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By email: democracyforum@ohchr.org

Dear Chief,

Parliaments as promoters of human rights, democracy and the rule of law

The Australian Human Rights Commission is an 'A' status national human rights institution (NHRI). We are a strong supporter of Parliament as a promoter of human rights and welcome the opportunity to contribute to this Forum.

Please find below information concerning the federal arrangements in Australia for parliamentary scrutiny of legislation for compatibility with human rights.

1 Parliament's role in promoting human rights

There is growing international consensus about the importance of the role of parliaments in the protection and realisation of human rights.¹ Parliament's role is particularly important in Australia, given that Australia does not have a federal charter of rights or any comprehensive federal human rights legislation. Human rights protection therefore takes place primarily at the policy level and in the legislative process. In that context, Parliament's role is essential.

The Commission also considers that parliamentary engagement with human rights enhances Australian democracy, as it ensures that elected representatives of the Australian people consider human rights issues and are accountable to the Australian people for their action or inaction in response to those human rights issues.

However, for parliaments to be effective promoters of human rights, the Commission considers that the manner, form and quality of their engagement with human rights must be suitable. In that regard, the Commission commends the efforts made to improve parliamentary engagement with human rights at the federal level by the

Parliamentary Joint Committee on Human Rights (PJCHR), but also notes the challenges facing Parliament in its effective promotion of human rights in Australia.

2 Federal arrangements re parliamentary human rights scrutiny

2.1 Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

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.²

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

Any Member of Parliament who proposes a draft law must also include a statement of compatibility in respect of the proposed law, which sets out whether the law is compatible with human rights.³ Where proposed legislation engages and limits a human right, the statement of compatibility should provide an assessment of the measures against the criteria for legitimate limitations under international human rights law instruments above.⁴

2.2 Parliamentary Joint Committee on Human Rights (PJCHR)

The Australian Government established the PJCHR in March 2012.⁵ The PJCHR analyses bills and legislative instruments introduced into 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.⁶

The PJCHR's function involves examining bills and legislative instruments that come before the Parliament for compatibility with human rights, as set out in the core international instruments listed, and reporting to Parliament.⁷ To be compatible, 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.⁸ The PJCHR's starting point in carrying out its assessment is the statement of compatibility.⁹

There are many parliamentary scrutiny committees and processes operating at the federal level.¹⁰ While the other parliamentary committees consider draft legislation and other draft legislative instruments through lenses which touch on human rights (for example, the Scrutiny of Bills Committee assesses bills against accountability standards including whether the bill 'unduly trespasses on personal rights and liberties'), only the PJCHR is required expressly to consider Australia's international human rights obligations.¹¹ This therefore represents an important extension of

existing parliamentary rights review mechanisms. The Commission considers that this provides a good model for legislative scrutiny that all Australian jurisdictions should similarly incorporate consideration of Australia's international human rights obligations into their legislative review processes.¹²

To that end, the Commission notes that the Northern Territory (NT) Parliament 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 that bills are reviewed by a scrutiny committee for compatibility with 'human rights', as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹³

Similarly, the NSW Legislation Review Committee is currently considering amendments to its legislative scrutiny regime, which does not currently require consideration of Australia's human rights obligations. The Commission has recommended that the *Legislation Review Act 1987* (NSW) be amended to require that the Legislative Review Committee consider Australia's international human rights obligations in performing its legislative scrutiny functions.

Victoria has enacted human rights legislation at the state level. The *Charter of Human Rights and Responsibilities Act 2006* provides that the Scrutiny of Acts and Regulations Committee in Victoria must consider any Bill introduced into Parliament and must report to the Parliament whether the Bill is incompatible with human rights under the Charter.¹⁴

The Commission is not aware of any other human rights scrutiny mechanisms operating in Australian parliaments.¹⁵

2.3 Challenges

The Commission notes that there are numerous challenges facing the PJCHR and the federal approach to human rights scrutiny of legislation. For example:

- a) Parliamentarians do not always consider the PJCHR's views.
- b) 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.¹⁶
- c) There is variable quality in the drafting of statements of compatibility within and across Government departments.¹⁷
- d) It is not the usual practice for the views of the PJCHR to be referred to in the course of parliamentary debate.

These challenges highlight that there is room for improvement to ensure that human rights are sufficiently protected, respected and promoted in Australia.¹⁸

In its 2016 report, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, the Australian Law Reform Commission (ALRC) made a number of suggestions to improve the federal scrutiny arrangements that would address such challenges.¹⁹ 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 the time available to conduct scrutiny; and improving the extent to which Parliament considers the scrutiny reports.²⁰

The Commission is considering ways of improving parliamentary scrutiny for human rights in the Australian context. In particular, we are exploring how to assist policymakers with relevant knowledge, skills and training to better address human rights issues, as a means of improving the quality of statements of compatibility with human rights and overall engagement with human rights in the legislative process.

3 Parliament and the UN human rights system

Parliamentary engagement with human rights should also extend to the international and regional machinery for protecting human rights.²¹ The Commission considers that there is room for improvement in this regard in the Australian context.

The Commission made numerous submissions to UN human rights treaty bodies in 2017, relating to Australia's periodic reviews for compliance with its human rights obligations.²² Across these submissions, the Commission provided commentary on, and made recommendations about, statements of compatibility and the role of the parliament. In particular, the Commission:

- commended the Australian Government for establishing the PJCHR,
- summarised the role of the PJCHR,
- recommended that the Australian Government ensure that concerns raised by the PJCHR are fully considered in the legislative process,
- raised concerns about the variable quality in the drafting of statements of compatibility within and across Government departments, and
- recommended that the Australian Government ensure that all statements of compatibility are consistently of a high standard and are supported by evidence and analysis.

The UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination recommended that Australia strengthen its legislative scrutiny process and that the PJCHR must be allowed to complete a full, meaningful review of bills to ensure their compatibility with the ICCPR.²³ In 2017, the Special Rapporteur on the rights of Indigenous Peoples called on the Government to pay due attention to the recommendations of the PJCHR in its scrutiny reports of draft bills.²⁴

However, the concerns and recommendations raised by the UN human rights system in relation to Australia are rarely mentioned in Parliament. The Commission notes that the Chair of the PJCHR has referred to UN treaty body concluding observations in the context of tabling speeches before Parliament, but typically only to the extent that the UN has mentioned the work of the PJCHR.

To promote human rights effectively, the Commission considers it necessary for parliaments to engage with the UN human rights system meaningfully, such that relevant concerns and recommendations emanating from the UN human rights

system are discussed in parliamentary proceedings as a matter of course. To that end, the Commission considers it important for the language of human rights to become part of the familiar vocabulary of parliamentarians.

To that end, the Commission considers that concluding observations from UN human rights treaty bodies and recommendations arising from the Universal Periodic Review should always be tabled in Parliament, so that attention is routinely drawn to them in the ordinary business of Parliament.

4 NHRI engagement with Parliament

The Commission considers that NHRIs have a key role to play in increasing the human rights knowledge and awareness of parliamentarians. This can be pursued through numerous avenues, including regular engagement with parliamentary scrutiny processes, direct engagement with parliamentarians and the provision of human rights knowledge and awareness training.

In relation to parliamentary scrutiny, the Commission considers it a key part of our role as an 'A' status NHRI to provide written submissions to parliamentary committees in relation to legislation and other matters engaging human rights. The Commission may also be called to provide oral evidence to parliamentary committees in the course of their inquiries.

In relation to direct engagement, the Commission has seven specialist Commissioners, with respective specialisations in age discrimination, children's rights, disability discrimination, human rights, race discrimination, sex discrimination and social justice for Aboriginal and Torres Strait Islander peoples. Our specialist Commissioners also engage directly with parliamentarians on human rights issues within their portfolios. In my role as President, I have engaged with parliamentarians specifically on the issue of parliamentary scrutiny and human rights.

In relation to training, following the introduction of a human rights scrutiny mechanism in the NT Parliament, the Commission provided human rights training to governmental and parliamentary officers in the NT. Survey evaluations received from participants immediately after the training revealed overwhelmingly positive results. In particular:

- **82%** reported an increase in their knowledge of human rights,
- **84%** reported an increase in their ability to identify human rights issues in legislation, and
- **92%** reported that they benefited from the training overall.

We would like to expand our training opportunities to the federal Parliament, and are in discussions with the PJCHR as to how to achieve greater rights-mindedness amongst legislative proponents engaging with human right scrutiny mechanisms.

The Commission considers that NHRIs are in a unique position to offer objective and accurate advice to parliaments in relation to human rights and to instil rights-

mindedness in the exercise of parliamentary functions. It encourages all NHRIs to consider opportunities for engaging with the parliaments operating in their states.

The Commission would be pleased to provide further information if requested.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

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¹ Brian Chang, 'Global Developments in the role of parliaments in the protection and promotion of human rights and the rule of law: An emerging consensus'. At <https://www.law.ox.ac.uk/research-and-subject-groups/parliaments-rule-law-and-human-rights-project/2017-paper-emerging> (viewed 1 May 2018).

² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 3, 8, 9. At <https://www.legislation.gov.au/Details/C2011A00186> (viewed 11 September 2017).

³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8-9.

⁴ See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility* (2014). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources (viewed 8 February 2017).

⁵ 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).

⁶ 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).

⁷ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7.

⁸ 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).

⁹ 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).

¹⁰ 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).

¹¹ See, eg, Australian Senate, Standing Orders, o 23(3). At https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00/b05#standing-order_c05-024 (viewed 4 May 2018).

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¹³ 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).

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 28–30.

¹⁵ The Commission notes that the Australian Capital Territory (ACT) has enacted human rights legislation. However, there is no mechanism for parliamentary scrutiny of legislation for compatibility with human rights in the ACT. Rather, the Supreme Court of the ACT may declare that the law is not consistent with the human rights set out in the Act. See *Human Rights Act 2004* (ACT), s 32.

¹⁶ 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).

¹⁷ 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).

¹⁸ 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).

¹⁹ 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 4 May 2018).

²⁰ 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 4 May 2018).

²¹ Brian Chang, 'Global Developments in the role of parliaments in the protection and promotion of human rights and the rule of law: An emerging consensus'. At <https://www.law.ox.ac.uk/research-and-subject-groups/parliaments-rule-law-and-human-rights-project/2017-paper-emerging> (viewed 1 May 2018).

²² The Commission made submissions to the Committee on Economic, Social and Cultural Rights in May 2017, the Human Rights Committee in September 2017 and the Committee on the Elimination of Racial Discrimination in October 2017. The submissions can be found here: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=AUS&Lang=EN (viewed 1 May 2018).

²³ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 9 November 2017 para 12. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNH%2fAUS%2f28980&Lang=en (viewed 1 May 2018). United Nations Committee on Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) para 6. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f18-20&Lang=en (viewed 1 May 2018).

²⁴ *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 18 [107]. At http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2 (viewed 16 April 2018).