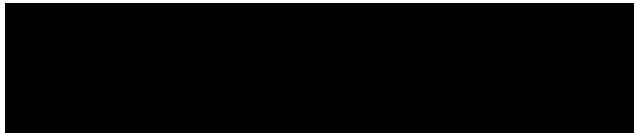
The *Legislation Review Act 1987* (NSW) (the Act) **does not** require the Legislation Review Committee to consider Australia's human rights obligations. The Commission considers that the Act could be amended to introduce a requirement that legislative scrutiny include reference to 'human rights', as defined in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). To support the Legislative Review Committee in performing such a function, it could also amend the Act to require statements of compatibility with human rights.

The Commission notes that there are some challenges facing the PJCHR and the federal approach to human rights scrutiny of legislation.⁸ Parliamentarians do not always consider the PJCHR's views. It is possible for a bill to pass into law prior to the PJCHR releasing its concluded view in relation to the human rights compliance of the bill.⁹ There is also variable quality in the drafting of statements of compatibility within and across Government departments.¹⁰ These challenges do not undermine the overarching value of considering Australia's international human rights obligations in the course of legislative review.

Recommendation

The Commission recommends that the *Legislation Review Act 1987* (NSW) be amended to require that the Legislative Review Committee consider Australia's international human rights in performing its legislative scrutiny functions.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM
President



¹ The Parliamentary Joint Committee on Human Rights (**PJCHR**) was established under the *Human Rights (Parliamentary Scrutiny) Act 2011*. The PJCHR was an important aspect of Australia's Human Rights Framework, which intended to improve the understanding of, and respect for, human rights in Australia. See Commonwealth of Australia, *Australia's Human Rights Framework* (April 2010). At <https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf> (viewed 1 February 2018).

² Since the beginning of 2016, the PJCHR has reviewed over 74 other legislative instruments. Parliamentary Joint Committee on Human Rights, *Index of Bills and Legislative Instruments*. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments (viewed 11 September 2017).

³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 3, 8, 9. At <https://www.legislation.gov.au/Details/C2011A00186> (viewed 11 September 2017).

⁴ Parliamentary Joint Committee on Human Rights, *Annual Report 2015–16* (5 December 2017) [2.5]–[2.6]. At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/Annual_Reports/Annual_Report_2015-16 (viewed 1 February 2017).

⁵ Parliamentary Joint Committee on Human Rights, *Annual Report 2015–16* (5 December 2017) [2.7]–[2.9]. At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/Annual_Reports/Annual_Report_2015-16 (viewed 1 February 2017).

⁶ Parliamentary scrutiny processes include the Senate Standing Committee on Regulations and Ordinances, Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on Human Rights, Senate Standing Committee on Legal and Constitutional Affairs, Parliamentary Joint Committee on Intelligence and Security and Parliamentary Joint Committee on Law Enforcement. Other review mechanisms include the Australian Human Rights Commission, Independent National Security Legislation Monitor and Australian Law Reform Commission. See Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws (Final Report)* (2016) Ch 3. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 11 September 2017).

⁷ Legislative Assembly of the Northern Territory, *Sessional Orders* (2017), Ord 12.3. At <https://parliament.nt.gov.au/business/standing-and-sessional-orders> (viewed 1 February 2017).

⁸ The Australian Law Reform Commission (ALRC) has made a number of suggestions to improve the federal scrutiny arrangements that would address such challenges. The ALRC's suggestions include additional guidance to policy makers during policy development and legislative drafting stages; improving quality of explanatory material and statements of compatibility; effective and appropriate streamlining of overlapping work across scrutiny committees; increasing time available to conduct scrutiny; and improving the extent to which Parliament considers the scrutiny reports. See Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws (Final Report)* (2016) 75–76 [3.95]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 11 September 2017).

⁹ George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 477, 506–7. At <http://www.austlii.edu.au/au/journals/MonashULawRw/2015/17.html> (viewed 11 September 2017).

¹⁰ Some statements of compatibility devote cursory attention to assessing a bill's identified impingement on human rights and some simply assert (without due explanation) that a bill is

compatible with human rights even where an impingement on rights has been acknowledged. See George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 474–5. At <http://www.austlii.edu.au/au/journals/MonashULawRw/2015/17.html> (viewed 11 September 2017); Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1069–1070. At <http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/journals/UNSWLJ/2015/37.pdf> (viewed 11 September 2017).