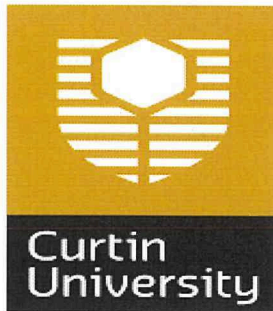




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23 June 2023

Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Re: Submission to Inquiry into Australia's Human Rights Framework : Parliamentary Joint Committee on Human Rights

Thank you for the opportunity to make a submission to this Inquiry, made in a private capacity.

This submission **will have a particular focus** on a matter noted in the PJCHR Media Release of 22 March 2023, 'Inquiry into Australia's Human Rights Framework', namely '*whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including ...to the remit of the Parliamentary Joint Committee on Human Rights*'.

Additional brief contextual consideration will be given to the further noted matter '*whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's relevant Position Paper)*'.

The above focus of this submission will also engage *the pre-eminent example of human rights issues – in the ongoing serial enactment of national security laws – with PJCHR and PJCIS reviews and interactions*

The submission will illustratively focus upon and highlight significant and substantial problems with the existing constraints upon the uptake and influence of *PJCHR Human Rights Scrutiny Reports* in national security legislation review matters, especially the interaction of *PJCHR Human Rights Scrutiny Reports* with the *review reports of the Parliamentary Joint Committee on Intelligence and Security (PJCIS)*.

There is a lack of influence and impact upon the PJCIS reports, an important issue given the serial enactment of national security legislative bills, amendments to those bills and the national security review and legislative process, both initial and subsequent, and influences upon and practices of those review processes.

The national security legislative space has, since 2001, been a leading Australian legal public policy site for the contestation of human rights principles and their potential contraction.

The positioning of human rights analysis and application is of *considerable ongoing public policy significance with the incremental implementation of the major national security report Comprehensive Review of the Legal Framework of the National Intelligence Community (Richardson Report)*, likely to produce transformative effects upon the qualitative aspects of Australian democratic institutions and practices (whilst pursuing some legitimate contemporary national security concerns and objectives) but potentially resulting in unnecessary levels of securitisation, insufficiently moderated by human rights principles.

This area sharply highlights the need for legislative and procedural reforms relating to the interaction of the PJCHR and the PJCIS (as well as the INSLM) to improve the influence of human rights compliance measures and culture in enacted national security legislation, and to re-set the balance in such measures.

Identification of the reasons for existing deficiencies in incorporating and assimilating human rights principles into national security legislative formation and amendment involving the formal reviewing bodies – will suggest reforms to improve human rights protection in the serial enactment of national security laws.

Suggested legislative and other reforms to improve protection of human rights are at the end of this submission – at pages 11 to 14

Suggested legislative and other reforms to improve human rights mechanisms and protections are included at pages 11 to 14 (at the end of the submission) under the heading *Pragmatic Suggested Reforms to Introduce New and Improve Existing Mechanisms for Federal Human Rights Protection – with Particular Reference to National Security Laws*

Identification of key problematic human rights areas in PJCHR review of national security laws

Several problematic aspects may be identified in the lack of Executive and PJCIS engagement with, and uptake of PJCHR reports, as informing and influencing an ongoing national security legislative program through human rights modifications.

. Basic limitations of the PJCHR review methodology in national security legislative situations

A **first principle** around PJCHR review is its inherent limits as an exclusive parliamentary model, with no judicial interpretive function for identified international human rights obligations, (as impacting bills or legislation), nor a clear parliamentary obligation to deliberatively consider PJCHR review findings. The absence of these requirements detrimentally impacts upon the reformative influence of PJCHR Human Rights Scrutiny Reports.

These weaknesses derive from a parliamentary self-regulatory model - a government maintaining confidence and supply in the lower house can determine qualitative or nominal compliance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Ultimately, there is a large element of Executive discretion from this model in how human rights analysis influences legislative process, construction and scope.

Other explanations also exist for the compromised effectiveness of PJCHR review.¹

A **second principle** is the interaction of PJCIS and PJCHR legislative reviews, involving certain consistent practices – namely marginalisation of national security legislative review recommendations relating both to substantive human rights amendments, as well as the timed release of PJCIS reports and subsequent legislative action, rendering PJCHR recommendations as of marginal relevance.

There is a disconnected manner between the two Committees in how human rights concepts are utilised in reviews, with the Executive using its executive discretion to prioritise PJCIS review findings in which human rights considerations are not a central or explicit operating principle.

. Contrasting the review methodology of PJCHR and PJCIS – the different role of human rights before each Committee

Put simply, the difficulties of the PJCHR in obtaining human rights purchase in national security legislation reviewed by the PJCIS are grounded in the significantly different stated legislative review methodologies of the PJCIS and PJCHR. Each methodology positions human rights elements with different emphasis and weight.

The PJCIS methodology considers that laws need to be effective at achieving their stated aims, simultaneously minimising human rights limitations:

- To be effective, the laws need to be workable from the perspective of law enforcement and prosecutors – that is, they must be enforceable.² Taking these considerations together, and having accepted the legitimacy of the aims of the Bill, the Committee has sought to ensure through its review that each of the measures in the Bill is
- . clear and unambiguous in its terms
 - . proportional and appropriately targeted to the threat, and
 - . enforceable³

¹ See Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33 (1) *Australasian Parliamentary Review* 72.

² Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (June 2017), 9.

³ *Ibid*, 10. The PJCIS also cited a submission from a previous PJCIS inquiry regarding limitations on human rights 'It is permissible for a legislative measure to limit human rights where the measure is expressed in clear and

Elsewhere, **the PJCIS has also articulated its operating principles:**

While acknowledging the need for increased transparency, the Committee has sought to identify areas where it considers appropriate amendments are required to improve the integrity and proportionality of the proposed measures, the clarity and effectiveness of their application and operation, and to ensure adequate safeguards are provided.⁴

and

In the main, the Committee expects that the powers have effective safeguards and oversight, and expects that they are being used appropriately by security agencies and law enforcement. The Committee reiterates the importance of the public assurance that is provided by effective and robust oversight measures.⁵

The above three excerpts display a primary focus of the PJCIS *upon the operability of legislation, accounting for human rights considerations incidentally through reliance on safeguards and legislative language*. The importance of ex post facto oversight is subsequently acknowledged. The focus of PJCIS review is enabling, albeit one accommodating human rights principles, but subordinated to a broadly conceived operability.

In contrast, *the PJCHR conducts its Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) reviews within a consistently articulated human rights framework:*

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.⁶

A focus of the PJCHR reports is to determine whether any limitation of a human right identified in the proposed legislation is justifiable. A measure that limits a right must be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to its stated objective; and be a proportionate method to achieve that identified objective.⁷

These criteria provide the analytical framework for the PJCHR. The criteria draw upon conventional international human rights law methodology and principles. There is accordingly a primary focus upon integrating human rights principles holistically and from the inception into the legislative resolution of public policy subject matters.

unambiguous terms, is directed to a legitimate aim, is necessary to achieve that aim and is proportionate: *Ibid*, 9-11.

⁴ Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (June 2018), 16.

⁵ Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) act 2018* (April 2019), 7.

⁶ Parliamentary Joint Committee on Human Rights, Commonwealth Parliament, Guidance Note 1: Drafting statements of compatibility (December 2014)

⁷ *Committee Information* – Parliamentary Joint Committee on Human Rights, Commonwealth Parliament, *Human Rights Scrutiny Report 3 of 2018*, iv.

. Persistent difficulties with timing and lack of adoption of PJCHR human rights scrutiny reports in relation to formulation of PJCIS reports – are framed as an issue of Executive discretion and the disposition of the relevant minister

The Commonwealth Parliament self-regulatory model of human rights protection accommodating a significant ministerial discretion and individual ministerial dispositions towards human rights, therefore exercises an outsize influence in legislative formation and review, particularly so in relation to the sensitive subject matter of national security.

Examples from 2018 and 2019 will illustrate the need for PJCHR Scrutiny Reports *to be granted greater scope, consistency of application and integration in legislative review*, thereby improving the application and protection of human rights.

In 2018 and 2019, Parliamentary reviews were conducted in relation to espionage, foreign interference and influence matters, and in relation to assistance and access to telecommunications.⁸ These serious and broadly based matters contesting Australian governance especially demand a carefully integrated human rights approach if the national security responses are not to undermine democratic institutions and practices.

Substantiated espionage and foreign interference and influence threaten a weakening of Australian representative government, advantaging the interests of a foreign power. Equally, a poorly crafted and calibrated legislative response presents such a threat and its implementation may also weaken Australian democratic governance practices and institutions. These subject matter capacities to ‘reduce Australia’s long term security and ... undermine our democracy and threaten the rights and freedoms of our people’⁹ have exposed tensions between legislative responses to a threat and the impact such responses exert on democratic institutions and practices. *The two-fold risks highlight the centrality of parliamentary committee review in achieving a human rights integrated approach in recommended legislative amendments – balance, restraint, detail, calibration and broad evidence grounded approaches are critical.*

Likewise, privacy and data security and the claimed exponential use by terrorist and criminal groups of secure, encrypted communications to avoid detection is an emergent, challenging issue. *If a purely preventative bias underpins legislative drafting and implementation, important democratic operative values and cooperative international data protection standards will be compromised. An integrative human rights approach again becomes paramount.*

The committee reviews of bills (*National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) and *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Cth) show predominance of the physical conception of safety and security, as reflected in the PJCIS review interaction (such as it may exist) with, and Executive responses to, the PJCHR approaches.

⁸ PJCIS Advisory Report on the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*; PJCIS Advisory Report on the *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (December 2018); PJCIS Review of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (April 2019)

⁹ PJCIS Advisory Report on the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, 9.

In the first example,¹⁰ significant human rights compatibility issues identified by the PJCHR persisted, but Attorney-General Hon Christian Porter's response ameliorated some of the bill's human rights infringements through amendments already provided to the PJCIS.¹¹ The PJCIS methodology in this instance indicated reporting on submissions made to it, being neither consistently human rights informed, nor endorsing the human rights informed perspectives included in these submissions.

This demonstrates *that to be effective, any explicitly framed human rights analysis deriving from PJCHR reviews under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) needs to identify and connect with PJCIS language and methodology to improve the chances of influencing PJCIS recommendations.*

In the second example,¹² a much sharper disconnection between PJCHR identified human rights issues, ministerial responses and PJCIS review of and reporting of the bill emerged.¹³ This was underpinned by the Minister for Home Affairs Hon Peter Dutton approaching the question from a narrowly conceived safety and security approach in insistence upon an expedited passage of the bill, producing significantly greater human rights concerns around compatibility than the circumstances of the earlier bill.¹⁴

The expedition of the second bill ultimately triggered an extraordinary prolonged and complicated review and legislative process,¹⁵ suggesting that an early, broader human rights amenable approach would have produced both significantly more effective and timely conclusions and legislation.

. A question of the perceived relative status and standing of the available national security legislation reviewers – the PJCIS, the INSLM and the PJCHR

. PJCIS relative status as a premier Parliamentary Committee

The PJCIS appears to have emerged as the *premier Commonwealth Parliament review committee* in its status, influence and in the seeking of membership of the PJCIS, partly founded upon its membership being confined to the major political parties of past, present and future Australian government. This is evidenced in various statements relating to the *National Security Legislation*

¹⁰ *National security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth).*

¹¹ Hon Christian Porter, *Response of Commonwealth Attorney General to Chair PJCHR Document MC 18-001708* dated 14 March 2018, paragraph 3 with enclosure 'Draft parliamentary amendments to National Security Legislative Amendment 9Espionage and Foreign Interference) Bill 2017.

¹² *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth)*

¹³ That disconnection is substantial, with the PJCHR reports (PJCHR *Human Rights Scrutiny Report 11 of 2018* (16 October 2018) 24-71 and PJCHR *Human Rights Scrutiny Report 13 of 2018* (4 December 2018) 51-120 identifying many significant ICCPR based human rights issues in the Bill's provisions.

¹⁴ Letter of 22 November 2018 from Minister Dutton to Chair of PJCIS, as Submission 89 to PJCIS *Inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*

¹⁵ Subsequent further PJCIS review in 2019 and INSLM review in 2020.

Amendment (Comprehensive Review and Other Measures No 2) Bill 2023 (Cth) – both in the PJCIS report on the bill¹⁶ and in Parliamentary debate on the bill.¹⁷

. The PJCIS has formalised legislative engagement with INSLM

. When the PJCIS engages with another legislative review body, its apparent, but unstated preference, is a form of *dual scrutiny review*, first conducted by the Independent National Security Legislation Monitor (INSLM), followed by review by the PJCIS itself. Both steps incorporated into the *Intelligence Services Act*.¹⁸ These formalised arrangements signal a clear hierarchy by giving explicit recognition to the role of the INSLM and omitting any explicit reference to the PJCHR.

These arrangements point to a precise *Executive self-selection as to the circumstances in which, and when, the PJCIS will be presented with the possibility of a focused consideration of human rights issues* contemporaneous with PJCIS review of the same national security legislation.

That situation arises as the *INSLM legislation includes explicit methodological international law orientated reference points*. These include whether Australia's counter-terrorism and national security legislation is (c) consistent with Australia's international obligations, including (i) *human rights obligations*; and (ii) counter-terrorism obligations; and (iii) international security obligations; and (d) *contains appropriate safeguards for protecting the rights of individuals*.¹⁹

Further, the INSLM must consider whether such legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains proportionate to any threat of terrorism or threat to national security, or both, and (iii) remains necessary.²⁰

When performing INSLM functions, the INSLM additionally must have regard to (a) Australia's obligations under international agreements (as in force from time to time) including (i) *human rights obligations*; and (ii) counter-terrorism obligations; and (iii) international security obligations.²¹

. There is no comparable preferred or formalised legislative dual scrutiny review arrangement for national security legislation between the PJCIS and PJCHR.

Instead, there is simply default reliance upon the review provisions of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* with the assumption that PJCHR review reports will be both afforded adequate time to be digested by other Parliamentary review committees and that PJCHR review of national security will be taken seriously. This assumption in practice has proven to be

¹⁶ Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security *Advisory report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023*, 49: 'The Parliamentary Joint Committee on Intelligence and Security is widely recognised as the most important and functional committee of the Parliament and has played a key role in supporting successive federal governments to protect the national security of Australia. Its members, past and present have prided themselves on working together constructively in a bipartisan way in the national interest.'

¹⁷ Commonwealth Parliament, *Parliamentary Debates*, House of Representatives, 25 May 2023, 88 (Andrew Wallace); 94 (James Stevens)

¹⁸ For instance, see s.6 (1B), (1C) and (1E) of the *Independent National Security Legislation Monitor Act 2010 (Cth)*

¹⁹ S.3 *Independent National Security Legislation Monitor Act 2010 (Cth)*

²⁰ S.6 (1) *Independent National Security Legislation Monitor Act 2010 (Cth)*. This section partly adopts the language of human rights analysis.

²¹ S.8 *Independent National Security Legislation Monitor Act 2010 (Cth)*.

largely problematic and unreliable in relation to national security legislation. For the PJCHR Scrutiny Report mechanism to ensure adequate and effective consideration of and protection of human rights in a national security context, reform of procedural and legislative relationships between the PJCHR and PJCIS is both necessary and desirable.

There appears to be a strong correlation between the reality and perception of the PJCHR (within Parliament, the PJCIS and the Executive) that as a *generalist human rights scrutiny committee* there is no apparent Executive practice in devising protocols to ensure regularity of interactions and co-ordination of the scheduling of committee activities, ensuring that the PJCIS at least considers PJCHR reports in its inquiries and deliberations, at least in the form of a de facto Inquiry submission to it.

It presents publicly at the moment as an invisible or unstated problem. This is a serious impediment to broader legislative review approaches, adequately protecting human rights, pointing to a need for remedial reforms.

. The elimination of competing and contesting Senate Legal and Constitutional Committee national security bill reviews reduces approaches more amenable to the incorporation of human rights principles

Until the time of the Abbott government in 2014, the Senate Legal and Constitutional Affairs Committee regularly reviewed national security laws, and was considered the premier Parliamentary Committee for this purpose. Its characteristics such as broader membership, more inclusive participatory practices and location in the Senate where the Government ordinarily does not control a majority, arguably made it more receptive and amenable to human rights discourse in submissions to it, which would now extend to engagement with the PJCHR scrutiny reports.

That role for the Senate Committee was forestalled by a Coalition majority membership decision in 2014 not to continue with a parallel inquiry into the *Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.²² The practice of conducting two parallel inquiries has not resumed.

Simply put, the continuing bypass of the Senate Legal and Constitutional Affairs Legislation Committee in national security legislation matters has created a de facto Parliamentary monopoly of Committee review of those laws by the PJCIS, and with its increased high institutional Parliamentary status as a Committee with accumulated experience and expertise on that topic. It has largely confined such review producing impact to a useful but more limited traditional common law modelled scrutiny paradigm. The high status of the PJCIS in these endeavours has been openly stated in debate within Parliament²³ and in dissenting comments in a PJCIS regarding the most recent national security legislation,²⁴ reinforcing present review and uptake practices.

This makes it much more difficult for the PJCHR and its Human Rights Scrutiny Reports to gain traction – its model is founded on participatory and deliberative principles requiring time and space, based on Australia’s seven major sets of international human rights treaty obligations. The PJCHR is

²² Parliament of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014), 1. See also the contrasting ‘Additional comments by the Australian Labor Party’ Ibid 3 and the ‘Dissenting Report of the Australian Greens’, Ibid 5.

²³ See n 17 above.

²⁴ Parliament of Australia, Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023* (May 2023) , 49-56 (Opposition dissenting report)

very much in the mould of a generalist Committee, like the Senate Legal and Constitutional Affairs Committee, the latter now stripped of its national security legislation review function.

Neither of these characteristics facilitates optimal advancement of the human rights in contemporaneous review of national security legislation.

Suggested changes to enhance the role of the PJCHR and its Scrutiny Reports in ongoing proposed national security legislative interactions with the PJCIS and the INSLM are included under the subsequent heading **Conclusions and Recommended Reforms – Pragmatic Reforms to Introduce New, and Improve Existing, Federal Mechanisms for the Protection of Human Rights – With particular Reference to National Security Laws**

. The national security legislation urgency paradigm further compromises and complicates the protective capability of human rights analysis

The preceding difficulty of the PJCHR Human Rights Scrutiny Reports gaining traction in the national security legislation review and enactment processes is compounded by identified and recognised national security legislation urgency paradigm.²⁵

Invocation of urgency effectively truncates or eliminates the space for reasoned and considered human rights assessment, review and modification of proposed national security laws. Questions of legality, proportionality, reasonableness, necessity and competing alternatives (derived from human rights analysis of proposed laws, such as arises in PJCHR Scrutiny Reports) become very difficult to engage in such time pressured circumstances.

By tightening legislative time lines even further, the urgency principle increases the marginalisation of the type of human rights analysis and the dialogic model contemplated in the remit of the PJCHR. The most recent escalation of the urgency principle has arisen in relation to the PJCIS review of the *National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023* (Cth).

The urgency principle there underpins the extraordinary tight timeframes for the calling by the PJCIS for submissions on 31 March 2023 with a deadline of midday on 6 April 2023 and for completion of its report requested by the end of April 2023, but then submitted on 12 May 2023.

This is a surprising new variation on the paradigm of urgency – one of *extreme or hyper urgency* – sharply commented upon in the Opposition Dissenting Report to the PJCIS Inquiry Report:

This unreasonably short timeline for the inquiry meant stakeholders were given just 5 business days to provide submissions. Such a short timeframe is disrespectful to stakeholders and otherwise unacceptable when it involves the examination of important amendments to national security legislation.

²⁵ The urgency paradigm in national security laws (and its adverse impacts) has attracted various commentaries: examples are Andrew Lynch, 'Legislating with Urgency – The Enactment of the Anti-Terrorism Act No 1 2015 (2006) 30 *Melbourne University Law Review* 747 ; Greg Carne, 'Hasten Slowly: urgency, Discretion and Review – A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 (2) *Deakin Law Review* 49.

The tight deadline set by the Government proved to be unworkable for the Committee whose members were required to review the submissions, held a public hearing, draft a report and consider its contents. For the Government to continue to place stakeholders, the members of the Committee and its Secretariat who are already under significant workload pressures, under such inordinate pressure on legislation which is not so time sensitive is inexcusable and is most certainly contrary to the *Set the Standard Report on the Independent Review into Commonwealth Parliamentary Workplaces*²⁶

It is unsurprising in these circumstances that the sole aspect of PJCHR review of the Bill – in PJCHR Report 5 of 2023 (confined to a narrow aspect of the Bill) was not released until 9 May 2023 and that there is no apparent reference to any PJCHR review contribution in the *PJCIS Advisory report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023*, handed down just three days later.

Aside from a general principle of past lack of PJCIS report engagement with PJCHR scrutiny recommendations, exacerbated by the urgency paradigm, the above timelines severely curtailed the subject matter capacity of relevant stakeholders to *directly provide independent human rights analysis* to the PJCIS,²⁷ signalling that comprehensive and considered analysis (with a view to greater conformity with Australia's human rights obligations) was practically impossible:

Not all amendments proposed in the nine Parts to Schedule 1 of the Bill attracted evidence beyond that provided in the Explanatory Memorandum (EM) or in statements of support from affected Departments and National Intelligence Community (NIC) agencies.

Accordingly, the Committee will not provide comment on the measures that did not attract substantive additional evidence, or that the Committee agrees are supported without extra comment.²⁸

The net effect of the urgency paradigm, made worse in its extreme or hyper manifestation, entrenches the separation of the work of the PJCHR from influence over national security legislative formation and amendment, including further isolating any such influence on the PJIS review functions or other review functions, such as those of the INSLM, including in legislated subsequent reviews by those bodies of the relevant legislation, after it has been operative.

²⁶ *Advisory report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023*, 51.

²⁷ Only ten public submissions were received by the Inquiry: *Advisory report*, 4. The Law Council of Australia submission observed that 'The Law Council has been unable to consider all aspects of the Bill in detail because of the limited time for consultation, nor has it had the opportunity to adequately consult with its membership on the proposed reforms'. *Advisory report*, 51.

²⁸ *Advisory Report*, 41.

CONCLUSIONS AND SUGGESTED REFORMS

PRAGMATIC SUGGESTED REFORMS TO INTRODUCE NEW, AND IMPROVE EXISTING, FEDERAL MECHANISMS FOR THE PROTECTION OF HUMAN RIGHTS - WITH PARTICULAR REFERENCE TO NATIONAL SECURITY LAWS

The work of the PJCHR in reviewing national security legislation and in assessing compliance with Australia's seven major United Nations human rights treaty obligations needs to be obligatorily integrated into the PJCIS review process of national security laws, given the ongoing legislative volume of such laws, the incremental implementation of the very substantial and detailed *Richardson Review* recommendations, and the unique challenges in providing effective human rights protections in relation to national security laws.

This is most likely achievable by practically affording a more equal, compatible and integrated institutional status to the PJCHR – by allowing adequate timing of Parliamentary deliberations on progress of national security legislation and digestion of the PJCHR recommendations on the same legislation.

The following *suggested reforms to the work methods of the PJCHR* in relation to national security legislation may also be relevantly adaptable to other human rights portfolio areas engaged with by the PJCHR.

(1) Establishing a PJCHR rapid response mechanism - to redress exclusion of influence from existing national security legislative formation, and enable PJCHR responses in national security laws' application of the urgency paradigm.

Given the history of the PJCIS and the Executive generally failing to engage with PJCHR scrutiny reports to affect amendments to national security legislation, the PJCHR needs to develop and resource a human rights research based rapid response mechanism. This rapid response mechanism should have an initial review function, and a further function of providing succinct and focused proposed legislative amendments to encourage stronger conformity with Australia's international human rights obligations.

This mechanism must be able to initially assess and express preliminary assessments of national security legislation quickly, with a succinct report which is additionally provided to the PJCIS as a submission, alongside the standard submissions made by stakeholders to individual PJCIS legislative inquiries, as referred by the relevant minister.

It should rapidly respond by a human rights submission to a PJCIS inquiry into a proposed national security bill; but it should also have the capacity (in relation to changes to standing orders below) to rapidly respond in the context of second reading bill debates being resumed with a week's notice – providing a final set of conclusions of compliance of the national security bill with Australia's international human rights obligations, consistent with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (and ideally, focused, targeted proposed amendments to the relevant national security bill)

(2) Development of an agreed consultative protocol between the PJCHR and PJCIS over national security bills

Further to the PJCHR submission to the PJCIS legislative inquiry reports, the PJCHR should negotiate a protocol with the PJCIS ensuring that from the point of preparation of PJCIS legislative

review reports, the PJCHR, relating to its submission above (as part of a rapid response mechanism) is consulted by the PJCIS as to the proposed national security legislation's compliance with Australia's international human rights obligations, consistent with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

(3) Changes to the Standing Orders of the House of Representatives and the Senate allowing a one week pause after handing down of PJCIS reports before resumption of second reading debates.

The Standing Orders of the House of Representatives and the Senate should be amended to require a minimum of one week between the handing down of a PJCIS Report and proceeding to second reading debates on the relevant reported national security bill, which would then be better informed by the PJCHR final set of conclusions of compliance of the national security bill with Australia's international human rights obligations, consistent with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (see above).

(4) Hierarchical adjustment - Dual scrutiny review – including the PJCHR on the same or improved status as the INSLM in the *Intelligence Services Act 2001* (Cth) – or having the INSLM in such dual scrutiny review engage with the PJCHR, in the form of submissions and advice.

As discussed in the submission heading 'The PJCIS has formalised legislative engagement with INSLM', for certain national security legislation, dual scrutiny occurs, with the first stage of that scrutiny conducted by the INSLM under the authority of the *Independent National Security Legislation Monitor Act 2010* (Cth) and *Intelligence Services Act 2001* (Cth).²⁹

Given the greater capacity of the INSLM to engage in international human rights scrutiny as part of its analysis, as the INSLM legislation includes explicit methodological international law orientated reference points (see discussion under the heading above 'The PJCIS has formalised legislative engagement with INSLM'), the INSLM legislation could be usefully amended to require the INSLM to engage with, or seek a submission from the PJCHR, wherever the dual scrutiny national security legislation review mechanism is engaged,³⁰ or at the discretion of the INSLM, (or indeed obligatorily) to further consult with the PJCHR in discharging any of the INSLM functions under s.6 of the *Independent National Security Legislation Monitor Act 2010* (Cth) involving a human rights aspect.³¹

This would provide an indirect method of improving the impact of PJCHR analysis of human rights compliance, and positively influence and improve the likelihood of developmental compliance of

²⁹ See, for example, s.6 (1B), (1C) and (1E) of the *Independent National Security Legislation Monitor Act 2010* (Cth) and corresponding provisions in the *Intelligence Services Act 2001* (Cth) s.29 (bbaa) and (bcaa).

³⁰ As in the present cited examples, or in future legislated examples.

³¹ Under s.6 (1) of the *Independent National Security Legislation Monitor Act 2010* (Cth) the INSLM functions are (a) to review, on his or her own initiative, the operation, effectiveness and implications of (i) Australia's counter-terrorism and national security legislation; and (ii) any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation; (b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a) (i) contains appropriate safeguards for protecting the rights of individuals, and (ii) remains proportionate to any threat of terrorism or threat to national security, or both, and (iii) remains necessary (ba) to report on matters relating to the performance of the Monitor's functions as set out in paragraphs (a) and (b).

national security laws (through recommended drafted amendments) with Australia's international human rights obligations.

(5) A Commonwealth (Federal) statutory Human Rights Act – the likelihood of improvement in the protection of human rights

The enactment of a Commonwealth Statutory Human Rights Act or Charter, with the characteristics advocated in the Brennan Committee Report in 2009³² would most likely result in advantages and gains for the role of the PJCHR in reviewing national security laws - in particular, in having its scrutiny function and reports engaged with more substantively and seriously by the PJCIS, the Executive and the Parliament.

This is for the following reasons usually consequential upon, or included in, statutory charters of rights.

- (i) Greater community awareness of human rights creating over time a ***stronger human rights culture***, raising expectations that the Executive and Parliament engage more substantively with, and responsively to, human rights improvements to bills raised in PJCHR scrutiny reports.
- (ii) A statutory charter obligation for relevant ***administrative decision makers to act consistently with human rights obligations in the Charter***, providing incentives to refine legislation in its formative stages, through engaging with PJCHR scrutiny reports, to aid human rights compliant administrative decision making, including that involving direct Ministerial delegated decision making
- (iii) An interpretive obligation, involving a curial process, that as far as possible and consistent with Parliament's intention, ***that legislation and delegated legislation be interpreted in a manner consistent with rights included in a Charter of Rights***. The involvement of Chapter III courts applying by authority of a statutory charter human rights principles incorporated into the judicial activity of statutory interpretation should enhance the role of the PJCHR in its Human Rights Scrutiny Reports in providing a pre-legislative report assessment of how compatible the then bill is with Australia's international human rights obligations.
- (iv) The capacity of a court, when interpreting a Charter, but unable to reach a legislative interpretation consistent with human rights compliance (because of contrary Parliamentary intention) ***to issue a declaration of inconsistent interpretation or a declaration of incompatibility – thereby triggering an obligatory Executive response (written into the Charter)*** – for instance an obligation that the Commonwealth Minister and the Commonwealth Attorney General table in the Parliament (within a specified time frame) an expression of how it is intended (if anything) that the Executive will respond (eg legislatively, administratively) to the finding of inconsistent interpretation or incompatibility – would strengthen the initial PJCHR Human Rights Scrutiny Report role, but also enable the PJCHR to re-engage with any notified proposed legislative amendments advised to the Parliament.

³² *National Human Rights Consultation Report*, Commonwealth Attorney-General's Department September 2009. See Recommendations, pp xxix – xxxviii.

The importance of introducing a Commonwealth statutory Human Rights Act for the PJCHR in its review of legislation for human rights compliance is that the additional requirements (as above) over existing arrangements under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is in the creation of **further subsequent accountability triggers** – so that the initial review commentary of national security bills by the PJCHR would be given greater status, functionality, purchase and notice in relation to the PJCIS, the Executive and the Parliament – because of the political, advisory (non-binding) legal, and obligatory Parliamentary reporting consequences which would ordinarily be included in an enacted Commonwealth statutory Human Rights Act, as modelled on other statutory charters of rights.

I would be pleased to provide any further information or assistance to the Parliamentary Joint Committee on Human Rights in its *Inquiry into Australia's Human Rights Framework*.

Yours faithfully

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Links to relevant publications informing the above submission

Greg Carne, 'The Legal Rhetoric of Safety and Security: Improving National Security Law Process, Enactment and Content by Moderating Its Executive and Legislative Influence' (2023) 50 (1) *University of Western Australia Law Review* 168 **especially pages 205-211, 212-215, 233-235** at https://www.able.uwa.edu.au/_data/assets/pdf_file/0011/3687923/5.-Legal-Rhetoric-of-Safety-and-Security.pdf

Greg Carne, 'Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security – Constructing Or Constricting Terrorism Law Review' (2017) 43 *Monash University Law Review* 334 **especially pages 367-376** at https://www.monash.edu/_data/assets/pdf_file/0005/1343921/02_Carne-1.pdf

Greg Carne, 'Sharpening The Learning Curve: Lessons From The Commonwealth Parliamentary Joint Committee of Intelligence and Security Review Experience Of Five Important Aspects Of Terrorism Laws' (2016) 41 (1) *University of Western Australia Law Review* 1, **especially pages 36-37, 42, 47** at https://www.able.uwa.edu.au/_data/assets/pdf_file/0005/2958845/01-Carne.pdf