AUSTRALIA'S HUMAN RIGHTS SCRUTINY REGIME

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The Human Rights (Parliamentary Scrutiny) Act 2011 *(Cth) aims to improve the protection of human rights in Australia. It does so by requiring federal Bills and legislative instruments to be accompanied by a statement as to their compatibility with a number of international human rights conventions. The Parliamentary Joint Committee on Human Rights, also constituted by the Act, examines such statements and makes recommendations on the human rights compatibility of Bills. In this model of human rights scrutiny, there is no scope for Bills or regulations to be interpreted conformably with rights, or declared invalid, by courts. This article uses empirical analysis to explore whether this model has led to greater discussion about, and protection of, human rights in Australia. While the regime has contributed to the dialogue between lawmakers about the human rights impacts of proposed legislation, the model is failing to deliver better substantive human rights outcomes in federal Bills and legislative instruments. If Australia is committed to enhancing human rights protection, the scrutiny regime should be reinforced, or other measures, such as a charter of rights, must be contemplated.*

I INTRODUCTION

It has been almost a decade since Australia implemented a scrutiny regime to better protect human rights. It was intended to be a central plank in the federal framework by which public institutions seek to protect human rights, as Australia does not possess, at the federal level, a bill of rights or human rights Act. Under the regime, the role of assessing laws against human rights standards and protecting against infringements of those rights is vested exclusively in Parliament. This 'deliberative' model stresses the value of dialogue and debate, which is supposed to improve the quality of the legislation under discussion and to provide the people, through their representatives in the legislature, with a process of consultation on the human rights impacts of proposed legislation.

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Under Australia's regime, proposed federal laws are accompanied by a statement of compatibility ('SOC') on whether the proposed law is compatible with many of Australia's international human rights obligations. The proposed law and its accompanying statement are reviewed by the Parliamentary Joint Committee on Human Rights ('PJCHR'). In contrast with comparable models abroad where courts are empowered to strike down laws that impermissibly burden human rights or to interpret such laws conformably with rights, and with the exception of the limited role played by Australian courts in enforcing such principles, in Australia's regime it is Parliament alone that is capable of engaging in rights protection at the federal level.

Australia's regime was conceived in 2009, when the National Human Rights Consultation produced a report identifying a range of weaknesses with Australia's existing human rights protections, and made a number of recommendations.[1] Chief among these was the enactment of a national human rights Act, with provision for the courts to read down legislation and void executive action that impinged upon protected rights.[2] This recommendation was not adopted by the Rudd government, which reasoned that 'the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community'.[3]

The government instead adopted other recommendations, including those for enhancing scrutiny in the federal Parliament on human rights matters. This was implemented by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*Act*'), which came into force on 4 January 2012.

After the regime had operated for four years, two of us (George Williams and Daniel Reynolds) published an article containing an empirical analysis of its operation over that period in light of indicators of its effectiveness drawn from the intentions and goals that led to the enactment of the regime ('2015 Article').[4] At the time of its inception, the first goal of the regime was to enhance rights protection by improving the quantity and quality of parliamentary deliberation with respect to human rights, as well as by fostering community debate on human rights issues.[5] The intention, it was said, was to '[establish] a dialogue between

1 See Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation* (Report, September 2009).

2 Ibid xxxiv recommendation 18.

3 Robert McClelland, 'Launch of Australia's Human Rights Framework' (Address to the National Press Club of Australia, 21 April 2010) <https://nswbar.asn.au/circulars/2010/april/hr3.pdf>.

4 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 ('2015 Article').

5 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General) ('McClelland Second Reading Speech'); Commonwealth, *Parliamentary Debates,* House of Representatives, 22 November 2010, 3243 (Laura Smyth) ('Smyth Second Reading Speech').

the executive, the parliament and ultimately the citizens they represent'.[6]

A second goal was to substantively improve the extent to which the laws Parliament enacts respect and promote human rights.[7] That was to occur primarily through the PJCHR's scrutiny of proposed Bills and legislative instruments. Prior to Bills and legislative instruments becoming law, the PJCHR was expected to play 'a very powerful gate-keeping and scrutiny role … to ensure that our laws reflect our human rights obligations'.[8] It was to do this by assessing the human rights compatibility of proposed legislation and, where necessary, making findings that a Bill or legislative instrument fell short of the expected standard. While the reports of the PJCHR were not to be binding, it was nonetheless to be expected that Parliament would consider the PJCHR's findings, and in light of an adverse conclusion, give thought to whether the Bill or legislative instrument should be amended or retracted.

Throughout its life, questions have been raised about the regime's effectiveness and whether it is meeting the aspirations held for it at the time of its creation. The 2015 Article examined the regime's progress in realising those aspirations by measuring its effectiveness in four ways:

1. First, does the regime improve engagement and debate among parliamentarians about the human rights issues raised by proposed laws (the 'deliberative impact')?

2. Second, does the regime improve the quality of legislation from a human rights perspective, such as by leading to legislative amendments or retractions of rights-infringing Bills (the 'legislative impact')?

3. Third, does the regime promote broader community awareness and understanding of human rights issues in regard to proposed laws (the 'media impact')?

4. Fourth, is the regime succeeding in not giving rise to additional litigation or powers to judges in respect of human rights (the 'judicial impact')?[9]

The 2015 Article concluded that the goals of the scrutiny regime were not being

6 McClelland Second Reading Speech (n 5) 271.

7 Ibid; Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2010, 3240 (Graham Perrett) ('Perrett Second Reading Speech').

8 Perrett Second Reading Speech (n 7) 3240.

9 Williams and Reynolds, '2015 Article' (n 4) 472.

realised.[10] This article follows after a further four-year interval to identify the shifts and lessons that can now be learnt, and to make an informed assessment of whether human rights protection in Australia has been enhanced by the *Act*. As the second paper in this series to analyse this question, it is important that this article applies the same methodology and frame of reference as was employed in the 2015 Article. This provides a common base of analysis, thereby allowing comparisons to be made across the different time periods.

This article is divided into the following parts: Part II sets out the operation of the scrutiny regime, including an overview of its work since its inception in 2012 until Parliament's dissolution on 11 April 2019, and the trends that can be discerned from this. Part III details the results of our empirical analysis of the regime's deliberative and legislative impact, and the use of its findings in the media and the courts. Part IV evaluates those results and considers the extent to which the recommendations in the 2015 Article remain apposite. Part V presents our conclusions on the regime.

II OPERATION OF THE SCRUTINY REGIME

A *Design of the Legislation*

The *Act* requires that '[a] member of Parliament who proposes to introduce a Bill for an Act into a House of the Parliament … cause a statement of compatibility to be prepared in respect of that Bill'.[11] The SOC 'must include an assessment of whether the Bill is compatible with human rights'.[12] A like obligation is imposed in respect of disallowable legislative instruments.[13] The *Act* does not provide a list of human rights against which Bills and legislative instruments are to be assessed, but instead defines the relevant 'human rights' as being 'the rights and freedoms

10 Ibid 506. Many other academics, some cited later in this paper, have also examined the effectiveness of the Australian human rights scrutiny regime and its place in the context of constitutional rights protective models. See, eg, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) ch 8 ('*The New Commonwealth Model of Constitutionalism*'); Stephen Gardbaum, 'What's So Weak about "Weak-Form Review"? A Reply to Aileen Kavanagh' (2015) 13(4) *International Journal of Constitutional Law* 1040; 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; Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66(1) *University of Toronto Law Journal* 83 ('The Lure and the Limits of Dialogue'); Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Publishing, 2018) ('*Australia's Human Rights Scrutiny Regime*'); Alison L Young, *Democratic Dialogue and the Constitution* (Oxford University Press, 2017); Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020).

11 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(1) ('*Act*').

12 Ibid s 8(3).

13 Ibid s 9(2).

recognised or declared' in any one of seven listed international instruments.[14]

The *Act* establishes the PJCHR as a scrutiny body which is to examine Bills and legislative instruments for compatibility with human rights and to present its conclusions to Parliament.[15] In addition to its primary pre-legislative scrutiny function, the PJCHR's functions also include the examination of existing Acts for compatibility with human rights, and the holding of inquiries into human rights matters referred by the Attorney-General; however, these latter two functions have formed a comparatively slim part of the Committee's total work. The PJCHR draws its 10 members equally from both Houses of Parliament,[16] including five Government members, four from the Opposition, and one independent or minority group member.[17] From its inception until 11 April 2019, the PJCHR underwent 11 changes to its membership, seeing some 22 members pass through its ranks. The PJCHR has a secretariat usually consisting of a Committee Secretary and several research officers. Additionally, the PJCHR has been aided by four external legal advisers.[18] The PJCHR can call witnesses, conduct public or private hearings, appoint subcommittees and call for the production of documents.[19]

The regime gives no role to the judiciary. The Labor government expressly disavowed the idea that the regime was intended to create any legal rights capable of being enforced in courts, instead making clear that 'statements of compatibility are not intended to be binding upon a court or tribunal'.[20] This is inherent in the parliamentary scrutiny model, which is intended by its design to give responsibility for ensuring that rights are protected to Parliament alone.[21]

14 Ibid s 3(1). This provides an early example of an area of concern with the legislative design. As Dr Lisa Burton Crawford argues, the *Act*'s failure to enumerate the rights that are intended to be protected may actually limit the efficacy of rights discussion and protection given the breadth of material as compared with the time and resources of the PJCHR and Ministers: Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 143, 159. She states:

> The way in which rights are defined in the Act arguably diminishes its political clout, and hence its capacity to create a proper rights-respecting culture. The political cost for legislating incompatibly with a right is likely to correlate, amongst other things, to the extent to which that right is valued by the voting public. If the political cost of ignoring certain rights recognised by the Act is low, the legitimacy of the Act in its entirety is diminished.

15 *Act* (n 11) s 7.

16 Ibid s 5(1).

17 Commonwealth, *Parliamentary Debates,* House of Representatives, 4 July 2019, 14 cl 1(a) (Christian Porter) ('Porter Speech').

18 Professor Andrew Byrnes (from November 2012 to September 2014), Professor Simon Rice (from October 2014 to December 2015), Dr Aruna Sathanapally (from February 2016 to December 2017) and Dr Jacqueline Mowbray (from February 2018 to present).

19 Porter Speech (n 17) cls 1(g), (k).

20 Smyth Second Reading Speech (n 5) 3243.

21 This point has been emphasised elsewhere: see Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian *Human Rights (Parliamentary Scrutiny) Act 2011*' (2015) 34(1) *University of Queensland Law Journal* 7. For historical background see Fletcher, *Australia's Human Rights Scrutiny Regime* (n 10) 16.

B *Statements of Compatibility*

A central obligation imposed by the regime is the preparation and tabling of SOCs in respect of Bills and legislative instruments. In keeping with the regime's design as a deliberative model, an SOC prepared in respect of a Bill or legislative instrument is designed for use by parliamentarians and is not binding on any court or tribunal, while a failure to prepare an SOC 'does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth'.[22] Thus judicial consideration of SOCs is limited, but not excluded entirely, as courts can use relevant extrinsic materials in interpreting legislation in accordance with s 15AB of the *Acts Interpretation Act 1901* (Cth).[23] Despite the fact that no consequences flow from failure to prepare an SOC, compliance with this obligation has been extremely high.[24]

The quality of SOCs, however, has varied. An early paper analysing the 129 SOCs produced in the first six months of the regime's operation found that 'most SOCs are brief and many display a disturbing lack of analytical rigour'.[25] A later study found discrepancies in the rights literacy of government departments, with some SOCs falling short of acceptable standards of analysis.[26] Similar observations were echoed in early PJCHR reports.[27] In Adam Fletcher's survey of SOCs in the first three years of the regime, he concluded that while there had been a moderate yet steady improvement in the quality of SOCs from 2012 to 2015, over 50% of SOCs produced in each year remained substandard.[28] While the PJCHR later observed some improvement in the level of detail and robustness of reasoning in most SOCs,[29] the improvement appears to have been modest at best. As PJCHR member Senator Moore observed on 21 June 2018:

> What we have found over the period that I've been on the committee … is that way too often these statements of compatibility do not fulfil the expectations of professional ministerial offices. We get basic statements of compatibility … We

22 *Act* (n 11) s 8.

23 See Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) 5.

24 Williams and Reynolds, '2015 Article' (n 4) 474.

25 Ibid 474–5, quoting George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 81.

26 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.

27 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012* (Interim Report, Fourth Report of 2012, 20 September 2012) 10 [1.27]–[1.29] ('*PJCHR Fourth Report of 2012*').

28 Fletcher, *Australia's Human Rights Scrutiny Regime* (n 10) 102, 116.

29 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012–2013* (Report, December 2013) 13–4 [1.62]–[1.63] ('*PJCHR Annual Report 2012–13*'); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014–15* (Report, 5 December 2017) 28–30 [3.61]–[3.66].

> are not getting the quality of responses across the board that we should expect in a system that has been operational in our parliament for a number of years.[30]

This is a problem for which only Ministers and other proponents of legislation can be held responsible. The PJCHR has published clear expectations for SOCs,[31] has developed multiple resources to educate and inform the Australian Public Service about human rights obligations and preparing SOCs,[32] and often writes to Ministers and proponents to explain how SOCs might be improved.[33] However, the situation is unlikely to change. As Dr Lisa Burton Crawford recently noted:

> There is no legal cost for failing to comply with the *Parliamentary Scrutiny Act*. That is, there are no legal consequences for tabling a perfunctory SOC that does not reflect a genuine assessment of the rights-implication of a bill or legislative instrument. There are no legal consequences for failing to table a SOC at all.[34]

C *Parliamentary Joint Committee on Human Rights*

The vast majority of the PJCHR's work to date has fallen under the first of the three functions conferred on it by s 7 of the *Act*, that is, 'to examine Bills for Acts, and legislative instruments … for compatibility with human rights'.[35] It is worth noting that the PJCHR has two other functions under s 7 of the *Act*: 'to examine Acts for compatibility with human rights', and 'to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of Parliament on that matter'.[36] These functions have been

30 Commonwealth, *Parliamentary Debates*, Senate, 21 June 2018, 3634–5 (Claire Moore).

31 See, eg, *PJCHR Annual Report 2012–13* (n 29) 12–3 [1.58]–[1.61], citing Parliamentary Joint Committee on Human Rights, *Practice Note 1* (Practice Note, September 2012) (now superseded).

32 Hutchinson (n 10) 103, citing Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.

33 For a recent example, see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 13 of 2018, 4 December 2018) 4–6 [1.11]–[1.22] ('*PJCHR Report No 13 of 2018*').

34 Crawford (n 14) 149.

35 *Act* (n 11) s 7(a).

36 Ibid ss 7(b)–(c).

exercised infrequently: four times[37] and one time[38] respectively. As for s 7(c), the Attorney-General has only once used his power to refer a matter to the PJCHR for consideration. This was the *Freedom of Speech Inquiry*, initiated by reference on 8 November 2016. The resulting report, published on 28 February 2017, attracted widespread public attention and debate and precipitated amendments to the procedures of the Australian Human Rights Commission ('AHRC').[39] While the PJCHR should be acknowledged for these inquiries, which involved significant effort on the part of the PJCHR members and secretariat and culminated in well-considered, thoughtful reports, this article focuses on the legislative scrutiny function of the PJCHR.

In its legislative scrutiny function, the PJCHR has produced in the period 4 January 2012 (the date the *Act* commenced) to 11 April 2019 a total of 88 reports assessing 1,495 Bills and 10,336 legislative instruments. In that period there were 233 instances where the PJCHR found that legislation was, was likely to be, or may be, incompatible with human rights.[40]

In spite of the PJCHR's impressive output of reports and analysis, three trends continue to undermine its effectiveness. We discuss these in turn.

1 *Opacity of Legislative Instruments Considered*

First, in August 2014, the PJCHR reformatted its report template such that it no longer published lists of the legislative instruments — as opposed to Bills — that it considered. Before the change, each PJCHR report contained an appendix providing the full list of legislative instruments considered by the PJCHR, along with their Federal Register of Legislative Instrument numbers, and importantly, a key to show which instruments had been commented on, which had been deferred for later consideration, which had become the subject of correspondence to relevant Ministers, and which had simply not been considered at all.

37 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (Final Report, Fifth Report of 2013, 20 March 2013); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation* (Ninth Report of 2013, 19 June 2013); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (11th Report of 2013, 27 June 2013); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (Final Report, 16 March 2016).

38 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act (1975) (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Inquiry Report, 28 February 2017) ('*Freedom of Speech Inquiry*').

39 See generally *Human Rights Legislation Amendment Act 2017* (Cth).

40 Statistics compiled by the authors by reference to all PJCHR reports and to the list of legislative instruments on the Federal Register of Legislative Instruments.

The removal of this appendix coincided with a decline in the percentage of legislative instruments that were subjected to scrutiny by the PJCHR.[41] There are several possible explanations for this: one is that the PJCHR grew less attentive to legislative instruments. Another is that a lower proportion of legislative instruments were, at the pre-scrutiny or 'triage' stage, identified as requiring further scrutiny (because they were merely machinery or procedural in nature, for instance). But without an appendix it is impossible to assess whether either of these explanations is correct. The result is a diminution of accountability, which, as Renuka Thilagaratnam — a former research officer for the PJCHR — concludes, 'is a troubling development, particularly as the government not infrequently seeks to give effect to controversial policies via delegated legislation'.[42]

2 *Delay in Producing PJCHR Reports*

Secondly, many Bills come to a vote, and many legislative instruments reach their disallowance date,[43] before the PJCHR has reported on their compatibility with human rights. The effect is to remove any impact the PJCHR's findings might have upon legislative outcomes, undermining the efficacy of the deliberative model.

One possible explanation for this is the often tight turnaround between when a Bill is first tabled and when it comes to a vote. As Zoe Hutchinson, a member of the PJCHR secretariat, explains:

> As the PJCHR does not receive bills until they are introduced into parliament, the PJCHR is engaged in a race to undertake its full analytical, information gathering and reporting processes (which frequently include complex human rights issues) before the passage of legislation.[44]

The result is that where the government hurries a Bill through Parliament within a few weeks, the PJCHR will be unable to adequately discharge its scrutiny function before the Houses vote.

Another contributing factor is that the PJCHR frequently defers its consideration of some Bills and legislative instruments, often expressing no concluded view until long after the Bill has been enacted. This can occur for many reasons, including because the Bill is particularly complex or because it relates to an area in respect of which the PJCHR is carrying out a broader inquiry. Since the *Act*'s

41 Renuka Thilagaratnam, 'The PJCHR, Legislative Instruments … and Some Nitpicking', *Human Rights Scrutiny Blog* (Blog Post, 30 August 2014) <https://hrscrutiny.wordpress.com/2014/08/30/the-pjchr-legislative-instruments-and-some-nitpicking/>.

42 Renuka Thilagaratnam, 'Legislative Instruments: 2012–2014', *Human Rights Scrutiny Blog* (Blog Post, 23 December 2014) <https://hrscrutiny.wordpress.com/2014/12/23/legislative-instruments-2012-2014/>.

43 Twelve out of the 68 legislative instruments, as distinct from Bills, reached their disallowance date before the PJCHR report.

44 Hutchinson (n 10) 87.

inception, the PJCHR has deferred its consideration of, on average, 5.7 Bills or instruments per report, and often defers its consideration of a given Bill or instrument for multiple consecutive reports.

As explained in the 2015 Article, the result in some cases has been to rule out the possibility of the PJCHR's final report having *any* effect. For example, the PJCHR deferred over three consecutive reports its consideration of the National Security Legislation Amendment Bill (No 1) 2014 (Cth). The Bill passed both Houses months before the PJCHR issued its final report concluding that the measure was incompatible with the prohibition against torture.[45]

In the case of the Bill considered above, Senator Wright raised this concern in the Senate before the PJCHR had issued its finding:

> Similarly, there is concern about the speed with which this legislation has been introduced to parliament and the fact that we have not yet seen some of the significant amendments. … It also means that the parliamentary watchdog on human rights, the Parliamentary Joint Committee on Human Rights, has not been able to assess the human rights implications of this legislation as yet. In my view, it is likely that many of the provisions of this bill will be found to be incompatible with various human rights in Australia. It is likely that the committee will actually make the same finding at the end of its process. But it is also likely that the government and the opposition will have dispensed with this and will pass the bill before it has even been canvassed by the human rights committee, making a mockery of the process that is designed to give appropriate consideration to human rights in the law-making of our national parliament.[46]

In response to this point, Hutchinson has observed that in 96% of cases the PJCHR will at least have published an *initial* human rights analysis prior to passage of the Bill.[47] Such initial reports, she continues, are not infrequently 'utilised by members of parliament as a resource for analysis in relation to human rights issues'.[48] While this may be accepted, the difficulty with the initial analyses is that they deliberately eschew firm conclusions about whether a measure is or is not compatible with the rights in question. While such interim analyses might *inform* parliamentarians, the preliminary and tentative conclusions they contain have not, so far as we are aware, prompted any serious *amendment* to rights-infringing legislation.

Another source of delay is that Ministers often do not respond to the PJCHR's

45 Williams and Reynolds, '2015 Article' (n 4) 477–8, citing Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44th Parliament: Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (Report, 24 November 2014) 52 [2.94].

46 Commonwealth, *Parliamentary Debates*, Senate, 23 September 2014, 6778 (Penny Wright).

47 Hutchinson (n 10) 87–9.

48 Ibid 89.

initial reports until after the voting date has passed. This was a clear source of consternation for PJCHR members earlier in the PJCHR's life, with former PJCHR member Penny Wright lamenting (in relation to the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth)):

> This is becoming a common occurrence in this parliament … Those speaking already, who are making assertions about the fact that this bill will not affect Australia's human rights, have not had the benefit of that parliamentary committee's consideration.[49]

Since August 2016, the PJCHR has taken additional measures to address this issue. When the PJCHR prepares an initial report and seeks further information from the proponent of the legislation, it now sets a deadline for the proponent's response, after which time it 'may' conclude its examination in the absence of the further information sought. A register of correspondence is now also maintained on the PJCHR's website recording whether responses have or have not been received. Since instituting these measures, the percentage of responses received within the requested time period has improved by 30%.[50]

While this is a welcome initiative, it has not entirely remedied the issue: since August 2016 there have nonetheless been 49 occasions where the PJCHR concluded that a Bill or legislative instrument was or might be incompatible with human rights at a time when the relevant Bill or legislative instrument had already come to a final vote. In addition, the PJCHR very rarely follows through on its threat to conclude a report in the absence of a response from the proponent by the deadline: of the 104 late responses listed on the PJCHR's online correspondence register (dating from approximately October 2016 to 11 April 2019), we have been able to identify only three examples where the PJCHR in fact went ahead and published its concluding report notwithstanding the lack of response.[51]

As discussed further below, the preferable procedure in such cases of ministerial silence would be for the PJCHR to proceed to its own finding of compatibility or incompatibility despite the absence of information in the SOC or in the Bill itself, effectively shifting the burden of proving that the Bill is compatible with human rights to the person who proposed it. A proponent of legislation should not be able to avoid PJCHR scrutiny simply by refusing to engage with it.

Another solution, considered in more detail in Part IV below (and endorsed by Hutchinson),[52] is to introduce either legislation or a new standing order that would

49 Commonwealth, *Parliamentary Debates*, Senate, 16 March 2015, 1442 (Penny Wright).

50 Hutchinson (n 10) 89.

51 Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (Cth); Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth); Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (Cth).

52 Hutchinson (n 10) 90.

have the effect of preventing the passage of legislation prior to the PJCHR's final report.

3 *Inconclusive Findings*

Another issue is that the PJCHR's conclusions are often framed in a way that avoids making direct findings that a measure *is* incompatible with any human right. Rather than stating that the PJCHR concludes that the measure is incompatible with the right in question, a typical conclusion for rights-infringing Bills or legislative instruments is as follows: 'The committee *is unable to conclude* that the measure *is compatible* with the right to privacy.'[53]

The difficulty with the PJCHR's practice of expressing a conclusion in terms that it is 'unable to conclude' that the measure is compatible with human rights is that it is premised on a view that the proponent of the legislation has no burden of persuasion. The intention behind a deliberative model such as Australia's human rights scrutiny regime is that it is a means whereby Parliament holds the executive to account. That function is not discharged if accountability can be avoided by failing to properly engage with the PJCHR's questions, as in cases where the PJCHR 'notes that the minister's response did not fully address the committee's inquiries in relation to these complex issues'.[54] That is precisely the kind of case where an adverse conclusion should be squarely stated, rather than a mealy-mouthed non-conclusion.

On other occasions, the PJCHR will state that the broad scope of the legislation means that rights may be impacted, but will refrain from reaching a conclusion on compatibility until the Bill has passed and a legislative instrument, which may change the scope of the rights-infringing power under the Bill, has been made. An example of this can be seen in the PJCHR's consideration of the Migration Amendment (Streamlining Visa Processing) Bill 2018 (Cth):

> The preceding analysis indicates that, noting the broad scope of the proposed power under section 46(2B), there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with the right to privacy. *However, setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of the legislative instrument once it is received*.[55]

53 This example taken from the Committee's consideration of the Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth): see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 1 of 2019, 12 February 2019) 97 [2.88] (emphasis added).

54 *PJCHR Report No 13 of 2018* (n 33) 89 [2.261]–[2.262], in relation to the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth).

55 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 2 of 2019, 2 April 2019) 207 [2.124] (emphasis added).

Once again, the more often that the PJCHR resorts to such formulations as these, the less often it issues direct conclusions that a Bill or instrument is or may be incompatible with human rights, as Figure 1 below shows.

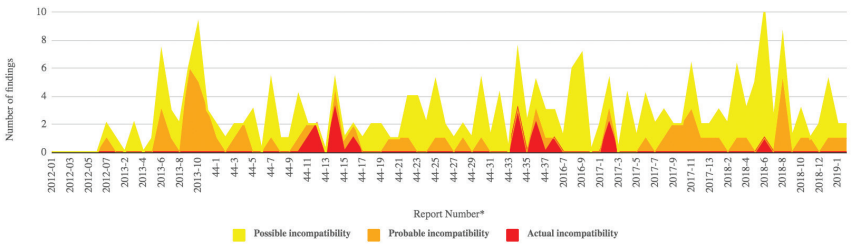
Figure 1 sets out, in three categories, the findings of incompatibility made by the PJCHR since its first report in August 2012. The three categories of findings are as follows:

1. 'Possible incompatibility': when phrasing such as 'may be incompatible with human rights', or 'the Committee is unable to conclude that the measure is compatible with human rights', is used.

2. 'Probable incompatibility': where the PJCHR used language such as 'likely to be incompatible'.

3. 'Actual incompatibility': where there was an unequivocal finding by the PJCHR that a Bill or instrument was incompatible with human rights.

Figure 1. Findings of Incompatibility



*In October 2016, the PJCHR returned to its original practice of numbering reports by reference to year rather than to Parliament number.

The results above are graphed cumulatively. For instance, it can be seen that the 11th report of 2017 contained three findings of 'probable incompatibility' and three findings of 'possible incompatibility'.

It can immediately be seen that in the 34th, 36th, and 38th reports of the 44th Parliament, the PJCHR made a number of findings of actual incompatibility: three, two and one respectively. Since that time, such findings have become vanishingly rare, and indeed, of the three more recent findings of actual incompatibility (in the second report of 2017 and the sixth report of 2018), one was merely a restatement of an earlier such finding in relation to a measure that was being reintroduced,[56] and a second was one the PJCHR was compelled to make, as it concerned the limitation of an absolute human right from which no derogation is permitted

56 Namely, the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 (Cth): see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 6 of 2018, 26 June 2018) 49–62 [2.16]–[2.58].

under international law.[57] In the third, the PJCHR did what we consider it should do routinely: it found that the Minister had not provided sufficient information to justify the burden on rights and proceeded to positively conclude that the instrument was an unjustifiable limitation on the right in question.[58]

The rest of the time, however, the PJCHR has taken the 'unable to conclude' path. The growth of the yellow area in the graph over time shows that this is now the norm.

III IMPACT OF THE SCRUTINY REGIME

A *Deliberative Impact*

A central aim of the scrutiny regime is to improve deliberation within Parliament on Bills and legislative instruments insofar as they intersect with human rights. In order to assess the effectiveness of the scrutiny regime in this regard, we examined its deliberative impact, meaning the extent to which parliamentarians engage with, debate or bring up human rights issues as a consequence of the regime. The notion of deliberative impact is especially important for those who advocate the concept of 'deliberative democracy', which describes a system in which public discussion and debate (in particular, debate between proponents of legislation) is designed to produce fairer and more legitimate outcomes for society as a whole. As Levy and Orr argue, however, without carefully designed laws (or political will to make deliberation effective), deliberative decision-making in practice can sometimes fail to live up to deliberative democracy's aims.[59]

Two issues arise in ascertaining deliberative impact: first, some aspects are simply not measurable — for instance, there is no way of knowing the extent to which the private thoughts or conversations of Members of Parliament are shaped by the regime; and secondly, our methodology focuses on the kinds of deliberation that can be attributed directly to the regime. So while, for example, a parliamentarian might have mentioned human rights on a more frequent basis since the regime began, that increase cannot be causally ascribed to the regime, as there may be any number of reasons for a Member's increasing awareness of or interest in such issues.

Two aspects of deliberative impact are ascertainable and measurable. The first

57 The right was the prohibition on retrospective criminal laws, and the Bill was the Privacy Amendment (Re-Identification Offence) Bill 2016 (Cth): see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 2 of 2017, 21 March 2017) 90–2 [2.123]–[2.137] ('*PJCHR Report No 2 of 2017*').

58 The right was the presumption of innocence, and the instrument was the *Jervis Bay Territory Marine Safety Ordinance 2016* (Cth): see *PJCHR Report No 2 of 2017* (n 57) 96–104 [2.149]–[2.193].

59 Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 143–4, 183.

is the extent to which the regime has caused proponents of legislation to more fully justify their policies and Bills from a human rights perspective ('deliberative impact within the executive'). The second is the extent to which it has caused the broader cohort of parliamentarians to discuss and debate human rights issues on a more regular basis ('deliberative impact within Parliament').

As to the deliberative impact within the executive, we have made mention already of the most visible example of this: SOCs. As discussed in Part II(B), while virtually all Bills and proposed legislative instruments now include an SOC, the quality of these has been repeatedly called into question. Another — less visible — kind of deliberative impact within the executive can also be identified. This is the 'feedback loop' whereby, through correspondence concerning particular Bills and instruments, proponents of legislation and the PJCHR engage in a human rights dialogue, potentially leading to 'an overall improvement in government articulation of the reasons for the adoption of many policies'.[60] An indicator of this effect is the multitude of correspondence that the PJCHR has received from proponents of legislation in response to its concerns, which the PJCHR publishes in the appendix to each of its reports. Since October 2016, it has elicited 137 such letters, mostly from Ministers, and typically at least two pages long. Because these letters are produced in response to specific questions in relation to Bills and legislative instruments, they tend to be more specific and more considered than the original SOC, resulting in 'a more detailed, reasoned explanation of the proportionality of the limitation on human rights that forms part of the public record'.[61]

The other kind of deliberative impact extends beyond the proponents of legislation to the broader cohort of parliamentarians. We have compiled a list of every Hansard reference since the regime's inception to either an SOC or to the PJCHR, which we have then sorted into substantive and non-substantive references,[62] adopting a methodology used by Paul Yowell in the course of comparable research on the UK Joint Committee on Human Rights.[63] These statistics present an overview of deliberative impact that covers the life of the regime until 11 April 2019. The

60 Andrew Byrnes, 'Human Rights under the Microscope: Reflections on Parliamentary Scrutiny' (Speech, Law Society of South Australia, 11 December 2014) 11 <http://archive.ahrcentre.org/sites/ahrcentre.org/files/mdocs/Byrnes%20--%20%20PJCHR%20-%20handout%20for%20Adelaide%20talk%20December%202014%20revised.pdf>.

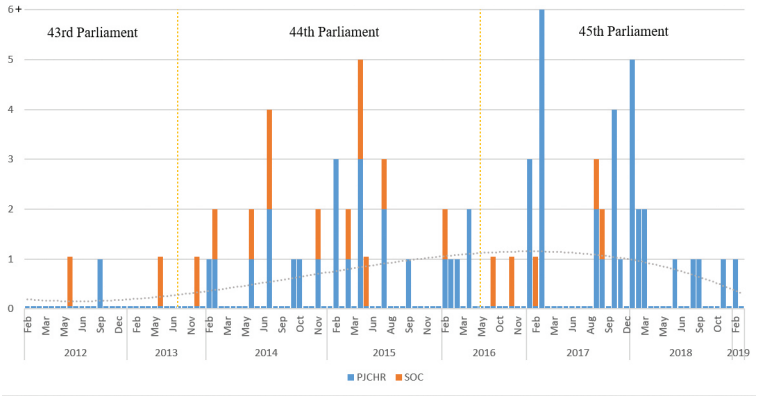
61 Hutchinson (n 10) 96.

62 Substantive references include any mention in Parliament relating to: the specific content of a PJCHR report or an SOC; the influence of a PJCHR report or an SOC on an issue; a finding by the PJCHR; and the effect of a PJCHR report on legislative outcomes. Non-substantive references include: a mere acknowledgement of someone as a member of the PJCHR; generic praise for the PJCHR's work; indications that the PJCHR will scrutinise or has scrutinised a Bill; a mention of the PJCHR as one of a number of bodies that share a certain view; the tabling statement of each PJCHR report (which are delivered as a matter of PJCHR practice and merely reiterate the views contained in each report); and a reference to an SOC in a first reading speech (rather than a second reading speech), as these simply list the features of a Bill without substantive comment.

63 Paul Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 141, 142–3.

number of substantive references per sitting week to SOCs or to the PJCHR in the House of Representatives since the start of 2012 are as follows:

Figure 2. Deliberative Impact (House of Representatives)

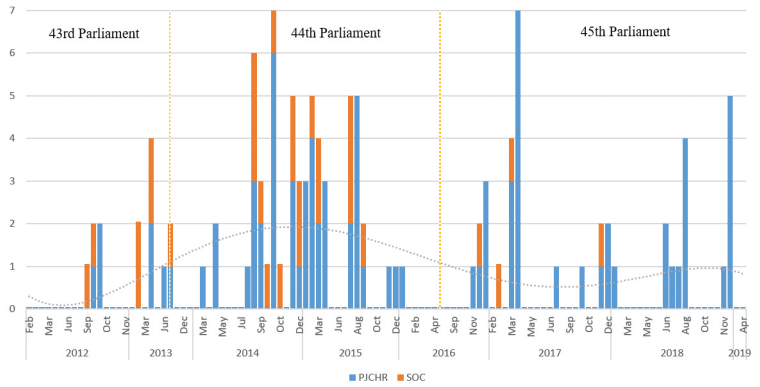


This graph shows that although deliberative engagement with both the PJCHR and SOCs has continued in the past three years, it has recently plateaued, especially in the past year. The exception to this is the last sitting week in February 2017, when the PJCHR handed down its report in the *Freedom of Speech Inquiry*, which was the subject of fervent debate in both Houses.[64] Even taking that into account, the total number of substantive mentions of either the PJCHR or SOCs from 4 January 2012 to 11 April 2019 in the House was 49, equating to 0.6 mentions per month. This is not a high number, especially considering the quantity of speeches that are given in the House every sitting day. What is more, substantive mentions of SOCs have disappeared entirely since the end of 2017. This might suggest that in the early years of the regime, some parliamentarians considered that there were real points to be made by reference to SOCs, but that in recent times SOCs have been seen as of little use.

In the Senate, there was slightly less discussion (particularly in the early years of the regime), with a total of 41 substantive mentions over the same period (or 0.5 mentions per month):

64 See *Freedom of Speech Inquiry* (n 38).

Figure 3. Deliberative Impact (Senate)



As can be seen, substantive mentions of the regime have reduced to a trickle in the last two years, and substantive mentions of SOCs have disappeared entirely since the end of 2017. As in the 2015 Article, it is worth noting that these substantive references can largely be attributed to a few outspoken advocates for the regime: especially Graham Perrett MP, Senator Nick McKim and Senator Rachel Siewert (the first two of whom are current PJCHR members). Putting those contributions to one side — or indeed, even including them — the figure above paints a meagre picture of the impact that the PJCHR and SOCs are having on parliamentary deliberations, especially in the 45th Parliament.

B *Legislative Impact*

Another aim of the regime is to improve the degree to which laws enacted by Parliament respect and promote human rights. This we consider under the rubric of 'legislative impact', meaning the extent to which the regime results in improvements from a rights perspective to the legislative output of Parliament (or the executive, in the case of legislative instruments). Examples include where a PJCHR report causes a rights-infringing Bill to be amended, retracted or voted down.

Measuring the legislative impact of human rights scrutiny regimes is a difficult exercise, as the effect on actual legislative outcomes may not be susceptible to quantitative analysis. As Aileen Kavanagh has pointed out, in summarising earlier research in the UK context:

> Meg Russell and Meghan Benton have documented the enormous methodological and other challenges facing scholars who wish to gather systematic information of this kind. As they observe, 'much of Parliament's influence is subtle, largely invisible, and frequently even immeasurable'. Similar problems beset any assessment of the impact and influence of parliamentary oversight committees

> such as the JCHR.[65]

One aspect of legislative impact that is difficult to measure is the extent to which there has been an overall lift in the quality of legislation in the period since the regime began. Leaving to one side the difficulty of causally attributing such improvements (or deteriorations) to the regime, there are few meaningful metrics by which to measure the quality of legislation. Hence, we have not sought to canvass this aspect of legislative impact, though we do note that the period since 2012 has seen exceptionally high numbers of rights-infringing Bills passed into law.[66] This trend was confirmed recently in the *Legal Rights Audit 2018* published by the Institute of Public Affairs.[67] That report identifies 358 current provisions of federal Acts breaching one of four rights: the presumption of innocence, natural justice, the right to silence and the privilege against self-incrimination.[68] The report concludes that 'traditional legal rights are being persistently undermined in federal legislation'.[69] As one of the authors of the report, Morgan Begg, said in a statement issued concurrently with the report:

> The erosion of the fundamental legal rights of all Australians have accelerated under federal law in 2018 … The fact that there has been another substantial increase in legal rights breaches proves it is a systemic problem.[70]

Other effects of the regime on legislative outcomes can be measured. It is often possible to conclude that a PJCHR report had *no* influence on a legislative outcome, for example where a Bill or legislative instrument was enacted in identical form to what had been originally proposed (despite a PJCHR report finding incompatibility), or where a Bill or legislative instrument either passed, lapsed, failed, or was withdrawn, before the PJCHR managed to produce a report on it. However it is much harder to say with any certainty that a PJCHR *did* have an influence on a legislative outcome. As Francesca Klug and Helen Wildbore state (again in the UK context):

> [I]t is very difficult to assess the extent to which JCHR reports have been directly

65 Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 115, 131 ('A Hybrid Breed of Constitutional Watchdog'), quoting Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Conference Paper, Political Studies Association Legislative Studies Specialist Group Conference, 24 June 2009) 1.

66 See, eg, George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *Queensland University of Technology Law Review* 19.

67 See Morgan Begg and Anis Rezae, Institute of Public Affairs, *Legal Rights Audit 2018* (Report, December 2018) <https://ipa.org.au/wp-content/uploads/2019/01/IPA-Report-Legal-Rights-Audit-2018.pdf>.

68 Ibid 4.

69 Ibid 15.

70 Morgan Begg, 'New Study Finds 358 Breaches of Fundamental Legal Rights in Federal Laws' (Media Release, Institute of Public Affairs, 25 January 2019) <https://ipa.org.au/ipa-today/new-study-finds-358-breaches-of-fundamental-legal-rights-in-federal-laws>.

> responsible for amendments to Bills. Even where there is a connection between what the JCHR suggests and an amendment, it is not always possible to assess how crucial the Committee's proposals have been or whether there were other more significant sources or reasons for an amendment.[71]

Kavanagh, assenting to Klug and Wildbore's point, adds the following: 'Moreover, when the Government frames its legislative proposals in anticipation of the adverse reaction of a committee, this influence can be "relatively hidden, or even wholly invisible".'[72]

It is also true that, beyond the formal relationship between Ministers and the PJCHR, the PJCHR may be influencing parliamentarians 'behind the scenes' through its work or through discussions with its members. All parliamentary committees, beyond their official functions, operate within the informal framework of Parliament and the deliberative impact of any committee may not necessarily be recorded in public statements.[73] For this reason, we have not attempted to identify every instance where the PJCHR's work has had an impact on legislative outcomes. Rather, we have adopted a generous dichotomy that gives the PJCHR the benefit of the doubt, sorting our findings into instances where it can categorically be said that a finding of incompatibility (actual, probable or possible) had *no* influence on legislative outcomes, and instances where it is possible that it had at least some influence.

From the regime's inception to 11 April 2019, there were 227 instances where the PJCHR found that the legislation before it either was, or at least may be, incompatible with human rights.[74] Applying the dichotomy above, the record shows that 65% of the time (or on 147 occasions), that finding had no impact on the ultimate outcome of that legislation's passage. Out of those 147 occasions, 139 of them are explained by the delay factor, as the PJCHR had not yet handed down its concluded report on the relevant Bill or legislative instrument by the time it came to a final vote. The remaining eight Bills were passed without amendments after the PJCHR's report. These statistics are very similar to those

71 Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] (3) *European Human Rights Law Review* 231, 241.

72 Kavanagh, 'A Hybrid Breed of Constitutional Watchdog' (n 65) 136, quoting Meg Russell et al, 'A Measurable Difference: Assessing the Westminster Parliament's Impact on Government Legislation, 2005–2010' (Conference Paper, European Consortium of Political Research Parliaments and Legislatures Conference, 24–7 June 2012) 2.

73 Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *University of New South Wales Law Journal* 40, 71–2.

74 Our analysis of the Committee's legislative impact looks only at these final conclusions, rather than the preliminary comments it makes from time to time as well. This is because the preliminary comments are subject to change, and so are not a reasonable basis upon which Parliament should be expected to respond. Further, preliminary comments are not always fully informed (for example, because of deficiencies in the statement of compatibility), and for this reason frequently consist of an invitation by the Committee to the relevant Minister to supply further information. In any event, the preliminary conclusions tend to ultimately be consistent with the final conclusions. We have also excluded from this inquiry six Bills that related only to s 7(b) inquiries into existing law.

we presented in the 2015 Article, demonstrating how the PJCHR's propensity to defer its consideration of proposed legislation, and its failure to issue concluding reports in the absence of timely responses from legislation proponents, continues to undermine its effect on legislative outcomes.

As to the 80 instances to date where the PJCHR may have had an impact, these fall into three categories: instances where a report was delivered and the relevant Bill or instrument was passed with amendments introduced after the report (28 occasions); instances where a report was delivered and the relevant Bill or instrument failed in Parliament or was withdrawn (11 occasions); and instances where a report was delivered and the relevant Bill or instrument lapsed (41 occasions, 18 of which were Bills that lapsed at the dissolution of Parliament on 11 April 2019).

In some of these cases, subsequent amendments to a Bill have appeared to have no connection with the recommendations made by the PJCHR. For instance, in its concluding report on the Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (Cth), the PJCHR concluded that 'the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets' may not be compatible with the right to social security, the right to privacy and family and the right to equality and non-discrimination.[75] The amendments subsequently passed by the Senate to the Bill were directed at moving the content of some legislative instruments made under the primary legislation into the legislation itself. Not one of the amendments appears responsive to the concerns raised by the PJCHR, and indeed Senator Siewert raised concerns that the amendments exacerbated the impact of the cashless debit card measures.[76]

In other cases, while amendments made to a Bill or instrument were consistent with recommendations made by the PJCHR, the extent to which the PJCHR was in fact a catalyst in these outcomes is elusive. For instance, the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth), which was subject to a finding of probable incompatibility by the PJCHR on 4 December 2018, was passed on 6 December 2018 with 173 amendments (all by government).[77] The PJCHR's report raised concerns about the powers given to the Director-General of Security under s 317L to require a telecommunications provider to do 'acts or things' in connection with any or all of the provider's broadly defined 'eligible activities'.[78] These listed acts or things included, for

75 *PJCHR Report No 13 of 2018* (n 33) 41–8 [2.15]–[2.41].

76 Commonwealth, *Parliamentary Debates*, Senate, 11 September 2018, 5978–80.

77 'Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6195>.

78 *PJCHR Report No 13 of 2018* (n 33) 52 [2.148].

example, giving access to a customer's equipment or software.[79] The PJCHR in its human rights analysis on 17 October 2018, prior to the Minister's response, noted that the Bill may limit the right to privacy, the right to freedom of expression and the right to an effective remedy.

The Bill was subsequently amended so as to include provisions requiring the Director-General of Security to notify the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman after it exercised the powers given by the Bill, and so as to list matters to which the Director-General of Security must have regard before concluding that the exercise of power is reasonable and proportionate. These amendments appear to have originated in dialogue with the Parliamentary Joint Committee on Intelligence and Security ('PJCIS'), to which the Bill was also referred. While the explanatory memorandum does not reference the PJCHR, it does contain a lengthy discussion of the right to privacy, including reference to art 17 of the *International Covenant on Civil and Political Rights* ('ICCPR') and the interpretation of 'reasonableness' by the United Nations Human Rights Committee. None of the 10 Members of Parliament who spoke on the second reading of the Bill referenced the PJCHR, although several referenced the PJCIS. Even the proposed amendments by Labor in the Senate were described as 'minor … amendments … to make the amended bill reflect the unanimous recommendations of the Parliamentary Joint Committee on Intelligence and Security'.[80]

In short, all available materials suggest that the rights-enhancing amendments that were made to the Bill were attributable to the PJCIS, not the PJCHR.[81] Yet on the dichotomy we have adopted above, cases like this are included as examples of the PJCHR possibly having had an impact, as that possibility cannot be categorically ruled out.

It must be noted that on at least one occasion a PJCHR report has caused the government to revisit a Bill considered by the PJCHR *after* the Bill was passed into law. In 2015, the PJCHR raised concerns about the Norfolk Island Legislation Amendment Bill 2015 (Cth), which limited the right to equality and non-discrimination and the right to social security, by denying social security to New Zealand citizens who were Australian permanent residents on Norfolk Island. Although the Bill was passed into law with that discriminatory provision retained, the government amended this shortly afterwards to remove the offending

79 Ibid 53–4 [2.151].

80 Commonwealth, *Parliamentary Debates*, Senate, 6 December 2018, 9771 (Penelope Wong, Leader of the Opposition in the Senate).

81 This conclusion accords with Grenfell and Moulds' analysis of the differing impacts that parliamentary committees can have. In particular, they cite the PJCIS as a committee which, on account of its 'bipartisan membership and close, respected relationship with key government agencies and departments' is often treated with greater deference by Parliament and the executive: Grenfell and Moulds (n 73) 71. It can certainly be said that, notwithstanding its bipartisan membership, the PJCHR is yet to acquire the level of reputation and influence of that the PJCIS enjoys.

provision,[82] apparently in response to the PJCHR's concerns.[83] While a welcome result, this appears to be a rare case, as we are unaware of any other examples of a PJCHR report on a Bill leading to amendments of that same Bill after it was enacted.

Such examples suggest that the Committee may have in fact had very limited impact upon legislative outcomes. This is confirmed by observations made by others connected to the scheme. According to Byrnes, the external legal adviser to the PJCHR for nearly two years, 'the PJCHR's clear findings of incompatibility (even when accompanied by boarder [sic] concern) have not been sufficient to change the minds of the executive on issues that are seen as being of fundamental (party) political importance'.[84]

Another report in 2014 comparing the PJCHR's performance with its ACT counterpart states the lack of impact in starker terms: '[The PJCHR's] reports have not to date resulted in any amendments to bills in the course of their passage through the Parliament'.[85] A more recent assessment contained the observation that 'the Government at times places a low priority on responding to the PJCHR's concerns, and by extension does not regard its work as integral to the legislative development process'.[86]

There has, however, been at least one occasion where it is possible to say with some certainty that the PJCHR's reporting has directly resulted in reform. In its sixth report of 2013, the PJCHR assessed a legislative instrument called the *Australian Public Service Commissioner's Directions 2013* (Cth), which among other things, provided for the gazetting of certain employment decisions in relation to Australian Public Service staff, including decisions relating to engagement, promotion and termination.[87] The PJCHR argued that this requirement engaged the right to privacy and, in the event that a person's employment was terminated because of mental or physical incapacity, rights contained in the *Convention on the Rights of Persons with Disabilities.*[88]

82 See *Territories Legislation Amendment Act 2016* (Cth) sch 1 item 1.

83 See below Part III(E).

84 Byrnes (n 60) 11. The effect of party discipline on the potential for a political rights review model to be effective is considered in more detail in Fergal F Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69(2) *Parliamentary Affairs* 213.

85 ACT Human Rights and Discrimination Commissioner, *Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004 by the ACT Human Rights and Discrimination Commissioner* (Report, 2014) 13.

86 Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 31, 45.

87 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 18–21 March 2013* (Sixth Report of 2013, 15 May 2013) 133 [2.19].

88 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). See ibid 134 [2.21].

Several years later, and after extensive correspondence, the PJCHR's concerns were at last acted upon. As the PJCHR's most recent annual report notes:

> On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that the current arrangements of publishing terminations of employment for breaching the Code of Conduct in the Gazette should not continue. The Commissioner stated that he intended to establish a new secure database of employment terminations for breaches of the Code of Conduct that would not be accessible to the general public.[89]

Byrnes acknowledges that the PJCHR has had small wins like these from time to time, but maintains the view that they are the exception rather than the norm:

> The PJCHR's adverse comments on legislation appear to have had only a marginal direct impact, but on some occasions they have contributed to a groundswell that has led to the amendment or abandonment of proposed legislation …[90]

This less direct 'groundswell' effect needs to be kept in mind. On occasion, a PJCHR report garners enough media attention (see Section D below) to contribute to a change of tide in the public debate, as in fact occurred in 2014 when the PJCHR concluded that the government's 'learn or earn' budget measures[91] were incompatible with human rights, a report which was picked up by advocacy groups, media and the major political parties.[92] One week later, realising that it lacked the numbers to get its budget measures through, the government split the package into four separate Bills, of which only two were eventually enacted. Unsurprisingly, the government did not credit the PJCHR when it announced its decision to repackage the Bill.

Another less direct way that the PJCHR's work can have positive effects is where its members have 'a "quiet word" outside the official committee report to persuade the government to change legislation in order to avoid a negative committee report'.[93] This kind of influence, though harder to detect, should be welcomed as a necessary incident of an improving rights-respecting culture.

Yet despite the possibility that good work is going on behind closed doors and in parliamentary corridors, our overall finding remains undisturbed: in 65% of the instances over the life of the regime where the PJCHR has made an adverse finding about a Bill or legislative instrument, that conclusion has had no impact on the

89 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2016–17* (Report, 19 June 2018) 7 [2.12] n 6.

90 Byrnes (n 60) 11.

91 Social Services and Other Legislation Amendment (2014 Budget Measures No 2) Bill 2014 (Cth).

92 'Report 24/44th Highlights Deepening Divisions in the PJCHR', *Human Rights Scrutiny Blog* (Blog Post, 4 July 2015) <https://hrscrutiny.wordpress.com/2015/07/04/report-2444th-highlights-deepening-divisions-in-the-pjchr/>.

93 Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 338.

fate or form of the legislation in question, while in the remaining 32% of cases in which an impact might have occurred, evidence that this occurred is hard to find. This represents a slight improvement from our earlier analyses: 73% of the time in the first four years of the regime the PJCHR's findings made no impact.[94] The large percentage change to date is partially explained by the lapsing of an unusual amount of Bills with the proroguing of Parliament on 11 April 2019, all of which are contained in our count of Bills upon which the PJCHR may have had an impact.

C *Judicial Impact*

The exclusive parliamentary model of rights protection leaves little room for judicial involvement.[95] For statements of compatibility, the courts' role is limited by s 8 (and identical provisions in relation to legislative instruments in s 9), which states that '[a] statement of compatibility … is not binding on any court or tribunal'.[96] However, SOCs can still be received and considered as extrinsic materials pursuant to s 15AB of the *Acts Interpretation Act 1901* (Cth) by courts interpreting legislation, in order to illuminate context and legislative intent.[97] The position with respect to reports of the PJCHR is identical,[98] although it has been suggested that these have the potential to be of more use to courts than SOCs as they are more likely to provide meaningful scrutiny and analysis.[99]

Judicial use of the scrutiny regime has been extremely limited. At the time of the 2015 Article, there had been only four cases where reference had been made to an SOC or the PJCHR. Since then, there have been another six. In three of these six, an SOC was merely mentioned in argument by one of the parties.[100] In the fourth, a passport dispute before the Administrative Appeals Tribunal ('AAT'), Senior Member Fice referred to the SOC made in respect of the *Australian Passports Determination 2015* (Cth) in the course of setting out the operation and intent of that determination.[101] However, that consideration was ultimately of little importance as Senior Member Fice decided to issue the passport in question under s 11(2)(b) of the *Australian Passports Act 2005* (Cth), to which the determination was irrelevant.[102]

94 Williams and Reynolds, '2015 Article' (n 4) 490; George Williams and Daniel Reynolds, 'Parliamentary Human Rights Vetting and Deliberation' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 72, 81.

95 Williams and Burton (n 25).

96 *Act* (n 11) s 8(4).

97 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) 5.

98 Ibid.

99 Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42(1) *Federal Law Review* 1, 13–15.

100 *Application/Notification by Construction, Forestry, Mining and Energy Union* [2015] FWC 3694, [74] (Deputy President Asbury); *Smith v VetPrep Australia Pty Ltd* [2017] FWC 5486, [25] (Commissioner Spencer); *Commonwealth v Dattilo [No 3]* [2017] FCCA 137, [18] (Smith J).

101 *Silva and Minister for Foreign Affairs* [2017] AATA 1285, [14]–[18].

102 Ibid [59]–[70] (Senior Member Fice).

In the fifth case, *Mentink v Commissioner for Queensland Police,*[103] an SOC played a more direct role. Mr Mentink was a 71 year-old man who had recently finished serving nine month sentences of imprisonment for two child sex offences committed in 1976.[104] By reason of his conviction, Mr Mentink was not permitted to travel overseas without obtaining permission from a 'competent authority', which in this case was the Commissioner for the Queensland Police.[105] Mr Mentink applied to the Commissioner for permission to return to Indonesia, where he had lived for a number of years with his family since his marriage in 2009 to his Indonesian wife, who, at the time of Mr Mentink's application, had breast cancer.[106] The Commissioner refused the application, finding that he had to be, but was not, 'satisfied by acceptable and cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision'.[107]

Mr Mentink sought judicial review of the Commissioner's decision before the Supreme Court of Queensland on several bases, including relevantly that the Commissioner erred in imposing such a high standard of proof on Mr Mentink to justify the decision.[108] This argument was accepted by Mullins J. In construing the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth), her Honour had regard to the SOC included in the explanatory memorandum of that Act, which relevantly provided:

> To the extent that a reportable offender may have other family members residing overseas, the measures in this Bill may engage [the right to protection against arbitrary interference with the family]. This right is accommodated by the ability of reportable offenders to seek the permission of the relevant competent authority to travel. In circumstances where they are not deemed a risk to those family members, a competent authority will be able to permit a reportable offender to travel overseas, providing the risks to children overseas can be appropriately addressed. As such, the measures are proportionate, reasonable and necessary to protect vulnerable children overseas.[109]

In light of this explanation, and the text, context and purpose of the relevant provision of the Act, her Honour concluded that there was nothing to warrant the Commissioner imposing a high burden on the applicant to justify the decision, but that the Commissioner was instead required simply 'to ascertain and weigh up all the relevant considerations to decide whether to grant or refuse the permission'.[110]

103 (2018) 335 FLR 64.

104 Ibid 66 [3] (Mullins J).

105 Ibid.

106 Ibid.

107 Ibid 72 [32].

108 Ibid 66 [4].

109 Ibid 70 [22], citing Explanatory Memorandum, Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (Cth) 7 [32].

110 *Mentink v Commissioner for Queensland Police* (n 103) 72 [35] (Mullins J).

Her Honour referred the application to the Commissioner for further consideration according to the law.[111]

In an additional case in 2019, *SZTVU v Minister for Home Affairs,*[112] there was substantive consideration of SOCs in interpreting a statute by Derrington J and Wheelahan J (with whom Perry J agreed).[113] In this case, the appellant's first application for a protection visa had been refused,[114] and s 48A of the *Migration Act 1958* (Cth) precluded him from making a further application. The appellant was subsequently informed that the Minister had exercised his personal discretion under s 48B to allow a further visa application to be made, following the inadvertent release of some of the appellant's personal information. The appellant was informed that his application would be considered under the fast track assessment process as he had been specified as a fast track applicant under the *Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017* (Cth) ('the Instrument').[115] The fast track application was ultimately refused.[116] The appellant sought review of the refusal in the AAT, which determined that because the appellant was a fast track applicant, it did not have jurisdiction to hear the appellant's application for review.[117]

The appellant commenced proceedings seeking judicial review of the AAT's decision on the basis that he was not in fact a fast track applicant because he had not been allocated a Personal Identification Digit ('PID') at the time that the Instrument was made.[118] Counsel for the Minister submitted that reference to the SOC included in the explanatory statement of the Instrument could assist the Court in its interpretation.[119] In construing the Instrument, their Honours had regard to the terms of the SOC included in the explanatory statement of the Instrument:

> The terms of the statement of compatibility set out above suggest that there might be support for the competing inference that the persons specified in the Schedule to the Instrument had been allocated PIDs at the time the instrument was made.[120]

In that same paragraph, however, their Honours noted potential complexity in the admissibility of SOCs for the purposes of drawing inferences from their contents,

111 Ibid 68–71 [15]–[27], 72 [32]–[35].

112 [2019] FCAFC 30.

113 Ibid [31], [84]–[85].

114 *SZTVU v Minister for Immigration and Border Protection* [2015] FCA 1449.

115 A legislative instrument made by the Minister under s 5(1AA)(b) of the *Migration Act 1958* (Cth).

116 *SZTVU v Minister for Home Affairs* (n 112) [19] (Derrington and Wheelahan JJ).

117 Ibid [23] (Derrington and Wheelahan JJ).

118 Ibid [33], [75] (Derrington and Wheelahan JJ).

119 Ibid [80] (Derrington and Wheelahan JJ).

120 Ibid [85] (Derrington and Wheelahan JJ).

but did not form a concluded view on the question:

> We observe though that the statement of compatibility states that it was prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and therefore was required to be included in the explanatory statement for the Instrument for the purposes of laying before each House of Parliament: *Legislation Act 2003* (Cth), s 15J(2)(f). Therefore, the statement of compatibility may not be admissible for the purpose of drawing inferences from its contents: *Parliamentary Privileges Act 1987* (Cth), s 16(3)(c). However, it is not necessary that we form a concluded view on that question, which was not argued. In our opinion, because the appellant did not raise this issue in the Federal Circuit Court, the Minister was not able to consider adducing direct evidence, which may have resolved the issue one way, or the other.[121]

Ultimately, the Court's discussion of the SOC did not affect the outcome of the appeal as the Court declined to decide the ground under which arguments about the SOC were made as it had not been argued in the court below.[122] The appeal was dismissed on other grounds.[123]

Based on these cases, it appears that the regime has been effective at limiting the scope for new human rights litigation arising out of the *Act.* Courts and tribunals remain limited in their capacity to reference and use SOCs in the process of statutory interpretation.

D *Media Impact*

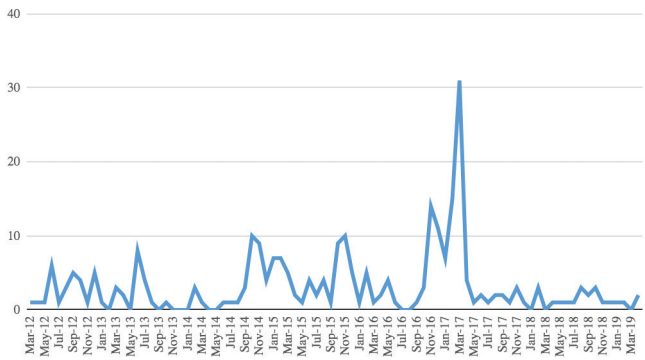
Public awareness of the scrutiny regime appears to be low. Generally, the PJCHR is mentioned in the media fewer than five times per month. This has been the case throughout the life of the regime, with the notable exception of the period from November 2016 to March 2017, when the PJCHR's actions took centre stage in Australian politics as it conducted its *Freedom of Speech Inquiry.* The following graph bears this out:

121 Ibid (Derrington and Wheelahan JJ).

122 Ibid [86]–[89] (Derrington and Wheelahan JJ).

123 Ibid [94] (Derrington and Wheelahan JJ).

Figure 4. Media Impact



As explained in Part II(C) of this article, our research has been concerned with the PJCHR's legislative scrutiny function, rather than other features of the regime such as the ad hoc inquiries conducted by the PJCHR under ss 7(b)–(c) of the *Act*. For that reason, the spike in media mentions above relating to the *Freedom of Speech Inquiry* can be put to one side for present purposes. It is clear, then, that the PJCHR's legislative scrutiny findings, even those of probable incompatibility or actual incompatibility, have not generated a great deal of media interest, nor, consequently, much public awareness of the PJCHR's work.

E *International Impact*

In the last three years there has been an increase in mentions of the PJCHR by United Nations bodies, as this period has coincided with a number of periodic reviews by various treaty bodies. Representatives for Australia have been questioned on several occasions about the effectiveness of the PJCHR, in particular about the frequency with which the PJCHR fails to publish final conclusions until after the legislation in question has already been enacted, and about whether legislators actually take notice of PJCHR recommendations.[124]

124 See, eg, Committee against Torture, *Sixth Periodic Report Submitted by Australia under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Due in 2018,* UN Doc CAT/C/AUS/6 (28 March 2019); *Second Session of the Forum on Human Rights, Democracy and the Rule of Law: Report of the Chair*, UN Doc A/HRC/40/65 (15 January 2019); Committee on the Rights of the Child, *Combined Fifth and Sixth Periodic Reports Submitted by Australia under Article 44 of the Convention*, *Due in 2018,* UN Doc CRC/C/AUS/5-6 (22 November 2018); *Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Australia*, UN Doc A/HRC/37/51/Add.3 (22 October 2018); Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018); Committee on the Elimination of Discrimination against Women, *Summary Record of the 1602nd Meeting*, UN Doc CEDAW/C/SR.1602 (10 July 2018); *Contribution of Parliaments to the Work of the Human Rights Council and Its Universal Periodic Review: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/38/25 (17 May 2018); Committee on the Elimination of Discrimination against Women, *List of Issues and Questions in Relation to the Eighth Periodic Report of Australia: Replies of Australia*, UN Doc CEDAW/C/AUS/Q/8/Add.1 (22 March 2018); Committee on the 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); *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017).

In 2017, when asked by the Committee on Economic, Social and Cultural Rights to provide examples of the work of the PJCHR and whether its recommendations were regularly taken into account by legislators, along with the status of the Human Rights Action Plan 2012, the Australian government responded that:

> Ministers regularly engage with, and provide further information to, the PJCHR. The PJCHR's work is considered in developing and refining legislation. For example, in 2015 the PJCHR raised concerns about the Norfolk Island Legislation Amendment Bill 2015. As a result, the Australian Government amended the legislation to ensure it did not limit the right to equality and non-discrimination and the right to social security for New Zealand citizens who were Australian permanent residents on Norfolk Island.
>
> The Human Rights Action Plan 2012 was the policy of the former Australian Government.[125]

In an illuminating statement, Mr Andrew Walter, a representative of the Attorney-General's Department, noted:

> Although the Parliamentary Joint Committee on Human Rights made every effort to complete its report on a bill before that bill was passed, so that its findings could inform the Parliament's deliberations, the timeliness of its reporting depended on a number of factors, including the speed with which ministers responded to its requests. If necessary, the Parliament could take remedial action in response to reports submitted after the relevant legislation had been passed.[126]

The government's responses to international treaty bodies in relation to the scrutiny regime thus contains some mixed messages. On one hand, the government has cited instances of the PJCHR precipitating legislative changes as an example of the strength of its human rights record. Further, the government has made repeated statements to the United Nations that, because the PJCHR mechanism is in place and because some states and territories are implementing or have implemented human rights regimes, there is no need for further rights protections in Australia.[127]

On the other hand, the government has now expressly disavowed the Human Rights Action Plan — of which the scrutiny regime was a key plank — as no longer representing government policy. It has also recognised that delay by its

125 Committee on Economic, Social and Cultural Rights, *List of Issues in Relation to the Fifth Periodic Report of Australia: Replies of Australia to the List of Issues*, UN Doc E/C.12/AUS/Q/5/Add.1 (17 March 2017) 2 [3]–[4].

126 Human Rights Committee, *Summary Record of the 3419th Meeting*, UN Doc CCPR/C/SR.3419 (24 October 2017) 2 [6].

127 See, eg, *Second Session of the Forum on Human Rights, Democracy and the Rule of Law: Report of the Chair*, UN Doc A/HRC/40/65 (15 January 2019); Committee on the Elimination of Racial Discrimination, *Summary Record of the 2597th Meeting*, UN Doc CERD/C/SR.2597 (1 December 2017).

own Ministers in responding to PJCHR correspondence has affected the PJCHR's ability to produce timely reports.

IV QUALITATIVE ANALYSIS

When the Human Rights (Parliamentary Scrutiny) Bill 2011 (Cth) was before Parliament, the Shadow Attorney-General George Brandis QC called it 'the most important piece of human rights legislation' in a quarter of a century.[128] However, as the empirical evidence above demonstrates, the high hopes for the regime have not yet been realised. As Fletcher notes in his review of the regime (current to 2016), there is little evidence that the PJCHR's work has influenced policy, served as a trusted or bipartisan guide for legislators, or provoked public debate and enhanced human rights discourse in Australia.[129]

To assess, in a qualitative sense, the extent to which Australia's human rights regime is fulfilling the purpose for which it was enacted, in this Part we examine (1) current government attitudes towards the regime; and (2) the effectiveness of a parliamentary scrutiny model generally.

A *Government Attitudes towards the Regime*

As mentioned in Part III, attitudes of the Australian government towards the parliamentary scrutiny regime, and in particular the PJCHR, are mixed. In January 2019, Sarah McGrath (Director of International Engagement for the Australian Human Rights Commission) reported to the UN Human Rights Council that there had been

> efforts to improve parliamentary engagement with human rights and the Committee's work in examining legislation for compatibility with human rights. In addition to scrutiny at the federal level, Ms McGrath said that some states and territories were embedding human rights scrutiny mechanisms. … Regarding the role of national human rights institutions, Ms McGrath recommended that parliaments see them as a key resource, consulting them on the human rights compatibility of proposed laws and using them to help parliamentarians develop skills.[130]

Similarly, the Australian government pointed to the existence of the PJCHR as an example of its success in the human rights arena when it sought candidacy to the

128 Commonwealth, *Parliamentary Debates*, Senate, 25 November 2011, 9661 (George Brandis).

129 Fletcher, *Australia's Human Rights Scrutiny Regime* (n 10) 198.

130 *Second Session of the Forum on Human Rights, Democracy and the Rule of Law: Report of the Chair*, UN Doc A/HRC/40/65 (15 January 2019) 12 [45].

Human Rights Council.[131]

On the other hand, there is a contingent of government Members of Parliament, spearheaded by Julian Leeser MP, a current member of the PJCHR, that wants to abolish the PJCHR. In a speech given on 15 July 2018, Leeser expressed concerns about Australia's approach to human rights protection, in the context of criticising the UN Human Rights Council for its stance on Israel:

> Despite its claim to a dialogue with the parliament no government member has mentioned the reports [of the PJCHR] in a substantive way in debate in the life of this parliament. And of the hundreds of bills passed by parliament this committee's reports have only been raised substantively on 13 occasions in highly politically contested bills. … If the intent of the committee is to improve legislation it goes about it in the wrong way.
>
> When the committee criticises ministers for failure to comply with human rights, the minister has no warning of the committee's ultimate finding until the report is published in the House … A number of cabinet minister[s] have complained to me about the 'gotcha' aspect of the committee and the amount of staff time it takes to comply with the requests of the committee on arcane points of human rights law. The cost of complying with the human rights compatibility statements — which are almost universally unread and unloved by parliamentary colleagues — and complying with the correspondence of the committee is significant.[132]

To criticise the PJCHR for engaging in 'gotcha' tactics is to give the PJCHR too little credit, given the procedures it has put in place to ensure procedural fairness to proponents of legislation: the PJCHR routinely publishes interim reports advising of its likely conclusions well in advance of its final reports, and seeks comment on those interim reports from relevant Ministers. If Ministers later complain that they were caught unawares by the PJCHR's final conclusion, that can only be because they ignored the PJCHR's interim report and correspondence.

More broadly, however, Leeser is not alone in being less than fond of the PJCHR's work; fellow PJCHR members James Paterson MP and Russell Broadbent MP have also subscribed to this position.[133] Fletcher, responding to these views, has noted that contrary to the tenor of these Members' criticisms of the PJCHR, the PJCHR's inability to improve legislation or debates on human rights stems largely

131 *Note Verbale Dated 14 July 2017 from the Permanent Mission of Australia to the United Nations Addressed to the President of the General Assembly*, UN Doc A/72/212 (24 July 2017) annex ('*Candidature of Australia to the Human Rights Council, 2018–2020*') 2 [6].

132 Julian Leeser, 'Human Rights Hijacked' (B'nai B'rith Human Rights Address, 15 July 2018) <https://www.julianleeser.com.au/media/speeches/human-rights-hijacked-2018-bnai-brith-human-rights-address>.

133 Rachel Baxendale, 'Human Rights Committee Should Be Abolished, Liberal MPs Say', *The Australian* (online, 7 August 2018) <https://www.theaustralian.com.au/news/human-rights-committee-should-be-abolished-liberal-mps-say/news-story/97d35636570dbd4051f65646536af120>.

not from its own practices but from the manner in which government interacts with it. In Fletcher's view

> the government is utterly dismissive of the mountain of work [the PJCHR] has compiled on the compatibility of legislation with Australia's international obligations. The government is simply not taking its obligations seriously, but that is no reason to shut the Committee down. Instead, it should have its mandate extended to be able to conduct wide-ranging inquiries like its UK counterpart), it should be consulted well before legislation reaches Parliament, and most of all its reports should be widely discussed in legislative debate …[134]

While the government has recently been mostly silent regarding the PJCHR, the comments of Members of Parliament such as Leeser can be contrasted with the government's views as expressed to the UN, noted above. On the international stage, the government frequently talks up Australia's human rights record and the work of the PJCHR, including in putting forward its candidature to the Human Rights Council.[135] Domestically, however, there has not been the same concerted effort to show leadership on the issue of human rights, nor has the government addressed any of the above statements made by Members of Parliament that boisterously challenge the legitimacy of the PJCHR. Overall, the Australian government's position in relation to rights protection is an ambivalent one. The positions taken abroad tend to suggest that the regime is seen to provide a ready answer to which the government can point when asked about its human rights record, yet which conveniently lacks the effectiveness needed to seriously affect its legislative agenda domestically. That would explain why, to date, the government has never adopted an official policy of abolishing the regime, for a fig leaf of human rights protection may well be thought preferable to being exposed to the criticism that our country offers no human rights protections at all.

The underwhelming record of Australian's human rights scrutiny regime is not simply the result of a disappointing few Parliaments. Rather, it is an entirely expected consequence of fundamental features of Australia's constitutional structure: in a system in which Parliament, or at least the lower House, remains weak with respect to the executive, it is hard to see any purely parliamentary-based scheme for human rights protection producing major alterations to executive proposals for new laws. It is not realistic in such a system to expect that a parliamentary scrutiny regime will overcome the power imbalance between these two arms of government,[136] and act to substantively improve legislation. The attitude of the government to the PJCHR is all-important to the regime's success or failure.

134 Adam Fletcher, 'Abolish the Joint Committee on Human Rights? We Should Be Strengthening It Instead…', *Castan Centre for Human Rights Law* (Blog Post, 21 August 2018) <https://castancentre.com/2018/08/21/abolish-the-joint-committee-on-human-rights-we-should-be-strengthening-it-instead/> (citations omitted).

135 *Candidature of Australia to the Human Rights Council, 2018–2020*, UN Doc A/72/212 (n 131) 2 [6], 5 [15].

136 Janet L Hiebert, 'Governing Like Judges?' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63.

It is clear that the attitude of the Government to the PJCHR is variable, and that the PJCHR's work is viewed as controversial and political in a way in which other parliamentary joint committees may not be. Harry Hobbs, a member of the PJCHR's secretariat from 2015 to 2016, made the following observations:

> My own limited experiences working in the Committee secretariat … revealed the acute challenge facing the Committee. Some members were uninterested in engaging with the human rights issues raised by the secretariat and external legal adviser. These members were seemingly more concerned with ensuring that the final report did not record that government Bills and legislative instruments were (or may be) inconsistent with Australia's international human rights obligations. Although a finding of inconsistency would not legally prevent or delay the passage of legislation it could make it politically more difficult, inhibiting the government's agenda.
>
> …
>
> The Committee's focus during my time in the secretariat was survival. Only a few years old, the Committee had not yet had the time to embed itself within the parliamentary furniture or to transform its working practices into reliable precedent. It faced a real prospect that it may be abolished. In these circumstances, it is no wonder that the PJCHR has not been able to exercise substantial direct influence on legislation or policy — but that has not chiefly been because of dissent within the Committee but because of government attitudes towards international human rights law.[137]

Not every committee suffers from these difficulties. As Sarah Moulds illustrates in her review of the effectiveness of parliamentary committees in the context of changing counterterrorism laws, in 2014–15 the PJCIS made 109 recommendations, all of which were accepted by the government, which translated into 63 amendments to Bills.[138] In one of our examples noted above, the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth), the PJCIS's role in shaping the Bill was discussed and praised by multiple Members of Parliament in the debate,[139] and referenced as instrumental to amendments to the Bill in the supplementary explanatory memorandum.[140] Hobbs' statement plainly illustrates the political pressures facing the PJCHR,

137 Harry Hobbs, 'Book Forum on Adam Fletcher's *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?*', *Australian Public Law* (Blog Post, 24 April 2019) <https://auspublaw.org/2019/04/book-forum-harry-hobbs/>.

138 Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-Terrorism Laws' (2016) 31(2) *Australasian Parliamentary Review* 46, 56.

139 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2018, 12776 (Mike Kelly), 12783 (Tim Watts), 12787 (Ed Husic), 12790 (Julian Hill), 12797 (Ged Kearney), 12800 (Peter Khalil), 12801 (Christian Porter).

140 Supplementary Explanatory Memorandum, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth) 2.

and may go some way to explaining the reluctance of the PJCHR in some instances to take a strong stance on the incompatibility of legislation, or of Members of Parliament to credit the PJCHR as having provided the impetus for legislative amendment. The greater difficulties faced by the PJCHR as compared with the PJCIS may also be attributed to the enthusiasm for national security, and contrastingly, the antagonism towards human rights, shared by some in government and in Parliament.

B *Effectiveness of the Parliamentary Scrutiny Model*

We turn to consider what bearing these findings have on the broader debate concerning whether parliamentary scrutiny models are the most effective method of protecting and promoting human rights, or whether other models, particularly those involving a role for courts, are preferable. This debate often suffers from an empirical deficit. In the context of parliamentary scrutiny models, this has tended to result in 'evidence-free optimism about the legislative human rights record'.[141] As the theoretical case for each model of rights protection is now relatively settled, the need for real world evidence to break the stalemate is becoming more frequently acknowledged: 'Increasingly, there has been a call for a turn to empirical method to test the capacity of actual democratic institutions to protect rights given their often significant democratic and deliberative deficits compared with any "ideal" legislature.'[142]

In particular, we consider whether: (1) too much emphasis has been placed on the role of deliberation rather than substantive outcomes; (2) legislatures alone are well-suited to the task of rights protection; and (3) courts should play some role in protecting rights.

1 *Efficacy of Deliberation as a Rights-Protective Tool*

As recounted earlier, the Australian model of parliamentary rights scrutiny is a deliberative model, promoting benefits such as the 'culture of justification'[143] or the 'improved opportunities for consultation'[144] that deliberation is said to provide. As Hilary Charlesworth has noted, '[t]he claim that "robust parliamentary debate" operates to protect rights has little empirical basis in Australian

141 Hilary Charlesworth, 'Who Wins under a Bill of Rights?' (2006) 25(1) *University of Queensland Law Journal* 39, 44.

142 Evans and Evans (n 93) 329.

143 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Interim Report No 127, July 2015) [2.2] ('*Traditional Rights and Freedoms*'), quoting Murray Hunt, 'Introduction' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15.

144 Smyth Second Reading Speech (n 5) 3243.

history'.[145] Our examination of the regime has shown that at a formal level the extent of deliberation concerning human rights has increased markedly during the operation of the regime. This is evidenced by the high formal compliance with the requirement to produce SOCs, the extent of correspondence entered into between the PJCHR and proponents of legislation, and the high volume of reports produced by the PJCHR.

Unfortunately, as has been noted on several occasions, SOCs are often not of a high quality and frequently provide inadequate justification for proposed laws that impinge on human rights.[146] The letters that Ministers write to the PJCHR justifying their laws, while occasionally supplying the basis for a conclusion that a law is compatible with human rights, more often merely reiterate claims made in the SOC. Meanwhile, PJCHR reports, while sophisticated in their analysis and (until recently) on occasion forthright in their conclusions, tend to be ignored by the government.

While deliberation may have procedural benefits, the data shows that it may be limited in producing substantive outcomes and may, in fact, be used to obscure or legitimate a rights-limiting outcome. This is a point that advocates for deliberation acknowledge, with Waldron arguing that while the process-related reasons for adopting a parliamentary scrutiny model are, in his view, quite strong, 'the outcome-related reasons are at best inconclusive'.[147] While deliberative models bring new information into the public domain and compel governments to consider and articulate the rights implications of their policies, at least via their departments or staff producing an SOC for each piece of legislation, there is no proven link between this increased deliberation and better rights outcomes. As Dr Lisa Burton Crawford notes:

> [T]he voting public … may in theory express their own displeasure at the ballot box if Parliament fails to adequately justify the legislation that it enacts. But none of these mechanisms will be effective (or at least, not very) if there is not a broader rights-respecting culture. In other words, the *Parliamentary Scrutiny Act* will only work if it generates a *political cost* for legislating incompatibly with rights without due deliberation and justification.[148]

If deliberation is to have intrinsic value, it must involve more than going through the motions: for instance, it should lead to an improved rights consciousness or a tangible 'culture of rights' within Parliament. Our research, however, points the opposite way: it is unclear that SOCs are widely read, neither SOCs nor the

145 Charlesworth (n 141) 44–5, citing John Howard, 'Democracy Built on a Fair-Go Ethic', *The Australian* (Canberra, 10 May 2001) 11.

146 See, eg, *PJCHR Fourth Report of 2012* (n 27).

147 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1375.

148 Crawford (n 14) 149 (emphasis in original).

reports of the PJCHR are mentioned with any great frequency in Parliament, nor do many parliamentarians engage in discussions with constituents or the media about human rights. In her recent chapter, Dr Lisa Burton Crawford cites the 2015 Article's statistics to argue that the human rights scrutiny regime has failed to achieve substantive rights-protective outcomes.[149] These statistics have, as this article discusses, remained broadly constant to date. It cannot be said, then, that the formal aspects of Australia's deliberative model have prompted a great deal of deliberation.

2 *'Democratic Legitimacy' as an Argument for Legislature-Based Rights Protection*

The core of the case in favour of parliamentary scrutiny models is that decisions made by a legislature with respect to rights will have the greatest possible democratic legitimacy.[150] This line of argument has been echoed by many Australian politicians arguing against the introduction of more substantive models of rights protection. For example, Sam O'Connor, Liberal National Party Member for Bonney in the Queensland Parliament, made the following statement in opposition to the Human Rights Bill 2018 (Qld):

> The evidence before us has shown no substantive benefit to this bill. I do not believe in passing bills just for the sake of it. It is merely a feel-good piece of legislation that has wasted time and taxpayers' money. It also dangerously shifts some power from the legislature to the judiciary. We must not undervalue one of our rights, and it is a right that exists without a Human Rights Bill: it is the democratic election of members to this parliament. The judiciary's job is to interpret laws before it. It should not be put in any position of power over this House. This bill does not preserve the separation of power, and that is fundamental to our system of government.[151]

There are several problems with this case. The first is that while the composition of Parliament is determined by elections, the governments thereby formed do not inevitably reflect a majority of voters, as many electoral systems make it possible for parties that win a minority of votes cast to form a government.[152] Nor is Parliament necessarily an accurate barometer of public views on a wide range of issues, as '[e]lections are too blunt, too infrequent, and typically raise too many issues for electoral consideration'.[153] They are also too unwieldy a tool for holding

149 Ibid 150–2.

150 Michael A Neblo, *Deliberative Democracy between Theory and Practice* (Cambridge University Press, 2015) 23. See generally Waldron (n 147).

151 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 440–1 (Samuel O'Connor).

152 Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7(4) *Perspectives on Politics* 805, 808.

153 Ibid 811.

legislators accountable for failing to protect and promote rights. And, even if Parliament could be said to reflect the majority view on a given issue, that does not necessarily lend Parliament's actions legitimacy. As former UK Supreme Court Judge Jonathan Sumption, in one of his Reith Lectures earlier this year, noted: 'Self-evidently, majority rule is the basic principle of democracy but that only means that a majority is enough to authorise the State's acts. It isn't enough to make them legitimate.'[154] Legitimacy stems from more than bare majoritarian rule; if enough people do not accept a law it may be rejected in a series of ways ranging from disregarding the law to actively protesting, regardless of its passage by Parliament.

Another problem with the case for parliamentary scrutiny of human rights is that by focussing on legitimacy, it tends to overlook or downplay Parliament's institutional weaknesses. These include the fact that Parliament is self-regulating, prone to populist lawmaking in times of emergency, and unlikely to uphold the rights of unpopular minorities. Perhaps most critically of all, in our Westminster-based system, Parliament, and the lower House in particular, remains weak with respect to the executive. This means that most decisions affecting rights are now made in party rooms rather than parliamentary chambers, and thus well before any form of deliberation promoted by scrutiny regimes.[155] Indeed, some Australian parliamentarians have noted that, even in the privacy of the party room, dissent on issues of rights is increasingly being branded as disloyalty and can have personal and career consequences for those who speak out.[156]

While Parliament was constitutionally intended to be the body that holds the executive to account, this traditional conception of responsible government has, in modern times, been turned on its head.[157] Parliamentary rights scrutiny models, although purporting to give power and responsibility to Parliament, do little to redress the power imbalance between Parliament and the executive. As Janet Hiebert notes in the context of rights instruments generally:

> There is little evidence that any of these bills of rights have altered the balance of power between government and parliament so as to enable parliament to marshal sufficient power to force government to justify or modify decisions that implicate rights adversely.[158]

Our analysis of Australia's parliamentary scrutiny regime substantiates this concern. It is confirmed by the fact that the PJCHR has on so few occasions been

154 Jonathan Sumption, 'In Praise of Politics' (Reith Lectures, Birmingham, 28 May 2019) <http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_2.pdf>.

155 Davis (n 84) 213, 223.

156 Evans and Evans (n 93) 340.

157 Harry Evans, 'Parliament: An Unreformable Institution?' (Papers on Parliament No 18, December 1992) <https://www.aph.gov.au/binaries/senate/pubs/pops/pop18/c02.pdf>.

158 Hiebert (n 136) 60.

able to alter the course of the government's legislative agenda. This experience highlights an inherent design flaw of parliamentary scrutiny models, as again identified by Hiebert:

> The very idea that these bills of rights would increase parliament's capacity in this way reflects a basic paradox; parliamentary bills of rights are simultaneously defended because parliament is considered too weak to force government to ensure that legislation is consistent with rights, and yet are celebrated because of the hope that parliament will play a strong rights-protecting role.[159]

3 *Should Courts Play a Role?*

One of the most contentious questions arising from the debate concerning rights scrutiny is what role should be given to the judiciary in protecting rights. As has been seen, the Australian parliamentary scrutiny regime was designed with a clear answer to that question: courts should be excluded. The basis for that point of view, as can be inferred from the preceding section, is that courts lack the democratic legitimacy that would entitle them to enter what is a highly politically charged arena — a supposed weakness sometimes referred to as 'the counter-majoritarian difficulty'.[160] This attitude towards the judicial function can be traced at least back to 1996, when the Howard government signalled a return to parliamentary sovereignty from what, in the era immediately postdating the Mason High Court, might otherwise have been a continued trend towards a wider role for rights protection by the courts.[161] The scrutiny regime was conceived in an era, continuing today, in which the courts are considered to have 'a subordinate, even apolitical, role',[162] which necessarily limits any rights-protective function that the judiciary might otherwise undertake.

One of the premises of the counter-majoritarian argument is that by making decisions about how legislation should be interpreted, courts arrogate to themselves a power that only democratically elected governments should have. There are two problems with this. First, it 'assumes that rights … are empty shells that can be filled with content in an arbitrary way'.[163] In reality, the interpretation of human rights laws amounts to no more than the court carrying out its accepted judicial role in statutory or constitutional interpretation. Moreover, those laws in turn have their own democratic credentials, having been enacted into law by an elected Parliament. Therefore, in such a model, as former Chief Justice

159 Ibid 43.

160 Waldron (n 147) 1349; Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962) 16–22; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 71.

161 Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017) 131, 185–6.

162 Ibid 185.

163 Charlesworth (n 141) 47.

Brennan of the High Court of Australia has said, '[t]he Courts apply the statutory expression of the people's will'.[164]

Secondly, the counter-majoritarian argument overlooks the forms of accountability that the judiciary does have. For instance, judges cannot simply invent new law, but are instead required to adhere to precedent. Their decisions, once handed down, are subject to appeal, often at two or three levels in the judicial hierarchy. And there are reputational risks for judges who demonstrate a lack of judicial temperament or repeatedly stray too far beyond the bounds of accepted doctrine.[165]

Many nonetheless dispute the premise that this judicial accountability is enough. Lord Sumption, for example, has argued:

> [A]llowing judges to circumvent parliamentary legislation or review the merits of policy decisions for which ministers are answerable to parliament … confers vast discretionary powers on a body of people who are not constitutionally accountable to anyone for what they do. It also undermines the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizens.[166]

The fact that judges are unelected, may, however, have its merits. Sometimes the independence of the judiciary from political interests enables it to act in ways that are more democratic in their effect than Parliament, such as when court decisions uphold core democratic rights, like freedom of speech, in opposition to an attempt by Parliament to abrogate these rights.[167] In addition, as Alison Young notes, there is a form of democratic dialogue that occurs between the judiciary and the legislature when Parliament passes legislation as a response to court decisions made under human rights charters.[168]

Lastly, as Janet Hiebert and James Kelly note, reflecting on the experiences of the United Kingdom after the implementation of the *Human Rights Act 1998* (UK), enforcement of the Act by the courts has led, for the most part, to Parliament framing its assessments of rights-affecting Bills in terms of the risks of attracting human rights litigation.[169] While it is true that there is the potential for legislation like the UK's *Human Rights Act* to foster a culture of litigation avoidance, rather than a culture of human rights protection, this is not necessarily a bad thing. As Hiebert and Kelly go on to note, discussions of human rights

164 Sir Gerard Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9(2) *Bond Law Review* 136, 138.

165 Lever (n 152) 812.

166 Sumption (n 154).

167 Lever (n 152) 806.

168 Young (n 10) 70.

169 Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, 2015) 256–7, 266.

in relation to proposed legislation are now more robust than before the Act was adopted, and 'the reluctance to provoke unnecessary litigation [has] a significant influence on legislation by identifying and pursuing more [rights] compliant ways of implementing a government's legislative objectives'.[170] Thus, even where litigation avoidance is the dominant motive, it is likely that, over time, lawmakers will come to regard the enactment of rights-respecting legislation as being in their own best interests, because it secures the longevity of their legislative initiatives.

The benefit of giving courts a role to play is significant, as they can operate to ensure accountability of the Parliament in human rights matters. As Sir John Laws said in the UK context:

> [T]he survival and flourishing of a democracy in which basic rights … are not only respected but enshrined requires that those who exercise democratic, political power *must have limits set to what they may do: limits which they are not* allowed to overstep.[171]

Ideally, a rights scrutiny model that incorporates judicial review would not result in courts frequently needing to exercise their powers (be they powers of making declarations of incompatibility, reading down legislation or declaring legislation invalid). As Stephen Gardbaum has noted, courts applying the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) have used their powers of declaration and of interpretation sparingly.[172] Rather, the existence of the mechanism of judicial review would incentivise the government to ensure that rights are protected at the drafting stage. As Hiebert has argued:

> Robust judicial review, along with remedial powers that can compel government to revisit and revise impugned legislation, appear essential for governments to take seriously the idea that rights should guide or constrain their legislative agenda, particularly when these considerations conflict with their ideological position, sense of the public interest, and strategic considerations about what will pay off politically and electorally.[173]

In the absence of such an incentive, the likelihood is that governments will carry on with business as usual. This is demonstrated by the fact that although the PJCHR on 213 occasions made findings that proposed legislation is, is likely to be, or may be incompatible with human rights, this typically has had no influence on the enacted form of the legislation.

170 Ibid 301.

171 John Laws, 'Law and Democracy' [1995] (Spring) *Public Law* 72, 81 (emphasis in original).

172 Gardbaum, *The New Commonwealth Model of Constitutionalism* (n 10) 220–1.

173 Hiebert (n 136) 64.

4 *Conclusions*

Elsewhere in Australia, significant progress has been made in lawmaking that substantively protects human rights. This is illustrated by the passage on 27 February 2019 of the *Human Rights Act 2019* (Qld) ('*Queensland Act*'). The *Queensland Act* is to commence operation in two phases: on 1 July 2019 the existing Anti-Discrimination Commission was rebranded as the Queensland Human Rights Commission, while on 1 January 2020 the balance of the *Queensland Act*, including the complaints mechanism, will commence, allowing persons who consider that their human rights have been violated by a public entity to lodge a complaint directly with the Commission. In introducing the Bill to Parliament on 31 October 2018, Attorney-General and Minister for Justice Yvette D'Ath expressed the purpose of the legislation as follows:

> The primary aim of the bill is to ensure that respect for human rights is embedded in the culture of the Queensland public sector and that public functions are exercised in a principled way that is compatible with human rights.[174]

The *Queensland Act* is structurally similar to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). The *Queensland Act* protects 23 rights[175] and provides for scrutiny of legislation via mandatory statements of compatibility (which, like federal SOCs, are not binding on any court or tribunal).[176] The *Queensland Act* makes it unlawful for a public entity to 'make a decision in a way that is not compatible with human rights' or to 'fail to give proper consideration to a human right relevant to the decision'.[177] If this occurs, persons may seek judicial review or a declaration of unlawfulness.[178] Persons may also make human rights complaints about such decisions to the Commission,[179] and questions of law that arise in relation to the application of the *Queensland Act* may be referred to the Queensland Supreme Court,[180] which is empowered to make declarations of incompatibility if a statutory provision cannot be interpreted in a way compatible with human rights[181] (although such a declaration will not affect the validity of the statutory provision or create any legal rights giving rise to any civil cause of action).[182] The *Queensland Act* also provides that Parliament can expressly declare that any Act has effect despite

174 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184.

175 *Human Rights Act 2019* (Qld) pt 2 divs 2–3.

176 Ibid s 38.

177 Ibid s 58(1).

178 Ibid s 59.

179 Ibid s 64.

180 Ibid s 49.

181 Ibid s 53(2).

182 Ibid s 54.

being incompatible with one or more rights.[183]

Although it is too early to assess, the *Queensland Act* demonstrates a way in which scrutiny mechanisms can be built into a broader structure that can create a more effective human rights protection mechanism. Given its complaint mechanism and room for the courts, the *Queensland Act* makes it more likely that Queensland will see substantive protection of human rights rather than the more process-focused approach that has been seen at a federal level. At the same time, however, the *Queensland Act* still represents merely a further step in the right direction, and importantly does not address all of the issues that have arisen with respect to the federal model: for example, it does not contain any measures to address the problem of Ministers failing to respond to parliamentary scrutiny reports in a timely way.

V RECOMMENDATIONS AND CONCLUSION

As our analysis shows, at a federal level, there remains little evidence that the human rights scrutiny regime is having a real impact in protecting and enhancing human rights. Our analysis has demonstrated the continued existence of significant shortcomings in both the design and practice of the scrutiny regime, and that it is having a limited impact by way of achieving its goals. Before exploring these weaknesses in more detail, it is worth first recognising the regime's strengths, namely the high compliance with SOC production, the volume of analysis conducted by the PJCHR, the dialogue between the PJCHR and proponents of legislation, and the achievement of the regime's stated aim of limiting litigation arising under the *Act*.

By contrast, the most significant shortcomings are the delay of the PJCHR in delivering reports (often because of delay in furnishing the PJCHR with information), the lack of clear and forthright conclusions in final reports, the low deliberative and legislative impact, and the low levels of public awareness surrounding human rights.

The following reforms and improvements, first put forward in the 2015 Article, remain the recommendations we would make:

1. The PJCHR should return to its former practice of including an appendix of instruments considered in each report in order to enhance transparency.

2. More should be done to tackle the PJCHR's delay problem, including:

    a. Amending the *Act* to prescribe the PJCHR a minimum time period for its consideration of Bills and instruments, during which it will not be

183 Ibid s 43.

possible for a Bill or legislative instrument to be enacted (perhaps with an exception for urgent matters);

b. The PJCHR should reduce the frequency with which it defers legislation for consideration;

c. The PJCHR should promptly issue concluding reports where responses from legislation proponents are not received by the stated deadline;

d. The PJCHR should reframe its initial questions on new legislative measures as 'interim conclusions'. Such a conclusion could be framed as follows: 'The PJCHR's interim conclusion is that the measure is incompatible with human rights as it engages [the right in question] and the SOC does not enable a conclusion that would justify it as proportionate. The PJCHR has invited comment from the Minister as to this conclusion, particularly in relation to the following questions …'.

3. The PJCHR should express its final conclusions in clear, unqualified language.

4. To improve its deliberative impact, the PJCHR should strive more often to make specific recommendations for reform of the measures it considers.

5. Relatedly, implementing PJCHR recommendations should be an easy thing to do. This could be achieved by amending the *Act* to provide that any amendment made in response to a recommendation of the PJCHR is exempt from the requirement for further review by the PJCHR. Such an amendment would be of real practical utility only if our recommendation for minimum time periods in all other cases were accepted.

Although in SOCs and via direct correspondence, Ministers have started justifying their policies through a human rights lens, we have found no evidence that this burgeoning 'culture of justification'[184] has in fact led to better laws. On the contrary, the evidence shows that during the life of the regime there have been extraordinarily high numbers of rights-infringing Bills passed into law.[185] The Institute of Public Affairs, which recently conducted an audit into breaches of legal rights (a subset of Australia's human rights obligations in the seven treaties covered by the *Act*) found that such rights have been persistently undermined in federal legislation since 2014, with a sharp increase in breaches in 2018.[186] The Institute of Public Affairs identified 34 new provisions breaching fundamental legal rights that were enacted into law in 2018 alone.[187] One is thus left to wonder,

184 *Traditional Rights and Freedoms* (n 143).

185 George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *Queensland University of Technology Law Review* 19. For a more recent example, see Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' (n 86) 35.

186 Begg and Rezae (n 67) 4.

187 Ibid.

as Aileen Kavanagh has done, whether 'dialogue' is a really an end to be desired in and of itself,[188] given that this model, which was expressly designed to enhance dialogue on human rights issues, has performed so poorly when it comes to actual effects on human rights.

While Hutchinson's view is that the first five years may have been growing pains as the regime became more established and respected,[189] the evidence to date suggests that this is not the case, and that the scrutiny regime continues to be ignored or dismissed by lawmakers. As Fletcher ultimately concluded, 'several years have passed since [the regime's] establishment, and there is little sign of increasing efficacy. On the contrary … if anything, the trend has been a diminution in impact since 2012/2013'.[190]

The trend has only continued in recent years, and is apparent when viewing the regime's impact as a whole. The consequence of these flaws is that the scrutiny regime is only occasionally referred to in parliamentary debate: a total of 278 times in eight years, 89 of which were non-substantive or purely formal references. Nor has the PJCHR's impact been felt in terms of legislative outcomes: at least 65% of the time (and in all probability a much higher percentage), the PJCHR's findings have no effect on the form or fate of the legislation considered. Further, the regime's discussion in the public sphere has been minimal, receiving an average of fewer than five mentions in the media per month. Amendments to the regime will improve its operation, but it is questionable whether it can ever live up to its lofty aspirations in the absence of a broader supportive framework, which our recommendations canvas.

In our view, reform rather than abolition is the answer. Our recommendations, if implemented, have the potential to significantly improve the regime's legislative and deliberative impact, and in turn to improve public awareness and understanding of the PJCHR's important work. Others, too, have suggested ways in which the regime could be reformed: Dr Lisa Burton Crawford, for instance, has argued in favour of redesigning the list of rights that the *Act* protects, in order to reduce the burden of compliance with the *Act* and to raise the political cost of non-compliance.[191]

However, it is necessary to be realistic about how effective such a regime can ever be when it is ultimately a mechanism of self-enforcement, with no real capacity for external scrutiny and review, such as by courts. So long as Australia's human rights scrutiny regime lacks this basic safeguard, its future can be expected to remain lacklustre. The evidence of almost a decade of operation of Australia's

188 Kavanagh, 'The Lure and the Limits of Dialogue' (n 10).

189 See, eg, the view expressed in Hutchinson (n 10) 101.

190 Fletcher, *Australia's Human Rights Scrutiny Regime* (n 10) 283.

191 See, eg, Crawford (n 14).

parliamentary scrutiny regime supplies an empirical basis for concluding that for a rights scrutiny model to be effective, it must not be based on parliamentary deliberation alone.