REVIEWING EXECUTIVE DECISION-MAKING IN EMERGENCIES: TIME TO CONSIDER A MORE SYSTEMATIC APPROACH TO POST LEGISLATIVE SCRUTINY IN AUSTRALIA

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COVID-19 highlighted the need for agile, fast decision-making and delegated lawmaking by the Executive branch. As a result, this emergency saw an increasingly dominant Executive exist against the legally and politically entrenched promise of accountability and review.

Topical case studies are used to consider this expansion of power. They show that, as executive power increases, so must mechanisms for review. It is no longer feasible to rely only on judicially based review mechanisms, or statutory oversight bodies like Ombudsmen, to hold the executive to account for its decision-making. Instead, we should reconceptualise what it means to review executive decision-making in Australia and consider practices such as post-legislative scrutiny as a beneficial supplement to the work of the courts and tribunals.

I INTRODUCTION

Decision-making in response to emergencies demands speed and agility. These are qualities most associated with the Executive branch – Prime Ministers, Premiers, police commissioners and Chief Health Officers – rather than the more cumbersome Legislature or Parliament. This has certainly been the case in the context of the COVID-19 pandemic in Australia which has seen unprecedented transfer of law-making power away from the Legislature towards the Executive, particularly at the State and Territory level.[1]

This increasingly dominant Executive exists against the legally and politically entrenched promise of accountability and review, enshrined at

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[1] Sarah Moulds, 'Democratic Scrutiny of COVID-19 Laws: are Parliamentary Committees up to the Job?' (2021) 23(2) *European Journal of Law Reform* 264.

the federal level through the doctrine of the separation of powers and Chapters I-III of the *Australian Constitution,* and supported by the conventions of responsible government and sovereignty of parliament. These features of Australia's democratic system, which lay the foundations for judicial and parliamentary review of executive decision-making, are supposed to protect us from executive excess and abuse of power, and to promote fairness and legality in all executive decision-making.

This system is complemented by a range of additional oversight and accountability mechanisms and bodies, including Ombudsman offices and industry-specific commissioners state and federal level. These institutions examine the compatibility of executive decision-making with respective laws and standards relevant to their industry, and generally have the powers to both respond to individual complaints and initiate reviews based on internal investigations.

But what if this system designed to safeguard us against the misuse or overuse executive power is failing to deliver in reality, particularly when it comes to making systematic or holistic changes to legal frameworks and legislative schemes? How do we bridge the gap between ensuring democratic accountability over the exercise of legal power and the unrelenting demand for fast-paced, decisive decision-making by governments in the face of global emergencies? How do we pause and reflect *after the emergency has passed* to make sure the laws we rushed through and the powers we granted executive officers under primary or delegated legislation are what we really want to help us next time we face a similar calamity or disaster?

This Article seeks to explore whether embracing a more systematic approach to post-enactment scrutiny (that is, review of the laws, regulations and directions that have already been made by our Parliaments or governments in response to emergencies or other time-critical contexts), could offer a beneficial supplement to existing forms of oversight of executive lawmaking and decision making - and most importantly, set us up for success in terms of responding to future emergency situations.

This concept will be explored reference to two topical case study examples introduced in Part II:

- federal executive decision-making under the *Biosecurity Act 2015* (Cth); and

- the cancellation of tennis star Novak Djokovic's visa on the grounds that he had failed to adhere to COVID-19 requirements for entry into Australia.

These examples are chosen because they highlight the tension between three potentially competing public interests: (1) the public interest in responsive, decisive executive decision-making to protect public health or preserve economic activity and (2) the public interest in ensuring that executive decision-making and lawmaking is fair, transparent and accountable and (3) that as a community we learn from experience and ensure that the legal frameworks authorising the use of executive power in response to emergencies are fit for purpose.

Before these examples are considered, Part I of the Article describes the key features of different forms of review of executive decision-making, focusing on judicial review, merits review, review by Ombudsman and other independent oversight agencies and parliamentary review. Part III of the Article finds that while each of these forms of review has the *potential* to pull in the reins of executive power, when taken in isolation they are failing to deliver meaningful accountability and fairness, particularly in the emergency context. The case studies show that, as the scope and complexity of executive power increase, so must the mechanisms for review. It may no longer be feasible to rely on just one form of review to hold the executive to account for its decision-making. This is particularly so considering the extensive range of emergency laws passed over the last three years, making it necessary to review the continued suitability of such laws and the powers they bestow on the Executive. Instead, a more multi-institutional, multi-faceted approach may be useful that seeks to promote a 'constructive alignment'[2] between (1) the type of parliamentary scrutiny that occurs *prior to enactment* of laws granting extraordinary broad executive powers, (2) the grounds on which the lawfulness or merits of decisions made under those laws can be challenged by individuals in courts and tribunals and (3) the type of parliamentary scrutiny that occurs *after enactment* (described as 'post-legislative scrutiny'). Each of these difference components of the multi-faceted approach to review of executive decision-making is discussed below. This multi-faceted

[2] The concept of 'constructive alignment' is well known in scholarship of teaching and learning. It is used to describe the practice of identifying the outcomes teachers intend students to learn, and aligning teaching and assessment to those outcomes. See, eg, John Biggs 'Enhancing Teaching through Constructive Alignment' (1996) 32(3) *Higher Education* 347, 347-8.

approach will ensure that all institutions of government – including the Executive – are in a better position to respond to future emergencies and facilitate public confidence in the suitability of emergency executive decision-making.

II KEY TERMS AND SPECIES OF REVIEW

In this Article, the term '**executive decision-making**' is used to describe decisions made by officers of the Executive (including Ministers, statutory office holders, public servants and police officers) in exercise of statutory authority, statutory functions or executive discretion. This can include, for example, the issue of Directions limiting the number of people that can attend a birthday party by the South Australian State Coordinator under section 25 of the *Emergency Management Act 2004* (SA), or the determination of eligibility for JobKeeper payments for small businesses facing revenue losses as a result of the COVID-19 pandemic.

Executive decision-making can be further divided into three core categories: (1) decisions made under primary legislation; (2) delegated legislation and (3) administrative decision-making.

The Executive performs a range of functions, including making proposals for and formulating primary legislation and subsequently making determinations under these primary legislative instruments (for examples, determinations under the *Biosecurity Act 2015* (Cth) as discussed in Part II Section A1 below). The Executive also formulates delegated or 'secondary' legislation. This is an efficient form of creating laws that does not require parliamentary debate or voting, and instead allows the Executive to make fast changes or additions to standards and regulations.

Delegated legislation is subject to Parliament's powers of disallowance. Parliament retains the right to disallow or overrule delegated legislation under s 42 of the *Legislation Act 2003* (Cth). However, there are exemptions to the disallowance process under s 44 of the *Legislation Act 2003* (Cth). These exemptions are broadly framed so that any legislation which 'facilitates the establishment or operation of an intergovernmental body' is exempt from Parliament's powers of disallowance. The discussion of the *Biosecurity Act 2015* (Cth) below will demonstrate how the operation of these exemptions grants the Executive unfettered decision-making power. Delegated legislation is also scrutinised by the Senate

Standing Committee for the Scrutiny of Delegated Legislation, which ensures that delegated legislation is not inconsistent with existing law and does not unnecessarily interfere with personal rights and liberties. But again the power of this Committee can be limited by legislation.

Finally, individual Ministers and executive bodies are responsible for extensive administrative decisions necessary for the day-to-day functioning of government and society, such as determinations regarding visas or social security payments. The Executive's power and discretion to make these administrative decisions is derived from enabling primary legislation.

While there are existing executive accountability mechanisms in the form of external agencies or merits review, these mechanisms are focused on review or investigation of individual, ad hoc decisions. None of these mechanisms require Parliament – the only democratically constituted law-making body – to actively review the suitability of primary and secondary legislation which gives the Executive the power to make decisions. A more systematic approach to review of executive decision-making is required, particularly in the case of delegated legislation that is not subject to the parliamentary disallowance mechanisms and when it comes to complex, rights-impacting legislative frameworks such as the *Migration Act 1958* (Cth). Emergency decision-making over the last three years has revealed the potential for unfettered Executive power when exemptions to parliamentary disallowance arise, and this is where post-legislative scrutiny may be beneficial. It has also revealed a need to reflect, refine and reframe parts of the emergency response legislation (at both the State and Federal level) to make sure it is well designed to respond to the next emergency. To do the best job of this, we need a review forum that has two intersecting elements (1) access to legal expertise and clear, consistent criteria for evaluating the constitutionality, fairness and effectiveness of the legislation and (2) the ability to call for and listen to a broad range of community voices to understand how the law has worked in practice. As discussed below, we suggest that a parliamentary committee, with clear scrutiny criteria and powers to call for input and evidence from a wide range of experts, statutory review bodies such as Ombudsman, *and* community members would meet these criteria and help fill this accountability gap.

This Article also distinguishes between different forms of review or oversight of executive decision-making. It uses the term '**parliamentary**

review' to describe review of executive decision-making that is initiated by or undertaken within the institution of parliament. This commonly takes the form of review by parliamentary committees but can also include practices and processes derived from Westminster traditions of responsible government (described below) including Question Time.

The Article also introduces and explores the concept of '**post-legislative scrutiny**' (PLS) which refers to the practice of reviewing enacted laws to determine whether the provisions have been implemented or enforced, and to evaluate the impact, proportionality and effectiveness of the laws.[3]

The term has become increasingly popular in academic commentary and development discourse following the work of the Law Commission of England and Wales on the topic in 2006, and more recently through the international development activities including those led by the Westminster Foundation for Democracy.[4, 5, 6] In the UK, a systematic process of post-legislative scrutiny has been implemented within the Westminster Parliament that includes the routine preparation of "Memorandum' Reports by government department about the impact and effectiveness of enacted legislation that are then considered by parliamentary committees who may decide to conduct a further inquiry.[7]

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[3] Law Commission of England and Wales, *Post legislative Scrutiny* (Cm 6945, 2006) <http://www.lawcom.gov.uk/app/uploads/2015/03/lc302_Post-legislative_Scrutiny.pdf>.

[4] See, eg, Thomas Caygill 'Legislation Under Review: An Assessment of Post Legislative Scrutiny Recommendations in the UK Parliament' (2019) 25(2) *Journal of Legislative Studies* 295; Lydia Calpinska 'Post-Legislative Scrutiny of Acts of Parliament' (2006) 32(3) *Commonwealth Law Bulletin* 191; Kakhaber Kuchava 'First Post-Legislative Scrutiny in Georgia: Steps Towards Generating Result-oriented Laws' Australia' (2019) 3(2) *Journal of Southeast Asian Human Rights* 258.

[5] Law Commission of England and Wales (n 3) 10.

[6] See, eg, Franklin De Vrieze and Victoria Hasson, *Post Legislative Scrutiny: Comparative Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for its Place in Democracy Assistance* (Westminster Foundation for Democracy, 2018).

[7] Richard Kelly and Michael Everett 'Post-Legislative Scrutiny' (House of Commons Library Standard Note. SN/PC/05232 23 May 2013) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05232>.

The term PLS remains largely unfamiliar in Australia. This is not because PLS is absent in Australia, or because it is not valued, but rather because the process of post-enactment review of laws is described differently in different jurisdictions, and often undertaken on an ad hoc basis. As observed in the *Statute Law Review,* '[e]valuating the impact and effect of legislation once it has been enacted is a well-recognised and important element of the cyclical nature of most legislative endeavour',[8] but in Australian jurisdictions it is not approached in a systematic way.

The relationship between these key terms, and the often dynamic and sometimes complementary intersections between these concepts, is explored in further detail below. The challenges associated with clearly delineating the scope of executive decision-making and the relationship between pre-and post-enactment parliamentary and judicial review is the central concern of this Article.

The need for more systematic post-enactment review of executive decision-making is particularly prevalent given the decisions made over the past three years in response to COVID-19 emergencies. The Executive has broad powers to either make delegated legislation in response to emergencies or to exercise broad discretion in administrative decision-making under primary legislation. While this Article will explain the existing oversight mechanisms, these are limited in the context of *emergency* decision-making due to exemptions from parliamentary disallowance, privative clauses limiting availability of judicial review or no statutory provision for merits review. While there are some review mechanisms which take place at the *pre*-enactment stage, such as review by parliamentary committees, this form of review cannot assess the suitability of the underlying legislation *after* the emergency. Nor can it bring in a diverse range of voices and expertise to help decision-makers reflect on the benefits and weaknesses of the legislative design.

This is where we suggest PLS could provide an answer. It would operate as a complementary mechanism to existing forms of review with distinct features, namely a focus on systematic and democratic review which examines the suitability of executive decision-making after an emergency. This form of PLS could have a revised timeframe which is appropriate for emergency law-making, such as 12 months after enactment, and would actively require Parliament to review the suitability of any laws passed,

[8] Editorial, 'Post-Legislative Scrutiny' (2006) 27(2) *Statute Law Review* iii.

having regard to prescribed scrutiny criteria as well as any relevant findings made by judicial or administrative review bodies. Such an approach allows us to assess future effectiveness of laws used for executive decision-making during emergencies and the executive's capacity to respond to emergencies generally.

A Judicial Review of Executive Decision-Making

The *Australian Constitution* invests the High Court with the power to review executive decision-making,[9] meaning that in theory an Australian citizen can access the High Court to challenge the lawfulness of a decision made about him or her by a federal Minister under a federal statute, such as the *Social Security Act 1991* (Cth). Similar avenues for judicial review exist at the state and territory level. When it comes to review of executive decision-making under statute – such as the examples explored in this Article – the scope of judicial review is determined by the legislative framework which applies to executive decision-making:[10] essentially, it depends on parliament setting appropriate limits on the exercise of executive power in the authorising statute.[11] Questions of policy, such as the scope of a decision maker's power or preconditions to the exercise of that power, are for the legislature to decide.[12] Certain executive decisions may also be non-justiciable,[13] such as where there is a political matter of 'national interest' in question.[14]

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[9] *Australian Constitution* s 75(v).

[10] Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 281. See also *Craig v South Australia* (1995) 184 CLR 163*; Attorney General (NSW) v Quinn* (1985) 170 CLR 1, 36.

[11] Gageler (n 10) 281.

[12] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Dixon, McTiernan, Williams, Webb, Fullagar, and Kitto JJ).

[13] See, eg, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449: Minister's decision to cancel student visa of daughter of Burmese regime senior member deemed non-justiciable. Basis of decision was Minister's discretion. See generally Alan Robertson, 'Supervising the legal boundaries of executive powers' (2021) 50 *Australian Bar Review* 12.

[14] William Gummow, 'Rationality and Reasonableness as Grounds for Review' (2015) 40 *Australian Bar Review* 1, 16: '[courts] are, rightly, more cautious in assessing the 'largely . . . political question' of what is in 'the national interest': see *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 [40].

This means that when Parliament grants the executive very broad discretions with no clear legislative limits or prescribed criteria – as in the case of executive decisions made under the *Emergency Management Act 2004* (SA) or the *Migration Act 1958* (Cth) – the judiciary's hands are effectively tied. This is further exacerbated in cases of 'urgent' or 'emergency' executive decision-making in response to the COVID-19 pandemic or other crises, where access to judicial review may be limited or postponed in order to avoid delays in public-interest decision-making.[15] In these cases, such as challenges to a COVID-19 Direction or a decision to cancel a visa, judicial review proceedings may fail to provide any insight into the original decision-maker's reasoning, leaving the broader community unclear of the extent to which the law is operating as originally intended or not.[16] In addition, a successful judicial review application does not necessarily correspond to a successful 'outcome' for the applicant.[17] A fine can still be issued, or a visa still cancelled, even if a successful judicial review challenge was mounted.

This is not to suggest that Australian judicial review can *never* deliver meaningful outcomes or lead to improvements in the merits or effectiveness of executive decision-making. Judicial review can shine a powerful light on the procedural deficiencies inherent in executive decision-making, which can in turn prompt legislative or policy change. However, as the case studies below illustrate, while there have been judicial cases that explore concepts of procedural fairness, unreasonableness and unfairness, these grounds for judicial review are often rendered impotent when the authorising statute explicitly or impliedly excludes natural justice or procedural fairness from the grant of

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[15] Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19* (Report No 1, October 1978) [57]-[58]; Administrative Review Council, *The Scope of Judicial Review* (Discussion Paper No 21, March 2003) 5.173-5.177.

[16] Robin Creyke and John McMillan 'The Operation of Judicial Review in Australia' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) 164.

[17] See generally Robin Creyke, John McMillan and Dennis Pearce, 'Success at Court: Does the Client Win?' (1998) 87 *Canberra Bulletin of Public Administration* 134.

executive decision-making power.[18, 19] These realties, plus costs and other legal technicalities, combine to make judicial review a 'difficult and hazardous process'.[20, 21] For these reasons, as explored in Part III, this Article argues that judicial review should not be relied upon *on its own* to ensure meaningful review of executive decision-making in emergencies, but it can play an important role when combined with the other forms of review described below.

B Statutory Review Mechanisms

Unlike a court undertaking judicial review, a merits review body has the power to make a fresh decision based on the evidence before it. This is generally an easier and more favorable course of action for an applicant looking to challenge the outcome of a decision. However, merits review is only available authorized by the relevant statutory framework.[22] This is again due to the separation of powers which provides that only the parliament can 'open the gate' to the use of executive power, including executive power exercised in the form of a tribunal or commission that is tasked with reviewing original decisions by public servants or other executive officers.[23] As Dr David Bennett, former Solicitor-General of Australia, observed:

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[18] For a comprehensive and critical analysis of the role judicial review can or should play in human rights protection in Australia see Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The New Despotism?* (Bloomsbury Publishing, 2019) ch 2.

[19] Gageler (n 10) 280, 281.

[20] For example, legal limits on accessing judicial review including limitations on standing: see, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35–7 (Gibbs CJ); Nathan Van Wees, (2016) 'The Zone Of Interests Test And Standing For Judicial Review In Australia' 39(3) *University of New South Wales Law Journal* 1127.

[21] Commonwealth Administrative Review Committee, *Commonwealth Administrative Committee Report* (Parliamentary Paper No 144, August 1971) ('Kerr Committee Report').

[22] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 46 FLR 409; *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

[23] Anthony Cassimatis, 'Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England', (2010) 34(1) *Melbourne University Law Review* 23, 27.

> The central distinction between merits review and judicial review Is that the former enables a review of all aspects of the challenged decision, including the finding of facts and the exercise of any discretions conferred upon the decision-maker, whereas the latter is concerned only with whether the decision was lawfully made.[24]

Merits review can offer a meaningful, often more affordable and accessible, legal remedy for an individual impacted by an executive decision, for example, a decision to revoke a driver's license or to cancel a visa. But, as refugee advocates have long been aware,[25] the accessibility of this form of review is completely dependent on parliamentary law-makers including merits review provisions within the authorizing statute in the first place, which can in turn depend upon the political context in which the executive power is granted.[26] As the below case studies illustrate, the political context of responding to the COVID-19 pandemic and determining the visa status of celebrity tennis players can be highly charged, beset by partisan war games and subject to constant media coverage. This means that if we are to harness the benefits of merits review in the context of emergency executive decision-making, we must look to the political sphere to 'front end load' the legislative framework under which such power is granted.

Additionally, there are a range of other methods of administrative review established under statute. Ombudsman offices at state and federal level deal with complaints from the public about government decision-making and also have the power to initiate their own investigations and inquiries into government action.[27] Independent oversight agencies have the

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[24] David Bennett, 'Balancing Judicial Review and Merits Review' (2000) 53 *Administrative Review* 3, 4.

[25] Jane McAdam, Submission No 167 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014* (31 October 2014).

See commentary on the 'Refugee Fast Track' regime introduced in 2012: Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003; Australian Human Rights Commission, 'Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload' (Executive Summary, 2019) 28.

[26] Sarah Moulds and Raffaele Piccolo, 'Case note: Exploring the parameters of executive detention following the High Court's decision in *'Commonwealth of Australia v AJL20"* (2021) 43(9) *Law Society of South Australia Bulletin* 22.

[27] See, eg, *Ombudsman Act 1976* (Cth) ss 7-8D.

statutory prescribed and, in some cases, limited power to investigate specific subject matters, such as security, privacy, corruption, human rights and anti-discrimination.[28] These bodies perform important functions, most significantly providing individuals with the opportunity to challenge and review executive decision-making and resolve problems through alternative dispute procedures. While these methods of administrative review are helpful, they are limited in scope and their ad hoc nature: review is dependent on an individual making a complaint or the availability of resources for the relevant body to initiate its own investigation.[29] It is important to note that the purpose of these review bodies to improve the quality and merits of administrative decision making,[30] rather than look more broadly at the quality, fairness and effectiveness of the legislation that bestows administrative decision making powers on executive officers in the first place. For this reason, as discussed below, we argue that post-legislative scrutiny of complex legislative frameworks that bestow discretionary power on Executive officers is needed – not to *replace* the important work of the Ombudsman and related oversight bodies – but to *supplement* that work by providing a democratically constituted forum from which to advance more systematic and holistic review of these legislative frameworks.

C Parliamentary Oversight of Executive Power

In Australia, parliamentary committees play a central role in conducting democratic review of proposed and enacted laws, and this forms the basis of an exclusively parliamentary model of rights protection at the federal level in Australia.[31] For example, the Senate Standing Committee for the

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[28] See, eg, at a federal level: Inspector-General of Intelligence and Security; Office of the Australian Information Commissioner; National Anti-Corruption Commission to be established by mid-2023 under the *National Anti-Corruption Commission Act 2022* (Cth); Australian Human Rights Commission.

[29] Anita Stuhmcke, 'Australian Ombudsmen: A Call to Take Care' (2016) 44 *Federal Law Review* 531, 545.

[30] Ibid 533. See generally Katrine del Villar, 'Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen' (2003) 36 *Australian Institute of Administrative Law Forum* 25.

[31] For further discussion about Australia's exclusively parliamentary-based model of rights protection see, eg, Adam Fletcher, *Australia's Human Rights Scrutiny Regime* (Melbourne University Press, 2018); Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary

Scrutiny of Bills (SBC) considers *all* Bills that are introduced into the federal Parliament and reports on whether they interfere with personal rights and liberties, or create excessively broad and unfettered administrative powers.[32]

Other parliamentary committees review proposed legislation following referral from a House of Parliament, often organised along thematic lines such as the Senate Standing Committee on Legal and Constitutional Affairs. Working together as a system, parliamentary committees can analyse proposed laws and policies and produce vital, information about their purpose and effectiveness. They can also hold individual executive officers to account for expenditure and provide a forum for experts and members of the community to share their views on a proposed law. [33]

The Senate Standing Committee on Delegated Legislation is specifically tasked with assessing delegated legislation against scrutiny principles that focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight.[34] Effectively, the role of the committee is to seek further explanation or information on the delegated legislation from the relevant Minister if required, and make recommendations to the Senate. These recommendations can include disallowance of the regulation, which, if adopted by Senate, has the effect of rending the regulation invalid. However, the Committee's powers are limited to delegated legislation which is not subject to disallowance exemptions.[35] This reveals that the

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Conceptions of Human Rights' (2006) *Public Law* 785; James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; George Williams and Lisa Burton, (2013) 'Australia's Exclusive Parliamentary Model of Rights Protection' 34(1) *Statute Law Review* 58.

[32] Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Guidelines on Technical Scrutiny Principles* (December 2021).

[33] Sarah Moulds, 'From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law Making' (2020) 31(3) *Public Law Review* 264.

[34] Commonwealth Senate, *Standing Orders and other orders of the Senate*, January 2020, SO23(3).

[35] See, eg, Senate Standing Committee on Delegated Legislation, Parliament of Australia, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021): significant concerns about the increasing exemption of delegated legislation from disallowance, particularly

broadly framed disallowance exemptions remove the possibility of both parliamentary override and committee review. The Senate Standing Committee on Delegated Legislation report published in March 2021 raises concerns about the lack of scrutiny and accountability resulting from growing disallowance exemptions for delegated legislation, noting that '[i]t is the [Parliament's] capacity to scrutinise delegated legislation, which constitutes about half the law of the Commonwealth by volume, that preserves constitutional principle.'[36]

As Canadian scholar Blidook explains, the 'particular nature of the fusion of executive and legislature in the Westminster parliamentary system'[37] can give rise to an apparent lack of robust scrutiny of executive decision-making, particularly if parliamentary committees are dominated by government members. Similar observations have been made in Australia, where, as Feldman explains, governments generally seek to avoid scrutiny because they 'value the freedom to make policy and to use their party's majority in the Parliament to give legislative force to it'.[38] Even the most well-regarded parliamentary committee lacks the legal and political authority to directly modify the content of the law or policy or the way it is implemented in practice, or to impose penalties or grant remedies in response to misuse of power or poor quality decision-making.[39] However, as explored further in Part III of this Article, when combined with other forms of review of executive decision-making, parliamentary scrutiny can play an important preventative and reformative role. This form of review can help parliamentarians 'open the gate' to merits review through pre-

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exempting delegated legislation made in response to the COVID-19 pandemic from parliamentary oversight: Recommendation 1 suggests that disallowance exemptions should only operate in primary legislation; Recommendation 3 suggests the repeal of blanket disallowance exemptions.

[36] Senate Standing Committee on Delegated Legislation, Parliament of Australia, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) xv.

[37] Kelly Blidook, *Constituency Influence in Parliament Countering the Centre* (UBC Press, 2012) 12-13.

[38] David Feldman, 'Democracy, Law and Human Rights: Politics as Challenge and Opportunity' in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 98.

[39] John Hirst, 'A Chance to End the Mindless Allegiance of Party Discipline', *The Sydney Morning Herald* (Sydney) 25 August 2010; Bruce Stone, 'Size and Executive-Legislative Relations in Australian Parliaments' (1998) 33(1) *Australian Journal of Political Science* 37.

enactment scrutiny, and can draw upon the powerful cultural commitment to parliamentary sovereignty and rule of law principles to more closely define the limits of executive decision-making power, even in the case of emergencies. And, as discussed below in the context of the Senate Select Committee on COVID-19, even if the political context of the day dilutes the ability of the parliament to redefine the legislative contours of executive power or permit individuals' access to merits review, parliamentary scrutiny can focus media and public attention on the actions of the executive, which in turn can generate the type of political pressure needed to advance reform in the future.

Most parliamentary-based review of executive decision-making in Australia either takes place at the *pre-enactment stage* (that is, at the time a new is being proposed and debated in Parliament where there are procedures in place for systematic review of all laws, for example by the SBC) or as part of the Senate Estimates process, where executive expenditure is scrutinised in a public forum. Occasionally, parliamentary committees will also scrutinise *existing laws* in a manner that resembles a form 'post legislative scrutiny' described above. This may occur because of the inclusion of a sunset clause in the original legislation; the inclusion of a specific review provision in the original legislation; or as a result of a specific referral by parliament. For example, the use of sunset clauses is common in legislation that is considered 'extraordinary' in nature, or enacted in response to an emergency situation (such as counter-terrorism measures or quarantine measures to protect public health).[40] However, unlike the UK, the Australian approach to post legislative scrutiny is more *ad hoc* than systematic.[41] There is no parliamentary committee with the responsibility to scrutinise all existing laws, and no general requirement for government departments to routinely report on the operation of existing legislation. This means, for example, that there are no consistent criteria for parliamentary review of existing legislation – and a lack of constructive alignment between the principles and criteria applied to all proposed laws by SBCs, and any subsequent review of enacted legislation by parliamentary committees. Such an approach is limited in its ability to

[40] John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 *Columbia Journal of Transnational Law* 442; John Ip, 'Sunset Clauses and Counterterrorism legislation' [2013] (1) *Public Law* 74.

[41] See Sarah Moulds, 'A Deliberative Approach to Post Legislative Scrutiny? Lessons from Australia's ad hoc Approach' (2020) 26(3) *Legislative Studies* 362.

deliver effective results and is also likely to be prone to politicisation, particularly in times of emergency decision-making. As discussed in Part III, this presents an important opportunity for reform in the Australian system and one that could provide a beneficial supplement to existing forms of review of executive decision-making, including court-based review. A systematic approach to post legislative scrutiny of emergency laws would better inform legislative design for the future and ensure that emergency laws strike an appropriate balance between providing the Executive with sufficient discretion to respond to the needs of the community and ensuring accountability of executive decision-making. This should not operate as a standalone form of review, but in conjunction with existing pre-enactment scrutiny processes and other accountability mechanisms such as judicial reviews and external agencies such as Ombudsman offices.

III EXAMPLES OF "EMERGENCY" EXECUTIVE DECISION-MAKING IN AUSTRALIA DURING 2020-2022

Since the beginning of the pandemic, we have seen an unprecedented increase in the scope of decision-making power granted to the Executive, including the delegation of law making power to senior police officers and senior health officer to make changes to directives that can impact on a person's ability to operate their business, leave their home, see their loved ones or access education.[42] We have also seen examples of the pre-existing excesses of power granted to executive decision-makers, including in the context of international tennis stars being embroiled in technicalities regarding medical exemptions from vaccination.[43]

These examples are chosen because they highlight the strong public interest in ensuring that executive officers – whether they are police officers, Public Health Officers, or border force officers – are empowered to make quick decisions to protect our health or to preserve economic activity. This public interest demands responsive, decisive executive decision-making – qualities that do not easily combine with mechanisms

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[42] See generally Boughey (n 18) 169.

[43] See generally Tracey Holmes, 'Retracing Novak Djokovic's Steps, from his Positive COVID Test to Touchdown in Melbourne', *ABC News* (online, 12 January 2022) <https://www.abc.net.au/news/2022-01-12/retracing-djokovic-from-positive-covid-test-to-touchdown/100752350>.

designed to facilitate merits or judicial review. However, the examples also highlight the competing public interest in ensuring that executive decision-making is fair, transparent and subject to effective oversight to guard against misuse or overuse, and provide a glimpse into the very real personal consequences that can flow from the exercise of executive discretion in these contexts.

A Federal Executive Decision-making in Response to the COVID-19 Pandemic

At a federal level, there has been an array of emergency laws passed on the premise of keeping the community safe from COVID-19.[44] These instances of delegated legislation demonstrate a notable shift of power to the executive to make discretionary determinations and regulations as required.[45] The extent of restrictions and requirements and the discretion with which they can be implemented means that significant decisions are being made without the transparency and accountability conventionally inherent to the legislative process.[46]

1. Biosecurity Act

Significantly, the pandemic prompted the declaration of a 'human biosecurity emergency' by the Governor-General under the *Biosecurity Act 2015* (Cth),[47] which gives the Federal Minister of Health power to extend the emergency period for up to 3 months if the Minister is satisfied that the disease subject of the declaration continues to pose a 'serious and immediate threat', and the extension is necessary to control that disease.[48]

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[44] See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, 'Scrutiny of COVID-19 Instruments' (17 February 2022).

[45] Talina Drabsch, 'The Impact of the COVID-19 Pandemic on Parliament' (e-brief, Parliamentary Research Service, Parliament of New South Wales, July 2021).

[46] Stephen Mills, 'Parliament in a Time of Virus: Representative Democracy as a 'Non-Essential Service' (2020) 34(2) *Australasian Parliamentary Review* 7; Holly McLean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Department of Parliamentary Services, Parliament of Victoria, August 2020) 3.

[47] *Australian Constitution* s 51(x). Cf Stephanie Brenker, 'An Executive Grab for Power During COVID-19?' AUSPUBLAW (13 May 2020) <https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/>.

[48] *Biosecurity Act 2015* (Cth) s 476.

Since the commencement of the pandemic (18 March 2020), this emergency period was extended seven times, ending on 17 April 2022.[49] During this emergency period, 727 delegated legislation instruments were made by the Executive, many of which fell under exemptions to parliamentary disallowance and therefore were not subject to committee review or possible parliamentary overruling.[50] The continued justification of this emergency period at the discretion of the Executive raised concerns regarding lack of transparency and accountability of government decision-making.[51] The declaration of a biosecurity emergency is a pre-condition to the exercise of powers under the legislation,[52] and the emergency period granted the Minister of Health a range of powers to determine emergency requirements or issue directions to prevent or control the biosecurity emergency in question. These powers are extremely broad, ranging from the ability to impose requirements or restrictions on people entering or leaving a specified place, preventing access to premises, or mandating social distancing.[53] The legislation requires the Minister to exercise these powers personally,[54] meaning that they cannot be delegated to any other individual or body. The legislation is deliberately drafted broadly and 'intended to provide a broad power to facilitate appropriate responses, including novel responses, to future and unknown threats'.[55] The measures

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[49] Senate Standing Committee for the Scrutiny of Delegated Legislation, 'Scrutiny of COVID-19 Instruments' (17 February 2022).

[50] Senate Standing Committee on Delegated Legislation, Parliament of Australia, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) xv: '[w]hether the Parliament was aware at the time, the Biosecurity Act 2015 had given the Health Minster the ability to exercise extraordinary powers through the making of legislative instruments, many of which are exempted from disallowance and parliamentary scrutiny. And from these instruments flowed a number of other actions with significant consequences for ordinary Australians. The point is not to make a policy comment on this legislation or the actions of the Health Minister or those who were delegated power under the Act. The point is to raise the issue of parliamentary scrutiny. Without the ability to scrutinise, the Parliament cannot make policy, or even technical, judgements on proposed laws.'

[51] Australian Human Rights Commission, 'What is the Commission's view on Limiting Human Rights During COVID-19?' <https://humanrights.gov.au/about/covid19-and-human-rights/what-commissions-view-limiting-human-rights-during-covid-19>.

[52] *Newman v Minister for Health and Aged Care* [2021] FCA 517 [93].

[53] *Biosecurity Act 2015* (Cth) ss 477-478.

[54] Ibid s 474.

[55] *Newman v Minister for Health and Aged Care* (n 52) [92].

implemented to facilitate the exercise of these powers is also significant. For example, it has extended to the collection and use of mobile phone data for the purposes of tracking and enforcing quarantine requirements.[56]

Even more significantly, the Act makes provision for the determinations to prevail over 'any other Australian law' in a 'Henry VIII' clause that elevates the determinations (made by the Minister) as primary law that overrides enactments of the Commonwealth and state parliaments. For example, section 477 of the *Biosecurity Act* provides:

> (1) During a human biosecurity emergency period, the Health Minister may give any direction, to any person, that the Health Minister is satisfied is necessary:
>
> (a) to prevent or control:
>
> (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
>
> (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; or
>
> (b) to prevent or control the spread of the declaration listed human disease to another country; or
>
> (c) if a recommendation has been made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease -- to give effect to the recommendation.
>
> …
>
> (2) A direction may be given under subsection (1) despite any provision of any other Australian law.

[56] Australian Health Protection Principal Committee, 'COVID-19 Statement' (23 March 2020). Cf Organisation for Economic Co-operation and Development, 'Tracking and Tracing COVID: Protecting Privacy and Data while Using Apps and Biometrics' (OECD Policy Responses to Coronavirus, 23 April 2020).

The lack of full parliamentary oversight of these determinations combined with the relatively low standard by which the Minister is to determine the necessity of issuing the determinations significantly reduces the capacity to provide oversight of these executive powers.[57] The fact that the determinations override all other Australian laws and, significantly, are enforced by criminal penalties means these determinations may give rise to particularly exorbitant exercises of power.[58] They may, some have argued, even stray into the constitutionally prohibited territory of seeking to invest judicial power – the ability to impose criminal sanctions such as detention – on the executive.[59]

Some decisions made by the Minister under the *Biosecurity Act* have been subject to judicial review. However, while the excessive scope of discretion afforded to executive decision-makers was highlighted during proceedings, courts have upheld the valid use of the powers to prevent citizens from re-entering Australia,[60] or even preventing Australian citizens from leaving Australia without a valid exemption.[61] The decisions – whilst highly significant in terms of impact on the lives of individuals – were within the legal boundaries of the provisions of the *Biosecurity Act*,

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[57] Note that the Senate Select Committee on COVID-19 (Final Report, April 2022) did not specifically consider the scope of determinations under the *Biosecurity Act 1977* (Cth). None of the committee's 19 recommendations specifically address the scope of discretionary power granted to the Executive under primary and delegated legislation made in response to COVID-19. This inquiry could in theory have operated as a form of 'ad hoc' post-legislative scrutiny. It certainly had the capacity to engage a wide range of experts and community members in its deliberations. However, as discussed below, its ability to offer concrete recommendations for improving legislative design for future responses to emergencies could be enhanced by embracing a more *systematic* approach to PLS, including for example, by establishing clear scrutiny criteria that draw from established rule of law concepts.

[58] *Biosecurity Act 2015* (Cth) ss 477-479.

[59] Andrew Edgar, 'Law-making in a Crisis: Commonwealth and NSW Coronavirus Regulations' AUSPUBLAW (30 March 2020) <https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/?utm_source=rss&utm_medium=rss&utm_campaign=law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations>; see generally *Thomas v Mowbray* (2007) 233 CLR 307.

[60] *Newman v Minister for Health and Aged Care* (n 52) [82].

[61] *LibertyWorks Inc v Commonwealth of Australia* [2021] FCAFC 90.

illustrating the limits of judicial review as a form of executive accountability discussed above.

The determinations under the *Biosecurity Act* are also exempted from the usual parliamentary review of legislative instruments. Under s 477(2) of the *Biosecurity Act*, the determinations are not disallowable by parliament. As a consequence, the determinations have not been placed before the Senate Standing Committee for Delegated Legislation, nor has the Minister provided a statement of compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) on their proportionate compliance with international human rights standards.[62] That means that when the biosecurity determinations fail to comply with the Committee's rule of law and human rights criteria, neither the PJCHR or the Delegated Legislation Committee can move to disallow the determinations or enter into correspondence with the Minister and Departmental officials questioning problematic provisions.[63] Nor is there any hope of merits review of biosecurity determinations in the Administrative Appeals Tribunal, with the Act clear on the non-reviewable status of these instruments.[64]

However, an interesting aspect of this case study is that despite the *Biosecurity Act* itself offering no meaningful avenue for parliamentary review of executive decision-making, the broader parliamentary committee system at the federal level (and particularly within the Senate) has provided a form of accountability and collated a body of public material that has led to legislative change.

This is because on 8 April 2020, the Australian Senate resolved to establish a select committee on COVID-19 to inquire into the federal government's response to the COVID-19 pandemic.[65] The terms of reference of this

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[62] Sarah Moulds, 'Democratic scrutiny of COVID-19 laws: are Parliamentary Committees up to the job?', (2021) 23(2) *European Journal of Law Reform*, 264.

[63] Standing Committee for the Scrutiny of Delegated Legislation, Delegated Legislation Monitor 2 of 2022, 1.9-1.26: Committee recommends that amendments are made to s 44 of the *Biosecurity Act* to provide that any future determinations setting out entry requirements will be subject to disallowance; Edgar (n 89).

[64] *Biosecurity Act 2015* (Cth) ch 8.

[65] The Senate has given the COVID-19 committee a long lead time to report, with a deadline of *30 June 2022; however, the committee called for submissions from the public* by 28 May 2020 in what appears to be a rolling

special committee include 'the Australian Government's response to the COVID-19 pandemic' and 'any related matters'.[66]

From its inception in March 2020, the committee has used its inquiry-related functions to rigorously examine government officials and other experts and has been active in sharing its work with the community through various means, including social media platforms, helping to generate sustained media and public interest in its work.[67] For example, even before issuing a written report, the COVID-19 committee influenced the shape of the legal framework for the COVIDSafeApp. This is because the COVIDSafeApp was initially introduced without a legislative framework and was instead supported by a declaration by the minister for health that set out some limits on the use and sharing of information collected via the app.[68]

The lack of legislative framework was recognized by many legal experts[69] as a shortcoming in the design and implementation of the app and was the subject of questioning by the COVID-19 committee. Although not tasked with applying a prescribed human rights analysis to this issue, the COVID-19 committee provided a forum for legal and technical experts and the community, more broadly, to consider whether the COVIDSafeApp is *necessary* in light of the nature of the threat posed by COVID-19 and the impact of the app on personal privacy and whether the app constitutes a *proportionate* way to respond to the COVID-19 virus. These questions demanded consideration of the scientific evidence relating to the prevalence of the COVID-19 virus within the Australian community, effectiveness and efficiencies of pre-existing contract tracing mechanisms and the effectiveness and efficiency of the app itself. Consideration was also given to the impact of the app on the rights of vulnerable members of

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approach to public engagement; Parliament of Australia, '10 COVID-19—Select Committee—Appointment' (Senate Journal No 8, 8 April 2020) 1408.

[66] Parliament of Australia, '10 COVID-19—Select Committee—Appointment' (Senate Journal No 8, 8 April 2020) 1408.

[67] Sarah Moulds (n 41).

[68] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020* (Cth).

[69] Kate Galloway and Melissa Castan, 'COVIDSafe and Identity: Governance Beyond Privacy' AUSPUBLAW (11 May 2020) <https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy>.

the community, such as women experiencing domestic violence, for whom a breach of privacy could have devastating consequences.[70]

The COVID-19 committee provided a forum for generating and testing legislative and policy alternatives to the COVIDSafeApp that refined and recalibrated impacts on personal privacy,[71] such as apps developed in Germany that avoid a government-controlled central location for information to be stored, significantly reducing the risk of misuse or overuse of personal information by government agencies.[72]

In the COVID-19 Committee's Final Report it recommended 'that the Australian Government 'cease any further expenditure of public funds on the failed COVIDSafe application'.[73] The Committee referred to concerns regarding the practical effectiveness of the App for contact tracing and the security of personal information and data obtained by the COVIDSafeApp.[74] This focus on the legality and effectiveness of the COVIDSafeApp has been the subject of public scrutiny[75] and the App, incidentally, is now effectively out of use, having been replaced by much more effective State and Territory based equivalents.[76] It provides an

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[70] These issues formed part of the Senate Select Committee's public inquiry hearings in April and May 2020, which drew from the analysis contained in the following two reports from the human rights committee: Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny of COVID-19 Legislation* (Report 5 of 2020); Report 6 of 2020 (see Chapter 1).

[71] Natasha Lomas, 'Germany Ditches Centralized Approach to App for COVID-19 Contacts Tracing', TechCrunch (online) <https://techcrunch.com/2020/04/27/germany-ditches-centralized-approach-to-app-for-covid-19-contacts-tracing/> (27 April 2020).

[72] Ibid. Caroline Compton, 'Trust, COVIDSafe and the Role of Government', AUSPUBLAW (11 May 2020) <https://www.auspublaw.org/2020/05/trust-covidsafe-and-the-role-of-government/>.

[73] Senate Select Committee on COVID-19, Final Report, April 2022, Parliament of Australia, December 2020, Recommendation 14, [4.113].

[74] Ibid Recommendation 14, [4.106]-[4.109].

[75] Graham Greenleaf and Katharine Kemp, 'Australia's 'COVIDSafe' Law for Contact Tracing: an Experiment in Surveillance and Trust' (2021) 11(3) *International Data Privacy Law* 257; Law Council of Australia, 'Tracing app has been released but privacy concerns still exist' (Media Release, 26 April 2020).

[76] Tom Lowrey, 'Call for COVIDSafe App to be Scrapped after Two Contacts Identified in Six Months', *ABC News* (online, 16 December 2021) <https://www.abc.net.au/news/2021-12-16/covidsafe-app-scrapped-poor-performance-contact-tracing/100703736>.

interesting example of how *post-legislative scrutiny* by parliamentary committees – even when undertaken in an ad-hoc way - can provide an important opportunity for the parliament (and the community) to reassess whether executive decision making in response to an emergency like the COVID-19 is within the scope of power allocated by parliament, effective at achieving its stated legitimate end, and proportionate in its impact.

2. *The Cancellation of Tennis Star Novak Djokovic's Visa*

The above example largely concerns executive decision-making in the form of delegated law-making power authorised under statute in the context of emergency response to the COVID-19 pandemic. However, the challenges associated with ensuring meaningful review of executive decision-making were evident long before the coronavirus hit our shores.

Executive decision-making under the *Migration Act* has been notoriously broad in scope and devastating in personal impact, as documented in a range of UN reports on Australia's compliance with its human rights obligations [77] and as evident from a steady stream of High Court challenges.[78] Powers granted to the Minister under the *Migration Act* are personal, non-delegable and wide ranging in scope. The High Court has explained that these kinds of personal powers were deliberately drafted by Parliament to be wide, unfettered and beyond the scope of review or procedural fairness protections.[79]

Many of the past efforts to seek judicial review of visa decisions under the *Migration Act* have involved asylum seekers and refugees, seeking to be resettled in Australia for the long term. However, a recent, controversial example of the scope of discretionary executive power under the *Migration Act* occurred in the very different context of Novak Djokovic's Australian

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[77] See, eg, Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot report 2017*; Ben Saul, 'Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions (2013) 20 *Australian International Law Journal* 55-75; Refugee Council of Australia Media Release 'UN Member States Challenge Australia's Refugee and Asylum Policies' (Report, January 2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/Australia-UPR-2101.pdf>.

[78] See, eg, *Kieran Pender,* 'Minister's Citizenship Powers go to High Court' *The Saturday Paper,* 18-19 February 2022.

[79] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2011) 246 CLR 636 [30] (French CJ and Kiefel J).

visa cancellation. Djokovic was granted a 'temporary activity visa' to enter Australia on the basis of competing in a sporting activity (the Australian Open) on 18 November 2021.[80] He also received a letter from the Chief Medical Officer of Tennis Australia on December 30 informing him that he was granted a 'medical exemption from COVID vaccination' based on the decision of two independent medical boards accepting that had recently recovered from COVID-19.[81] This advice from Tennis Australia was contrary to written instructions from the Federal Health Minister given to Tennis Australia on 29 November 2021 outlining that previous infection was not a valid grounds for a medical exemption, and that being 'fully vaccinated' was a criterion for quarantine-free travel to Australia.[82] Djokovic received an automated message that he met the requirements for quarantine-free travel on January 1, and arrived in Melbourne on a flight from Dubai on 5 January 2022.[83] Upon arrival, Djokovic was detained by Australian Border Force officials before being informed that his visa was cancelled. This decision was successfully challenged on 10 January 2022 in the Federal Court by Djokovic's legal team, with Kelly J ruling that the decision was unfair due to a lack of procedural fairness.[84] Despite this ruling, the Minister for Immigration then used his 'public interest' power to make a second decision to cancel Djokovic's visa on 14 January 2022,

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[80] *Migration Act 1958* (Cth) s 504(1); *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (temporary visa subclass 408).

[81] Judd Boaz, 'Novak Djokovic Needs One Final Green Light from the Government to Chase Tennis History', *ABC News* (online, 12 January 2022) <https://www.abc.net.au/news/2022-01-12/novak-djokovic-in-australian-open-visa-limbo/100750800?utm_medium=social&utm_content=sf252726815&utm_campaign=fb_abc_news&utm_source=m.facebook.com&sf252726815=1&fbclid=IwAR04fwzEtAIVQakbdr8aYCJcXd3nv3ZCefEWOrPv7kViwyNQBHhJVYEoikI>.

[82] Ibid.

[83] ABC News, 'BBC Investigation Raises Doubts over Timing of Novak Djokovic's Positive COVID test' (online, 29 January 2022) <https://www.abc.net.au/news/2022-01-29/bbc-investigation-raises-doubts-timing-novak-djokovic-covid-test/100790060>.

[84] *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 7 [63]-[66] (Kelly J); detailed explanation of legal process: Joe McIntyre, 'Novak Djokovic's path to legal vindication was long and convoluted. It may also be fleeting', *The Conversation* (online, 12 January 2022) <https://theconversation.com/novak-djokovics-path-to-legal-vindication-was-long-and-convoluted-it-may-also-be-fleeting-174603>.

and this decision was upheld as legally valid by the Full Court of the Federal Court on 16 January 2022 based on the wide, discretionary nature of this executive power. This reveals that judicial power does not provide an adequate safeguard here, as the primary legislation giving the Minister the power to make the decision was drafted so broadly that any potential review mechanism is practically ineffective. The reasons for the Minister's cancellation were based on the assertion that Djokovic's presence in Australia would encourage anti-vaccination sentiment and therefore posed a risk to the health and good order of the Australian community.[85] Djokovic's legal team argued that the Minister's decision to cancel his visa again based on his 'anti-vaccination views' was irrational, illogical and unreasonable[86] and 'government over-reach with respect to private choice'.[87] This argument would establish a procedural error with the Minister's decision: basically that the visa cancellation was so unreasonable that no reasonable decision maker in that position would have made that decision.[88] Ultimately, the Full Court of the Federal Court held that it was:

> …not irrational for the Minister to be concerned that the asserted support of some anti-vaccination groups for Mr Djokovic's apparent position on vaccination *may* encourage rallies and protests that *may* lead to heightened community transmission. Further, there was evidence…that Mr Djokovic had recently disregarded reasonable public health measures overseas by attending activities unmasked while COVID positive to his knowledge. It was open to infer that this, if emulated, *may* encourage an attitude of breach of public health regulations. Whether or not such consideration should have weighed so heavily in the decision was a matter of weight and balance for the Minister.[89]

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[85] *Migration Act 1958* (Cth) s 116(1)(e)(i).

[86] See *Gong v Minister for Immigration and Border Protection* (2016) 309 FLR 151 (Smith J) [41].

[87] Novak Djokovic, 'Applicant's Outline of Submissions', Submission in *Djokovic v Minister for Immigration,* VID18/2022, 15 January 2022, [28].

[88] *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 [129] (Crennan and Bell JJ); *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [20] (Gleeson CJ).

[89] *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3 (Allsop CJ, Besanko and O'Callaghan JJ) [85]-[87] ('*Djokovic'*).

Given the wide discretion the *Migration Act* bestows on the Minister, it made it very difficult to invalidate a decision on the grounds of irrationality.[90] As Pelly observed, '[b]y making it all about his discretion, the Minister ensured there would be no argument about scientific evidence – or visa rules'.[91] As long as there is *some* evidence that this individual's presence *may* pose a *possible* risk to the health, safety or good order of the community, the Minister is entitled the balance the relevant considerations as he sees fit. This does not require the Minister to consider whether their absence or deportation due to a visa cancelation would create a similar risk (for example, due to protests): '[n]o statutory obligation arose to consider what risks may arise if the holder were removed from, or not present in, Australia'.[92]

The Djokovic case highlights that the discretion in s 116(1)(e) is deliberately wide and grants the Minister to cancel a visa based on his or her assessment of the possible risk an individual may pose[93] to the 'values, balance and equilibrium of Australian society'.[94] Whether another person in the Minister's position would have reached the same decision is irrelevant: the basis of the Minister's opinion under s 116 was not irrational or illogical, hence there was no error in the decision-making process.[95] The use of s 116 in the Djokovic case during a tumultuous socio-political time

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[90] *Minister for Immigration v Li* (2013) 249 CLR 332 [28] (French CJ): the requisite degree of unreasonableness must be 'arbitrary, capricious and to abandon common sense'; [68] (Hayne, Bell and Kiefel JJ): '[t]he legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre decision', [76]: a conclusion of unreasonableness 'may be applied to a decision which lacks evident and intelligible justification'. See generally Gummow (n 14).

[91] Michael Pelly, 'How Hawke Forced Djokovic into an Unwinnable Argument over Rationality', *Australian Financial Review* (online, 16 January 2022) <https://www.afr.com/politics/how-hawke-forced-djokovic-into-an-unwinnable-argument-over-rationality-20220116-p59oln>.

[92] *Djokovic* (n 88) [95].

[93] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 24.

[94] *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, 94 (Goldberg J).

[95] *Djokovic* (n 88) [104]. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 [137] (Gummow J).

was met with controversy,[96] as this cancellation power has conventionally been exercised in situations where, for example, an individual is convicted of a crime.[97] It has raised concerns about Australia's 'dysfunctional and dangerous' visa rules,[98] setting a precedent for more visa cancellations on political grounds based on the Minister's opinion. Michael Stanton, president of Liberty Victoria, observed that:

> [d]eportation of a person because of a purported risk as to how others might perceive them and then act sets a terrible precedent…[o]ne danger of largely unfettered discretions, or 'God powers', is that decision-making just becomes political and populist … eroding the integrity of the executive and the rule of law.[99]

In these situations, a systematic approach to PLS could invite a democratically constituted parliamentary committee - with the power to call upon witnesses from all walks of life – to assess whether the s 116 powers are working as intended and are appropriate in scope, having regard to their recent use, their impact on the rights of individuals, as well as fundamental principles of administrative law, including procedural fairness. The lack of available review mechanisms for this decision reveals how PLS would be beneficial to assess the suitability of the Minister's decision in an emergency context and open the door to revisit the operation

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[96] See, eg, Paul Sakkal, ''Dangerous in a democracy': Civil rights groups' alarm at government's Djokovic case', *The Age* (online, 16 Janaury 2022) <https://www.theage.com.au/sport/dangerous-in-a-democracy-civil-rights-groups-alarm-at-government-s-djokovic-case-20220116-p59omd.html>; Lawrence Ostlere, 'Novak Djokovic's visa appeal is a victory for human rights and free speech, father declares', *The Independent* (online, 10 January 2022) <https://www.independent.co.uk/sport/tennis/novak-djokovic-father-family-covid-vaccine-b1990008.html>.

[97] See, eg, *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120: s 116 visa cancellation for multiple convictions for dealing dangerous drugs. Cf *Shinde v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1873: s 116 visa cancellation based on misunderstood nature of intervention order held to be invalid.

[98] Ben Doherty, 'Djokovic case exposes 'dysfunctional and dangerous' Australian visa rules, experts say', *The Guardian* (online, 17 January 2022) <https://www.theguardian.com/sport/2022/jan/17/djokovic-case-exposes-dysfunctional-and-dangerous-australian-visa-rules-experts-say>.

[99] Ibid.

and scope of broadly worded discretion when it is arguably misapplied in an emergency context.

Djokovic was initially subject to a three-year ban from re-entering Australia,[100] which could be waived for 'compelling or compassionate reasons'.[101] However, the Minister for Immigration used his discretion to overturn his ban, and Australia has since removed any vaccination requirements for visitors. Djokovic competed at (and won) the 2023 Australian Open a year on from his controversial ban and Federal Court challenge.

The Djokovic drama highlights the limits of existing review mechanisms: while judicial review appears to be a safeguard for accountable executive decision-making, as it sounds the public alarm about a transgression by the executive, it is often hollow in its impact on the lives of the individuals involved because it fails to 'come to the rescue' by actually changing the outcome. Merits review is limited by the enabling legislation. This is the type of legislative design feature that requires regular democratic review, for example through PLS, to ensure it remains appropriate given the rights-impacting nature of the Minister's powers on the lives of individuals.

IV Time To Consider A More Systematic Approach To Multifaceted Review Of Executive Decision-Making In Australia?

In the Australian context, we have all the legal, institutional and cultural ingredients to provide robust review of executive decision-making – more than this, we have a constitutional *promise* that it will be our elected members in Parliament and not government officials that will make our laws and define the scope of executive decision-making. However, the examples above illustrate that – particularly in recent years – we have failed to use these ingredients effectively. We have taken them for granted, and they are showing signs of decay. As Boughey concluded in 2020:

> Different forms of government accountability are appropriate in different circumstances. Emergencies probably necessitate a decrease in certain formal accountability mechanisms, particularly those that

[100] *Migration Regulations 1994* (Cth) sch 4: Public Interest Criterion 4013.

[101] Doherty (n 98).

> delay or diminish a government's ability to effectively respond to the emergency. However, there must be alternative ways through which governments explain themselves, and in which they can ultimately be judged for their handling of the emergency. Any limits on formal accountability should be justifiable, and it is not clear whether the exclusion of parliamentary disallowance or use of soft law is necessary. And limits to government accountability must not become permanent features of the way governments make rules.[102]

There is no quick fix for this complex and entrenched challenge, but there are two modest, practical actions that draw upon the constitutional promise described above that we could take to help restore some vitality to each individual ingredient and to encourage a more meaningful overall result. Both aim to offer practical solutions to lawmakers and policy makers beset with complex policy challenges. These are described below as:

- Adopting a more systematic approach to post-legislative scrutiny within existing parliamentary committee settings;
- Prescribing multifaceted review of executive decision-making as best practice legislative drafting to achieve a constructive alignment between pre and post parliamentary review of executive decision-making, particularly in the context of emergency decision-making and related powers to introduce delegated legislation.

A Adopting a More Systematic Approach to Post-legislative Scrutiny within Existing Parliamentary Committee Settings

As noted in Part I of this Article, the Australian approach to parliamentary review of emergency law-making can be described as ad hoc in nature. It contains some elements of consistent, regular and prescribed review, such as the process of scrutinising Bills or amendments to Bills through the SBC or the Parliamentary Joint Committee on Human Rights ('PJCHR'), but once the relevant law has been enacted, it is generally only subject to further post-enactment scrutiny if the law itself includes a sunset clause or if a specific referral is made by Parliament. Additionally, delegated legislation exempt from parliamentary disallowance is effectively non-reviewable, leaving no opportunity to review the suitability of discretion which grants power to make significant decisions affecting individual and collective rights. There is no consistent, systematic approach to reviewing enacted laws – even those laws that prescribe extraordinary executive

[102] Boughey (n 18) 174.

powers. In addition, there is no set criteria or process for ensuring that the post-legislative scrutiny ('PLS') that does occur by Australian parliamentary committees is conducted in a manner that interrogates whether the laws have been fairly applied, or implemented in a way that achieves their stated policy objectives. In short, there is an absence of constructive alignment between the stated objectives of the law at the time it is first introduced into parliament and any subsequent parliamentary review of its provisions.

This absence of alignment between pre and post legislative review was in part what motivated the Law Commission of England and Wales to recommend that a systematic approach to PLS be implemented in the UK Parliament.[103] As Lord Norton explained, structured forms of PLS can play a critical role in closing the 'scrutiny loop' that begins with pre-enactment scrutiny (usually by specific parliamentary committees) and ends with PLS.[104] When undertaken in structured, systematic way, PLS works as a safeguard against the misuse of power by governments and as a way to monitor whether laws are benefiting citizens as originally intended.[105]

A systematic approach to PLS has since been developed in the UK Parliament, wherein government departments prepare and publish a report that contains an assessment of whether an Act has met its key objectives within three to five years of the Act coming into force.[106] In its response to the Law Commission's Report, the Government did not establish a new specialist House of Commons committee to undertake post-legislative scrutiny. Instead it sought to integrate this role into the existing Select Committees system, supported by guidance material for government

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[103] Law Commission of England and Wales, Ninth Programme of Law Reform (2005 Law Com No 293)

[104] United Kingdom, *Parliamentary Debates*, House of Lords, vol 672, col 747-52 (Lord Norton). See also Lydia Calpinska (2006) 'Post-Legislative Scrutiny of Acts of Parliament' 32(3) *Commonwealth Law Bulletin* 191, 192.

[105] Westminster Foundation for Democracy, *London Declaration on Post-Legislative Scrutiny* (2018) Preamble.

[106] Office of the Leader of the House of Commons, 'Post-Legislative Scrutiny – The Government's Approach' (Stationary Office, March 2008, Cm 7320) 8-9 and 15, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228516/7320.pdf> (7 February 2020). See also Caygill (n 4) 296.

departments who are required to prepare a 'Memorandum' on appropriate Acts which are then considered by the relevant Commons departmental select committee.[107] According to the Cabinet Office's Guide to Making Legislation,[108] these Memorandums should be prepared within three to five years after the Act in question has received Royal Assent and is intended to provide a preliminary assessment of how the law is working in practice, having regard to any objectives or benchmarks identified when the law was first considered by the Parliament.[109] The Memorandum is published as a 'Command Paper' and the relevant House Select Committee then decides whether it wishes to conduct a more detailed review of the Act.[110] Kelly and Everett have explained that in some instances this can lead to a different parliamentary body, such as a House of Lords Committee or Joint Committee conducting further scrutiny of the enacted legislation.[111] The UK government is then required to provide a written response to the findings of the relevant Committee within two months of publication of the post-legislative report.[112] The Westminster Foundation for Democracy reported in 2020, that 'at this initial response, up to 40% of the committee's recommendations are fully or partially accepted, though over time more recommendations find government acceptance'.[113]

The federal Australian Parliament could consider adopting a similar approach to implementing a more structured, systematic approach post-legislative scrutiny, drawing upon its existing system of 'technical' and 'inquiry' based parliamentary committees and adapting existing explanatory material templates including Explanatory Memorandums, Statements of Compatibility with Human Rights and Regulatory Impact

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[107] Kelly and Everett (n 7) 5-6; Office of the Leader of the House of Commons (n 106).

[108] United Kingdom Government, Cabinet Office, *Guide to Making Legislation* (2013, last updated 14 July 2017) <https://www.gov.uk/government/publications/guide-to-making-legislation>.

[109] Ibid 294.

[110] Ibid 294-300.

[111] Kelly and Everett (n 7) 6.

[112] Tom Caygill, 'A Tale of Two Houses?' (2019) *European Journal of Law Reform* 87-101.

[113] Westminster Foundation for Democracy, 'Not All Scrutiny is Equal: How Parliaments Vary in Scrutinising the Implementation of Legislation' (*Report*, 26 March 2020) <https://www.democraticaudit.com/2020/03/26/not-all-scrutiny-is-equal-how-parliaments-vary-in-scrutinising-the-implementation-of-legislation/>.

Statements to facilitate routine reporting from government departments. When it comes to laws authorising the use of extraordinary executive power to respond to specific emergencies, this form of systematic, structured post-legislative scrutiny could be triggered by specific provisions in the legislation itself (similar to existing review mechanisms featuring in other emergency contexts),[114] or take place at regular 12-month intervals to enable timely review of the use, effectiveness and impact of the relevant laws.

In addition, consideration could be given to ensuring that the criteria applied to post-legislative scrutiny of existing laws by Australian parliamentary committees is drawn from the criteria applied by the SBC and also includes a specific requirement to consider the extent to which the exercise of any relevant executive powers have been subject to judicial or merits review. This would help achieve the type of constructive alignment across different forms of review of executive decision-making currently lacking within the Australian system. One aspect of PLS in an emergency context could consider whether the legislation (primary or delegated) which enables the Executive power should be amended to introduce options for review in the form of removing disallowance exemptions, or introducing avenues for merits or judicial review. Alternatively, it may reveal that the Executive discretion is excessive or has been exercised inappropriately in a particular situation, as could be the case with Djokovic's visa cancellation decision under s 116 of the *Migration Act.*

Such an approach would not be a radical departure from what is already considered 'best practice' when it comes to designing legislative provisions that authorise the use of broad executive powers or that operate to curtail individual rights and freedoms in significant ways.[115] It would mirror many existing statutory regimes put in place to monitor specific laws, such as the provisions of the *Intelligence Security Act 2001* (Cth) that set up the Parliamentary Joint Committee on Intelligence and Security and provide the committee with a mandate to conduct both pre and post legislative scrutiny of specific national security laws. However, it would inject a level of structure and consistency currently absent from Australia's ad hoc approach to reviewing enacted laws. It would also help meet what

[114] See, eg, *Intelligence Security Act 2001* (Cth) pt 4 sch 1.

[115] See, eg, Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Guidelines on Technical Scrutiny Principles* (December 2021).

Lord Sales has described as the appropriate balance between *ex ante* and *ex post* accountability and review. [116]

B Prescribing Multi-faceted Review of Executive Decision-Making as Best Practice Legislative Design

In order to harness the potential value of more structured, systematic post-legislative scrutiny of laws that invest significant powers in the executive, it is essential to ensure that these laws contain sufficient safeguards and facilitate multiple forms of review in the first place. Ideally this means using the legislative process to (1) *prescribe* clear limits on and criteria for executive decision-making, (2) *enable* merits review of all executive decisions that impact an individual's rights, (3) *include triggers* to prompt post-enactment parliamentary review of the key provisions (including, for example, sunset clauses) and (4) acknowledge and affirm principles of judicial review, including procedural fairness, through statutory context and design.

Whilst, as Feldman has observed, it might be overly optimistic to expect these features to be included in the first iteration of a new law proposed by a Government that enjoys some level of executive dominance over the Parliament, it may be more realistic to seek to include these components within the legislation as it moves through both Houses of Parliament and/or as it is amended overtime. The prompt for including these features within the legislative design of future emergency management laws, for example, might be the outcome of review of existing COVID-19 related laws following the expiry of a sunset clause. The trigger for including these features within the *Migration Act 1958* (Cth) regime could be sustained media coverage following a successful (or unsuccessful) judicial review application by a high-profile visa applicant.

Regardless of the conditions under which these reforms take place, if this type of coordinated, multi-faceted review was included in the legislation authorising the types of executive decision-making described above, the overall impact would have been considerable with benefits not just for the Australian community but also for the Government. The COVID-Safe App would have almost certainly been improved or disbanded much sooner, more diverse voices could have been considered in the design of COVID

[116] Lord Sales, 'Algorithms, Artificial intelligence and the Law' (The Sir Henry Brook Lecture for BAILII, London, 12 November 2019) 10, <https://www.supremecourt.uk/docs/speech-191112.pdf>.

restrictions and visa holder's claims could have been resolved without causing international embarrassment.

Certainly, in each of these cases, the federal Government would still have retained the legal and political power to act decisively in response to the COVID-19 pandemic. This power would still extend to making decisions that limited or even abrogated individual rights in favour of collective public interests. However, by adopting a multifaceted review approach, the *quality* of the legislative framework authorising the use of these powers would have been improved, and the risk of misuse or overuse minimised by providing meaningful incentives for decisions makers to focus on *fairness in process* as well as effectiveness of outcome.

For example, in the case of the *Biosecurity Act*, enabling review of the Ministerial Directives by the Senate Standing Committee on Delegated Legislation and the PJCHR would have flagged problems with the practical and legal design of many directives that have given rise to serious concerns, including those relating to Aged Care and those relating to the largely ineffective COVID-Safe App. These committees provide a useful basis for the consideration of further expert government and non-government input prior to implementation. This could have been further enhanced by including a review clause within the legal framework governing the making of Directives under the *Biosecurity Act*, for some but not all decisions made in response to the COVID-19 pandemic. For example, the inclusion of a merits review process to enable individuals to challenge decisions about their loved one's health care, or the sharing of their personal information with non-health related agencies, would have provided a strong incentive for public servants and other executive decision-makers to think carefully about the fairness and efficacy of processes and procedures relating to the roll-out of Biosecurity Directives *at the design stage.* This would in turn save time and money at the implementation stage, whilst still preserving the Minister's powers to issue broad-ranging directives to regulate public behaviour in the context of the pandemic.

The Djokovic legal proceedings also provide a useful lens through which to consider the potential benefits of multifaceted review. On the one hand, the Djokovic case highlights the limits of judicial review as a mechanism for holding executive decision-makers to account. While Kelly J's decision invalidated the original visa cancellation due to a lack of procedural

fairness,[117] the power of the courts is limited to invalidating the government decision due to an unfair or incorrect process, and then referring back to the original decision maker (here, the Minister for Immigration) to decide the outcome, or merits, of the case. On the other hand, Kelly J's decision invalidated the original visa cancellation due to a lack of procedural fairness, sounding the alarm and generating media attention about the scope of executive decision-making power in visa cancellation decisions – not just for international tennis stars, but also for other visa applicants including protection visa applicants.[118]

The powerful value of procedural fairness – that is evident in both judicial review jurisprudence and the scrutiny criteria applied by parliamentary committees – resonated with the Australian community, and in the right conditions, could give rise to political incentives to improve the procedural safeguards for executive decisions made under s 116 of the *Migration Act*, particularly if facilitated through a routine, structured post-legislative scrutiny process that includes the provision of relevant information from government departments as well as the application of Scrutiny of Bills-type criteria.

Existing accountability mechanisms are limited in emergency contexts. Avenues of judicial review, merits review and Ombudsman/agency complaints are dependent on the enabling legislation providing these avenues of review, and even if this is the case, they are only appropriate for ad hoc, *individual* cases. The model of PLS we propose is different because it is systematic in nature: it addresses the suitability of the underlying legislation which grants the Executive the power to make discretionary, significant decisions, particularly in emergency contexts. It offers an opportunity for the implementation of (1) recommendations made by other bodies, for example Ombudsman offices and (2) feedback from past instances of excessively wide Executive discretion. This goes beyond addressing *individual* complaints to ensure the appropriateness of

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[117] Note that default outcome of invalidating cancellation is that visa is valid: see *Migration Act 1958* (Cth) s 133C.

[118] See generally Alice Cuddy, 'Djokovic stay highlights refugee concerns at Melbourne detention hotel, *BBC News* (online, 7 January 2022) <https://www.bbc.com/news/world-australia-59901094>; Basmah Qazi, 'Mehdi Ali's Been in Australian Detention for 9 Years, Last Week Novak Djokovic Was His Neighbour', *The Latch* (online, 14 January 2022) <https://thelatch.com.au/novak-djokovic-park-hotel-refugees/>.

Executive discretion for *everyone* affected by emergency decision-making in the future.

Facilitating this type of multifaceted review starts and ends with parliament and the way it uses its law-making power to prescribe clear limitations on the scope of executive decision-making and includes mechanisms for ongoing parliamentary and merits review of those decisions. This in turn depends on parliamentarians (including those that form Governments) identifying political incentives in the inclusion of such provisions in proposed or existing laws. This is no easy task, but one that can be built upon over time particularly when combined with public demand for better quality executive decision-making. This may be supported by the changing political landscape in Australia which has seen a trend towards the election of independents and growing confidence among government backbenchers to 'break ranks' with their leaders when necessary to duly serve their electorates.[119]

It is also important to understand that although the concept of prescribing multifaceted review of executive decision-making sounds quaint or naïve, it is in fact already entrenched in parliamentary practice in the form of the scrutiny criteria applied by the SBC and the Delegated Legislation Committee. These Committees have also produced detailed Guidelines designed to encourage Government ministers, instructing departments and MPs to design new laws in ways that clearly define the scope of executive power and facilitate review of executive decision-making.[120] For example, the SBC has commented on Henry VIII clauses, noting that administrative flexibility is not a sufficient justification for allowing delegated legislation to override primary legislation, and offering alternatives for policy makers keen to facilitate decisive, and authoritative decisions.[121] It has also resulted in guidance for the framing of Commonwealth Offences to help ensure that governments can criminalise dangerous or anti-social behaviour, whilst at the same time including appropriate safeguards to protect individual rights and avoid excessive delegation of rule-making

[119] See, eg, Mark Evans and Gerry Stoker, *Saving Democracy* (Bloomsbury, 2021).

[120] Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Guidelines on Technical Scrutiny Principles* (December 2021).

[121] Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 1 of 2022, 4 February 2022) 1.15. See Explanatory Memorandum, Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (Cth) 272.

power to the executive.[122] The Committee's generally bipartisan, technical reports on Bills frequently result in legislative amendments, improved explanatory materials and increased parliamentary debate, despite the fact that non-government members hold the majority and the Chair.[123] For example, the Committee's concerns about the reduced level of parliamentary scrutiny and broad executive powers in the Coronavirus Economic Response Package Omnibus Bill 2020 resulted in additional clarification and information from relevant Ministers about how the proposed schemes would operate in practice.[124] Our proposed approach to PLS would effectively be an extension of existing review mechanisms applied more broadly to look at primary legislation which grants Executive discretion to make administrative decisions in emergencies and delegated legislation which is subject to parliamentary disallowance exemptions.

In addition, it is likely that public servants and government departments are looking for reliable, legally-tested guidance when forced to draft legislative provisions or executive directions or directives 'on the run' in the face of an emergency. For this reason, these materials should form the focus of a new shared commitment across the parliament to develop and promote best practice in legislative design that could be spear headed by incoming independent MPs,[125] as well as senior public servants from instructing departments who would directly benefit from improved clarity

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[122] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27; Senate Standing Committee for Scrutiny of Bills, Parliament of Australia; Department of Prime Minister and Cabinet, *Legislation Handbook* (2017) 5.20, 5.25; Office of Parliamentary Counsel, Australian Government, *Index of Drafting Directions* (13 October 2020).

[123] Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Annual Report 2020*, 10-17.

[124] Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 7 of 2020, 10 June 2020) 37–39; Senate Standing Committee for Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2020, 13 May 2020) 22–25.

[125] For example, an agreement was reached between Prime Minister Julia Gillard and Independents to form Minority Government in 2010. This included the undertaking that Julia Gillard would meet each of the independents each sitting week 'principally to discuss and negotiate any planned legislation': see Agreement to Form Government: The Windsor-Oakeshott-Gillard Deal (signed 7 September 2010) Text Available at <https://australianpolitics.com/2010/09/07/agreement-to-form-government.html> (accessed 25 February 2022).

and guidance in this area. The benefits of such an approach also extend to cost savings associated with improved public service delivery and reduced risk of expensive litigation (as illustrated by the above examples).

Generating or refreshing practical templates for legislative design would also assist parliamentarians seeking to facilitate swift executive responses to emergencies, for example by identifying minimum and maximum options for parliamentary and judicial oversight of executive action. It would *empower* parliamentarians to exercise their sovereignty over the executive, rather than *limiting* their collective ability to determine the ultimate shape and content of the law.

This could be supported by amending parliamentary Standing Orders to require that the reports of relevant scrutiny committees (such as SBCs or Legislative Review Committees) be tabled *prior* to the finalisation of the Second Reading stage of debate, to ensure that the Parliament has access to this important information before finalising its position on a Bill. Such an amendment would not prevent a government from suspending Standing Orders to pass urgent laws, but it would help entrench a culture of scrutiny within the parliament that is already emerging within Standing and Select Committees in a number of jurisdictions, particularly those with growing numbers of independent members. This could be further enhanced by utilising the mechanisms for *post* legislative scrutiny described above.

V CONCLUSION

Ensuring effective review of executive decision-making is not a challenge easily overcome – particularly in a political climate where swift, decisive executive decision-making is highly coveted by all major parties, necessary to protect and preserve collective and individual rights and rewarded by the community at the polls. However, it is a challenge that is essential for any functioning, modern democracy to take seriously particularly as it grows exponentially in frequency and impact. The absence of effective review of executive decision-making is also a problem that a growing number of independent members of parliament and prospective parliamentary candidates are articulating as central to their reform agenda.[126]

[126] See, eg, Mark Rodrigues and Scott Brenton, 'The Age Of Independence?: Independents In Australian Parliaments' (2010) 25(1) *Australasian*

The case studies make it clear that judicial review – once described as '…the enforcement of the rule of law over executive action'[127] – can be of limited practical utility in the face of an authorising statute that is overtly deferential in form and substance. Merits review can also be excluded within these emergency-management statutory frameworks.

These shortcomings demand that we reconceptualise what it means to review executive decision-making in Australia and look beyond the courts and tribunals for other forums of accountability. The parliament – with all its complex political dynamics – is the obvious choice, but it too can be limited in its capacity to transcend executive dominance particularly in the absence of any consistent or structured approach to post-legislative review of enacted laws.

This is why a model of consistent *multifaceted* review is necessary. In essence this means using the pre-legislative parliamentary review stage to (1) *prescribe* clear limits on and criteria for executive decision-making, (2) *enable* merits review of all executive decisions that impact severely on an individual's rights (3) *include triggers* to mandate post-legislative scrutiny of key legislative regimes and (4) acknowledge and affirm principles of judicial review, including procedural fairness, through statutory context and design. If this can be achieved, the quality of the legal framework authorising executive decision-making will be enhanced, increasing the likelihood that the decisions made under the legal framework will be effective, efficient and fair, and providing scope for meaningful external review without jeopardising the policy objectives of the legislative design. Moreover, it would greatly enhance the quality and effectiveness of emergency law-making in the future.

Post-legislative scrutiny offers an opportunity for systematic implementation of recommendations made by other review bodies, such as Ombudsmen or Tribunals. It provides an opportunity for regular, systematic, and democratically constituted review (for example, at 12-month intervals) of the suitability of primary and delegated legislation made in emergencies to assess whether these laws appropriately balance

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Parliamentary Review 109-135; Benjamin Reilly and Jack Hudson Stewart, 'Compulsory Preferential Voting, Social Media And 'Come-From-Behind' electoral Victories In Australia' (2021) 56 (1) *Australian Journal of Political Science* 99-112.

[127] *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 (Brennan J).

community protection with Executive discretion, accountability and the separation of powers.

This concept of multifaceted review necessarily accepts that some level of deference to the executive is needed, particularly in times of emergency. However, it also aims to promote the foundational constitutional value of parliamentary sovereignty by proactively positioning the legislature in a position of active control over the scope and use of executive power. It does this by providing practical guidance to proponents of new laws about how to best design discretionary provisions to safeguard individual rights and facilitate merits and judicial review. It also creates forums for a more diverse range of parliaments to contribute to legislative design through the committee process. A multifaceted review approach also advocates utilising *post*-legislative scrutiny to enable courts, tribunals, executive decision-makers, and community members, to 'feed back' to the Parliament about how well the emergency lawmaking framework is working to protect and promote the public's rights and interests.