

**The Operation and Impact of Australia's Parliamentary Scrutiny Regime for  
Human Rights**

Williams, George and Reynolds, Daniel

*(2015) Monash University Law Review Volume 41(2)*

*[2016] UNSWLRS 26*

# THE OPERATION AND IMPACT OF AUSTRALIA'S PARLIAMENTARY SCRUTINY REGIME FOR HUMAN RIGHTS

GEORGE WILLIAMS\* AND DANIEL REYNOLDS\*\*

*The Australian constitutional framework for the protection of human rights is unique among democratic nations. It alone lacks a national Human Rights Act or Bill of Rights. Instead, the framework seeks to improve rights protection by enhancing deliberation within Parliament. To this end, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) requires federal Bills and legislative instruments to be accompanied by a statement as to their compatibility with a number of international human rights conventions. These claims can be examined, and other human rights matters investigated, by a Parliamentary Joint Committee on Human Rights. This process of human rights vetting of legislation differs from that of other nations in that there is no scope for Bills or regulations to be struck down or declared inconsistent by the courts. This article evaluates this model of human rights protection by analysing the operation and impact of the regime in light of key indicators of its effectiveness.*

## I INTRODUCTION

Australia has for the past four years operated a new national regime to protect human rights by way of enhanced parliamentary scrutiny. Under this model, all proposed federal laws must be accompanied by a statement of compatibility ('SOC') setting out whether the law would be compatible with many of Australia's most significant international human rights obligations. The proposed law and its accompanying statement are then subjected to review by the Parliamentary Joint Committee on Human Rights ('PJCHR'). The Committee makes a determination of the extent to which the proposed law is compatible with human rights, and reports its findings to Parliament.

This regime differs from mechanisms in other democratic nations in that the role of assessing laws against human rights standards and protecting against infringements is vested exclusively in Parliament. No role is provided to the courts, nor does Australia possess, at the federal level, a national Bill of Rights, Human Rights Act or other like instrument that might separately empower the

\* Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar.

\*\* Research Assistant, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. We are grateful to Simon Rice and Andrew Byrne, as well as to the anonymous peer reviewers, for their helpful comments on an earlier draft.

courts to strike down laws that contravene human rights, or to otherwise interpret laws where possible to be consistent with such rights. The result in Australia is a unique set of national constitutional arrangements whereby Parliament is the only body capable of engaging in processes of rights protection that extend across the full ambit of human rights.

Australia's new regime of parliamentary rights protection resulted from the National Human Rights Consultation initiated by Prime Minister Kevin Rudd in 2008 and chaired by Father Frank Brennan. That inquiry, the most extensive of its kind in Australian history, produced a report in 2009 that identified a range of weaknesses with Australia's existing arrangements to foster and protect human rights.<sup>1</sup> The inquiry made a number of recommendations, including for 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. This recommendation was not adopted by the Rudd Government, which described it as 'divisive'.<sup>2</sup> Instead, the government adopted other recommendations, including those aimed at enhancing scrutiny within the federal Parliament on human rights matters. This was implemented by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The enactment of this regime produced a flurry of academic responses, along with early assessments and predictions of how the regime might operate in practice, and in particular whether it might prove effective in protecting against the abrogation of human rights.<sup>3</sup> The fact that the regime has now been in operation for four years, and across two parliaments, permits a longer-term assessment.<sup>4</sup> Our goal in this article is to do this by way of conducting an empirical analysis of the operation of the regime over its first four years in light of key indicators of its effectiveness.

We assess the regime against the intentions and goals that led to its enactment. The most significant of these is that the regime will enhance human rights protection in Australia. It was anticipated that the regime would do this by improving

- 1 National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009).
- 2 Attorney-General Robert McClelland, 'Address to the National Press Club of Australia — Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).
- 3 See, eg, James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58; Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 75; Hugh Mannreitz, 'Commonwealth Statements of Compatibility — Small Steps, Early Days' (2012) 71 *Human Rights Law Centre Bulletin* 8; Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' (2012) 37 *Alternative Law Journal* 228; George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58, 81.
- 4 See, eg, Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian *Human Rights (Parliamentary Scrutiny) Act 2011*' (2015) 34 *University of Queensland Law Journal* 7; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38 *University of New South Wales Law Journal* 1046.

parliamentary deliberation with respect to human rights, as Attorney-General Robert McClelland explained during debate on the Bill:

Statements of compatibility on human rights for all new laws will establish a dialogue between the executive and the parliament and inform parliamentary debate on human rights issues considered by the executive ...<sup>5</sup>

Laura Smyth MP, also of the Labor Government, explained this in more detail:

When parliament considers new legislation, statements of compatibility will give parliament guidance as to the relevant human rights considerations raised by the legislation and will assist in the direction of parliamentary debate ... We are also ensuring better opportunities for dialogue between the proposers of new legislation, other members of parliament, members of the public and affected groups in relation to the likely impact of proposed legislation from a human rights perspective. The measures proposed by the bills provide for greater transparency and improved opportunities for consultation in the legislative process.<sup>6</sup>

As the reference to 'members of the public' makes clear, the kind of enhanced deliberation contemplated extends beyond merely improving debate between parliamentarians. So much was made clear in the second reading speech: '[T]hese measures incrementally advance the concept of participatory democracy by providing additional means for citizens to have input into the legislative process.'<sup>7</sup>

Another goal of the scrutiny regime was to improve the quality of legislation itself, and in particular, the extent to which the laws that Parliament enacts respect and promote human rights. One aspect of this occurs at the policymaking or legislative drafting stage, as reflected in the Attorney-General's claim in introducing the Bill that it would '[ensure] appropriate recognition of human rights issues in legislative and policy development'.<sup>8</sup> This derives from the final report of the National Human Rights Consultation, which stated:

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.<sup>9</sup>

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2010, 3525 (Robert McClelland).

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2010, 3244 (Laura Smyth).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271–2 (Robert McClelland).

8 Ibid 271.

9 National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009) 174.

Again, this aspiration was confirmed by Government members in parliamentary debate on the Bill. For instance, Laura Smyth MP stated:

[The Bills] provide for early consideration of human rights issues in both policy and law-making and reflect this government's desire to give meaningful, practical and, importantly, whole-of-government effect to our international commitments.<sup>10</sup>

The other aspect of the regime's aim to improve legislation occurs after the drafting stage, when the proposed law falls for consideration by members of Parliament, and importantly, by the PJCHR. At this stage, the Committee is expected to play 'a very powerful gate-keeping and scrutiny role ... ensur[ing] that our laws reflect our human rights obligations'.<sup>11</sup> It does this by assessing the human rights compatibility of proposed legislation and, where necessary, pointing out that a Bill or legislative instrument falls short of the expected standard. While the reports of the Committee are not intended to bind Parliament, it might also be expected that Parliament would consider its findings, and in light of an adverse conclusion on a Bill, give thought to whether the Bill should be amended or even retracted.

Where the regime stops short is in giving any additional role to the judiciary. In fact, parliamentarians expressly disavowed the idea that the regime was intended to create any legal rights capable of being enforced in courts, instead averring that 'statements of compatibility are not intended to be binding upon a court or tribunal'.<sup>12</sup> 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 and not to courts.<sup>13</sup>

This paper examines how well the regime is realising these aspirations. These goals and assessments of how the regime ought to operate in protecting human rights suggest four main ways in which its effectiveness might be measured. First, does the regime improve engagement and debate among parliamentarians about the human rights issues raised by proposed laws (the 'deliberative impact')? 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')? Third, does the regime promote broader community awareness and understanding of human rights issues in regard to proposed laws (the 'media impact')? Fourth, is the regime succeeding in not giving rise to additional litigation or powers to judges in respect of human rights (the 'judicial impact')?

Part II of this paper sets out the operation of the scrutiny regime, including an overview of its work to date, and trends that can be discerned from this. Part

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2010, 3243 (Laura Smyth).

11 Ibid 3242 (Graham Perrett).

12 Ibid 3244 (Laura Smyth).

13 Particular emphasis is given to this point in another recent study of the regime: Campbell and Morris, above n 4.

III then 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 then evaluates those results and makes recommendations for reform in light of the regime's goals and the experience of other jurisdictions that have also adopted regimes involving enhanced parliamentary scrutiny, notably the United Kingdom, the ACT and Victoria. Part V concludes the paper and presents a summary of our findings.

## II OPERATION OF THE SCRUTINY REGIME

### A Design

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('the Act') commenced operation on 4 January 2012. It 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'.<sup>14</sup> The SOC 'must include an assessment of whether the Bill is compatible with human rights'.<sup>15</sup> A like obligation is imposed on rule-makers in respect of disallowable legislative instruments.<sup>16</sup> The Act does not provide a list of domestic human rights against which Bills and legislative instruments are to be assessed. Instead, it defines the relevant 'human rights' as being 'the rights and freedoms recognised or declared' in any one of seven listed international instruments, including the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the International Covenant of Civil and Political Rights ('ICCPR').<sup>17</sup>

An SOC prepared in respect of a Bill or legislative instrument is designed for use by parliamentarians. It is not written with future judicial use in mind. Hence, the Act states in s 8 that a SOC 'is not binding on any court or tribunal' and that a failure to prepare a SOC 'does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth'. As a result, the potential for 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).<sup>18</sup>

The Act also establishes the PJCHR. Its functions are set out in s 7 of the Act:

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

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

15 *Ibid* s 8(3).

16 *Ibid* s 9.

17 *Ibid* s 3(1).

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

- (c) 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 the Parliament on that matter.

Under parliamentary resolutions,<sup>19</sup> the PJCHR draws its ten members equally from both Houses of Parliament,<sup>20</sup> including five Government members, four from the Opposition, and one independent or minority group member.<sup>21</sup> Since its inception, the Committee has undergone 13 changes to its membership, seeing some 30 members pass through its ranks. The most significant change occurred in the wake of the federal election of 2013 in which the Abbott Coalition Government replaced the Rudd Labor Government, after which all but four Committee members were replaced. Despite the changes, three members are noteworthy for having served for nearly the whole of the Committee's life: Senators Dean Smith and Penny Wright, and Ken Wyatt MP (although of these three, only Senator Smith now remains).

The PJCHR has a secretariat usually consisting of a Committee Secretary and four research officers.<sup>22</sup> Additionally, the Committee has been aided by two external legal advisers: first, Professor Andrew Byrnes, who assisted from November 2012 to September 2014, and then Professor Simon Rice.<sup>23</sup> The Committee can call witnesses, conduct public or private hearings, appoint subcommittees and call for the production of documents.<sup>24</sup>

## **B Statements of Compatibility**

A central obligation imposed by the regime is the preparation and tabling of SOC's in respect of Bills and legislative instruments. As noted, however, no consequences follow from a failure to do so. Despite this, compliance with this obligation has been extremely high. Fewer than a dozen instances of non-compliance have been identified by the PJCHR,<sup>25</sup> meaning that since the Act was passed, 99.8 per cent of proposed Bills and legislative instruments have been accompanied by an SOC.

The quality of SOC's is a different matter. An early paper analysing the 129 SOC's produced in the first six months of the regime's operation found that 'most SOC's

19 Which are given statutory effect by s 6 of the Act. The resolution currently in force can be found at Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 2013, 967–8 (Christopher Pyne) and is almost identical in terms to the previous Parliament's resolution.

20 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 5(1).

21 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 2013, 967 (Christopher Pyne).

22 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eleventh Report of 2013* (2013) iii.

23 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44<sup>th</sup> Parliament* (2014), and the reports following.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 2013, 967–8 cls 1(g), (k) (Christopher Pyne).

25 Based on searches of the reports of the PJCHR for terms such as 'without a statement of compatibility' and 'no statement of compatibility'.

are brief and many display a disturbing lack of analytical rigour'.<sup>26</sup> A more recent study found discrepancies in the rights literacy of governmental departments, with some SOCs falling well short of an acceptable standard of analysis.<sup>27</sup> Similar observations are echoed in the PJCHR reports.<sup>28</sup> However, it should be noted that, at least in 2013, the Committee's view of SOCs generally was that, both in terms of level of detail and robustness of reasoning, their quality was improving.<sup>29</sup> The Committee attributed this to its own work, as it had taken an active role not only in assessing the human rights compatibility of proposed legislation, but also in monitoring compliance with SOC obligations and promulgating a Guidance Note on drafting SOCs. As the PJCHR then stated:

From the outset the committee has adopted what it hopes is a constructive approach to statements of compatibility and has set out the following expectations:

- statements should read as succinct self-contained documents capable of informing debate within the Parliament;
- they should contain an assessment of the extent to which the legislation engages human rights;
- where limitations on rights are proposed, the committee expects the statement to set out clear and adequate justification for each limitation and demonstrate that there is a rational and proportionate connection between the limitation and a legitimate policy objective.<sup>30</sup>

### **C Parliamentary Joint Committee on Human Rights**

The entirety of the PJCHR's work to date has fallen under the first two of the three functions conferred on it by s 7 of the Act, that is, (a) to examine Bills and legislative instruments for compatibility with human rights, and (b) to examine Acts for compatibility with human rights. Its third statutory function — (c) 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 the Parliament on that matter — has not been exercised, as no referral from the Attorney-General has yet been made. As the Committee has pointed out, '[t]he Act attaches no priority to any of the committee's functions', and 'the explanatory memorandum ... states that the committee's examination of Bills and legislative instruments is primarily a traditional scrutiny function and will be the major activity of the committee'.<sup>31</sup>

26 Williams and Burton, above n 3, 81.

27 Rajanayagam, above n 4.

28 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourth Report of 2012* (2012), in relation to the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (Cth) 10.

29 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012–2013* (2013) 13–14 [1.62]–[1.63] ('Annual Report').

30 Ibid 12–13 [1.58], citing Parliamentary Joint Committee on Human Rights, *Practice Note 1* (2012) (now superseded).

31 Annual Report, above n 29, 1 [1.3].



The Committee has embraced its legislative scrutiny function with great diligence, having produced in its first four years a total of 50 reports comprising some 6662 pages, and assessing no fewer than 763 Bills and 4719 legislative instruments.<sup>32</sup> As at 4 January 2016 (the fourth anniversary of the Committee and the date to which all data in this paper is current), there have been 95 instances where the Committee has found that legislation is, or at least may be, incompatible with human rights.

In spite of the PJCHR's impressive output of reports and analysis, three disconcerting trends have emerged in the Committee's practice, all of which have become pronounced in the past year. The first of these relates to the Committee's scrutiny of legislative instruments. In August 2014, a decision was made to reformat the Committee's report template in a way that no longer details which legislative instruments — as opposed to Bills — have been considered. Prior to the revamp, each PJCHR report contained an appendix providing the full list of legislative instruments considered by the Committee, 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. From August 2014 onwards, that appendix has no longer been provided. This has coincided with a decline in the percentage of legislative instruments that have been subjected to scrutiny by the Committee. In the 43<sup>rd</sup> Parliament, the Committee commented on 2.8 per cent of legislative instruments it introduced in each reporting period, whereas in the 44<sup>th</sup> Parliament that figure has dropped to 0.6 per cent.<sup>33</sup> There are several possible explanations for this. One is that the Committee has grown less attentive to legislative instruments. Another is that, since August 2014, a lower proportion of legislative instruments have, at the pre-scrutiny or 'triage' stage, been identified as requiring further scrutiny (because they are machinery in nature, for instance). The difficulty created by the failure to publish an appendix is that there is no way for an outsider to assess which of these explanations is correct. The result is a loss of accountability, which, as Renuka Thilagaratnam — a former research officer for the Committee — concludes: 'is a troubling development, particularly as the government not infrequently seeks to give effect to controversial policies via delegated legislation'.<sup>34</sup>

Second, Bills have increasingly come to a vote before the Committee has reported on their compatibility with human rights. The effect is to deprive parliamentarians of the Committee's views, and to remove any potential impact that the Committee's findings might have upon legislative outcomes. One possible explanation for this is the often very tight turnaround between when a Bill is first tabled in Parliament, and when it comes to a vote. Once a Bill has been tabled, the secretariat of the

32 As at 4 January 2016.

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

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

Committee must conduct its analysis, and forward it to the Committee members for their consideration. The Committee must then meet and agree on the position that it will take. If it is impossible to form a view on the compatibility of the Bill — typically because the SOC has failed to identify whether human rights are engaged, and, if they are, whether there is a legitimate aim, rational connection and justification for their being affected — the Committee will write to the relevant Minister and seek further information. Once the Minister responds, the Committee is usually equipped to form a concluded view; however even at this stage, further clarification may be required and sought. The result is that, on the occasions where a Bill is hurried through Parliament within a few weeks, it can be well-nigh impossible for the Committee to adequately discharge its scrutiny function before the vote.

Another possible explanation or contributing factor is that frequently, and particularly in the latter half of 2014, the Committee has deferred its consideration of some Bills and legislative instruments, often failing to express a concluded view until months after the Bill has been enacted into law. This can occur for a number of reasons, including because the Bill is particularly complex, or because the Bill relates to an area in respect of which the Committee is carrying out a broader, thematic inquiry, or because the Committee is awaiting a ministerial response. For example, on 16 July 2014, the Government introduced the National Security Legislation Amendment Bill (No 1) 2014, which sought to give the Australian Security Intelligence Organisation ('ASIO') major new powers, including to conduct a new class of operations known as special intelligence operations ('SIOs'). The Bill raised a broad range of significant human rights issues. For example, it provided that the Minister could not grant an authorisation for an SIO unless 'satisfied that there are reasonable grounds on which to believe' that the operation will not involve a participant engaging in conduct that constitutes torture.<sup>35</sup> However, the Bill did not expressly prohibit agents from committing torture once an SIO had been authorised.

The PJCHR deferred its consideration of the Bill for three consecutive reports (on 26 August, 2 September and 24 September). Before any final report was handed down, the Bill was passed by Parliament on 1 October 2014 (receiving royal assent the following day). Five hours after the Bill had passed, a Committee report was tabled in the Senate containing some preliminary observations about possible amendments, but expressing no concluded view as to the Bill's compatibility with human rights, instead seeking further information from the relevant minister. Nearly a month later, the Minister responded. Still a further month later the Committee released its final report finding that 'the SIO scheme in the Bill is incompatible with the prohibition against torture and the rights contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because it does not prohibit an Australian agency or official

35 National Security Legislation Amendment Bill (No 1) 2014 (Cth) sch 3 cl 3, inserting *Australian Security Intelligence Organisation Act 1979* (Cth) s 35C.

from engaging in all forms of conduct that are prohibited by that Convention'.<sup>36</sup> Whether this delay was more directly caused by the Minister or the Committee, the result is that it was far too late for the report to have any effect.

Earlier in the Committee's life, delay had not been an issue. In its first two years, the Committee's practice was to table a regular scrutiny report on the Tuesday of each joint sitting week, covering all new Bills introduced since its last report. On only one occasion in the 43<sup>rd</sup> Parliament did the Committee defer its consideration of a Bill until a later report. By contrast, in the 44<sup>th</sup> Parliament, the Committee has so far deferred its consideration of 119 Bills and instruments, with the result that many of these have been enacted into law before the Committee has reached its findings on the Bill.

Some delay between the initial dissemination of a Bill and the release of a final PJCHR report is understandable. As part of its consideration of proposed legislation, the Committee regularly corresponds with proponents to clarify the legislation's expected impact in order to reach as full a view as possible as to its human rights compatibility, and to provide procedural fairness. As explained in the Annual Report:

The PJCHR normally asks questions in its first round of comments and reserves making its final assessment until after the government (or proponent of the legislation) has been given an opportunity to respond to the identified concerns.<sup>37</sup>

This pre-reporting aspect of the Committee's practices is praiseworthy, because by requiring proponents to give serious consideration to the human rights impacts of their proposals — where otherwise it might not have occurred to them to do so — the Committee's deliberative impact is augmented. On the other hand, because the Committee effectively gives ministers a second chance to remedy the deficiencies in their SOCs, and because the ministers often do not respond until after the voting date has passed, the Committee's legislative impact can at times be jeopardised. No doubt this can become a tricky balancing act, as former PJCHR member Penny Wright lamented (in regard to the Migration Amendment (Protection and Other Measures) Bill 2014):

The Parliamentary Joint Committee on Human Rights has considered this bill at length and has sought responses from the Minister for Immigration and Border Protection to particular concerns and queries. That analysis is not yet complete, but as is all too often the case in this parliament, where we have significant legislation such as this that engages a wide range of human rights, the result of that committee's scrutiny — the report that will identify the rights that are engaged and the risk that those rights will not be

36 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44<sup>th</sup> Parliament* (2014) 52 [2.94].

37 'Immediate Call by PJCHR that Migration Amendments are Incompatible with Non-Refoulement Obligations' on Renuka Thilagaratnam, *Human Rights Scrutiny Blog* (24 August 2014) <<https://hrscrutiny.wordpress.com/2014/08/24/migration-amendment-protection-and-other-measures-bill-2014-pjchr-finds-multiple-breaches-in-first-round-of-comments/>>, citing Annual Report, above n 29, 6 [1.23]–[1.26].

dealt with in a compatible way — has not yet been tabled. 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.<sup>38</sup>

Nonetheless, the blame cannot be placed solely on the intransigence of ministers. The Committee needs to develop a procedure for progressing to a conclusion when a response is not forthcoming. If it does not, ministers may be encouraged to delay their response to queries from the Committee because this will enable contentious Bills to proceed without the Committee having brought human rights concerns to the attention of Parliament. One way that it might do this is by altering its procedure so that it proceeds to its own finding of compatibility in spite of 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. Another solution would be for Parliament to amend the *Human Rights (Parliamentary Scrutiny) Act* so that there is a legislative requirement that SOC's comply with the Committee's expectations, specifically, by (1) stating whether proposed legislation affects human rights, and if it does, (2) providing clear justification. A third solution, considered in more detail in Part IV below, is for Parliament to legislate for a guaranteed minimum time period during which the Committee can consider any proposed Bill or instrument.

The third concerning trend relates to a breakout of dissent and partisanship on the Committee. In the 43<sup>rd</sup> Parliament, the PJCHR produced consensus reports only, that is, reports where the Committee's ten members unanimously agreed on all of the findings made. On 25 November 2014, that changed when the PJCHR tabled a report containing a dissenting opinion authored by three government members: Senator Matthew Canavan, Dr David Gillespie MP, and Ken Wyatt MP.<sup>39</sup> The following report, too, contained a dissent, this time signed only by Canavan and Gillespie.<sup>40</sup> Since then, only a small fraction of the Committee's reports have contained unanimous opinions, demonstrating a clear reversal of the prior approach of consensus-based decision-making.<sup>41</sup>

This is not to say that unanimity is always desirable, or that dissent must be avoided. Indeed, it is to be expected that members from different political parties will on occasion have divergent views on the interaction of laws and human rights principles, including the extent to which limitations upon particular human rights may be justifiable. A level of disputation may be an indication that committee members are engaging fully with the questions at hand, and taking their task seriously. So much was evident from these early dissenting reports, which

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

39 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44<sup>th</sup> Parliament* (2014) 61–3.

40 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventeenth Report of the 44<sup>th</sup> Parliament* (2014) 15–16.

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

explained the reasons for their departure from the majority view. For example, when the majority of the Committee concluded that the Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014 had not been adequately justified as a proportionate measure by the Minister for Social Services, and may therefore have been incompatible with the rights to equality and non-discrimination, Canavan and Gillespie dissented, arguing:

1.7 The Committee based its finding on the Minister's alleged lack of explanation in response to the Committee's request for further advice as to whether the measures in the bill are compatible with the rights to equality and non-discrimination. In our view, the Minister has explained that the measure is a proportionate and appropriate means of addressing the need to maintain a sustainable welfare system for the community.

1.9 ... [W]hile we acknowledge that the Minister could have provided a more extensive discussion of potential indirect impacts on the basis of gender, we cannot support the Committee's strong conclusion that the measure may be incompatible with the right to equality and non-discrimination.<sup>42</sup>

Unfortunately, this practice of clearly articulated dissent was abruptly abandoned in March 2015, immediately after the Chair of the PJCHR, Senator Dean Smith, was replaced by Philip Ruddock MP. Ruddock, who is 'Father of the House', brought a different perspective to the Committee, as he alluded to in his first tabling speech as Chair:

I mention the staff because the committee is well served; it has a great deal of professional advice in assisting mere members in understanding the international human rights treaties, to which we are a party and their potential implications. Given that I have previously been the Attorney, that I am a lawyer and that I do have some views on this matter, it has perhaps presented them with some more challenging moments, because I have sought to have an understanding of what are competing human rights.<sup>43</sup>

The first report tabled by the Committee under Ruddock's leadership contained a new device for recording dissent to what had been employed in the Committee's 37 preceding reports. That device, which appeared five times in Mr Ruddock's first report and has appeared in most of the Committee's reports since, typically follows the following pattern:

2.116 [S]ome committee members noted the minister's advice that any deprivation of a person's right to enter Australia is not arbitrary and, accordingly, consider that the expanded visa cancellation powers are justified.

42 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventeenth Report of the 44<sup>th</sup> Parliament* (2014) 16 [1.7], [1.9].

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2015, 2808 (Philip Ruddock).

2.117 Other committee members consider that revoking the citizenship of a person who may then be unable to enter, remain or return to their 'own country' is likely to be incompatible with the right to freedom of movement (which includes the right to enter, remain and return to one's own country).<sup>44</sup>

From this formula it is impossible to glean (1) how many members thought that the Bill was incompatible with human rights; (2) which particular members fell on either side of the divide; and (3) in many cases, what reasons the first group of members had for agreeing with the Minister that the Bill was likely to be compatible with human rights. A conclusion of this kind is no conclusion at all, as there is no finding of compatibility or otherwise that the report ascribes to the Committee. All it does is indicate that some members of the Committee disagree with other members of the Committee.

Divided conclusions such as these, as well as rendering the PJCHR ineffectual, arguably also amount to a breach of the requirements of the parliamentary resolution by which the Committee is bound, particularly cl 1(e), which requires that 'in the event of an equally divided vote, the chair, or the deputy chair when acting as chair, have a casting vote'.<sup>45</sup> This stipulation, and its counterpart provision cl 1(g)(ii) in relation to subcommittees, contemplates that the resolution of divergent views shall be achieved through a voting system.<sup>46</sup> The practice of simply recording the existence of multiple viewpoints without reaching a decision as to the Committee's position frustrates the object of these clauses.

This practice, if maintained,<sup>47</sup> has the potential to render the PJCHR otiose, as it allows the existence of dissent by one or more members to prevent the Committee from reaching a finding on a Bill or legislative instrument. As Senator Wright has noted, some two months after Mr Ruddock took over as Chair of the Committee:

Until recently the committee has fulfilled its role by applying the consistent, principled analysis that has been missing from many other parliamentary and public debates. Regrettably, it is now showing signs of descending into the type of partisan culture that dominates other parliamentary committees. I am concerned the committee's emerging culture risks undermining hard-won values the Australian legal profession holds dear, and may jeopardise one of the few mechanisms we have to make sure new laws are consistent with internationally recognised human rights.<sup>48</sup>

44 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Fourth Report of the 44<sup>th</sup> Parliament* (2015) 46 [2.116]–[2.117].

45 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 2013, 967 (Christopher Pyne).

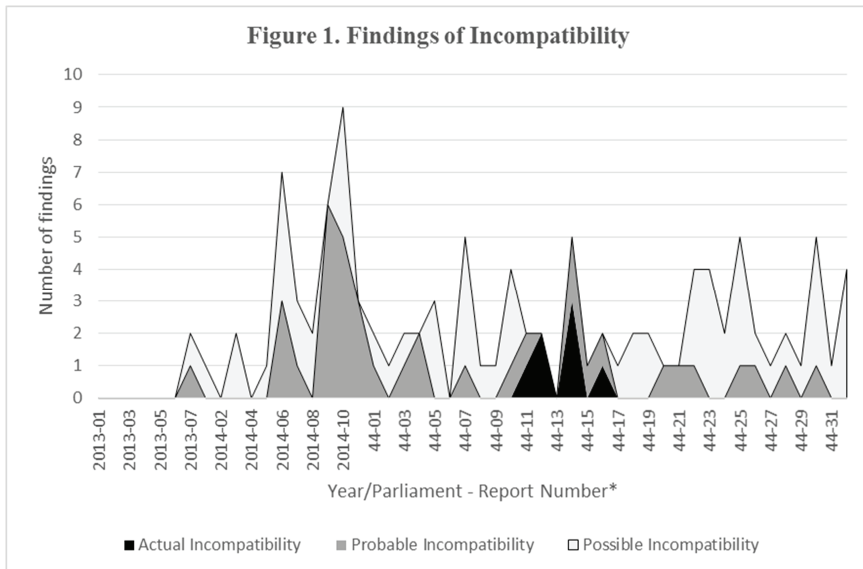
46 Ibid.

47 There has been one isolated instance of named dissent since Mr Ruddock took over as Chair of the Committee, namely from Dr David Gillespie MP, Senator Matthew Canavan and Mr Michael Sukkar MP in opposition to the Marriage Legislation Amendment Bill 2015: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirtieth Report of the 44<sup>th</sup> Parliament* (2015) 151–75. The use of the drafting device we have detailed above has not, however, otherwise abated.

48 Penny Wright, *Lawyers, Raise Your Voice* (11 May 2015) Lawyers Weekly <<http://www.lawyersweekly.com.au/opinion/16494-lawyers-raise-your-voice>>.

These fears are reflected in the Committee’s record in finding proposed laws to be incompatible with human rights. Figure 1 below sets out, in three categories, the findings of incompatibility made by the Committee since its inception. The three categories of findings are as follows:

- ‘Possible incompatibility’: when phrasing such as ‘may be incompatible with human rights’ is used. For example, in the tenth report to the 44<sup>th</sup> Parliament, the Committee found in relation to the Fair Work Amendment Bill 2014 that ‘the amendments may be incompatible with the right to freedom of association and the right to bargain collectively’.<sup>49</sup>
- ‘Probable incompatibility’: where the Committee used language such as ‘likely to be incompatible’. For example, in the seventh report to the 44<sup>th</sup> Parliament, the Committee concluded in relation to the Migration Amendment Bill 2013 that ‘the amendments in Schedule 3 are likely to be inconsistent with the ICCPR’s prohibition on arbitrary detention and the prohibition on cruel, inhuman or degrading treatment’.<sup>50</sup>
- ‘Actual incompatibility’: where there was an unequivocal finding by the Committee that a Bill or instrument was incompatible with human rights.



\* In December 2013 the Committee began numbering its reports by reference to the Parliament number (then the 44<sup>th</sup>) rather than the year, hence the reports of 2013 and 2014 have been labelled differently in this graph to the subsequent reports.

49 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of the 44<sup>th</sup> Parliament* (2014) 157 [2.46].

50 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventh Report of the 44<sup>th</sup> Parliament* (2014) 75 [2.12].

For example, in the eleventh report to the 44<sup>th</sup> Parliament, the Committee, in summarising its findings on the Business Services Wage Assessment Tool Payment Scheme Bill 2014, concluded that ‘the bill is incompatible with the right to just and favourable conditions of work’.<sup>51</sup>

The results above are graphed cumulatively, so for instance it can be seen that the seventh report of 2013 contained one finding of ‘probable incompatibility’ and one finding of ‘possible incompatibility’. What our chart shows is that from the 11<sup>th</sup> to the 16<sup>th</sup> Reports of the Committee in the 44<sup>th</sup> Parliament — which spanned the period of 2 September 2014 to 25 November 2014 — the Committee began making, for the first time, unequivocal findings that proposed laws were incompatible with human rights. That practice ceased in the report in which three Coalition members first took the step of articulating a dissenting view. No such findings have been reached since, suggesting that the partisanship that has become evident on the Committee, and the procedure adopted for recording this, have prevented the Committee from reaching clear findings as to the incompatibility of proposed laws.

### 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. We examine the effectiveness of the scrutiny regime in this regard by assessing its deliberative impact, by which we mean the extent to which parliamentarians consider, engage with, debate or bring up human rights issues as a consequence of the regime. Two issues arise in ascertaining deliberative impact. The first is that some aspects are simply not measureable — for instance, there is no way of knowing the extent to which the thinking or private conversations of Members of Parliament are shaped by the regime. The second is that our methodology focuses on the kinds of deliberation that can be attributed directly to the regime. So while, for instance, a parliamentarian might have mentioned human rights on a more frequent basis since the regime began, that cannot be ascribed to the regime without something more specific to provide the link, as there may be any number of reasons for a member’s increasing awareness or interest in such issues.

Two aspects of deliberative impact are ascertainable and measurable. The first is the extent to which the regime has caused proponents of legislation, typically Ministers, 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

51 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eleventh Report of the 44<sup>th</sup> Parliament* (2014) 25 [2.25].



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: SOC's. As discussed in Part II Section B, some 99.8 per cent of Bills and proposed legislative instruments have complied with this requirement. While the quality of these SOC's has been called into question,<sup>52</sup> it cannot be denied that, at least formally, the requirement to produce them has resulted in a more regular consideration of human rights issues by the proponents of legislation. However, the improvement is far from uniform, as merely appending a document with the heading 'Statement of Compatibility' to a Bill does not necessarily mean that meaningful rights consideration has taken place. Indeed there is no shortage of examples where an SOC has asserted that a Bill does not engage a relevant human right, only for the Committee to conclude, on the contrary, that it does.<sup>53</sup>

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 that results in iterative improvements in the quality of later SOC's. As Byrnes noted, recounting his impression of the period up until September 2014 when he stepped down as legal adviser, the:

PJCHR has engaged in consistent, principled analysis that has led to an overall improvement in government articulation of the reasons for the adoption of many policies.<sup>54</sup>

This effect was undoubtedly a result of the PJCHR's practice of commencing its analysis of any Bill by asking proponents for more thorough and specific justifications as to how proposed legislation could be viewed as compatible with human rights. Prior to the commencement of the regime in 2012, questions such as these were not mandatory considerations for legislators, so it is unsurprising that part of the Committee's role in the regime's early stages would be to institutionalise the kind of rights-consciousness that the Act was intended to bring about.

An indicator of this effect is the multitude of correspondence that the Committee has received from proponents of legislation in response to its concerns, which the Committee publishes in the Appendix to each of its reports. It has so far elicited 152 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 contain more detailed and targeted

52 See, eg, Rajanayagam, above n 4.

53 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Second Report of the 44<sup>th</sup> Parliament* (2015) 38–40 [1.202]–[1.214]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Seventh Report of the 44<sup>th</sup> Parliament* (2015) 20–8 [1.84]–[1.134].

54 Andrew Byrnes, 'Human Rights under the Microscope: Reflections on Parliamentary Scrutiny' (Speech delivered at the Law Society of South Australia, Adelaide, 11 December 2014) <<http://bit.ly/1J2iVDw>> 11.

analysis than had been carried out in the original SOC. Indeed, it is frequently because of such letters that the Committee concludes that a proposed law it had thought might raise concerns is in fact compatible with human rights.

It is important to recognise however that not all Ministers have been enthusiastic participants in this process. For instance, Scott Morrison MP, then the Minister for Immigration and Border Protection, was asked, in relation to a particular legislative instrument<sup>55</sup> which capped the annual number of protection visas issued by Australia to 2773:

- whether the cap of 2773 determined for this financial year has already been reached;
- and if so, whether the capping on the issuing of protection visas to those held in immigration detention is compatible with the prohibition on arbitrary detention, the right to humane treatment, the right to health, and children's rights;
- whether the capping on the issuing of protection visas to those who are in the community on bridging visas is compatible with the right to work, the right to social security, and the right to an adequate standard of living; and
- whether the capping on the issuing of protection visas is compatible with rights relating to the protection of the family.<sup>56</sup>

He responded:

This instrument does not fall within the scope of section 9 and therefore does not require a Statement of Compatibility; therefore I do not propose to respond to questions in relation to this instrument.<sup>57</sup>

The Committee noted in its report that its mandate to examine legislative instruments in fact derives from section 7 of the Act, and that while no SOC is required for legislative instruments that are exempt from disallowance, the Committee 'provides the proponent of the legislation with the opportunity to provide a statement of compatibility, or further information before determining whether legislation is compatible with human rights'.<sup>58</sup> Even if the Minister was unaware that the Committee's mandate extended so far, his response is at least disingenuous as, in the same letter, he provided detailed defences of five other legislative instruments, despite not being bound to do so.

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 reference in Hansard to either a SOC or to the PJCHR, which we have then sorted

55 Minister for Immigration and Border Protection (Cth), *Granting of Protection Class XA Visas in 2013/2014 Financial Year*, IMMI 14/026, 4 March 2014.

56 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventh Report of the 44<sup>th</sup> Parliament* (2014) 88 [2.49].

57 Ibid.

58 Ibid [2.52].

into substantive and non-substantive references,<sup>59</sup> adopting a sorting technique modelled by Paul Yowell in connection with comparable research on the UK Joint Committee on Human Rights.<sup>60</sup> To give an example of a substantive reference in relation to an SOC, Labor MP Andrew Giles made the following remark in June 2015 when speaking against the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015:

the best the government could do was assert in its statement of compatibility that, while the exclusion period and age change measures would limit [the rights to equality and non-discrimination], the limitations were considered reasonable ‘proportionate to the policy objective’ and for ‘legitimate reasons’. Unsurprisingly, this bald and callous assertion is not expanded on much ...<sup>61</sup>

SOCs have also been referenced in support of Bills such as in this comment by Liberal MP Karen McNamara in relation to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014:

The Australian Greens have described this government’s proposal as:

...a time of renewed Government efforts to intrude, observe and monitor the private lives of ordinary Australians.

This is a complete misrepresentation of the intent of this bill and I, along with my government colleagues, reject this claim. In fact, this bill’s statement of compatibility with human rights states:

The Bill is compatible with human rights because it promotes a number of human rights. To the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.<sup>62</sup>

59 Substantive references include any mention in Parliament relating to:

- the specific content of a Committee report or an SOC;
- the influence of a Committee report or an SOC on an issue;
- a finding by the Committee;
- the effect of a Committee report on legislative outcomes.

Non-substantive references include:

- a mere acknowledgement of someone as a member of the Committee;
- generic praise for the Committee’s work;
- indications that the Committee will scrutinise or has scrutinised a Bill;
- a mention of the Committee as one of a number of bodies that share a certain view;
- the tabling statement of each Committee report (which is delivered as a matter of Committee practice and merely reiterates the views contained in each report);
- 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.

60 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.

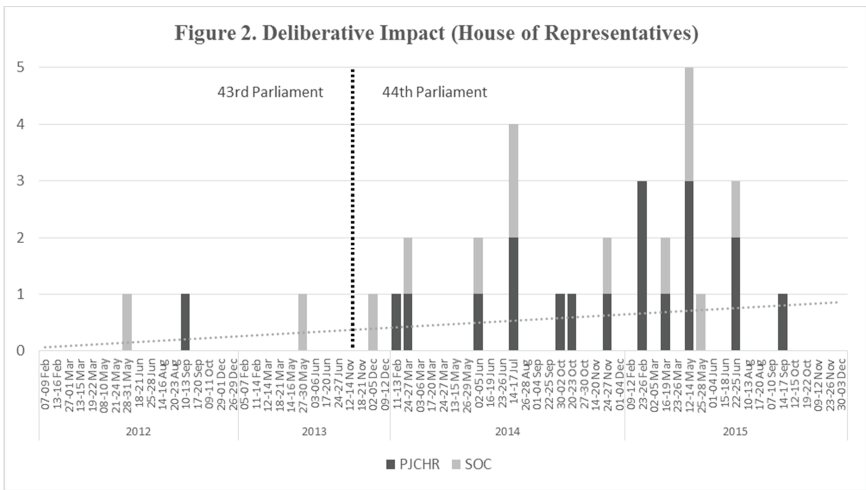
61 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2015, 7061 (Andrew Giles).

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2015, 2818 (Karen McNamara).

Finally, an example of a substantive reference to a report of the PJCHR comes in the form of a comment by Senator Penny Wright in relation to that same Bill on data retention:

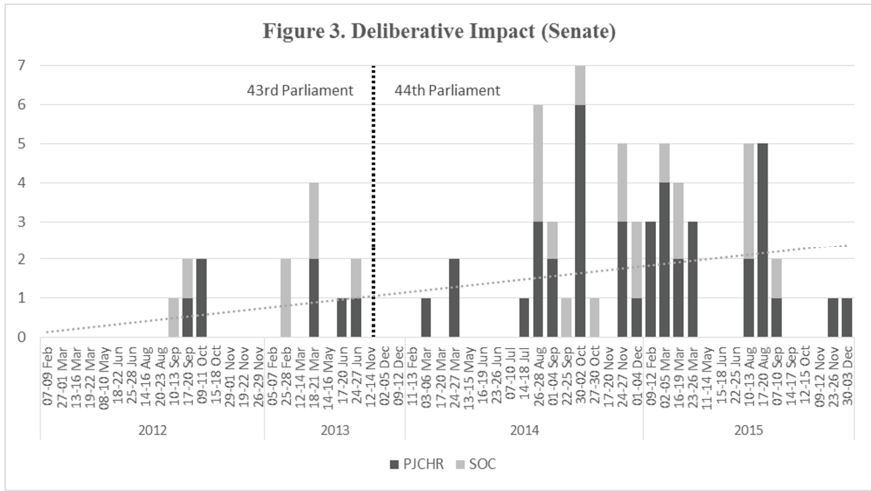
There is absolutely no independent check that happens before data is accessed under this bill, and this should be of grave concern to all of us. It certainly was of concern to the Parliamentary Joint Committee on Human Rights. In its recent report, which included an examination of this bill, the committee made it clear that the human right of privacy is seriously at risk here and that this bill will limit that right significantly.<sup>63</sup>

Starting with the House of Representatives, we have graphed the number of substantive references by sitting week:



This graph shows that deliberative engagement with both the PJCHR and with SOCs is slowly improving, and particularly so in the 44<sup>th</sup> Parliament. That said, with a total of 32 substantive mentions in the history of the scrutiny regime up to 4 January 2016, these results suggest only a very limited impact upon parliamentary debate. The scoresheet for the Senate is only slightly more promising, with a total of 74 substantive mentions:

63 Commonwealth, *Parliamentary Debates*, Senate, 24 March 2015, 2136 (Penny Wright).



Overall the trend in both Houses is slow improvement from a low base. It should be noted though that such references are not evenly spread across Parliament, but are in large part due to a few outspoken advocates for the human rights scrutiny regime. In the House of Representatives, Andrew Giles MP of the Australian Labor Party has been especially vocal, accounting for 28 per cent of the mentions in that House, while in the upper house, Senators Penny Wright and Rachel Siewert, both of the Greens, have often employed the findings of the Committee to critique assertions contained in SOCs, the two of them together accounting for 32 per cent of the mentions in the Senate. Of these three, only Senator Wright has been a member of the Committee.

## **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 Committee report leads to the introduction of a new Bill to protect human rights or if a 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.<sup>64</sup>

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. To say nothing of the fact that it could not be ascertained whether the regime was causative of any such improvement or deterioration, 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.<sup>65</sup>

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 Committee report finding incompatibility), or, where a Bill or legislative instrument either passed, lapsed, failed, or was withdrawn, before the Committee managed to produce a report on it. However it is much harder to say with any certainty that a PJCHR report *did* have an influence on a legislative outcome. As Francesca Klug and Helen Wildbore state (again in the UK context):

it is very difficult to assess the extent to which JCHR reports have been directly 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.<sup>66</sup>

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'.<sup>67</sup>

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

64 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, citing Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at PSA Legislative Studies Specialist Group Conference, London, 24 June 2009).

65 George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *Queensland University of Technology Law Review* (forthcoming).

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

67 Kavanagh, above n 64, citing Meg Russell et al, 'A Parliament that Bows and Scrapes?: The Westminster Parliament's Impact on Government Legislation 2005–2010' (Paper presented to the PSA, Belfast, 3–5 April 2012) 2.

adopted a ‘generous’ dichotomy that gives the Committee the benefit of the doubt, sorting our findings into instances where a finding of incompatibility (actual, probable or possible) categorically had no influence on legislative outcomes, and instances where it is possible that it had at least some influence.

As at 4 January 2016, there have been 95 instances where the Committee has found that the legislation before it either is, or at least may be, incompatible with human rights.<sup>68</sup> Applying the dichotomy just mentioned, the record shows that 73 per cent of the time (or on 69 occasions), that finding had no impact on the ultimate outcome of that legislation’s passage. Out of those 69 occasions, 66 of them are explained by the delay factor, as the Committee had not yet handed down its concluded report on the relevant Bill or legislative instrument by the time it came to a final vote. This demonstrates how the Committee’s propensity to defer its consideration of proposed legislation undermines its effect on legislative outcomes.

On the other hand, there have been 26 instances to date where the PJCHR may have had an impact. These fall into four categories: instances where a report was delivered and the relevant Bill or instrument was passed with amendments introduced after the report (11 occasions); instances where a report was delivered and the relevant Bill or instrument failed in Parliament (six occasions); instances where a report was delivered and the relevant Bill or instrument lapsed (seven occasions); and instances where a report was delivered and a new amending, repealing or disallowing piece of legislation was later enacted in respect of the relevant Bill or instrument (two occasions).

The extent to which the Committee was in fact a catalyst in these outcomes can be elusive. For instance, we examined the Migration Amendment (Protection and Other Measures) Bill 2014, which was subject to a finding of probable incompatibility by the Committee on 18 March 2015,<sup>69</sup> and was passed one week later with a total of 14 amendments (12 Government and two Opposition). The Committee’s report raised, in particular, concerns about Schedule 2 of the Bill, along with (proposed) sections 5AAA, 423A, 91W and 91WA. These latter four sections were unaffected by the amendments, which were mostly machinery in nature. However Schedule 2 of the Bill, which the Committee had warned was incompatible with Australia’s non-refoulement obligations, was removed from the Bill by an Opposition amendment. Neither the Bill’s original Explanatory Memorandum, nor any of its three supplementary Explanatory Memoranda, make reference to the PJCHR report. Further, while Hansard reveals that the Opposition

68 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 SOC), 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 all Bills that are still before Parliament and legislative instruments still subject to disallowance.

69 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twentieth Report of the 44<sup>th</sup> Parliament* (2014).

amendment was introduced with human rights concerns in mind, Senator Carr, in introducing it, made no reference to the PJCHR report.<sup>70</sup> If he had spent time reading and considering the report, it might be thought that he would mention that fact when introducing an amendment dealing with the very concerns it raised.

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:

[In other cases] the PJCHR's clear findings of incompatibility (even when accompanied by [broader] concern) have not been sufficient to change the minds of the executive on issues that are seen as being of fundamental (party) political importance.<sup>71</sup>

Another report in 2014 comparing the Committee'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.'<sup>72</sup>

These views are confirmed by the fact that the Committee's own Annual Report of 2012–13 (the only such report it has produced to date) does not identify a single occasion where one of its findings has resulted in an actual legislative outcome. The highest it puts its impact is as follows:

There are positive signs that the committee's work is being taken into account in the development and refinement of legislation. Departments and agencies are increasingly aware of the committee's expectations regarding the content of statements of compatibility. More significantly, a number of Ministers have undertaken to review procedures and make amendments to legislation in response to the committee's comments.<sup>73</sup>

That last sentence makes reference via a footnote to five undertakings given by Ministers to reconsider and, where appropriate, amend their legislative proposals. For the same reasons given earlier, it is not possible in each case to determine if this was causative of change. However there was at least one occasion where a legislative outcome did result. In its Sixth Report of 2013, the Committee assessed a legislative instrument called the *Australian Public Service Commissioner's Directions 2013* (Cth), which, among other things, provides for the gazetting of certain employment decisions in relation to Australian Public Service ('APS') staff, including decisions relating to engagement, promotion and termination. The Committee argued that this requirement engaged the right to privacy and, in the

70 Commonwealth, *Parliamentary Debates*, Senate, 25 March 2015, 2277 (Kim Carr).

71 Byrnes, above n 54. 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) *Parliamentary Affairs* (forthcoming) (Advance Access published 10 September 2015, doi: 10.1093/pa/gsv047).

72 ACT Human Rights Commission, *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* (2014) 13.

73 Annual Report, above n 29, 10 [1.46].



event that a person's employment is terminated because of mental or physical incapacity, rights contained in the Convention on the Rights of Persons with Disabilities.<sup>74</sup> It accordingly sought an explanation from the Minister as to why the measure was necessary.

The following month, the then Minister for the Public Service and Integrity, Mark Dreyfus QC MP, wrote back:

The current gazettal requirements have been a feature of APS employment for many years. The historical justification for publishing APS employment decisions is to reinforce the openness, transparency and accountability of the APS ...

However, in the light of the concerns the Committee has raised, I believe the matter should be considered further and I have agreed to a proposal from the Public Service Commissioner ... that he should consult publicly and review whether publication of termination decisions, including those relating to Senior Executive ...employees, and the grounds for termination is in the public interest having regard to an individual's right to privacy and the Convention on the Rights of Persons with Disabilities.<sup>75</sup>

Sixteen months later, the APS Commissioner made a new Direction,<sup>76</sup> removing the requirement that certain employment decisions be notified in the Public Service *Gazette*. This was expressly said to have been done in response to the Committee's report.<sup>77</sup> In a later report, the Committee thanked the Commissioner for dealing with its concerns, but sought an explanation as to why the new Direction still retained a requirement to publicise termination decisions in cases of misconduct.<sup>78</sup> However, on that occasion the Committee received a frostier reception, with a newly appointed APS Commissioner responding: 'I believe that the balance of the public interest lies in continuing to publish in the Public Service *Gazette* decisions of this kind and that that does not represent an arbitrary interference with privacy.'<sup>79</sup>

Byrnes acknowledges such small wins in the Committee's record so far, although reiterates his impression that they are exceptional:

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

74 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of 2013* (2013) 134 [2.21].

75 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of 2013* (2013) Appendix 3.

76 *Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014* (Cth).

77 Australian Public Service Commissioner, *Explanatory Statement: Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014*, Attachment B, 'Statement of Compatibility with Human Rights'.

78 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eighteenth Report of the 44<sup>th</sup> Parliament* (2015) 66 [1.254]–[1.255].

79 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-First Report of the 44<sup>th</sup> Parliament* (2015) Appendix 1.

groundswell that has led to the amendment or abandonment of proposed legislation.<sup>80</sup>

This less direct ‘groundswell’ effect needs to be kept in mind. On occasion, a PJCHR report garners enough media attention (as to which, see Section D below) to contribute to a change of tide in the public debate. This in fact occurred when the Committee concluded that the Government’s ‘learn or earn’ budget measures<sup>81</sup> were incompatible with human rights, in a report which was picked up by advocacy groups, media and the major political parties.<sup>82</sup> One week later, realising it did not have 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 specifically credit the Committee when it announced its decision to re-package the Bill.

There is also potential for impact where a preliminary comment of the Committee prompts early legislative action, so that the final conclusion of the Committee, when ultimately released, is no longer critical of the Bill. This has happened at least once, in relation to the National Disability Insurance Scheme Bill 2012. That Bill contained provisions requiring persons other than participants in the Scheme to disclose information that the CEO believes they might have — such as whether a participant is truly eligible for the scheme — and made it an offence to fail to comply with such a direction.<sup>83</sup> In a preliminary report, the Committee asked the Minister whether that provision infringed the right against self-incrimination. In her response, the Minister announced that the Government had by then successfully introduced an amendment to the Bill dealing with the issue the Committee had raised, providing that it was now a ‘reasonable excuse for an individual to refuse or fail to give information or produce a document on the ground that to do so might tend to incriminate the individual’.<sup>84</sup>

Another less direct way that the Committee’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’.<sup>85</sup> This kind of influence, though harder to detect, should be welcomed as it is a necessary incident of an improving rights-respecting culture. As Kavanagh explains:

Other forms of subtle influence behind the scenes were often perceived to be more effective than the formal processes. These forms of influence

80 Byrnes, above n 54.

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

82 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twelfth Report of the 44th Parliament* (2014). See, eg, Renuka Thilagaratnam, *Sitting Fortnight Wrap-Up* (5 October 2014) Human Rights Scrutiny Blog <<https://hrscrutiny.wordpress.com/2014/10/05/sitting-fortnight-wrap-up/>>.

83 National Disability Insurance Scheme Bill 2012 (Cth) ss 55, 57.

84 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of 2013* 277–8 [3.10]–[3.13].

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

are, by their nature, less tangible and less measurable than straightforward take-up by government of committee recommendations. In fact, the more integrated and effective the committees become in the policy-making process, the more difficult it is to isolate their influence from other actors.<sup>86</sup>

Yet despite the possibility that good work is going on behind closed doors and in Parliamentary corridors, our overall finding remains undisturbed: on 73 per cent of the instances where the Committee has made an adverse finding about a Bill or legislative instrument, that conclusion has had no impact on the fate of the legislation in question, while in the remaining 27 per cent of cases in which an impact might have occurred, evidence of this is hard to find.

### C Judicial Impact

The exclusive parliamentary model of rights protection leaves little room for judicial involvement.<sup>87</sup> For SOCs, the courts' role is limited by s 8 of the Act (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'.<sup>88</sup> 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.<sup>89</sup> The position with respect to reports of the PJCHR is identical,<sup>90</sup> 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.<sup>91</sup>

Judicial use of the scrutiny regime has been extremely limited. As at 4 January 2016, there have been only four cases where reference has been made to an SOC or the PJCHR. One occurred in the context of a general discussion of human rights developments in Australia,<sup>92</sup> while another is buried in a detailed narration of a matter's procedural history.<sup>93</sup> The third and fourth cases, however, make more substantial use of SOCs. In *Wearden & Scotland*,<sup>94</sup> a court-appointed independent children's lawyer sought a declaration that he was exempt from paying subpoena filing fees by virtue of r 2.04(1) of the *Family Law (Fees) Regulation 2012* (Cth). That Regulation exempted legal aid grantees,<sup>95</sup> and persons younger than 18,<sup>96</sup>

86 Kavanagh, above n 64, 136 (citations omitted).

87 Williams and Burton, above n 3, 89.

88 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(4), 9(3).

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

90 *Ibid.*

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

92 *DPP (Vic) v Kaba* [2014] VSC 52 (18 December 2014).

93 *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities* [No 2] 225 FCR 97.

94 [2013] FMCAfam 268.

95 *Family Law (Fees) Regulation 2012* (Cth) reg 2.04(1)(a).

96 *Ibid* reg 2.04(1)(d).

from the requirement to pay. The position of the Attorney-General's Department was that the Regulation did not exempt independent children's lawyers, as they:

are not the child's legal representative and are not obliged to act on the child's instructions in relation to the proceedings ... . The appointment of an ICL does not mean that the child becomes a party to the proceedings such that the exemption in s 2.04(1)(d) would be enlivened.<sup>97</sup>

Roberts FM came to the opposite view, taking into consideration the Regulation's SOC, which stated that:

The Regulation advances the right to access to justice by providing a fee exemption for certain disadvantaged litigants specified in the proposed Regulation or where payment of the fee would cause financial hardship to the individual. These persons will be able to access court services without paying court fees. These disadvantaged persons include recipients of legal aid, people receiving Commonwealth income support, and minors under 18 years of age.<sup>98</sup>

His Honour inferred from this explanation that the legislative intent behind the Regulation was to waive the fee requirement when it related to subpoenas 'issued in the pursuit of outcomes that are intended to be in the best interests of children'.<sup>99</sup> Though accompanied by other arguments, this finding was a key step in his reasoning to make the declaration sought.

In the fourth case, *SZVBN v Minister for Immigration*,<sup>100</sup> two children had been included (unknowingly, it was contended) in an application for a protection visa made their by mother. That application was unsuccessful. The children then made further applications of their own, which were refused on the basis that s 48A of the *Migration Act 1958* (Cth) prevents a person who has been refused a protection visa from making a subsequent protection visa application. The question for determination by Judge Driver was whether s 48A required the children to have had knowledge of the original application before the section could operate to prevent them from making a further one. Judge Driver considered the context of s 48A in detail, including the Statement of Compatibility for the Bill that introduced it, which stated that:

Persons who were refused as members of another person's family unit ... and who did not raise their own protection claims at the time, will also be prevented from making a further protection visa application relying on their own protection claims.<sup>101</sup>

After considering this and several other contextual matters, he held that nothing in the text or context of s 48A led to the conclusion that it contained a knowledge

97 *Wearden & Scotland* [2013] FMCAfam 268 [9].

98 Statement of Compatibility, Family Law (Fees) Regulation 2012 (Cth).

99 *Wearden & Scotland* [2013] FMCAfam 268 [8].

100 [2015] FCCA 2977 (11 December 2015).

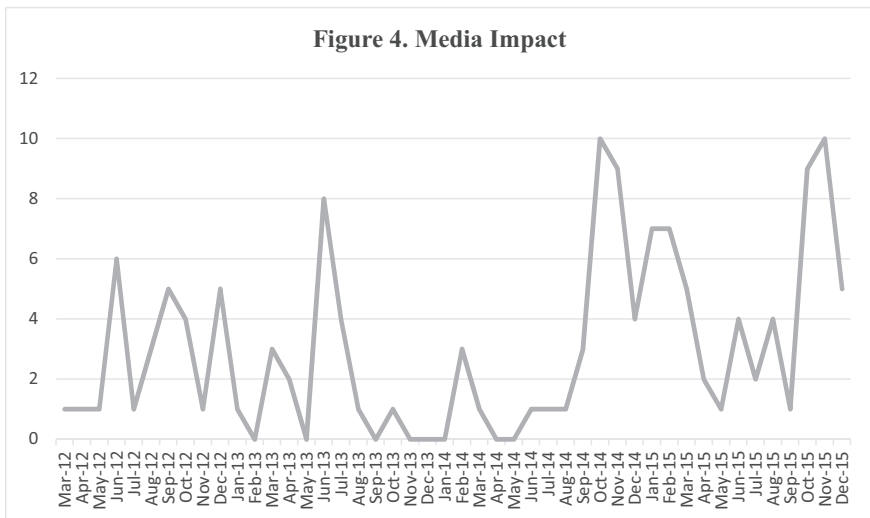
101 *Ibid* [58], quoting Explanatory Memorandum to the Migration Amendment Bill 2013 (Cth), Attachment A.

requirement, and that the children's application for judicial review of the Minister's refusal to grant them protection visas could not succeed.

To date, these are the only two instances of the scrutiny regime having had such an impact in the judicial arena. Clearly, the regime has so far succeeded in limiting the scope for new human rights litigation arising out of the Act.

### D Media Impact

Public awareness of the scrutiny regime appears to be low. This was particularly the case for the first two years of the PJCHR's life, when its findings garnered a few media mentions per month, with occasional spikes whenever a topical Bill was commented upon. However, that changed in September 2014, when a series of findings on controversial Bills introduced by the Abbott Government brought the Committee into the public debate for a more sustained period. We have identified mentions of the PJCHR in the Australian media since its inception,<sup>102</sup> which we have then sorted by month. The results are as follows:



The various spikes throughout 2012 and 2013, and in late 2015, are referable to a variety of the Committee's findings, for instance in relation to legislation dealing with single parents' welfare payments, offshore processing for asylum seekers, and same-sex marriage. As to the larger and more sustained spike lasting from September 2014 to March 2015, the Committee's media impact is referable, by and large, to its findings in relation to three Bills:

<sup>102</sup> Based on searches conducted on Google News, with the 'Country: Australia' filter applied. Google News aggregates results from online news media outlets, including purpose-built news websites, websites associated with newspapers, websites associated with radio and TV stations, and blogs. This search was then supplemented by a separate search on the Factiva database.

1. the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill (Cth) 2014 which introduced, among other measures, a 26-week waiting period for all new job seekers under the age of 30 before they would be eligible for social security. The Committee found this measure to be incompatible with human rights, as it affected the right to social security and the right to an adequate standard of living, and because despite the proportionality analysis given in the Minister's response to the Committee, it had not been shown how young people would be able to sustain themselves financially during the waiting period;<sup>103</sup>
2. the Telecommunications (Interception and Access) Amendment (Data Retention) Bill (Cth) 2014, which required providers of telecommunications services to retain data relating to all of their customers' communications for a period of two years. In a preliminary report, the Committee indicated its view that the Bill should be amended so that the types of data that may and may not be collected are clearly defined, in order to prevent the Bill from arbitrarily interfering with the right to privacy;<sup>104</sup> and
3. the Racial Discrimination Amendment Bill (Cth) 2014, which sought to legalise acts likely to 'insult' or 'offend' a person or group of people on the basis of their race; conduct which is otherwise unlawful under s 18C of the *Racial Discrimination Act 1975* (Cth). The Committee concluded, without providing reasons, that this Bill did not raise human rights concerns.<sup>105</sup>

The higher profile that the Committee received over this period reflects the heated national debate on each of these Bills. However, this does not explain why the Committee did not receive similar levels of coverage in relation to other findings of incompatibility, for instance, in relation to Bills affecting national security, higher education or the building and construction industry, all of which have been high-profile topics in Australia in the past few years.

At this stage the data does not lend itself to strong conclusions, except to say (a) that the Committee's overall media impact has been sporadic, and, generally, minimal (with an average of three mentions per month); (b) that this started improving in August 2014; (c) that it plummeted again in March 2015, which, incidentally, was the same month that the Committee began its practice of making inconclusive findings instead of reaching a consensus view; and (d) that it experienced one final burst in October and November 2015, which was referable to a variety of Bills. To take a recent example of a report that perhaps should have garnered more publicity than it did, the Committee in June 2015 handed down its report on the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities)

103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twelfth Report of the 44<sup>th</sup> Parliament* (2014) 70–3 [2.9]–[2.12].

104 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of the 44<sup>th</sup> Parliament* (2014) 14 [1.35]–[1.36].

105 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eighteenth Report of the 44<sup>th</sup> Parliament* (2015) 1–2 [1.6]–[1.7].

Bill 2015.<sup>106</sup> That Bill confers broad discretionary powers on officers to use force to maintain ‘good order’ in immigration detention facilities, and grants legal immunity from prosecution where those powers were exercised in good faith. In keeping with the now familiar formula, some members of the Committee thought that the Bill unduly infringed the right to life, the right to humane treatment in detention, the right to freedom of assembly, and the prohibition on torture. Other Committee members thought that it did not.<sup>107</sup> Though it was dealing with a high-profile Bill with controversial ramifications, the report received only one mention in the media.<sup>108</sup>

Overseas, the Committee’s work has been referenced in several news outlets (including Russia’s *Sputnik News*<sup>109</sup> and Norway’s *The Oslo Times*<sup>110</sup>), as well as before UN bodies on nine occasions. The latter has often been the result of the Australian Human Rights Commission’s various reporting duties to the General Assembly (under the Universal Periodic Review for instance), on the development and implementation of Australia’s human rights measures. Most references have been merely descriptive,<sup>111</sup> and occasionally commendatory,<sup>112</sup> while on one occasion, the regime was criticised on the basis that the Committee’s ‘recommendations are not always taken into account’.<sup>113</sup>

#### IV OBSERVATIONS AND REFORMS

Our analysis has exposed 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. In particular, these are:

1. the requirement to produce SOCs for all proposed legislation, with which there has been formal compliance by the executive;

106 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Fourth Report of the 44<sup>th</sup> Parliament* (2015), 83–108.

107 Ibid.

108 Gabrielle Appleby and Claire Higgins, ‘How Much Power Is Too Much When Dealing with Asylum Seekers’, *Sydney Morning Herald* (online), 25 June 2015 <<http://www.smh.com.au/comment/how-much-power-is-too-much-when-dealing-with-asylum-seekers-20150625-ghxfpq.html>>.

109 ‘Australian Welfare Reforms may Breach Human Rights: Human Rights Committee’, *Sputnik News* (online), 30 September 2014 <<http://sputniknews.com/politics/20140930/193461925/Australian-Welfare-Reforms-Could-Breach-Human-Rights-Human.html>>.

110 ‘Aussie “Learn or Earn” Policy may Breach Human Rights: Parliamentary Committee’, *The Oslo Times* (online), 30 September 2014 <<http://archive-old.theoslotimes.com/aussie-learn-or-earn-policy-may-breach-human-rights-parliamentary-committee/>>.

111 See, eg, Committee Against Torture, *Summary Record of the 1260th Meeting*, 53<sup>rd</sup> sess, UN Doc CAT/C/SR.1260 (12 November 2014) 3.

112 See, eg, Human Rights Council, *Information Presented by the Australian Human Rights Commission*, 25<sup>th</sup> sess, UN Doc A/HRC/25/N1/10 (3 March 2014) 5.

113 Committee Against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, 53<sup>rd</sup> sess, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) 8 [21].

2. the industriousness of the PJCHR, as evidenced by the significant volumes of analysis it has conducted;
3. the consultative approach adopted by the PJCHR, whereby proponents of legislation are afforded an opportunity to provide further justification for their proposals beyond that contained in the SOC; and
4. the regime's success in achieving its stated aim of limiting the scope for litigation arising under the Act.

By contrast, the most significant shortcomings are:

1. loss of clarity, on the face of Committee reports, as to which legislative instruments have been assessed;
2. the delay of the Committee in delivering reports;
3. inappropriate procedures in the event of Committee disagreement;
4. low deliberative impact;
5. low legislative impact; and
6. low public awareness.

We address each of these in turn, including in light of the experience of similar scrutiny regimes in United Kingdom, the ACT and Victoria (which were established in 2001, 2004 and 2007 respectively), with a view to suggesting improvements and reforms.

The first problem is that the Committee has abolished the practice of publishing lists of which legislative instruments (as opposed to Bills) it has considered in producing its reports. This has coincided with lesser scrutiny of such instruments. In deciding whether to formally assess an instrument or not, the Committee makes a preliminary assessment of the instrument and places it one of three categories:

1. legislation that does not appear to raise human rights concerns;
2. legislation that potentially raises human rights concerns; and
3. legislation that raises human rights concerns that the Committee considers require closer examination.<sup>114</sup>

An instrument will fall into the first category if 'the committee has been able to satisfy itself, on the face of the legislation and the statement of compatibility, that the legislation is unlikely to give rise to human rights incompatibility'.<sup>115</sup> Where this occurs, the Committee makes no further inquiries into the instrument's likely operation, and the instrument is not mentioned in the Committee's report for the relevant time period, thereby eliminating transparency for that aspect of the Committee's review function. By contrast to the position regarding legislative instruments, in relation to Bills the Committee continues to provide lists specifically naming each Bill that it has determined falls into the first category.

<sup>114</sup> Annual Report, above n 29, 5 [1.19].

<sup>115</sup> *Ibid* [1.20].



This issue can be remedied by returning to the former practice of including an Appendix listing all of the instruments considered. Not only is the fix straightforward, but the risk averted is serious. If a government believes that legislative instruments are likely to receive less scrutiny from the Committee (whether or not that is in fact the case), it may seek to avoid the Committee's gaze by relegating its more controversial policies to this form of law. This is undesirable because it creates an incentive for the government to deprive Parliament of the opportunity to publicly consider and debate, at the pre-enactment stage, substantive and potentially rights-infringing legislation, delegating the task instead to decision-makers whose work is less visible to the public eye. Although the level of PJCHR scrutiny may well be the same regardless of the form in which the legislation is ultimately enacted, other forms of accountability are affected when new laws are enacted as subordinate legislation.

The problem has been tackled in Victoria. Its rights scrutiny committee — the Scrutiny of Acts and Regulations Committee ('SARC') — was originally only given a mandate to scrutinise Bills and 'statutory rules' (which is only one of the two distinct categories of subordinate legislation in Victoria, the other being 'legislative instruments'). Realising the flaw three years later, the Victorian Parliament passed the *Subordinate Legislation Amendment Act 2010* (Vic), extending the SARC's remit to legislative instruments, and further, giving it the extraordinary power to suspend legislative instruments that it considers to be incompatible.<sup>116</sup> As the SARC itself has since noted:

While regulations and legislative instruments are sometimes perceived to be of lesser importance than Acts of Parliament, they do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as Acts of Parliament. The potential for abuse of the regulation-making power and erosion of citizens' rights always exists.<sup>117</sup>

So that there can be no doubt, the SARC publishes an annual report listing all of the legislative instruments that it has considered, as well as its findings on each of them.

Other jurisdictions have not gone quite as far as Victoria. The ACT's Standing Committee on Justice and Community Safety ('SCJCS') has no power to scrutinise delegated legislation for human rights compliance (although it does have powers to scrutinise such legislation for some other purposes). The UK Joint Committee of Human Rights ('UKJCHR') is empowered to determine its own scrutiny agenda,<sup>118</sup> which though originally confined to Bills, it later extended, as it came to the view that delegated legislation is 'no less likely to interfere with, or authorise interference with, human rights'.<sup>119</sup> It does not now go so far as to systematically

116 *Subordinate Legislation Act 1994* (Vic) s 25B.

117 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2014: Regulations and Legislative Instruments* (2015) 2.

118 Kavanagh, above n 64, 119.

119 Joint Committee on Human Rights, Parliament of the United Kingdom, *The Work of the Committee in the 2001–2005 Parliament: Nineteenth Report of Session 2004–05* (2005) 36 [99].

scrutinise all legislative instruments, arguing that such comprehensive scrutiny is unnecessary where, '[a]lmost without exception, secondary legislation which is not compatible with the [European Convention on Human Rights] is *ultra vires* and, if and when challenged, is struck down by the courts on those grounds'.<sup>120</sup> Nonetheless, its approach, along with Victoria's, demonstrates the conviction held in other jurisdictions that delegated legislation should not be accorded a second-tier status when it comes to parliamentary scrutiny of human rights.

Secondly, the Committee's effectiveness is being undermined by its delay in producing reports. On 66 occasions so far, the Committee has handed down a final report criticising the human rights impact of a Bill or instrument which, by the time the report was finished, had already been enacted into law. If nothing else, this may encourage the government to avoid human rights scrutiny by expediting the passage of a Bill through Parliament. It is true that much of the Committee's influence may be felt at the pre-reporting stage of its work, yet, as has been noted, 'for legislative scrutiny to be meaningful and effective, timing is of the essence'.<sup>121</sup> Indeed, a number of Australian parliamentarians interviewed in a 2011 study indicated that '[t]he main thing that would make parliamentary scrutiny more effective is more time'.<sup>122</sup>

One solution mentioned in the Interim Report of the Australian Law Reform Commission on Traditional Rights and Freedoms is for minimum time periods to be established, for the purpose of Committee review, during which it will not be possible for a Bill or legislative instrument to be enacted into law.<sup>123</sup> This procedure exists already in the ACT, where Standing Order 182A provides that a government amendment to its own Bill cannot be moved until the Scrutiny Committee has considered and reported on it,<sup>124</sup> and, by a similar provision, any original Bill that has been introduced and referred to a standing committee cannot be dealt with until the committee has reported.<sup>125</sup> Such a change, perhaps with an exception for urgent matters, should also be introduced to the Commonwealth level, which would aid not only the PJCHR's work, but also the parliamentary process more generally, which has suffered from the over-hasty passage of a number of measures in recent times, including the Northern Territory intervention<sup>126</sup> and recent national security laws.<sup>127</sup> The Northern Territory example is particularly telling of the need for minimum time periods. That intervention consisted of a package of five Bills, involving significant restrictions on human rights, which were introduced in response to a 2007 report detailing widespread sexual abuse

120 Joint Committee on Human Rights, Parliament of the United Kingdom, *Work of the Committee in 2008–09: Second Report of Session 2009–10* (2009) 16 [27].

121 Kavanagh, above n 64, 120.

122 Evans and Evans, above n 85, 342.

123 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (Interim) (2015) 52.

124 Legislative Assembly (ACT), *Standing Orders and Continuing Resolutions of the Assembly*, December 2015, Standing Order 182A.

125 *Ibid*, Standing Order 175.

126 Williams and Burton, above n 3, 63–5.

127 Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws* (NewSouth Publishing, 2015).

of Aboriginal children.<sup>128</sup> The Bills, which ran to 604 pages, were introduced into the House of Representatives on 7 August 2007 at 12.32pm (which was the first opportunity most parliamentarians had to read them), and were passed at 9.34pm that same day after short debate.<sup>129</sup> The Senate then passed the Bills a week later without amendment.

In a recent statutory review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), Michael Brett Young considered this same issue of short timeframes to be his ‘main criticism’ of the scrutiny process in Victoria.<sup>130</sup> As the Law Institute of Victoria said in its submission to that Review:

One of the purposes of the Charter is to ensure that human rights are appropriately considered in developing laws: debating Bills in Parliament without adequate time for scrutiny undermines the impact and benefit of the Charter.<sup>131</sup>

On the other hand, at the Commonwealth level, the Scrutiny of Bills Committee considered the idea of minimum time periods in relation to its own work, but concluded that its role was not to delay the passage of legislation, but rather to provide timely reports to alert the Senate of the need for possible further examination of provisions of concern.<sup>132</sup> If the PJCHR were to take the same view, it would need to revise its work practices so that promptness becomes a higher priority, for instance by proceeding to a final conclusion despite deficiencies in the SOC. Even then, the rapid passage of some legislation, including measures having the greatest impact on human rights, may still preclude the Committee from completing its work. This course would also have the further disadvantage of eliminating the useful feedback loop effect whereby correspondence between the Committee and Ministers leads to improved human rights consciousness and understanding. The enactment of a minimum time period, discussed above, would thus provide the best opportunity for the Committee to balance its needs to be prompt and to be consultative.

Thirdly, the Committee’s recent innovation of accommodating dissent by handing down inconclusive reports poses a crippling threat to its effectiveness. By contrast, Victoria’s SARC only allows members to dissent from the majority view either by voting against the majority’s approach to a Bill, or if the dissenters feel sufficiently strongly about the issue, by producing a minority report in which they can articulate their concerns and alternative conclusions.<sup>133</sup> However, this occurs

128 Northern Territory Government, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) (also known as the *Little Children Are Sacred* report).

129 Williams and Burton, above n 3 64.

130 Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Summary Report, 2015) 15.

131 Ibid.

132 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 127 (Interim) (2015) 52.

133 Scrutiny of Acts and Regulations Committee, *Inquiry Process* (1 June 2011) Parliament of Victoria <<http://www.parliament.vic.gov.au/sarc/inquiry-process>>.

quite rarely, with only three instances of dissent in the Victorian Committee's eight-year history.<sup>134</sup>

In the UK JCHR, members are prevented from making dissenting reports. However, they may move amendments to the draft report of the Committee, or propose an alternative draft report. The matter is then resolved by way of a vote, and minority votes are recorded in the minutes of the Committee, so that the existence of dissent remains on the public record. Across the 250 reports that the Committee has produced in its fifteen-year history, there have been only 27 instances of dissent.<sup>135</sup> Finally, the ACT's SCJCS has had a ten-year run of consensual reporting.

The lesson from these jurisdictions is that dissent is generally expected to be a rarity, and when it does occur, it is to be accommodated either by way of a vote, or by requiring members with an alternative view to squarely account for their position by (at least) disclosing their identity and (ideally) providing reasons for their point of view. The current approach of the PJCHR by contrast allows dissent to be anonymous, unsubstantiated and unresolved. That approach is made possible by the vague words of the Act itself, which does not specify the manner in which the Committee should reach its conclusions (although the parliamentary resolution relating to the Committee does appear to contemplate the resolution of divergent views by a vote).<sup>136</sup> An appropriate solution to this would be to amend the Act so that it requires the Committee to reach a majority view, while making provision for dissenting members to provide reasons, along with their names.

Fourthly, in Part IIIA we assessed the Committee's deliberative impact as being relatively low, with a total of 106 substantive mentions in Parliament (32 in the House of Representatives and 74 in the Senate) in its four-year history, or an average of 27 mentions a year. Notwithstanding the Committee's better run in terms of eliciting correspondence from Ministers about their proposed Bills — on our count, 152 letters so far — the number of mentions in Parliament is important too, as it measures the engagement amongst parliamentarians, as opposed to the executive alone.

In the UK, Yowell examined the deliberative impact of the JCHR and found that, for its first three years, the impact was similarly underwhelming (in fact the annual number of mentions in Parliament was lower than the PJCHR's).<sup>137</sup> However in 2005–06, the figure suddenly skyrocketed, with the Committee's work receiving 258 mentions that year, followed by 210 and 246 the two years thereafter.<sup>138</sup> Since there had been no significant change in the number of reports produced, Yowell accounts for the dramatic increase by reference to a change in the Committee's working practices in 2006:

134 'Unpicking Dissensus' on Renuka Thilagaratnam, *Human Rights Scrutiny Blog* (2 March 2015) <<https://hrscrutiny.wordpress.com/2015/03/02/unpicking-dissensus/#more-1295>>.

135 *Ibid* (see link to 'over 25 examples to committee disunity').

136 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 2013, 968 (Christopher Pyne).

137 Yowell, above n 60, 143.

138 *Ibid* 143 n 6.

One of the changes was the adoption of a deliberate strategy of recommending amendments to bills to give effect to the Committee's recommendations. Those amendments were often moved by some particularly active members of the Committee, resulting in more debate of the Committee's reports on the floor of both Houses.<sup>139</sup>

The PJCHR, too, has been doing this since at least its first report to the 44<sup>th</sup> Parliament, in which it proposed a direct amendment to the *Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1)*.<sup>140</sup> However, it does not make recommendations for all legislation that it scrutinises, nor even for all the legislation that it considers to be potentially incompatible with human rights. It may be that a more uniform approach, where suggestions for amendments to incompatible or borderline legislation were offered as a matter of course, would have a greater impact upon deliberation within Parliament, as it would gradually come to be recognised that PJCHR reports invariably offer solutions to the problems they identify.

Fifthly, as to legislative impact, we found that on 73 per cent of occasions where the Committee had expressed a view that legislation may be incompatible with human rights, that conclusion had no effect on whether the Bill was enacted or on its content. Further, 73 per cent represents the most generous possible estimate: qualitative feedback from Committee insiders and commentators indicates that the figure is likely to be much higher, and indeed, there appear to be only a few occasions when a Committee report has had a direct impact on legislation.

Legislative impact is a 'thorny issue'<sup>141</sup> because it does not lend itself to straightforward quantitative analysis. It also needs to be kept in mind that the Committee may have 'anticipatory influence'<sup>142</sup> on legislative outcomes, that is, it may influence government departments at the planning and drafting stages. Nonetheless, comparisons may be drawn between the legislative impact of the PJCHR and its contemporaries.

With the exception of the ACT's SCJCS, the track record of other Committees in this area does not outshine that of the PJCHR. In a recent self-assessment, Victoria's SARC concluded that it had only had an effect on 21 pieces of legislation in its seven-year history<sup>143</sup> (and this was using a 'generous' yardstick, similar to ours for the PJCHR, which included Bills that happened to lapse after receiving adverse reports and Bills that were amended consistently with the Committee's concerns but without mention of the Committee). Similarly, for all its 1,006 mentions in Parliament, the UK JCHR has only managed 16 amendments.<sup>144</sup> In

139 Ibid 144.

140 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *First Report of the 44<sup>th</sup> Parliament* (2013) 91 [2.10].

141 Kavanagh, above n 64, 117.

142 Ibid 137.

143 Scrutiny of Acts and Regulations Committee, *Alert Digest No. 13 of 2014* (2014) Parliament of Victoria <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert\\_Digests/Alert\\_Digest\\_No\\_13\\_of\\_2014.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert_Digests/Alert_Digest_No_13_of_2014.pdf)> Appendix 5.

144 Yowell, above n 60, 161.

an assessment that is reminiscent of Byrnes' view of the PJCHR, Michael Tolley says of the UK JCHR:

In most instances ... the JCHR is unable to get the Government to consider its views during the drafting stage ... [and] is unable to prevent the Government from passing the bills it wants.<sup>145</sup>

The SCJCS is the exception to the rule. On its own analysis, in 2014 alone the government moved almost 100 amendments to 7 Bills 'ostensibly' in response to comments made by the Committee.<sup>146</sup> Whether that figure was arrived at using a generous or a strict approach, it eclipses the performance of the other three Committees combined. One possible explanation for this is that the ACT has a better-developed rights culture than most other Australian jurisdictions, particularly since the enactment of its *Human Rights Act 2004* (ACT). As one government interviewee said in a report exploring this phenomenon in 2008:

Coming from another jurisdiction, the extent to which human rights issues are to the fore here is very noticeable. It is embedded in the consciousness of officials. It very genuinely forms part of the way in which the government transacts its business.<sup>147</sup>

This was confirmed in a recent review of the first ten years of the *Human Rights Act* by the ACT Human Rights Commission, which found that:

By all accounts, the HR Act's main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work.<sup>148</sup>

A further possible explanation for the SCJCS's effectiveness is a Standing Order introduced in 2009 which provides that a government amendment to its own bill is exempt from the need to wait for a new Committee report if the amendment is 'in response to comment made by the Scrutiny Committee'.<sup>149</sup> In light of the SCJCS's record to date, a provision fast-tracking the enactment of rights-enhancing amendments should be considered at the federal level too. Beyond this, amendments to the scrutiny regime are not themselves capable of bringing about the enhanced human rights culture necessary for its effectiveness.

Finally, we noted in Part IIID that the impact of the scrutiny regime beyond Parliament has not been significant. In the media, some impact has been felt, but these instances are in the dozens, and not the hundreds or more that might be thought fitting for the federal parliamentary body responsible for ensuring that new laws in Australia comply with human rights. With only a few notable

145 Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41, 53.

146 ACT Human Rights Commission, above n 72, 13.

147 ACT Human Rights Act Research Project ANU, *Creating a Human Rights Culture within the ACT Government: Report on Interview Research Assessing the Impact of the Human Rights Act 2004 on the ACT Public Service* (2008) 19.

148 ACT Human Rights Commission, above n 72, 13.

149 Legislative Assembly (ACT), *Standing Orders and Continuing Resolutions of the Assembly*, December 2015, Standing Order 182A(c).

exceptions, the Committee has operated under the radar when it comes to public debate about the enactment of laws that may impact on human rights. The lack of media and public attention is a likely consequence of the Committee's limited deliberative and legislative impact. Until the Committee's impact in these areas improves, its work is not likely to be regarded as being newsworthy on a general basis. Hence, improving other aspects of the impact of the committee may well have important flow-on effects for its capacity to improve public awareness and understanding of these issues.

## V CONCLUSION

The National Human Rights Consultation conducted by the Rudd government identified major weaknesses in Australia's framework for protecting human rights, and made recommendations that included the enactment of a national Human Rights Act. Instead, Australia gained an enhanced regime of scrutiny on human rights grounds, whereby the federal Parliament was given primary responsibility for ensuring that new laws do not impact unduly on human rights.

When the Bill was before Parliament, the Shadow Attorney-General, George Brandis QC, went so far as to call it 'the most important piece of human rights legislation in a quarter of a century'.<sup>150</sup> The Government also held high hopes for the new regime, stating that:

The measures in this bill will deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues.<sup>151</sup>

These goals have not yet been realised. Indeed, having now completed its fourth year, the major achievements of the regime are difficult to identify. Although in SOCs and via direct correspondence, Ministers have started justifying their policies through a human rights lens, there is no evidence that this burgeoning 'culture of justification' has in fact led to better laws. On the contrary, there is evidence that recent years have each seen extraordinarily high numbers of rights-infringing Bills passed into law.<sup>152</sup>

The buck is then passed to the PJCHR, which routinely assesses and reports on the rights impacts of all proposed laws. However, again, its impact has been stymied by several shortcomings. The first is that it does not detail which legislative instruments it has considered. The second is that delay in reaching its conclusions means that Bills have already been passed when the Committee's final report is issued. The third is that the Committee has ceased making unanimous findings

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

151 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 272 (Robert McClelland).

152 Williams, above n 65.

that legislation is incompatible with human rights, resorting instead to divided conclusions, where those in dissent provide neither their identity nor their reasons.

The consequence of these flaws is that the scrutiny regime is only very occasionally referred to in parliamentary debate: a total of 106 times over the first four years of its operation. Nor has the Committee's impact been felt in terms of legislative outcomes: at least 73 per cent of the time (and according to insiders and commentators, a considerably higher percentage), the Committee's findings have had no effect at all on the form or fate of legislation that it has considered. Further, the regime's impact in the public sphere has been minimal, receiving an average of just three mentions in the media per month.

A few changes could substantially improve the regime's effectiveness. A new provision should be inserted into the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) allowing the Committee a guaranteed minimum time period to consider each new Bill before it can be debated in Parliament, and the Committee should alter its work practices so that it meets that deadline. That waiting period should be waived when the government introduces an amendment to its own Bill in response to a comment made by the Committee. The Committee should also be required to reach a majority view in its findings, with provision for dissenters to give reasons, and should consider uniformly recommending specific amendments for all incompatible or borderline Bills and instruments. Finally, the Committee should return to its former practice of detailing all the legislative instruments it has considered.

Such changes could have a major impact upon the operation and effectiveness of the parliamentary scrutiny regime. However, this should not be overstated. Other factors relating to Australia's constitutional structure have a more profound effect upon the capacity of the regime to enhance human rights protection. In particular, 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 parliamentary based scheme for human rights protection producing major alterations to executive proposals for new laws. It is simply not realistic in such a system to expect that a parliamentary scrutiny regime will overcome the power imbalance between these two arms of government.<sup>153</sup>

In addition, in the absence of independent judicial supervision of Parliament's work, the incentives to comply with the regime are few. It was for precisely this reason that a Human Rights Act was the primary recommendation of the National Human Rights Consultation in 2009. By giving the judiciary a role to play, the responsibility of ensuring compliance with human rights would no longer fall exclusively on the branch of government most frequently charged with breaching those rights. The evidence of the regime's operation to date suggests that this recommendation should be revisited, and that the parliamentary scrutiny regime be incorporated within a national Human Rights Act that combines parliamentary deliberation with appropriate judicial protection for human rights.

153 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.