

## THE ROLE OF COMMITTEES IN RIGHTS PROTECTION IN FEDERAL AND STATE PARLIAMENTS IN AUSTRALIA

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*This article offers a snapshot of how Australian parliamentary committees scrutinise Bills for their rights-compliance in circumstances where the political stakes are high and the rights impacts strong. It tests the assumption that parliamentary models of rights protection are inherently flawed when it comes to Bills directed at electorally unpopular groups such as bikies and terrorists by analysing how parliamentary committees have scrutinised rights-limiting anti-bikie Bills and counter-terrorism Bills. Through these case studies a more nuanced picture emerges, with evidence that, in the right circumstances, parliamentary scrutiny of 'law and order' can have a discernible rights-enhancing impact. The article argues that when parliamentary committees engage external stakeholders they can contribute to the development of an emerging culture of rights-scrutiny. While this emerging culture may not yet work to prevent serious intrusions into individual rights, at the federal level there are signs it may at least be capable of moderating these intrusions.*

### I INTRODUCTION

Australia has a parliamentary model of rights protection which means that, outside of the protections provided by the *Constitution* and the common law, most Parliaments in Australia have almost exclusive responsibility for directly protecting the rights of all members of the community. Only in two Australian Parliaments, those of Victoria and the Australian Capital Territory, is this direct

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responsibility shared with the courts through a Bill of Rights framework.<sup>1</sup> Committees in Australian Parliaments assist the institution of parliament in holding the executive accountable and, in particular, in ensuring that the executive gives due regard to the protection of individual rights and freedoms. Parliamentary committees perform this function by systematically scrutinising all Bills for their rights implications and informing parliament as to whether limitations on rights are appropriate.

In the United Kingdom ('UK') context, Janet Hiebert observes that once legislation is introduced, the government is rarely prepared to entertain any amendments or scrutiny and also that 'the government is unlikely to change its mind on the basis of a single but contrary parliamentary committee report'.<sup>2</sup> 'Once the [executive] government has decided on a course of action [through introducing a Bill] ... it is generally reluctant to agree to amendments' in parliament because to do so could lead to the reopening of internal divisions and signal government weakness.<sup>3</sup> Such weaknesses in the parliamentary model of rights protection have been well canvassed by Hiebert and other scholars.<sup>4</sup> These perceived weaknesses often draw from the reality that the members of parliamentary committees are political actors, with political incentives to support or oppose the legislation they are tasked with scrutinising, and with limited resources to exert influence over policymaking carried out by the executive.<sup>5</sup> This suggests that within Westminster systems, parliamentary committees, and in particular government-dominated committees, will be seriously compromised as a form of rights protection, especially when scrutinising laws that affect electorally unpopular groups, such as bikies and terrorists.

This article seeks to unpack this assumption and test whether the parliamentary model of rights-protection has had any positive impact on the

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1 Statutory charters of rights exist in Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic)) and the ACT (*Human Rights Act 2004* (ACT)) with committees performing human rights scrutiny forming part of this legislative framework.

2 Janet L Hiebert, 'Governing Like Judges' in Tom Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63.

3 Janet Hiebert, 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints' in Murray Hunt, Hayley J Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39, 52; *ibid* 60–1.

4 See, eg, James B Kelly, 'A Difficult Dialogue: Statements of Compatibility and the Victorian Charter of Human Rights and Responsibilities Act' (2011) 46 *Australian Journal of Political Science* 257, 272. See also David Feldman, 'Democracy, Law and Human Rights: Politics as Challenge and Opportunity' in Murray Hunt, Hayley J Cooper and Paul Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 95, 108; Hiebert, above n 3, 41; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1, 7–8.

5 The resources enjoyed by the executive and its ability to control at least one house of parliament means that it is difficult for parliament to counter the executive's influence in policymaking and for it to make the executive accountable for its actions, particularly those actions that restrict individual rights and freedoms. Executive control extends into parliamentary committees, particularly where they are joint committees dominated by the Lower House, chaired by government members and where, at the state level, members of the executive such as parliamentary secretaries can be members. These broader structural dynamics of our system are compounded by the fact that Australian political parties have some of the strongest party discipline among their Westminster cousins in the UK, Canada and New Zealand.

development and content of anti-bikie or counter-terrorism laws in Australia. Anti-bikie laws and counter-terrorism laws attract a high level of media attention and have significant human rights implications. Both of these ‘law and order’ areas have not just added considerably to the range of criminal offences and investigative powers, they have also deviated substantially from the traditional criminal principles in the manner in which they have attached criminal liability to what people say, who they meet with, where they travel to and even what they wear. Both types of laws invest the executive government with the power to exclude or expel a person from the Australian community for certain broadly defined prohibited behaviours or associations. These laws have rapidly expanded the scope of criminal law and public law in Australia by targeting ‘pre-crime’, and in doing so they reject standard due process protections in the criminal law.<sup>6</sup> Both give rise to highly popular ‘tough’ policy and rhetoric that generally enjoys bipartisan support. For these reasons, they provide compelling case studies to observe the workings of Australia’s parliamentary model of rights protection, when the rights impact and political stakes are high.<sup>7</sup>

The point of interest for the purposes of this article is the fact that despite this rhetoric and the bipartisan support, in the 2014–16 tranche of counter-terrorism legislation there was a significant number of successful amendments made in the Commonwealth Parliament attributable to the work of one federal parliamentary committee – the Parliamentary Joint Committee on Intelligence and Security (‘PJCIS’).<sup>8</sup> For example, parliamentary scrutiny of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) (‘Citizenship Bill’) resulted in 26 amendments to the law, the majority of which were rights-enhancing changes. The PJCIS’s 2014–15 annual report suggests that across the four counter-terrorism Bills reviewed in this period, it made 109 recommendations for change, all of which were accepted by government, and resulted in 63 successful amendments to the Bills.<sup>9</sup> In 2016, all the legislative changes recommended by the PJCIS to the counter-terrorism Bills were implemented as amendments.<sup>10</sup> According to David Monk, such a high rate of

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6 Jude McCulloch, ‘Human Rights and Terror Laws’ (2015) 128 *Precedent* 26, 28.

7 While this heightened political environment clearly does not represent the ‘average experience’ of parliamentary committees, it is fair to say that no such ‘average’ exists within the dynamic environment in which parliamentary committees operate.

8 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Annual Report of Committee Activities 2014–2015* (2015) 3.

9 *Ibid.* The Bills examined during this period were the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), National Security Legislation Amendment Bill (No 1) 2014 (Cth), Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) and the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth). Care must be taken not to overstate the impact of this legislative success rate. Not all of the 63 amendments made were substantive or rights-enhancing, and it is difficult to compare this to the ‘average experience’ of parliamentary committees as such data is not collected.

10 The PJCIS made 23 recommendations (14 of these recommendations proposed amendments to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) itself, six related to the Explanatory Memorandum and three were non-legislative in nature): Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (2016) xi–xiv. All of the Committee recommendations were accepted: Supplementary Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist

acceptance of recommendations ‘is a significant achievement for a committee in most Westminster Parliaments and should be recognised as such’.<sup>11</sup> This suggests that when it comes to the detail of criminal Bills that seek to restrict the rights of unpopular minorities, committee scrutiny at the Commonwealth level can be relatively influential. This is in stark contrast to the scrutiny processes performed by state parliamentary committees, which the Hansard indicates received minimal mention in anti-bikie debates. In the period of 2009–14, 11 anti-bikie Bills in Australia’s three largest state Parliaments were enacted without amendment, and often at breathtaking speed.

While other scholars have evaluated the role or effectiveness of particular committees in the formal parliamentary scrutiny system,<sup>12</sup> this article compares committees across different Australian jurisdictions. Such a parallel analysis assists in gaining a more holistic view of how the parliamentary model of rights protection operates in different parliamentary contexts in Australia. These contexts range from a unicameral Parliament in Queensland, the New South Wales (‘NSW’) Parliament with its minimal system of rights scrutiny, the Victorian Parliament with its Bill of Rights framework, and the federal Parliament which at one time can have up to three to four committees scrutinising a Bill with each committee having a different mandate and membership.

Drawing on the experience of the Commonwealth’s 2014–16 tranche of counter-terrorism legislation, this article argues that there is reason for cautious optimism about the capacity of the parliamentary model of rights protection to have some influence on the development and content of counter-terrorism and anti-bikie law. The 2014–16 counter-terrorism experience arguably reflects a broader trend at the Commonwealth level towards rights-enhancing parliamentary scrutiny of counter-terrorism law. This experience may help identify whether there are fissures in the parliamentary model of rights protection which may assist state parliaments to strengthen their systems of formal parliamentary scrutiny particularly in ‘law and order’ areas such as anti-bikie laws.<sup>13</sup>

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Offenders) Bill 2016 (Cth). The Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) was reintroduced in an amended form after the PJCIS’s recommendations were made. The PJCIS made 20 recommendations for changes to be made, 12 of which related to the Bill: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) xiii–xix. The government responded to the PJCIS report by saying that it accepted all of its recommendations and that they were reflected in the 2016 Bill: George Brandis and Malcolm Turnbull, ‘Strengthening Counter-Terrorism Legislation’ (Media Release, 25 July 2016) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/CT\\_Amendment\\_Bill\\_2015/Government\\_Response](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CT_Amendment_Bill_2015/Government_Response)>.

11 Monk, above n 4, 8.

12 Shawn Rajanayagam, ‘The 2014 Anti-Terrorism Reforms, the *HRPS Act* and Legislative Rights Deliberation’ (Paper presented at Public Law Weekend: Constitutional Deliberations, Australian National University, 1–2 October 2015); George Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2016) 41 *Monash University Law Review* 469.

13 Williams and Reynolds, above n 12.

## II SCOPE AND METHODOLOGY OF THE ARTICLE

This article begins its comparative snapshot of parliamentary committees and rights scrutiny by offering an analysis of the effect of federal parliamentary committees on counter-terrorism Bills through a case study of one piece of the jigsaw of counter-terrorism legislation, the Citizenship Bill. This scrutiny process is compared with parallel developments at the state level through a case study of anti-bikie Bills in NSW, Queensland, and Victoria in the period of 2009–14.<sup>14</sup> The focus of this comparison is on the extent to which parliamentary committees can influence the enactment of criminal laws when it comes to Bills directed at electorally unpopular groups and whether state parliamentary committees might be able to draw any insights from the federal level to help increase their influence. This article acknowledges that there are a number of differences between these two case studies as well as between federal and state parliaments. Nonetheless, it argues that a comparative approach is useful in underlining any fissures in the parliamentary model of rights protection which may assist state parliaments to reawaken their understanding of the value and potential strengths of their formal rights-scrutiny processes.

This article identifies five key factors that are relevant to assessing the overall capacity of the current Australian formal parliamentary committee system to deliver rights protection. These factors are: adequacy of time to conduct formal parliamentary scrutiny; the attributes of particular committees that lead to greater legislative influence (in particular membership, mandate, scrutiny criteria and relevant standing orders); the power and willingness of parliamentary committees to facilitate public input; a culture of respect for the value of formal parliamentary scrutiny including rights scrutiny; and, the generation of a particular rights discourse in parliamentary debates.

The article's methodology is to look for evidence of both the legislative impact (such as attributable amendments to the Bills) and the deliberative impact of the parliamentary scrutiny on the case study of the Bills.<sup>15</sup> The article uses the

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14 Crimes (Criminal Organisations Control) Bill 2009 (NSW); Crimes (Criminal Organisations Control) Bill 2012 (NSW); Crimes (Criminal Organisations Control) Amendment Bill 2013 (NSW); Criminal Organisation Bill 2009 (Qld); Vicious Lawless Association Disestablishment Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld); Tattoo Parlours Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld); Criminal Organisations Control Bill 2012 (Vic); Fortification Removal Bill 2013 (Vic); Criminal Organisations Control and Other Acts Amendment Bill 2014 (Vic). An extended version of these state-based case studies can be found in Laura Grenfell, 'Rights-Scrutiny Cultures and Anti-Bikie Bills in Australian State Parliaments: "A Bill of Rights for the Hell's Angels"' (2016) 44 *Federal Law Review* 363.

15 The article acknowledges the risks associated with seeking to evaluate the performance of highly complex, dynamic bodies such as parliamentary committees. As many previous attempts have found, it is difficult to develop a methodology that successfully counters all of these risks, however certain safeguards can be used to improve the quality of the analysis. These include: (a) acknowledging that the composition and goals of specific parliamentary committees can change over time; and (b) looking for evidence of impact beyond legislative change. John Uhr, 'Parliamentary Measures: Evaluating Parliament's Policy Role' in Ian Marsh (ed), *Governing in the 1990s: An Agenda for the Decade* (Longman Cheshire, 1993) 346. See also Malcolm Aldons, 'Rating the Effectiveness of Parliamentary Committee Reports: The Methodology' (2000) 15(1) *Legislative Studies* 22.

term ‘deliberative’ in a similar way to that conceptualised by John Uhr, to refer to the quality of public debate and discussion<sup>16</sup> occurring within and outside of parliament, and looks to see how both internal and external stakeholders responded to scrutiny committee reports on the relevant Bills.<sup>17</sup>

As Dominique Dalla-Pozza has outlined,<sup>18</sup> this ‘quality of debate’ concept of deliberation may be a relatively narrow way to understand deliberative democracy ideas,<sup>19</sup> but one that nonetheless provides a useful ‘yardstick’ against which to assess parliament’s work.<sup>20</sup> This yardstick is particularly relevant in the case of counter-terrorism and anti-bikie laws, which are widely heralded by proponent governments of all political stripes to ‘strike the right balance’ between safeguarding security and preserving individual liberty.

The article begins by sketching how three federal parliamentary committees scrutinised the Citizenship Bill. It surmises as to why the recommendations of the PJCIS were translated into successful legislative amendments.<sup>21</sup> It then analyses how anti-bikie Bills were scrutinised (or not) in the Parliaments of NSW, Queensland and Victoria. While no amendments in regard to any of the 11 anti-bikie Bills introduced into these state Parliaments were adopted, the comparison offers some insights into what mechanisms may assist these Parliaments in enabling the rights-scrutiny process to have greater deliberative impact in Parliament and legislative impact in the form of amendments.

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16 See John Uhr, ‘Parliament and Public Deliberation: Evaluating the Performance of Parliament’ (2001) 24 *University of New South Wales Law Journal* 708, 712, 712 nn 11–12; John Uhr, ‘The Constitutional Convention and Deliberative Democracy’ (1998) 21 *University of New South Wales Law Journal* 875, 879; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 220, 227.

17 Monk, above n 4, 1. Note that Monk’s framework does not specifically relate to scrutiny committees which differ from other parliamentary committees in their narrow focus on scrutinising Bills or regulations in light of their mandate. Internal stakeholders include the government, comprising both ministers and the bureaucracy (the latter of which is difficult to trace), the parliament, and the political parties themselves including backbenchers all of which overlap with the parliament. The external stakeholders predominantly encompass public submission-makers and inquiry participants. It is important to acknowledge the complex interplay between all the various internal and external stakeholders much of which is impossible to trace.

18 Dominique Dalla-Pozza, ‘Refining the Australian Counter-Terrorism Framework: How Deliberative Has Parliament Been?’ (2016) *Public Law Review* 271, 273.

19 Ibid. See also David Owen and Graham Smith, ‘Survey Article: Deliberation, Democracy and the Systemic Turn’ (2015) 23 *Journal of Political Philosophy* 213, 214.

20 Dalla-Pozza, ‘Refining the Australian Counter-Terrorism Legislative Framework’, above n 18, 272. Uhr, *Deliberative Democracy*, above n 16. See also Dominique Dalla-Pozza, *The Australian Approach to Enacting Counter-Terrorism Laws* (PhD Thesis, University of New South Wales, 2010) 76–89.

21 For an analysis of the complexity of amendments and the ability of parliaments to exert substantial influence in the policy process, see Meg Russell, Daniel Gover and Kristina Wollter, ‘Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt’ (2016) 69 *Parliamentary Affairs* 286.

### III THE COMMONWEALTH PARLIAMENT AND THE CITIZENSHIP BILL 2015

#### A The Citizenship Bill

The Citizenship Bill was introduced with a particular focus on disrupting and deterring so-called ‘foreign fighters’ – young Australians travelling overseas to participate in, or support, terrorist activity and returning to Australia radicalised and posing a serious terrorist threat.<sup>22</sup> The Bill removes a dual national’s citizenship in certain terrorist-related circumstances, by ‘operation of the law’<sup>23</sup> rather than by the exercise of Ministerial discretion, as originally proposed.<sup>24</sup> Introduced into the Senate on 24 June 2015, the Citizenship Bill was enacted in amended form five and a half months later on 11 December 2015.

#### B Commonwealth Committee Structures, Composition and Remits

Immediately after introducing the Citizenship Bill to the Senate, the federal Attorney-General referred the Bill to the PJCIS for inquiry and report.<sup>25</sup> The PJCIS’s clear mandate to evaluate the effectiveness of a Bill<sup>26</sup> regularly sees this Committee commenting directly on the policy underpinning the Bill and making specific recommendations for legislative amendment.

Before looking in detail at the PJCIS inquiry, it is important to note that at the Commonwealth level, a Bill can be referred to multiple legislative review committees for inquiry and report, in addition to being automatically reviewed by

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- 22 In February 2015, the then Prime Minister, Tony Abbott, had flagged that his government would impose tougher citizenship laws as part of ongoing efforts to counter this threat in Australia: ABC Radio National, ‘Tony Abbott Flags Changes to Citizenship, Vilification Laws as Part of Counterterrorism Response’, *The World Today*, 23 February 2015 (Naomi Woodley) <<http://www.abc.net.au/worldtoday/content/2015/s4185085.htm>>. The proposed new citizenship laws would become part of the final raft of policy changes pursued by Tony Abbott as Prime Minister, who was replaced by Malcolm Turnbull on 15 September 2015. As noted below, this particular political context may have had some bearing on the timing and nature of the parliamentary debates on the proposed laws.
- 23 The Citizenship Bill introduced three new ways in which an Australian dual national can cease to be an Australian citizen. These are where the person acts inconsistently with their allegiance to Australia by either: engaging in specified terrorist-related conduct; fighting for, or being in the service of, a declared terrorist organisation; or, being convicted of a prescribed terrorism offence. The key provisions were the proposed new ss 33AA, 35A, 35 of the *Australian Citizenship Act 2007* (Cth).
- 24 As originally drafted, the key provisions of the Bill operated ‘automatically’ – revoking citizenship as a matter of law at the moment the prohibited conduct occurs – with non-compellable personal powers given to the Minister to exempt a person from the key provisions. For commentary on this shift in approach, see Mark Kenny and David Wroe, ‘Abbott’s Crabwalk from New Citizenship Laws, a Win for Common Sense’, *The Sydney Morning Herald* (online), 19 June 2015 <<http://www.smh.com.au/national/abbotts-crabwalk-from-new-citizenship-laws-a-win-for-common-sense-20150619-ghsdwj.html#ixzz3pNxdeK3H>>.
- 25 In the case of the Citizenship Bill inquiry, the Attorney-General also asked the PJCIS to consider whether proposed conviction-based cessation of citizenship provisions should apply retrospectively to convictions prior to the commencement of the Act.
- 26 The PJCIS’s mandate under s 29 of the *Intelligence Services Act 2001* (Cth) includes reviewing ‘the operation, effectiveness and implications’ of a list of prescribed intelligence and security related legislation. For example, this includes Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth), Division 3A of Part IAA of the *Crimes Act 1914* (Cth) and, Divisions 104 and 105 in the Schedule of the *Criminal Code Act 1995* (Cth).

the Senate Standing Committee for Scrutiny of Bills ('Scrutiny of Bills Committee') and the Parliamentary Joint Committee on Human Rights ('PJCHR').<sup>27</sup> Unlike the Senate Committees, the PJCIS, with its major-party only, joint House membership, does not have the capacity to hold up legislation.<sup>28</sup>

The Scrutiny of Bills Committee<sup>29</sup> reports on whether a proposed law 'trespass[es] unduly on personal rights and liberties',<sup>30</sup> commonly referred to as the 'traditional common law scrutiny mandate'.<sup>31</sup> The Scrutiny of Bills Committee has long claimed to be a 'technical' scrutiny committee that assists Parliament by offering technical guidance on a Bill's compliance with the particular set of criteria prescribed in Senate Standing Order 24.<sup>32</sup>

27 In the case of the Citizenship Bill, the PJCIS was the only 'non-rights scrutiny' committee that considered the Bill. An attempt by the Greens to have the Citizenship Bill referred to the Senate Committee on Legal and Constitutional Affairs ('SCLCA') was defeated, highlighting some important points of difference between the two committees, including that the SCLCA includes members outside of the major political parties.

28 A number of Senate Standing Orders govern the tabling of Senate Committee reports. These include: Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 38; and Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 62. These Orders, when combined with: Orders governing the commencement and resumption of debate on Bills in the Senate (such as Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 115(3)); and the priority given to Business of Senate over Government Business (provided for in Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 58), invest the Senate with the power to require that any relevant Senate Standing Committee report with respect to a Bill be tabled prior to the conclusion of debate on the Bill. This has been the general practice with respect to most Government Bills, however, it is noted that Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 142, sets out a procedure for the consideration of urgent Government business or Bills that departs from the procedures outlined in the above Standing Orders.

29 The membership of the Scrutiny of Bills Committee comprises six senators, three being members of the government, and three being senators who are not members of the government party, nominated by the leader of the opposition in the Senate or by any minority groups or independent senators: see Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 24.

30 Ibid.

31 This term is used in Andrew Byrnes, 'The Protection of Human Rights in NSW through the Parliamentary Process – A Review of the Recent Performance of the NSW Parliament's Legislation Review Committee' [2009] *University of New South Wales Faculty of Law Research Series 1*; Law Council of Australia, Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010, 8–9.

32 John Halligan, Robin Miller and John Marcus, 'Policy Roles of Committees' in John Halligan, Robin Miller and John Marcus, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Publishing, 2007) 60, 63. Since its establishment in 1981, the Scrutiny of Bills Committee has been adamant that its role does not include an evaluation of the policy intent of the proposed law: David Pearce, 'Opening Address' (Speech delivered at the Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills, Parliamentary House, Canberra, 25 November 1991) 4, 6–8 <[http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/10\\_years/report.pdf?la=en](http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/10_years/report.pdf?la=en)>; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report – Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (2012) 6 [2.10]. Whether this claim rings true in practice is contested, but the fact that it is repeatedly made is an important and distinguishing attribute of the Scrutiny of Bills Committee within the broader federal parliamentary committee system. See, eg, John Uhr, 'Future Directions: Scrutiny of Bills in the 90s and Beyond' (Speech delivered at the Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills, Parliament House, Canberra, 25 November 1991) 75, 81–4 <[http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/10\\_years/report.pdf?la=en](http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/10_years/report.pdf?la=en)>.



The PJCHR<sup>33</sup> has also made claims to be a ‘technical’ scrutiny committee. For example, in its 2015 *Guide to Human Rights* publication, the PJCHR clearly states that it ‘undertakes its scrutiny function as a technical inquiry relating to Australia’s international human rights obligations’ and ‘does not consider the broader policy merits of legislation’.<sup>34</sup>

The working practices of both the PJCHR and the Scrutiny of Bills Committee differ in important respects to those parliamentary committees tasked with inquiring into legislation referred by the House of Representatives or the Senate, such as the PJCIS. For example, the Scrutiny of Bills Committee and the PJCHR rarely hold public hearings or proactively call for submissions when assessing the compatibility of Bills, relying instead on the expertise and experience of specialist advisors, secretarial staff, committee members and the explanatory material accompanying the Bill.<sup>35</sup> Dialogue is facilitated between the committees and the executive through the formal exchange of correspondence, but rarely with the broader community. This can be contrasted with the public inquiry approach of the PJCIS, where submissions are called for and public hearings held before a final report containing specific recommendations for legislative change is released.

### C Divergent Committee Responses to the Citizenship Bill

In terms of timing, all three of the committees were able to table their reports on the Citizenship Bill at least two to three months prior to the conclusion of the second reading debates, with the PJCIS tabling its report three weeks after the other two committees.<sup>36</sup> This was followed by considerable parliamentary debate

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33 The PJCHR's mandate, functions and membership are prescribed by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Section 5 provides that the membership of the PJCHR shall comprise five members appointed by the House of Representatives and five by the Senate.

34 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) ii. This claim has been contested. Some scholars have suggested that it is difficult to characterise the type of analysis the PJCHR is engaged in, which regularly involves consideration of whether less rights-restrictive means exist for achieving the same legitimate policy end, as purely ‘technical’ in nature. For these reasons, it is possible to view the PJCHR as deeply engaged in policy evaluation, regardless of structural similarities to the Scrutiny of Bills Committee. See Rosalind Dixon, ‘A New (Inter)national Human Rights Experiment for Australia’ (2012) 23 *Public Law Review* 75; James Stellios and Michael Palfrey, ‘A New Federal Scheme for the Protection of Human Rights’ (2012) 69 *AIAL Forum* 13; George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34 *Statute Law Review* 58; Williams and Reynolds, above n 12.

35 It is noted that the Scrutiny of Bills Committee has previously requested a specific public inquiry holding function: see Senate Standing Committee for the Scrutiny of Bills, *Final Report*, above n 32, ix (‘Recommendation 4’).

36 The PJCIS issued its report on the Citizenship Bill on 4 September 2015: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015). The PJCHR issued its report with respect to the Citizenship Bill almost a month before the PJCIS on 11 August 2015: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-fifth Report of the 44<sup>th</sup> Parliament* (2015). The Scrutiny of Bills Committee issued its report on 12 August 2015: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 7 of 2015, 12 August 2015, 3–18.

on the Bill,<sup>37</sup> which passed in amended form five and a half months after its introduction.

The timing of the debates with respect to the Citizenship Bill was not the norm when it comes to enacting counter-terrorism laws.<sup>38</sup> In fact, many other counter-terrorism laws were enacted at far greater speeds – in particular the Anti-Terrorism Bill (No 2) 2005 (Cth) (six weeks) and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (‘Foreign Fighters Bill’) (five weeks) – with less opportunity for committees to table their reports prior to the commencement of second reading debate and with less hours of parliamentary debate.<sup>39</sup> When compared with the extremely short timeframes used for many anti-bikie laws in state Parliaments,<sup>40</sup> these time periods appear at least workable, although clearly not ideal, for rigorous scrutiny and public input.

However, it is not clear that timing alone is indicative of the ‘quality of debate’ a counter-terrorism Bill receives. For example, the three-week PJCIS inquiry into the Foreign Fighters Bill attracted 46 written submissions followed by 10 supplementary submissions, included three days of public hearings and resulted in a 213-page report containing 37 recommendations for changes to the Bill, all of which were supported by government.<sup>41</sup> Conversely, regardless of how much time is allocated to any particular inquiry, some committees such as the PJCHR regularly fail to generate direct influence over legislative outcomes.<sup>42</sup>

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- 37 Debate on the Citizenship Bill totalled 19 hours: Dalla-Pozza, ‘Refining the Australian Counter-Terrorism Legislative Framework’, above n 18, 283.
- 38 Ibid. It should also be noted that the change of Australia’s Prime Minister from Tony Abbott to Malcolm Turnbull on 15 September 2015 may have also delayed the debates for longer than usual. In 2016, the two significant counter-terrorism Bills, the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) and the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), respectively took 8 and 10 weeks between introduction and enactment.
- 39 See, eg, Williams and Reynolds, above n 12, 502; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016) 71–5. Dalla-Pozza cites a range of factors for why the Citizenship Bill may have attracted greater parliamentary and public attention, including the constitutional issues raised by the Bill that culminated in an exchange of constitutional advice across the Chamber: Dalla-Pozza, ‘Refining the Australian Counter-Terrorism Legislative Framework’, above n 18, 283–6. In addition, the change of Australia’s Prime Minister from Abbott to Turnbull on 15 September 2015 may have delayed the Citizenship Bill debates for longer than usual.
- 40 See below Parts IV, V, VI. In some cases, anti-bikie Bills were introduced and enacted in state parliaments within 24 hours or within a week. Note that unlike in the NSW and Queensland Parliaments, it is not possible to fast-track Bills in the federal Parliament and to thereby bypass any committee scrutiny. The scrutiny performed by the Scrutiny of Bills Committee and PJCHR is via automatic referral: Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 24.
- 41 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).
- 42 For example, it is exceedingly rare for the findings of the PJCHR to be directly referred to in parliamentary debates on any of the counter-terrorism Bills introduced since the PJCHR commenced operation in 2012. However, as discussed in this article, there appears to be a slow but steady growth in the general ‘human rights literacy’ of the Commonwealth Parliament and among the other parliamentary committees and their submission-makers who regularly refer to the work of the PJCHR. It is also rare to find any direct references to the work of the Scrutiny of Bills Committee in parliamentary debates on counter-terrorism laws, or in supplementary explanatory memoranda accompanying legislative amendments. However, as discussed above, this lack of direct legislative influence should not obscure the

This experience is replicated in many ways in the case of the Citizenship Bill, where the findings and questions posed by the reports of both the Scrutiny of Bills Committee and the PJCHR failed to generate more than a cursory response from government, but the 26 recommendations made by the PJCIS report were quickly and explicitly supported by government and ultimately reflected in successful government amendments.<sup>43</sup> At first sight this might be read as a rebuff to these two committees and their rigorous reports but a deeper reading of events shows a complex process of committees working in a more interactive manner with each other. The following section traces some of the particular attributes of the parliamentary committees involved in scrutinising the Citizenship Bill, and analyses why the recommendations made in the PJCIS's report were translated into successful amendments.

The PJCIS's inquiry into the Citizenship Bill spanned just over two months, attracted around 50 written submissions and involved three public hearings in addition to private briefings.<sup>44</sup> Its report was extensive, spanning 180 pages and covering a broad range of issues in some detail.<sup>45</sup> The PJCIS's report also incorporated concerns articulated by a relatively diverse group of submission-makers, including by directly reflecting some of these concerns in its findings and specific recommendations for legislative reform.<sup>46</sup>

In a number of instances, these recommendations, implemented as successful legislative amendments, could be described as important rights-enhancing changes to the Bill.<sup>47</sup> The amendments narrow the range of conduct that can

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other forms of influence that the Scrutiny of Bills Committee can have on the development and content of these types of laws.

43 The government's amendments can be seen on the Citizenship Bill's homepage: *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5507](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5507)>.

44 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015). The PJCIS received 43 submissions and 7 supplementary submissions. Public hearings were held on 4, 5 and 10 August 2015, and the PJCIS also received one private briefing and conducted one classified hearing. The PJCIS requested two extensions of time for issuing its report on the Citizenship Bill, finally issuing its Advisory Report on 4 September 2015.

45 These include constitutionality, compliance with Australia's international human rights obligations, effectiveness as a response to the particular threat of terrorism posed by foreign fighters, application to children, oversight and accountability mechanisms, and retrospective application of the post-conviction based provisions.

46 For example, the PJCIS report includes quotations and references attributable to submission-makers such as Professor George Williams, Professor Helen Irving, Dr Rayner Thwaites, Commonwealth Ombudsman, Australian Human Rights Commission, Law Council of Australia, Attorney General's Department, Federation of Ethnic Communities' Councils of Australia, Refugee Council of Australia, Professor Ben Saul, Professor Kim Rubenstein, Australian Defence Association, Department of Immigration and Border Protection, Executive Council of Australian Jewry, Australian Lawyers for Human Rights, Muslim Legal Network, and UNICEF Australia.

47 For example, the amendments make it clear that before a dual national could have their citizenship 'renounced' by doing something terrorist-related overseas, they must at least have *intended* to engage in the particular prescribed conduct (rather than been reckless or negligent): *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) sch 1 item 3, inserting *Australian Citizenship Act 2007* (Cth) s 33AA(3).

trigger the provisions:<sup>48</sup> they require the Immigration Minister to notify the person who has ‘renounced’ their citizenship that he or she is no longer an Australian, they set out the person’s rights of review,<sup>49</sup> and they make it clear that the laws cannot be applied to children under 14.<sup>50</sup> While these changes by no means remedy the full range or even the most severe intrusions into individual rights and freedoms posed by the Bill, they nevertheless constitute specific and substantive improvements.

The level of specificity of the recommendations made by the PJCIS can be contrasted with the approach adopted by the PJCHR and the Scrutiny of Bills Committee when scrutinising the Citizenship Bill. Due to their (claimed) ‘technical scrutiny’ status, these Committees often frame their findings in terms of matters of concern for the Parliament to consider, or items on which the executive should provide further information, rather than specific recommendations for legislative amendments.<sup>51</sup> However, despite this difference in style, it is clear that both the Scrutiny of Bills Committee and the PJCHR’s final reports on the Citizenship Bill address many of the same issues and themes as those explored by the PJCIS, albeit within the context of quite a different analytical framework. In fact, the vast majority of the 26 specific recommendations for legislative reform made by the PJCIS can be linked to the compatibility findings of the PJCHR and/or the Scrutiny of Bills Committee, and this is evident by the cross-referencing within the PJCIS report to the findings of the scrutiny committees.

The approach adopted by each parliamentary committee with respect to the Bill’s impact on rights suggests a commonality of rights prioritisation (for example procedural rights, children’s rights and retrospectivity), but a significantly different analytical approach to determining whether the impact on those rights was justified, having regard to the broadly accepted objects of the Bill. The PJCHR relies exclusively on international human rights law principles (such as necessity, proportionality and legitimate end) to arrive at conclusions as to whether the Bill has ‘got the balance right’, whereas the PJCIS draws upon multiple sources, from the operational observations of the Australian Federal Police to the concerns raised by civil liberties groups, to justify its conclusions as to the effectiveness of the Bill.

It is also clear from the Citizenship Bill example that the analytical framework employed by the Scrutiny of Bills Committee is more appealing to the

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48 From the previously low level ‘damage to Commonwealth property’, to a tighter list of conduct with a closer connection to an actual terrorist act: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) sch 1 item 3, inserting s 33AA(2).

49 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) sch 1 item 3, inserting s 33AA(11).

50 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) sch 1 item 3, inserting s 33AA(1).

51 It is noted however that in other reports of the PJCHR, such as that in relation to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), the PJCHR made a number of specific recommendations for legislative amendments alongside requests for further information to be provided by the Attorney-General: see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of the 44<sup>th</sup> Parliament* (2014) 10–26.

PJCIS than that employed by the PJCHR. This can be seen by the way the PJCIS's report included an extensive section entitled 'Australia's international obligations'.<sup>52</sup> It preferred to frame its most critical analysis of the Bill in terms of its impact on traditional common law principles, including common law privileges, or by reference to rule of law values, such as the need to ensure there are clear legislative parameters on the use of executive power. It framed its remedies to any uncomfortable intrusion into these principles in terms of 'safeguards' or 'accountability measures', rather than demanding that the government provide more evidence of the need for, or proportionality of, the proposed measures.<sup>53</sup> This 'rule of law' approach has a number of similarities with the prescribed scrutiny criteria applied by the Scrutiny of Bills Committee.<sup>54</sup>

When taken together, the PJCIS and Scrutiny of Bills Committee's complementary analytical styles translate into legislative impact. This can be contrasted to the relative lack of legislative influence enjoyed by the PJCHR. This is partly explained by the fact that the international law principles applied by the PJCHR do not share the same status as those applied by the Scrutiny of Bills Committee, and have yet to become fully entrenched in the practices of parliamentary drafting or policy development, or part of the majority parliamentary discourse at the Commonwealth level. As a result, while the PJCHR raised concerns with similar provisions of the Citizenship Bill as the Scrutiny of Bills Committee and the PJCIS, its legislative impact is harder to trace.

Of course, the analytical framework applied by the PJCIS is not the only explanation for its relatively high legislative impact in the Citizenship Bill example. The PJCIS has a number of unique features that make it particularly well-placed to achieve strong legislative results. Chief among these is the PJCIS's membership and relationship with the key government agencies and departments responsible for developing and implementing Australia's counter-terrorism laws.<sup>55</sup>

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52 For example, just like the PJCIS, the PJCHR's report focuses on the impact of the Bill on procedural and process rights and on the rights of children, and generally identifies the same key features of the Bill as those identified by the PJCIS in its report: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 47–61.

53 For example, the PJCIS accepted the evidence of legal experts relating to the problematic interaction between proposed s 35A (revocation of citizenship after conviction) and proposed s 33AA (revocation on the basis of conduct prior to conviction), and the risk that s 33AA could be used as a way for authorities to circumvent the need to successfully prosecute a terror suspect in Australia: *ibid* 87–91. The PJCIS recommended that the proposed s 33AA be limited to persons who have engaged in the relevant conduct offshore or have left Australia before being charged and brought to trial for that conduct, whereas the proposed s 35A would apply to conduct occurring onshore where a person has been tried and convicted of a relevant offence: *ibid* 92 (Recommendation 1). Another example is the PJCIS's consideration of rights of review under the Bill: *ibid* 146–51. This issue was considered alongside concerns relating to the constitutionality of the Bill. The PJCIS recommended that a number of additional safeguards be included in the Bill to 'enhance procedural fairness' and 'provide a greater measure of transparency': *ibid* 152.

54 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 7*, above n 36, 13.

55 To be a member of the PJCIS, a parliamentarian must be approved by the Prime Minister in consultation with the leader of the opposition and other parties represented in parliament. To date, the members of the PJCIS have come from the major political parties. The detailed procedures and information access and

The PJCIS's specific national security focus may also contribute to its capacity to influence legislative outcomes, particularly in the context of a government elected on the basis of a strong 'tough on terror' platform, such as in the case of the Citizenship Bill. The Citizenship Bill example highlights how the Commonwealth parliamentary committee system can work together to have a substantial impact on the content of a particular law, and the way that laws are drafted and developed over time. In the case of the Citizenship Bill, the so-called 'technical' committees do not have a direct impact in terms of influencing legislative change or being referred to in public or parliamentary debates on the Bill, but are moderately successful in alerting parliament to the issues that parliamentarians and lawmakers should turn their minds to when considering laws of this nature.<sup>56</sup> This trend is also apparent with respect to the formal parliamentary scrutiny of other counter-terrorism Bills.<sup>57</sup>

#### D Insights to Be Drawn from Committee Scrutiny of Citizenship Bill

While care must be taken to not extrapolate too broadly from one case study, parliamentary scrutiny of the Citizenship Bill provides a number of interesting insights into the nature of the rights-scrutiny culture at the Commonwealth level. It is a particularly strong example because in many ways it reflects a broader trend apparent at the Commonwealth level when it comes to the scrutiny of counter-terrorism law. The other five significant counter-terrorism laws enacted in the period of 2014–16 were, like the Citizenship Bill, all considered by the PJCIS, Scrutiny of Bills Committee and the PJCHR, and all were amended to

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disclosure requirements of the PJCIS are contained in *Intelligence Services Act 2001* (Cth) sch 1 cl 14. PJCIS members are able to receive certain classified information in closed hearings and the Committee's Secretariat staff are also authorised to access certain classified material. In addition, the PJCIS Secretariat has the benefit of advice from secondees from law enforcement and intelligence agencies, providing a further opportunity for committee members to clarify the implications and practical implementation of any proposed recommendations before making their views publicly known. See, eg, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) 278–9.

56 This is evident both in terms of the PJCIS's reference to the findings of the Scrutiny of Bills Committee and the PJCHR, and in the relationship between the key issues focused on by both the Scrutiny of Bills Committee and the PJCHR and successful legislative amendments made to the Bill. For example, in chapter 8 (entitled 'Children') of the PJCIS's report on the Citizenship Bill, the findings of the PJCHR were referred to on six occasions, including extensive quotes from the PJCHR's report. The PJCIS's recommendations relating to children included that the Bill be amended to limit the extent of its application to children (Recommendation 20), which also reflected the PJCHR's findings. PJCIS Recommendations 2, 6, 8 and 9 are designed to narrow the scope of offences for which the conviction-based provisions of the Bill would apply, responding to concerns raised by the Scrutiny of Bills Committee: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 7*, above n 36, 8. A range of other PJCIS recommendations reflect concerns raised by the Scrutiny of Bills Committee, for example those relating to concerns as to adequate judicial review, which were reflected in PJCIS Recommendation 14.

57 This includes the National Security Legislation Amendment Bill (No 1) (Cth), the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) and the Foreign Fighters Bill 2014 (Cth).

implement the full range of PJCIS recommendations with important – albeit modest – rights-enhancing results.<sup>58</sup>

On the one hand, the detailed scrutiny by these three separate committees and the significant rights-enhancing legislative amendments made in response to the PJCIS reports on these Bills supports the conclusion that there is an emerging rights-scrutiny culture at the Commonwealth level.<sup>59</sup> On the other hand, it is possible to view the scrutiny of the Citizenship Bill (and the other recent counter-terrorism Bills) more cynically, as an example of deliberate legislative overreach with respect to a politically popular issue, followed by more moderate post-scrutiny amendments designed to ensure support from the opposition, resulting in a legislative regime that continues to seriously abrogate individual rights.<sup>60</sup>

Another reading, which echoes Dalla-Pozza's work on the deliberative capacity of the Commonwealth Parliament, is to see the PJCIS as a forum in which the Coalition Government can engage in negotiations with the Labor Opposition on the detail of their counter-terrorism provisions, away from the public performance and recording of the Hansard, but with the benefit of public input and the tabled reports of the Scrutiny of Bills Committee and PJCHR. The strong bipartisan support for both the broad policy objectives underpinning the counter-terrorism laws, and for achieving consensus in terms of findings and recommendations within the PJCIS, makes the Committee a relatively safe political space for government to 'gauge the reaction of its backbenches to a proposal'.<sup>61</sup> Certainly the Citizenship Bill example illustrates the important behind-the-scenes scrutiny role government backbenchers can play both *pre-introduction* (for example, by the government's shift in policy approach from the time of the initial policy announcement to the introduction of the Bill), and *post-introduction* through direct involvement in the parliamentary committee process. This arrangement diverges from Hiebert's observation in the UK context, mentioned above, and it gives some cause for optimism about the value of the Commonwealth scrutiny committee system as a whole.

These reasons could lead to the conclusion that the PJCIS is effective at generating legislative change only because it works within the accepted political

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58 These five Bills are: Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth); Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) (which later became the Counter-Terrorism Legislation Amendment Bill (No 1) 2016); Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth); Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth); Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth). The PJCIS's reports on these Bills, along with the government's response to these reports, are available from the PJCIS's website: *Completed Enquiries and Reports*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/completed\\_inquiries](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/completed_inquiries)>.

59 Stephen Argument, 'Of Parliament, Pigs and Lipstick (Slight Return): A Defence of the Work of Legislative Scrutiny Committees in Human Rights Protection' (Paper presented at the AIAL National Administrative Law Forum, Canberra, 21–22 July 2011).

60 See, eg, Jonathon Holmes, 'Tyrannical Citizenship Bill an Attack on Our Liberties', *The Sydney Morning Herald* (online), 26 August 2015 <<http://www.smh.com.au/comment/tyrannical-citizenship-bill-an-attack-on-our-liberties-20150824-gj6tub.html>>. This media article explores themes previously considered by Williams and Burton, above n 34; Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2007) 30 *Melbourne University Law Review* 747.

61 Monk, above n 4, 7.

parameters defined by the major parties, and is governed by a government majority. This may be true, however it is important to note that PJCIS reports, and in particular the submissions and evidence given to the PJCIS, contain extensive and critical rights analysis which suggests that the PJCIS is also seen by key scrutiny players as an effective forum for enhancing individual rights protection in proposed counter-terrorism laws.<sup>62</sup>

Critically, the PJCIS has a strong track record of attracting high quality, detailed public submissions from a range of individuals and organisations with the legal expertise to offer specific recommendations for legislative change or articulate concerns in terms of rule of law or criminal law concepts, or operational insights to strengthen the policy case for the proposed reforms.<sup>63</sup> This public profile as the ‘forum of choice’ for articulate and high-profile submission-makers solidifies the political status of the PJCIS, and enhances its capacity to generate media attention.<sup>64</sup> It also enhances the quality of debate the Bill receives, helping to satisfy the tests developed by Uhr<sup>65</sup> and adapted by Dalla-Pozza<sup>66</sup> by providing a forum for different positions or arguments – for example, on the

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62 The relatively recent practice of law enforcement and intelligence agencies providing a standing secondee to the Department of the House of Representatives, which provides staff to support the PJCIS, helps entrench the close working relationship between these agencies to the PJCIS, and further improves the chances of the PJCIS’s recommendations resulting in legislative change.

63 See, eg, the following submissions to the PJCIS’s inquiry into the Citizenship Bill: Law Council of Australia, Submission No 26 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 17 July 2015; Helen Irving, Submission No 15 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 15 July 2015; Muslim Legal Network (NSW), Submission No 27 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 17 July 2015; Ben Saul, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 30 June 2015; Councils for Civil Liberties Across Australia, Submission No 31 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 19 July 2015; Rayner Thwaites, Submission No 16 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015; Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 20 July 2015; Shipra Chordia, Sangeetha Pillai and George Williams, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015. For a full list of submissions see: *Submissions*, Parliament of Australia <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/Citizenship\\_Bill/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions)>.

64 See, eg, ABC Radio National, ‘Security Committee Recommends 27 Changes for Citizenship Laws to Pass’, *PM*, 4 September 2015 (Naomi Woodley) <<http://www.abc.net.au/news/2015-09-04/security-committee-recommends-27-changes-for/6751684>>; David Wroe, ‘Powerful Committee of MPs Backs Stripping Citizenship, but Calls for Changes’, *The Sydney Morning Herald* (online), 4 September 2015 <<http://www.smh.com.au/federal-politics/political-news/powerful-committee-of-mps-backs-stripping-citizenship-but-calls-for-changes-20150904-gjf4or.html#ixzz3wF02tQ15>>. The SCLCA once enjoyed a similar status among submission-makers in the area of counter-terrorism, however in recent years it has been surpassed by the PJCIS and its strong track record of having its recommendations implemented into legislative change.

65 Uhr, *Deliberative Democracy*, above n 16.

66 Dalla-Pozza, ‘Refining the Australian Counter-Terrorism Framework’, above n 18, 272. See also Dalla-Pozza, *Enacting Counter-Terrorism Laws*, above n 20, 76–89.



constitutionality of key provisions of the Bill – to be presented, considered and debated, *prior* to the final parliamentary chamber debate on the Bill.

The PJCIS's relatively high public profile and respect among submission-makers and government agencies and departments also generates a consistently high level of praise from parliamentarians, particularly the two major parties.<sup>67</sup> In contrast, it is extremely rare to find a direct reference in the Hansard to the PJCHR or the Scrutiny of Bills Committee in the Hansard debates on the Citizenship Bill.<sup>68</sup> Despite this, it is clear that many of the rights-related issues that formed the focus of these committees' reports were in the minds of the parliamentarians during debate on the Bill. For example, the Hansard indicates that almost every one of the 60 federal parliamentarians who spoke about the Citizenship Bill talked about 'rights, liberties and freedoms', with most frequent attention being given to well-entrenched common law rights and rule of law concepts such as access to judicial review and limits on executive power.<sup>69</sup> This suggests that while the majority of parliamentarians may not yet attribute any political consequences to voting for laws that unduly infringe the full range of internationally protected human rights,<sup>70</sup> they at least want to create the public impression that scrutiny of laws against some relatively narrow set of rights is part of the legitimate role of parliament.<sup>71</sup>

The Commonwealth Parliament is the largest of the four Australian Parliaments analysed in this article and it has a multi-layered framework of parliamentary scrutiny committees that cannot be emulated in the smaller, state Parliaments. Despite this, it is worth considering state Parliaments in this article, especially those of the largest states, as they offer some insights into what weakens or strengthens the parliamentary model of rights protection when it comes to criminal law Bills that aim to restrict the rights of unpopular minorities.

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67 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13, 117–8 (Michael Danby).

68 It is noted that in her second reading speech with respect to the Citizenship Bill, Senator Katherine Gallagher referred in some detail to the Bill's Statement of Compatibility: Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015 (Katy Gallagher) 9490, 9493.

69 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13 560 (Warren Entsch); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13 326–30 (Lisa Chesters); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13 117–19 (Michael Danby).

70 For further discussion of the Australian Parliament's lack of engagement with international human rights law, see George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136. Williams and Burton, above n 34; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38 *University of New South Wales Law Journal* 1046.

71 As Labor member Terri Butler observed in her second reading speech on the Bill:

[G]overnments should be very careful before diminishing people's civil, political and other rights in the name of security. We as a parliament should be very careful to ensure that the laws that we scrutinise and pass balance those rights, those obligations, those concerns and those imperatives. If we do not do that, we are not just failing the people affected by the bill at hand, we are failing the tradition of Western democracies, where parliaments have been at pains to ensure that the laws we make and the decisions we make, whether in times of conflict or in times of peace, continue to maintain the values we share.

Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015 (Terri Butler) 13 297.

#### IV THE NSW PARLIAMENT AND THE ANTI-BIKIE BILLS OF 2009–13

In 2009, NSW was the second Australian State to introduce anti-bikie laws which incorporate many controversial elements of federal counter-terrorism laws, in particular, control orders. In expressing the support of the NSW opposition for this new regime, Greg Smith MP (later to become Attorney-General), observed:

In some ways this bill is akin to the terrorist legislation ... Something must be done in response to the recent crisis of lawlessness between comparatively small groups – almost a civil war. ... Being humble servants of this Parliament and the community, my leader and I will do our best ... The Opposition wants to do what can lawfully be done to protect the community from gangs that are urban terrorists, which is why the Opposition will not oppose the conferring of extraordinary powers.<sup>72</sup>

Unlike in the Commonwealth Parliament, rights-talk was very much restrained among the major parties in NSW in all three main anti-bikie Bill debates in 2009, 2012 and 2013.<sup>73</sup> In introducing its 2009 Bill, the NSW Labor Government asserted that the Bill ‘gets the balance right’<sup>74</sup> but nowhere in the Lower House did the government explain what it was balancing and whether this balancing included rights considerations. In all three anti-bikie debates, both major parties showed considerable reluctance to use the terms ‘civil liberties’ or ‘human rights’, in contrast to the Greens in the Upper House who vigorously embraced these terms in these debates.<sup>75</sup>

The NSW Legislation Review Committee (‘LRC’) systematically scrutinises all Bills in relation to whether they ‘unduly trespass on personal rights and liberties’, the traditional common law mandate. It is a Committee consciously modelled on the federal Scrutiny of Bills Committee, as that senate committee was in 2001–02 at the time of the LRC’s establishment. The LRC has the same mandate as the Scrutiny of Bills Committee but it differs in that it is a joint committee dominated by the Lower House and it is chaired by a government member. In 2002, the LRC was not given the power to conduct public hearings or invite submissions, a position which reflects the Scrutiny of Bills Committee’s powers before it was given a permanent public inquiry power in mid-2014.<sup>76</sup> The NSW Legislative Council has six General Purpose Standing Committees that, much like the PJCS, enjoy the power to conduct inquiries into Bills. However,

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72 New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14 455–6. On the migration of extraordinary, rights-abrogating measures from federal anti-terrorism legislation to anti-bikie laws, see Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38 *Melbourne University Law Review* 362.

73 Crimes (Criminal Organisations Control) Bill 2009 (NSW); Crimes (Criminal Organisations Control) Bill 2012 (NSW); Crimes (Criminal Organisations Control) Amendment Bill 2013 (NSW).

74 New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14 440 (Nathan Rees, Premier), 14 452 (Kristina Keneally).

75 New South Wales, *Parliamentary Debates*, Legislative Council, 14 March 2012, 9487–90 (David Shoebridge).

76 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 June 2002, 3257 (Paul Whelan).

since 1997, only 11 Bills have been referred to these committees.<sup>77</sup> None of these inquiries have related to the State's anti-bikie regime despite the fact that, as Greg Smith acknowledged in his 2009 speech, the regime confers 'extraordinary powers' on the executive.<sup>78</sup> Unlike the Scrutiny of Bills Committee, the LRC is not aided by a Statement of Compatibility<sup>79</sup> and its practice does not include requesting that the responsible Minister provide further information (a practice which the Scrutiny of Bills Committee developed over time).<sup>80</sup> In this sense the LRC does not facilitate any direct dialogue between the Parliament and the executive or between the Parliament and the public. At its heart, the LRC is a technical scrutiny committee with few levers to exert influence.

In the debate on the three main anti-bikie Bills, neither major party made any reference to the scrutiny process performed by the LRC. The timing of the LRC's reports significantly affected the ability of the LRC to influence debate and lead to amendments. Citing a bikie brawl that took place at Sydney Airport roughly a week earlier in March 2009, the Labor Government suspended standing orders so that the Bill could be introduced and debated in both Houses and enacted in the same day. This fast-tracking obviously meant there was no possibility for the LRC to scrutinise the Bill for its rights implications before the Bill was passed, although the LRC did submit a substantive report on the 2009 Bill a month after the Bill was enacted.<sup>81</sup> Timing was also difficult in regard to the two subsequent Bills: the 2012 Bill, which re-enacted the 2009 Act with some slight amendments following the High Court case of *Wainohu v New South Wales*,<sup>82</sup> took one month to be passed by both houses while the 2013 Bill was passed in five days.

In the 2012 and 2013 debates, the timing of LRC reports meant they were not tabled in time for debate in the Lower House, although they were tabled in time for the Upper House. In the 2012 debates, members of the Lower House could have made extensive use of the 2009 LRC report to articulate rights concerns, given that the two Bills were almost identical, but only an independent member, Clover Moore, did so.<sup>83</sup> In the 2009 debates, the suspension of the standing orders which enabled the Labor Government to fast-track the Bill was opposed only by the Greens. Despite this, the Greens member of the LRC, Sylvia Hale, did not

77 See the terms of reference of the Select Committee on the Legislative Council Committee System, Parliament of New South Wales, *Legislative Council Committee System – Discussion Paper* (2015) 9.

78 New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14 455–6 (Greg Smith).

79 Under s 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a member who introduces a Bill must table a Statement of Compatibility which states whether the Bill is compatible with the seven international human rights treaties set out in s 3.

80 Senate Standing Committee for the Scrutiny of Bills, *Final Report*, above n 32, 6 [2.8].

81 This sequence is anticipated in s 8A(2) of the *Legislation Review Act 1987* (NSW) which states that, '[a] House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act'. Ordinarily, according to the standing orders, there 'shall be at least five clear days' between the introduction of a Bill by its 'mover', which includes a second reading speech, and the ensuing debate: Legislative Assembly, Parliament of New South Wales, *Standing Orders of the Legislative Assembly*, April 2016, O 188(10). This gives the LRC time to perform its scrutiny, and for this purpose it uses the second reading speech as a statement of the Bill's intent.

82 (2011) 243 CLR 181.

83 New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8343.

refer to the need for LRC scrutiny when voicing her opposition and in making her contribution to the debate.<sup>84</sup>

The LRC's reports on the three anti-bikie Bills offered serious rights scrutiny. According to two criminal law experts, the 2012 Bill was 'one of the most rigorously examined and scrutinised' by the LRC between 2010 and 2012.<sup>85</sup> Despite this, the LRC's scrutiny of the 2012 Bill was entirely ignored in the 2012 debates. A comparison of the LRC's scrutiny of the near-identical Bills in 2009 and 2012 indicates that, by 2012, the LRC had shifted to a mode of scrutiny which was more narrowly focused on common law rights than the 2009 LRC assessment, which included reference to international human rights standards and offered comparisons with other Australian jurisdictions. Moreover, in the 2012 report the LRC used weaker language, advising that a clause 'may be inconsistent' with the presumption of innocence, possibly in a bid to be more deferential.<sup>86</sup>

This general disregard for the LRC reports by members of the major parties suggests that the LRC's lack of influence is a result of more than inadequate timing. The LRC's inability to engage with the public through receiving public submissions or holding public hearings means that its reports lack some of the weight and legitimacy enjoyed by the PJCIS's reports which are the subject of significant public input. This makes it easy for members of both major parties to disregard them, regardless of their rigour. No amendments were made to the three anti-bikie Bills as a consequence of concerns raised by the LRC. Indeed, no amendments at all were successful in any of the NSW anti-bikie debates.<sup>87</sup> There is no evidence that the LRC enjoyed either deliberate or legislative impact in the three anti-bikie Bill debates.

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84 In 2009 the Greens argued that the Bill be referred to the Standing Committee on Law and Justice which is considered a more powerful option in this regard: New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 361–4 (John Kaye).

85 Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27 *Current Issues in Criminal Justice* 21, 32. This assessment of the quality of the LRC's scrutiny was relative to the LRC's scrutiny of other Bills.

86 See Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest*, No 10/55 of 2012, 21 February 2012, 15. Cf Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009, 4 May 2009, 6. Although the 2009 LRC report refers to international human rights standards, it does not use the proportionality framework applied by the PJCHR in its analysis of federal Bills.

87 In the 2009 debates, the Greens proposed a set of 25 amendments but the Liberal Opposition proposed none, consistently giving the 2009 Bill bipartisan support. In the 2012 debates, the Labor Opposition proposed a total of 31 amendments and the Greens proposed one amendment while no amendments at all were proposed in the 2013 debates. These amendments proposed by the Labor Opposition in 2012 were not rights-based but were aimed at addressing constitutional concerns; this may account for why Labor did not succeed in gaining any support from the four Greens members in the Upper House for its proposed amendments. Note that in 2008–09, the Labor Government did not control the Upper House and about 20 to 25 percent of all amendments moved in the Upper House were agreed to: Department of the Legislative Council, Parliament of New South Wales, 'Annual Report 2009' (Annual Report, 2009) 6. Thus, the zero per cent of amendments successfully agreed to in the 2009 anti-bikie debates does not represent the norm.

This small case study echoes the conclusion of Luke McNamara and Julia Quilter that the NSW Parliament has ‘an entrenched culture of ignoring and deflecting the [Legislation Review] Committee’s advice’.<sup>88</sup> McNamara and Quilter’s view is based on a survey of 40 criminal Bills during the period 2010–12 in which they found ‘little evidence’ that the LRC’s work ‘enhances the quality of parliamentary debate on criminal law bills’.<sup>89</sup> McNamara and Quilter conclude: ‘As currently practised, pre-enactment parliamentary scrutiny is an ineffective mechanism for influencing the quality of criminal law-making in NSW’.<sup>90</sup> In their view, this is unlikely to change unless Parliament is required to debate the matters referred to it by the LRC or ministers are under an obligation to respond to the LRC.<sup>91</sup> Thus, the LRC differs significantly from the Scrutiny of Bills Committee in that it does not attract the same regard and attention and, furthermore, its scrutiny is not performed simultaneously with other committees.

In light of McNamara’s and Quilter’s suggestions, the next Parts consider the anti-bikie Bill debates in the Parliaments of Queensland and Victoria. In those debates, ministers regularly chose to respond to issues referred by the parliamentary scrutiny committee. Unlike in NSW, before a Bill is introduced, the scrutiny committees in these two State Parliaments are equipped with an executive statement along the lines of a federal Statement of Compatibility which set out a Bill’s rights implications.<sup>92</sup> While these various mechanisms can be, and are, commonly circumvented or strategically used by governments not keen on either scrutiny or amendments, the following Parts examine whether these two Parliaments nonetheless offer glimpses of a scrutiny system that functions with the goal of protecting rights and holding the executive accountable.

## V THE QUEENSLAND PARLIAMENT AND THE ANTI-BIKIE BILLS OF 2009–13

Scrutiny committees within Queensland’s unicameral Parliament have experienced significant change in the period marked out by the State’s three anti-bikie Bill debates in 2009 and in October and November 2013.<sup>93</sup> This change relates to the role and goal of these committees but it is not necessarily manifested in the three sets of debates. In late 2009, a Labor Government introduced the State’s first anti-bikie Bill but it failed to secure bipartisan support from the Liberal National Party (‘LNP’) Opposition. The Scrutiny of Legislation

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88 McNamara and Quilter, above n 85, 35.

89 Ibid 30.

90 Ibid 33.

91 Ibid 35.

92 Under s 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a member who introduces a Bill must table a Statement of Compatibility which states whether the Bill is compatible with the seven international human rights treaties set out in s 3.

93 Criminal Organisation Bill 2009 (Qld); Vicious Lawless Association Disestablishment Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld); Tattoo Parlours Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld).

Committee ('SLC'), the relevant scrutiny committee at the time, tabled its report on the 2009 Bill two weeks before debate commenced. Its mandate was provided by the fundamental legislative principles introduced via legislation in the wake of the Fitzgerald reforms. The fundamental legislative principles offer a non-exhaustive list of 11 examples that guide parliamentary scrutiny as well as the two other arms of government as to the benchmarks for good legislation. The 'rights and liberties of individuals' form the basis of these 11 scrutiny examples that constitute the fundamental legislative principles. Aiding the SLC (and the current parliamentary portfolio committees) was a system whereby the relevant Minister is required to notify Parliament when a Bill seeks to depart from the fundamental legislative principles and to set out the reasons for the departure.<sup>94</sup>

In 2009 the LNP Opposition objected to the Bill on rights grounds, and during these debates eight opposition LNP members referred specifically to the detailed scrutiny work of the SLC.<sup>95</sup> Meanwhile, 18 LNP Members of Parliament repeatedly voiced their opposition to the 2009 anti-bikie Bill relying on the submissions of the Council for Civil Liberties as well as the Bar Association of Queensland ('BAQ') and the Queensland Law Society ('QLS').<sup>96</sup> These submissions were not formally received by the SLC which considered itself a technical scrutiny committee whose procedures did not include the power to call for stakeholder submissions although it did infrequently and informally receive them. The SLC's report on the 2009 Bill was highly technical and cautious in guiding members as to whether the Bill paid sufficient regard to the rights and liberties set out in the fundamental legislative principles.

The LNP's opposition to the 2009 Bill echoed the approach taken by the Greens in the NSW Parliament in invoking both the rule of law and rights discourse. For example, Deputy Opposition Leader Lawrence Springborg MP began his second reading speech as follows, '[t]his bill is fundamentally an anti-freedom bill. This bill tears apart the foundation of the rule of law, which has guided us and protected the basic rights and liberties [of citizens]'.<sup>97</sup> In these 2009 debates, no government MP mentioned the SLC nor the fundamental legislative principles, even though the SLC report had been tabled two weeks previously.<sup>98</sup> Despite this, it is possible to say that the SLC had some discernible, albeit minor, impact on the deliberative process but, given that none of its concerns were translated into amendments, it had no discernible legislative impact.

By October 2013, when Parliament next debated such legislation, the SLC no longer existed due to parliamentary action taken in 2011, which decentralised its

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94 This is required under s 23 of the *Legislative Standards Act 1992* (Qld).

95 Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest*, No 11 of 2009, 10 November 2009, 11–29. Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 3600 (Lawrence Springborg), 3619 (Vaughan Johnson), 3628 (Andrew Powell), 3632, 3634 (Janet Stuckey); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3672 (Elizabeth Cunningham), 3683–4 (Peter Dowling), 3695 (Glen Elmes), 3701 (Tracey Davis), 3702 (Robert Messenger).

96 These 18 members include the 8 members cited above.

97 Queensland, *Parliamentary Debates*, 25 November 2009, 3594.

98 Scrutiny of Legislation Committee, above n 95, 11–29.

parliamentary committee system with bipartisan support. The Parliament set up seven portfolio committees which each have the responsibility of scrutinising Bills in relation to the fundamental legislative principles. These committees are designed to engage and inform the public. According to the Standing Orders of Queensland's Parliament:

In examining a Bill, a portfolio committee is to operate in as public and transparent manner as practicable and to this end is to – (a) aim to engage likely stakeholders in the Bill; (b) hold briefings from departmental officers and hearings in public ... (c) publish submissions ...<sup>99</sup>

In a number of respects, the portfolio committees have powers akin to that of the Commonwealth PJCIS. For example, the Queensland portfolio committees are required to conduct a broader review of Bills for their policy intent,<sup>100</sup> which means they are more than technical scrutiny committees unlike the former SLC, the Scrutiny of Bills Committee and the NSW LRC. Furthermore, the role of the portfolio committees is to determine whether to recommend the Bill under scrutiny be passed, and may recommend amendments to the Bill.<sup>101</sup>

Despite the 2011 legislative attempts to strengthen Queensland's parliamentary scrutiny system, in October 2013 the LNP government successfully bypassed the parliamentary committee scrutiny process by declaring a tranche of three anti-bikie Bills to be 'urgent'.<sup>102</sup> The tranche was enacted as a set within 24 hours. With no time to read the three Bills which comprised 180 pages, one strategy of the Labor Opposition was to voice its concern regarding this bypassing of the committee system. This concern was echoed by the two minor conservative parties in Queensland's Parliament, the Katter Australia Party and United Australia Party,<sup>103</sup> the former of which was quoted in the media calling for the 'scrapping' of the committee system on the grounds that the government was abusing it.<sup>104</sup> In these October 2013 debates, there was no mention whatsoever of the fundamental legislative principles and, in stark contrast to the 2009 anti-bikie debates, only a couple of references to the parliamentary portfolio committees that perform such scrutiny. These references were made by the Labor opposition leader who suggested that the relevant committee could be given 24 hours in which to undertake this process.<sup>105</sup>

In November 2013, the LNP government introduced another anti-bikie Bill to amend 23 Acts, including the three Acts enacted a month earlier. Immediately

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99 Legislative Assembly, Parliament of Queensland, *Standing Rules and Orders of the Legislative Assembly*, June 2017, O 133(2).

100 *Parliament of Queensland Act 2001* (Qld) s 93.

101 Legislative Assembly, Parliament of Queensland, *Standing Rules and Orders of the Legislative Assembly*, June 2017, O 134.

102 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3158 (Jarrod Bleijie).

103 No member of the Greens Party has won a seat in Queensland's unicameral parliament that does not have a system of proportional representation. In 2008 Labor MP Ronan Lee defected to the Greens but was not re-elected in the March 2009 state election.

104 Melinda Howells, 'KAP Call to Abolish Qld Parliamentary Committees', *ABC News* (online), 28 October 2013 <<http://www.abc.net.au/news/2013-10-28/kap-call-to-abolish-qlld-parliamentary-committees/5051048>>.

105 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3158–9, (Annastacia Palaszczuk).

following the introduction of the 175-page Bill, the LNP Attorney-General Jarrod Bleijie announced, late in the evening, that the Bill would be referred to the Legal Affairs and Community Safety Committee ('Legal Affairs Committee'), requiring the Committee to report in 36 hours. Bleijie stated, '[s]ome 99 per cent of these law reforms that this bill covers are new ... as a sign of good faith the government is showing that we will send the bill off for at least a day so that committee members can get their teeth into it'.<sup>106</sup>

The Legal Affairs Committee attracted relatively extensive public interest and engagement. Despite being given less than 48 hours to conduct its scrutiny, it received 13 public submissions, thus attesting to the strong public concern regarding the Bill, and it held a public briefing in which it took evidence from representatives from various government departments. Some submission-makers attempted to focus on the need for rights scrutiny and compliance. For example, the brief submission of the QLS underlined the need for proper consultation which 'ensures that issues relating to fundamental legislative principles or unintended drafting consequences are identified'<sup>107</sup> and it expressed concern regarding the Bill's impact on various rights. In contrast, the Council for Civil Liberties urged the Legal Affairs Committee 'to refuse to participate in the farce and charade', arguing that the tight timeframe and lack of public hearings contradicted the recommendations of the Fitzgerald Report.<sup>108</sup> The Legal Affairs Committee published these submissions but it recommended that the Bill be passed even though it acknowledged, in the preface, that the length of the Bill meant that it had not had time to read it in detail.<sup>109</sup> At the same time the Legal Affairs Committee recommended that, in his second reading speech, the Attorney-General address the fundamental legislative principle concerns identified by the Legal Affairs Committee, arguing that the Explanatory Note accompanying the Bill had given insufficient explanations as to how these rights matters were affected by the Bill.<sup>110</sup> The Legal Affairs Committee stopped short of making any recommendations for amendments to the Bill.

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106 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 2013, 3993 (Jarrod Bleijie). For an analysis of Bleijie's impact on human rights in Queensland's criminal justice system, see Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review* 1.

107 Queensland Law Society, Submission No 9 to Legal Affairs and Community Safety Committee, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013*, 20 November 2013, 1.

108 Queensland Council for Civil Liberties, Submission No 1 to Legal Affairs and Community Safety Committee, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013*, 18 November 2013, 2–3.

109 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 Report No 46* (2013) 2. Furthermore, the Legal Affairs Committee recommended that, in his second reading speech, the Attorney-General address the fundamental legislative principles concerns identified by the Legal Affairs Committee. The Legal Affairs Committee highlighted 17 fundamental legislative principles rights matters that were insufficiently covered in the Explanatory Note accompanying the Bill, indicating that its scrutiny was of a serious nature: at 22–33. The Legal Affairs Committee made no recommendations for amendments to the Bill.

110 *Ibid* 23.



The timing of the debate on the Bill led to an extraordinary set of speeches which engaged with the content of the public submissions and offered insights into the process undertaken by the Legal Affairs Committee. The debate was dominated by the speeches of six of the seven Legal Affairs Committee members (including five LNP members) whose speeches evinced the tension among committee members and the LNP.<sup>111</sup> Verity Barton, a LNP member of the Legal Affairs Committee, defended the time allocated by arguing that the QLS, Council for Civil Liberties and BAQ had been given ‘ample opportunity ... to make written submissions’.<sup>112</sup> The Independent United Australia Party member for Nicklin, Peter Wellington, expressed concern as to whether the tight timeframe might become a precedent, ‘I would be very disappointed if this becomes the norm when matters are referred to either this committee or to other committees in the future ... I believe that committees need to have reasonable opportunities to consider bills’.<sup>113</sup> This echoed Wellington’s ‘Statement of Reservations’, an appendix to the Legal Affairs Committee’s report, where he described the timeframe as a ‘stunt’ and ‘an abuse of the Parliamentary Committee process’.<sup>114</sup>

Ultimately, the rights concerns of the various external stakeholders, such as the QLS and BAQ, possibly received considerably more attention on the floor of Parliament than may have otherwise been the case if the timing had not been so tight. LNP members appeared to have felt compelled to rebuff these stakeholder concerns, possibly because of the very recent nature of these concerns. However, like in the NSW anti-bikie Bill debates, no government amendments followed and the LNP was successful in ramming through its Bill. For his part, the Attorney-General addressed the Legal Affairs Committee’s rights concerns but only in the most perfunctory manner, showing little regard for the scrutiny process.<sup>115</sup>

Overall, some deliberative impact is evident in these sets of debates. With the exception of the first set of 2013 debates, anti-bikie debates in Queensland generally show that members have a relatively keen interest in the work of the parliamentary committee system and stakeholder contributions. This is in sharp contrast to the debates in the NSW Parliament. Both the unicameral system and the Fitzgerald reforms are important factors in this. It is arguable that the LNP government’s bypassing of the parliamentary committee scrutiny system in the anti-bikie Bill debates may have affected the LNP’s ability to form government

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111 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4237–9 (Ian Berry), 4239–43 (Verity Barton), 4244–7 (Sean Choat), 4247–9 (Aaron Dillaway), 4251–2 (Peter Wellington), 4250–1 (Trevor Watts).

112 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4240.

113 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4251 (Peter Wellington).

114 Legal Affairs and Community Safety Committee, above n 109, 35–7. The Labor member of the Legal Affairs Committee, Bill Byrne, also indicated his reservations to the Legal Affairs Committee report and these are articulated in Labor’s only contribution to the debate, via its leader: Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4203–6, 4230–5 (Annastacia Palaszczuk). This speech does not cite the Legal Affairs Committee’s report but merely refers to the stakeholder submissions, thus treating the Legal Affairs Committee and its report as nothing more than a conduit for public consultation.

115 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4199–203 (Jarrod Bleijie).

after its election loss in 2015. Labor's ability to form minority government was made possible through the support of an independent MP, Peter Wellington, based on a list of promises including 'commit[ment] to the "Fitzgerald principles" of accountability and, as "a principle", not use "any urgency motions to by-pass or truncate the committee system"' unless the crossbench is first consulted.<sup>116</sup> A second promise was that Labor would consider a possible Bill of Rights which, according to news reports, Wellington 'demand[ed] ... to ensure freedom of ... association' in Queensland.<sup>117</sup>

Without a house of review, rights-scrutiny culture within Queensland's Parliament is both fragile and germane. The anti-bikie Bill debates show that the 2011 decentralisation of Queensland's committee system may not have been successful in strengthening it. Governments repeatedly devise strategies to circumvent such parliamentary mechanisms, as is shown by the fast-tracking of Bills and the shortening of timeframes. The greatest strengths in Queensland's rights scrutiny culture are the mechanisms enabling its portfolio committees to seek stakeholder contributions through public submissions and public hearings and to engage with them in a transparent manner. For these mechanisms to be effective, both reasonable timeframes and political willingness to respond to this public input are required. Part VI focuses on the debates in Victoria where relatively reasonable timeframes were allowed for Bill scrutiny but political willingness to debate rights in Parliament was limited.

## VI THE VICTORIAN PARLIAMENT AND THE ANTI-BIKIE BILLS OF 2012–14

Before debate commenced in either house of Parliament on Victoria's three anti-bikie Bills in 2012, 2013 and 2014,<sup>118</sup> Victoria's Scrutiny of Acts and Regulations Committee ('SARC') duly tabled its full reports which set out the compatibility of the Bills in relation to SARC's traditional common law mandate ('trespasses unduly on rights or freedoms') and the list of rights set out in the

116 Amy Remeikis, 'Labor's Deal with Peter Wellington', *Brisbane Times* (online), 5 February 2015 <<https://www.brisbanetimes.com.au/national/queensland/labors-deal-with-peter-wellington-20150205-136xj1.html>>.

117 Matthew Killoran, 'Queensland Election 2015: Peter Wellington to Push for Bill of Rights', *The Courier Mail* (Brisbane), 10 February 2015; Michael Madigan, 'Labor Deal with Independent MP Peter Wellington Could Ease Bikie Laws', *The Courier Mail* (online), 10 February 2015 <<http://www.couriermail.com.au/news/queensland-state-election-2015/queensland-election-2015-peter-wellington-to-push-for-bill-of-rights/news-story/0b4add992f5fc15c4879087a98271f5f>>. In response, in late 2015 the Labor Party moved a motion in Parliament for the Legal Affairs Committee to conduct an inquiry into the desirability of a Human Rights Act for Queensland, possibly in line with Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic); the Legal Affairs Committee was unable to reach consensus on this issue, with committee members divided on party and ideological lines: Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act in Queensland* (2016). The Labor Government is still considering a Human Rights Act: Jessica Marszalek, 'Deadline Looms for Promises', *The Courier Mail* (Brisbane), 24 September 2017, 11.

118 Criminal Organisations Control Bill 2012 (Vic); Fortification Removal Bill 2013 (Vic); Criminal Organisations Control and Other Acts Amendment Bill 2014 (Vic).

*Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). In this regard, it was assisted by the Statements of Compatibility tabled by the relevant minister, a requirement under section 28 of the Charter, each of which stated whether the Bill was compatible with the rights set out in the Charter. Despite SARC's good timing and the detail offered by its reports, it is not apparent that SARC's reports had any impact on the final outcome once the anti-bikie Bills were introduced into Parliament.<sup>119</sup> Like Hiebert's observation of the UK Parliament, once the executive decided to introduce the Bills, it was reluctant to entertain the possibility of any amendments and this stance was unchallenged by the opposition. This correlates with a study conducted by Kelly of the 315 Bills that were introduced in the first three and half years of the Charter (2007–mid-2010) during the Brumby Labor Government.<sup>120</sup> Kelly found that 15 out of the 315 Bills were amended but none were amended in response to SARC and the Charter. He states:

SARC clearly engages the Victorian Charter but it can only be considered a modest dialogue because, to date, there are no concrete examples of the Cabinet amending legislation in response to SARC's concerns – either directly or indirectly ... there is very limited evidence of parliamentarians using SARC reports to challenge a statement of compatibility introduced by a minister.<sup>121</sup>

The anti-bikie Bills are in line with these findings as no amendments were successfully made in the post-introduction phase of the anti-bikie Bills despite one amendment based on a SARC report being proposed and others circulated.<sup>122</sup>

While it is not possible to discern any legislative impact flowing directly from SARC's scrutiny process, equally it is difficult to trace much impact on the deliberative process. In Victoria's anti-bikie debates, none of the speeches made by members of the major political parties refer to SARC reports except to respond to questions from Greens Members of Parliament. This is regardless of whether the speech was made by a member of SARC.<sup>123</sup> In the 2012 debates, the Labor Opposition referred to reports of the Law Institute of Victoria ('LIV') only

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119 See the table on 'Bills Amended in Response to SARC' for the period of 2010–14 in Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to Department of Justice and Regulation, *2015 Review of the Charter of Rights and Responsibilities Act 2006*, 1 September 2015, 44. This table indicates that during this period, only four Bills were amended in response to SARC.

120 Kelly, above n 4, 258.

121 Ibid 270. This is consistent with the observations of the Chair of SARC in 2009, Carlo Carli, quoted in Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, Department of Justice and Regulation, 2015) 177. This is contested by SARC, which claims that between 2007 and mid-2010, its comments led to seven Bills being amended: see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 13 of 2014, 14 October 2014, Appendix 5, 27–8.

122 In total, of the 332 Bills that were passed in the entire 57<sup>th</sup> Parliament of Victoria (December 2010 – November 2014) only 11 were amended in the Legislative Council and 28 were amended in the Legislative Assembly. While it appears that all were government amendments, it is possible that some can be traced to some form of parliamentary pressure: see Russell, Gover and Wollter, above n 21, 295. Note that the Liberal-National Coalition controlled the Victorian Legislative Council with 21 out of 40 seats.

123 See for example the contribution of Edward O'Donohue in the debates in Victoria, *Parliamentary Debates*, Legislative Council, 13 December 2012, 5643–5. O'Donohue only mentions SARC in response to the Greens' questions.

to predominantly highlight potential constitutional problems rather than rights implications.<sup>124</sup> On the other hand, the Greens consistently used SARC reports (as well as LIV and Liberty Victoria submissions) as a basis upon which to propose amendments, to pose questions and to question the Minister's response.

Although SARC is a joint committee with a government chair and a government majority (four out of seven members are government members),<sup>125</sup> the use of SARC reports by Greens members suggest that the Greens do not characterise the scrutiny committee as a rubber stamp. In relation to the anti-bikie Bills, SARC identified at least one human rights issue not covered by the Statement of Compatibility. Indeed, SARC's scrutiny of the 2012 anti-bikie Bill was singled out for praise by the Victorian Equal Opportunity and Human Rights Commission for its extensiveness.<sup>126</sup> It is possible that SARC's influence, as one part of the *Charter* system, is felt in the policymaking process where policymakers may be moderating their proposals to be compatible with the *Charter* (the pre-introduction scrutiny phase). While this sphere of influence is not visible to the public and is largely based on the self-reporting of government departments and Members of Parliament,<sup>127</sup> arguably it offers a glimpse of optimism in assessing the model of parliamentary protection of rights as a whole.

SARC publicly claims to be a '[n]on-policy scrutiny' committee and aligns itself with the technical tradition of the Scrutiny of Bills Committee even though SARC's mandate was significantly widened by the *Charter* to be much broader than that of the Scrutiny of Bills Committee.<sup>128</sup> In its reports, SARC has limited its toolkit to either drawing something to the attention of Parliament or requesting that the minister provide further information. In relation to the anti-bikie Bills, SARC was cautious in never commenting on the quality of Statements of Compatibility. It also never commented on ministerial responses or directly contradicted the conclusions of the minister's Statement of Compatibility that the legislation was compatible, in that its limitation of rights was reasonable and justified.

Kelly observes that 'Cabinet engages in legislative strategies that significantly reduce the dialogic potential of section 28 and SARC's review of statements of compatibility'.<sup>129</sup> In regard to ministerial responses to SARC, the anti-bikie Bills show that the Minister's responses were very prompt and carefully crafted,<sup>130</sup> even though the *Charter* does not put ministers under a

124 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2012, 5282 (Jacinta Allan), 5284 (Murray Thompson), 5287 (Benjamin Carroll).

125 This is in accordance with s 21(1) of the *Parliamentary Committees Act 2003* (Vic) which provides that, '(a) at least one [member of SARC] must be a member of the Legislative Assembly; and (b) at least one must be a member of the Legislative Council'.

126 *VEOHRC 2015 Submission*, above n 119, 43.

127 Young, above n 121, 177; Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 338.

128 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2012* (March 2013) x.

129 Kelly, above n 4, 268.

130 Victoria, *Parliamentary Debates*, Legislative Council, 13 December 2012, 5644 (Edward O'Donohue).

statutory requirement to respond to SARC's requests. One Coalition strategy appears to be that of giving prompt ministerial responses to ensure that any debate is highly scripted by the Government and thus to shut down any potential questions that might be posed in Parliament.<sup>131</sup>

The government's strategy appears to use the ministerial response to SARC as a means of amplifying the voicing of its policy and to use the combination of the Statement of Compatibility, SARC report and minister's response as a means of muting any debate on human rights issues raised by specific provisions. This is compounded by the silence in second reading speeches among both major parties, in particular the Labor opposition, in relation to SARC reports or the *Charter*.<sup>132</sup>

SARC's reports on the three anti-bikie Bills did not include any dissents. This may also be due to the fact that, like the PJCIS, it is a bipartisan committee with no crossbench members.<sup>133</sup> Unlike some of the anti-bikie Bills in NSW and Queensland, Victoria's anti-bikie Bills did not bypass Parliament's rights-scrutiny process offered by its parliamentary committee SARC.<sup>134</sup> The 2012, 2013 and 2014 Victorian debates took place over four weeks, three and a half months and seven weeks, respectively, which are reasonable timeframes relative to those used for the anti-bikie Bills in NSW and Queensland.<sup>135</sup>

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131 An example can be seen from the 2013 debates when Greens Upper House member Sue Pennicuik asked the government to elaborate on the Minister's response that a clause 'may negatively interfere with the person's privacy or home ... [but] any such interference will be lawful as it is specifically permitted by clause 48 [of the relevant Bill]': Victoria, *Parliamentary Debates*, Legislative Council, 3 September 2013, 2591 (Sue Pennicuik), quoting Scrutiny of Acts and Regulations Committee, *Alert Digest*, No 7 of 2013, 28 May 2013, 22. The government's response to Pennicuik's request was as follows, '[w]e say that the bill seeks to confer upon police a power that is both proportionate and reasonable, again for the reasons stated in the minister's response to the SARC report as well as in the statement of compatibility and the second-reading speech': Victoria, *Parliamentary Debates*, Legislative Council, 3 September 2013, 2593 (Michael O'Brien). This response shows the government attempting to shut down debate on the basis of the executive statements that have been provided.

132 This is not to say that there is no consideration of human rights but that such debate often relates to concerns that bikie gangs will be able to find human rights loopholes, aided by lawyers, so as to thwart the legislation: Victoria, *Parliamentary Debates*, Legislative Council, 3 September 2013, 2592. This concern, that lawyers will exploit any provisions that protect due process rights, is consistent throughout the debates in all the surveyed parliaments but it is most vehemently articulated in the SA debates. See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 6 May 2008, 2670, 2676 (Paul Holloway).

133 This absence of crossbenchers makes it difficult to characterise SARC as a particularly representative body, given the increase in crossbench members in Victoria's Legislative Council since the advent of the Single Transferrable Vote Proportional Representation System in that house in late 2006 when two new parties (the Greens and Democratic Labor) entered the Council. Since this time, they have been joined by three more minor parties but, between 2012–14, only 3 of the 40 MLCs were crossbenchers, all from the Greens party. Crossbenchers sit on the parliamentary rights-scrutiny committees in NSW and Queensland as well as the two federal rights-scrutiny committees, the Scrutiny of Bills Committee and the PJCHR.

134 This is a requirement under s 28 of the Charter, but failure to present a Statement of Compatibility does not affect the Bill's validity or operation upon enactment. Section 30 states that SARC must report to Parliament as to whether a Bill is incompatible with the human rights listed in the Charter but it does not stipulate a timeframe for this reporting or clarify whether a failure to report affects a Bill's validity.

135 By convention, two weeks are generally allowed between the introduction of a Bill via the second reading speech (the time at which a Statement of Compatibility is tabled) and debate on the Bill. This convention is not enshrined in Victoria's *Constitution* or any standing or sessional orders of either House of

Although SARC has the power to hold public hearings as well as to receive public submissions,<sup>136</sup> unlike the Queensland portfolio committee in November 2013, it did not do so. This is despite the fact that the timeframes for the 2013 and 2014 Bills may have allowed SARC to receive public input and, from its own *Charter* analysis and its research into interstate schemes, SARC would have been aware of the high level of public interest in such legislative incursions into rights protections.<sup>137</sup> SARC's reluctance to engage with the public has led to a widely held view among external stakeholders that 'making a submission to SARC about a Bill's human rights impacts has little purpose, because SARC does not usually engage with the detail of these submissions or refer to them in its Alert Digests'.<sup>138</sup> For these stakeholders, there is little potential gain for their efforts at this point in the legislative process in contrast to the behind-the-doors phase of pre-introduction scrutiny.

While SARC is a joint committee, between 2012–14, only one of its seven members was a member of the Upper House and a number of its members were serving in the executive as parliamentary secretaries.<sup>139</sup> This composition, which is heavily weighted toward government members in the Lower House, narrows the committee's political and educative influence within the two houses of Parliament and decreases the incentive for its members to engage in robust rights dialogue with the executive through holding public hearings and actively encouraging and engaging with public submissions. Overall, the government's strategies and SARC's reluctance to engage with the public indicate that the executive is keen to mute the potential deliberative and legislative influence of SARC.

## VII COMMONALITIES, DIFFERENCES AND POSSIBLE GLIMPSES OF FUNCTIONING PARLIAMENTARY RIGHTS PROTECTION

The comparative snapshot of Commonwealth and state rights-scrutiny mechanisms offered by this article points to various commonalities and differences among Australia's largest Parliaments based on the Westminster system in a bid to shine light on any fissures. The differences among these

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Parliament: Young, above n 121, 184. However, nothing prevents Parliament from passing a Bill before SARC performs its scrutiny process and reports to Parliament and indeed, s 17(c) of *Parliamentary Committees Act 2003* (Vic) states that SARC can 'consider any Act that was not considered ... when it was a Bill ... within 10 sitting days *after* the Act receives Royal Assent' (emphasis added).

136 *Parliamentary Committees Act 2003* (Vic) ss 27(1), 28(8).

137 In its scrutiny of the 2014 Bill, SARC would have been aware of the intense public response to Queensland's anti-bikie laws in October and November 2013. The last public hearing held by SARC was in 2009 to determine whether amendment should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995* (Vic): Parliament of Victoria, *Exceptions and Exemptions in The Equal Opportunity Act 1995* <<https://www.parliament.vic.gov.au/sarc/inquiry/61>>.

138 Young, above n 121, 182.

139 For example, Edward O'Donohue and Dr Bill Sykes. Unlike the Scrutiny of Bills Committee, there appears to be no general rule that parliamentary secretaries do not sit on SARC.

systems suggest caution in making generalisations, but at the same time the similarities among the systems suggest that lessons can be drawn from jurisdictions where parliamentary scrutiny is having stronger deliberative and legislative impact. Unfortunately, the approaches and strategies used by the Victorian executive and Parliament, as well as by those in NSW and Queensland, appear to confirm the view of experts such as David Feldman that governments generally seek to avoid scrutiny. He explains: ‘Government ministers ... do not welcome 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’.<sup>140</sup>

This is particularly pertinent where the government is successful in securing bipartisan support for its Bills,<sup>141</sup> a situation in which the government may see no value in having Bills delayed in the form of scrutiny or amendments. Despite this, the experience of federal parliamentary committees in scrutinising counter-terrorism Bills in 2014–16 signals that there may be some openings in the parliamentary model of rights protection which indicate the possibility of strengthening parliaments’ ability to protect rights and hold the executive accountable. These openings are important to explore given that there are few other existing institutional mechanisms for rights protection in Australian jurisdictions. While care is needed not to overstate the significance of the findings drawn from the above case studies from the Commonwealth and state jurisdictions, this article points to five factors as particularly relevant to understanding and evaluating the Australian parliamentary model of rights protection.

### A Adequacy of Time to Conduct Formal Parliamentary Scrutiny

The above examples show that ensuring the adequacy of time to conduct formal parliamentary scrutiny is a foundation to developing a culture of parliamentary rights scrutiny. Adequate timeframes are clearly a relative concept. At the federal level, so-called ‘urgent’ counter-terrorism Bills were ‘rushed’ through Parliament in five weeks while in state Parliaments, this process was in fast-forward mode, with urgent Bills being rammed through in 24 hours, entirely bypassing any rights-scrutiny process.

Unlike the experience of the anti-bikie laws at the state level, parliamentary scrutiny of the Citizenship Bill as well as other significant counter-terrorism Bills in the 2014–16 tranche appeared to allow appropriate timeframes to facilitate public engagement with the scrutiny process. Even where assertions of urgency have resonated at the Commonwealth level with respect to other counter-terrorism laws, such as the Foreign Fighters Bill, multiple committees have managed to conduct inquiries into the Bills, and the PJCIS was able to attract

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140 Feldman, above n 4, 98.

141 According to Bruce Stone, bipartisan support in the Commonwealth Parliament is the case with at least 80 per cent of all Bills: Bruce Stone, ‘Opposition in Parliamentary Democracies: A Framework for Comparison’ (2014) 29(1) *Australasian Parliamentary Review* 19, 25. Stone explains that even the Abbott-led Liberal-National Opposition in the 2010–13 Commonwealth Parliament, which had a higher rate of negative voting than previous oppositions (1996–2010), supported nearly 80 per cent of Bills. This indicates that bipartisan support is the norm in Australian Parliaments.

numerous written submissions, hold public hearings, issue detailed reports and deliver successful recommendations for legislative change. By way of contrast, the fast-tracking of Bills in the NSW and Queensland Parliaments indicates that formal rights scrutiny is only considered an optional ‘add-on’ and not a necessary aspect of a legitimate parliamentary process. Lip-service was paid to the scrutiny process in Queensland’s November 2013 Bill by giving the parliamentary committee 48 hours to report. However, this strategy arguably backfired on the LNP government as its disregard for the scrutiny process came publicly to the forefront. Some external submission-makers worked within this brief timeframe in a bid to thwart the government’s attempt to mute their rights criticism of the Bill. Timing was not an issue in the Victorian anti-bikie Bill debates where the major parties deployed other strategies to undermine the potential legislative influence of SARC.

It is clear that parliaments can tighten timeframes in order to circumvent scrutiny, and where this occurs as part of a deliberate strategy it can significantly weaken the ‘quality of debate’<sup>142</sup> a Bill receives. The Commonwealth experience of scrutinising complex counter-terrorism Bills demonstrates that a sophisticated and relatively well-resourced parliamentary committee system can rise to the challenge of such tight timeframes. This is not the case in state parliaments where sole committees are not equipped to meet this challenge. State governments appear to be employing manifestly inadequate timeframes for short-term gains. By imposing such tight timeframes, the NSW and Queensland Parliaments are undermining the legitimacy of their parliamentary committees, causing long-term damage to their reputations as rights-protecting institutions and, more critically, undermining the legitimacy of the parliamentary model of rights protection.

### **B Attributes of Particular Committees Lead to Greater Legislative Influence**

The comparative snapshot shows that attributes of particular committees (such as their membership, mandate, scrutiny criteria, analytical approach, and standing orders) can lead to varying levels of legislative influence. Particular parliamentary committees can emerge as having more direct legislative and deliberative impact than others. Although at the federal level, with its system of multiple committees, attributes of particular committees complement each other – a dynamic that is not the case at the state level where one committee invariably carries the burden of sole scrutiny, intensifying the importance of its attributes.

In the Citizenship Bill case study, the Government and Parliament conferred the greatest legitimacy on the PJCIS report as a result of a number of the PJCIS’s attributes. Significant amongst these is the PJCIS’s bipartisan membership and close, respected relationship with key government agencies and departments. Furthermore, it is a committee which receives significant public input and perceives its role as one of influencing policymaking through the form of recommending specific legislative change. The PJCIS enabled a forum for the

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142 This is one of a number of ‘families’ of tests articulated by Uhr to assess deliberative democratic process in Australian Parliaments. See Uhr, *Deliberative Democracy*, above n 16.



two major parties to negotiate with each other on the detail of the Bill in light of the reports of the Scrutiny of Bills Committee and the PJCHR and a large number of public submissions that helped to set the parameters of this negotiation. Similar experiences occurred with respect to the other five major counter-terrorism Bills introduced in the 2014–16 tranche.<sup>143</sup>

The Commonwealth experience suggests that creating a committee environment where the major political actors feel comfortable negotiating over the detail of a proposed law may play a significant role in legislative success. In the case of counter-terrorism law, this environment includes ensuring access to relevant (and often classified) information, and providing the opportunity to test certain proposals or options against the views of those tasked with implementing the changed laws. This combines to increase the chance of a consensus report and lowers the political risks associated with recommending legislative change to a popular legislative proposal. In turn, this also helps to attract submissions from high quality, high-profile submission-makers, and can provide fertile ground for the reports of other less popular, less visible committees to be considered in new forums. In such an environment, committee members may be prepared to raise rights concerns expressed by respected submission-makers or test alternative options for implementing government policy outside of the public glare of the parliamentary chamber.

On the other hand, this committee environment, which depends heavily on establishing relationships of trust with key government departments and agencies, can threaten the deliberative impact of the parliamentary committee if it gives rise to questions about the independence of the committee from the executive branch of government. If this occurs, a narrower range of submission-makers may seek to engage with the committee, and thus the quality and diversity of the debate and deliberation on the proposed law may fail, with flow-on effects for the rights-enhancing potential of the scrutiny.

At the Commonwealth level, senators or members may participate in more than one committee, and this can lead to a cross-fertilisation of ideas and give rise to particular personalities having an influence over different committees' processes and outcomes. Involvement in multiple committees by one member or senator can also contribute to the dominance of certain committees over others, particularly when the individual involved possesses distinct seniority within their political party and/or anticipates a more advantageous political outcome in one committee over another.

Among the state scrutiny committees, the Queensland portfolio committees come closest to the PJCIS in their role of scrutinising both the policy content and

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143 Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth); Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) (which later became the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth)); Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth); Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth); Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth). This can be seen by the consensus reports and recommendations issued by the PJCIS, the bipartisan support for the Government amendments moved to implement the PJCIS recommendations, and the praise given to the work of the PJCIS by both the Opposition and the Government with respect to these Bills. See, for example, the parliamentary debates mentioned in footnote 147 below.

technical aspects of Bills. This is bolstered by their ability to be briefed by departmental officers and their capacity and willingness to engage with external stakeholders. The attributes of these portfolio committees position them well to develop strength in performing formal rights scrutiny, but they face many challenges as a result of the fast-tracking of Bills, the imposition of inadequate scrutiny timeframes and the absence of an Upper House to potentially champion their recommendations.

Despite its mandate and powers, Victoria's SARC has consciously chosen to style itself as a solely technical committee and to limit its public engagement, thus weakening its status among external stakeholders. SARC's membership has arguably dulled its willingness to engage with the public. It is a joint house committee almost only in name, with six of its seven members being chosen from the Lower House. SARC's members only draw from the major parties and it includes members who serve as parliamentary secretaries, arguably compromising its ability to keep the executive accountable.

The NSW LRC styles itself as a technical committee, reinforced by the fact the NSW Parliament has not empowered the LRC to receive public submissions or hold public hearings. In this sense, it is out of step with its model, the Scrutiny of Bills Committee, whose powers have, over time, been enlarged in this regard. While McNamara and Quilter may be correct in suggesting that ministerial responses to the NSW LRC's reports might assist the LRC to exert some influence in the deliberative process, the LRC would be better equipped to exert such influence if it was perceived by the public as more than a technical committee but also as a vehicle for communicating external stakeholder concerns and translating them into recommended amendments.

### **C Power and Ability to Facilitate Public Input**

Dalla-Pozza argues that facilitating public and expert input through committee processes has flow-on implications for the quality and length of parliamentary debate on a Bill, which in turn improves the deliberative capacity of the Parliament.<sup>144</sup> This article's comparison suggests that those committees with the strongest deliberative impact also appear to have the best opportunity to deliver rights-enhancing results. This deliberative impact correlates with the power and ability of parliamentary committees to facilitate public input. The multi-committee system at the federal level means that it is not detrimental for the quality of formal scrutiny if individual committees such as the Scrutiny of Bills Committee and PJCHR do not activate this power. At the state level, the failure to activate or hold this power has more serious consequences for the deliberative impact of formal rights scrutiny and for the parliamentary model of rights protection.

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144 Dalla-Pozza, 'Refining the Australian Counter-Terrorism Legislative Framework', above n 18. It is noted that many submission-makers to the committees discussed in this article are experienced submission-makers, often including organisations with legal expertise. Such regular submission-makers have been described as 'the usual suspects', and may not represent a full cross-section of the community. For further discussion, see Kelly Paxman, 'Referral of Bills to Senate Committees: An Evaluation' (1998) 31 *Papers on Parliament* 76, 81.

While facilitating public input is not feasible for all Bills, it should be set as a priority for those Bills that clearly restrict rights and freedoms given the fact that most Australian jurisdictions have an exclusive system of parliamentary rights protection. The process of engaging with the public has the potential to considerably enhance the legitimacy of the scrutiny process and to boost the role of all parliamentary committees in assisting parliament to keep the executive accountable. Providing meaningful opportunities for public participation also helps to develop and entrench a broader culture of respect for the formal scrutiny process – submission-makers who begin to see their concerns or suggestions reflected in committee reports and recommendations, the media who may be motivated to follow the key points put forward by high-profile submission makers, and parliamentarians themselves who can begin to see a political as well as a principled reason to take formal parliamentary scrutiny seriously.

As noted above, public participation in a particular committee's processes can be both *indicative* of the committee's status and legislative influence, and *determinative* of that status and influence – especially in the context of multi-committee systems. The more sophisticated parliamentary scrutiny systems, such as that at the Commonwealth level, facilitate public participation in parliamentary committees alongside technical scrutiny processes that rarely involve public submissions. However, even within the Commonwealth system, there is scope for enhancing public input, particularly with respect to the PJCHR, whose mandate and purpose straddles both technical scrutiny and dialogue creation and includes a specific function to conduct inquiries where appropriate.<sup>145</sup>

Queensland's portfolio committees have scope in their mandate and standing orders to boost the level of their public engagement. This enhancement is dependent on Parliament setting adequate timeframes for scrutiny. Victoria's SARC similarly has the power to engage the public through holding public hearings and inviting public submissions. Unlike in Queensland, short timeframes have not been the stumbling block for SARC; rather, it appears to be the willingness of SARC to activate its powers to their full extent. NSW's LRC remains alone in not enjoying formal powers to hold public hearings or invite public submissions. This is possibly one reason why the NSW LRC suffers 'routine parliamentary disregard for [its] findings and recommendations' despite their quality.<sup>146</sup>

#### **D Culture of Respect for the Value of Formal Parliamentary Scrutiny**

At the federal level, a culture of respect for the value of formal parliamentary scrutiny is emerging. In the Citizenship Bill debates, the full political spectrum of politicians who spoke to the Bill acknowledged the need for robust scrutiny of the Bill, many of whom referred to the PJCIS and its inquiry in detail in their

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

146 McNamara and Quilter, above n 85, 35.

second reading speeches.<sup>147</sup> This has been replicated in the debates on the other four major counter-terrorism laws introduced in the 2014–16 tranche.<sup>148</sup>

In contrast, in the state parliamentary debates surveyed in this article, politicians from the major parties were reluctant to engage with the scrutiny process. The exception was the Queensland Parliament, where the scrutiny process was used by both sides of politics for strategic gain but not to directly influence the content of the Bill. In Queensland, formal parliamentary scrutiny is particularly pertinent given the absence of an Upper House. The strategic bypassing of formal parliamentary scrutiny by the LNP in its first tranche of anti-bikie Bills in 2013 can be read as one of the catalysts for the renewed call for a state Bill of Rights.

In the Commonwealth debates, formal parliamentary scrutiny became particularly important for the Labor Opposition which desired to emphasise that

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147 See, eg, complimentary references to the PJCIS by members of Government: Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015, 9508 (George Brandis, Attorney-General). Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13 034–5 (Andrew Nikolic); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13 048 (Luke Simpkins); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13 339 (Michael Sukkar); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13 322 (Craig Kelly); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13 559 (Warren Entsch); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13 556 (Sarah Henderson).

148 See, eg, with respect to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5148 (Mark Dreyfus); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5146 (Michael Keenan). With respect to the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) (which later became the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth)), see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3977 (Graham Perrett); Commonwealth, *Parliamentary Debates*, Senate, 8 November 2016, 2216 (George Brandis, Attorney-General). With respect to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), see Commonwealth, *Parliamentary Debates*, Senate, 24 March 2015, 2226 (Lisa Singh); Commonwealth, *Parliamentary Debates*, Senate, 24 March 2015, 2121 (Mitch Fifield). With respect to the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), see Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2014, 13 639 (Mark Dreyfus); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2014, 13 645 (Andrew Nikolic). With respect to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), see Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 2014, 12 595 (Terri Butler); Commonwealth, *Parliamentary Debates*, Senate, 28 October 2014, 8010 (George Brandis, Attorney-General). While the PJCIS does not have an explicit ‘rights scrutiny’ role, the majority of its substantive legislative recommendations with respect to the five major counter-terrorism Bills in the 2014–16 tranche can be described as rights-enhancing, albeit relatively modestly so. For example, PJCIS recommendations that were implemented as amendments with respect to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) narrowed the range of offences to which the continued detention order regime applies to, improved the judicial oversight of the regime, and introduced independent review mechanisms and sunset clauses: Supplementary Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth). PJCIS recommendations that were implemented as amendments with respect to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) ensured that ministerial declarations of ‘declared areas’ were subject to oversight by the PJCIS and disallowance by Parliament, narrowed the range of applicable offences, and introduced a sunset clause to the new regime: Supplementary Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

its support for the Citizenship Bill was carefully measured.<sup>149</sup> The frequent and positive reference to the work of the PJCIS in Commonwealth debates would appear to be in contrast to the anti-bikie Bills experience in the Parliaments of NSW and Victoria, where the reports of parliamentary committees are rarely referred to or quoted from the floor of Parliament outside of the minor parties or independents. It may suggest that within the Commonwealth Parliament there is a level of ingrained respect for the legitimate role of rights scrutiny even in the context of a Bill that enjoys bipartisan support for its primary objects.

Another means of gauging respect for formal scrutiny is whether there is a robust human rights dialogue taking place within parliament and between the government and the parliament. There is evidence of the Government responding to requests of parliamentary committees in the Commonwealth and Victorian Parliaments and, to a small degree, in Queensland's Parliament. The timing of these government responses is strategically set to the government's advantage, with, for example, the responses of Victoria's Government tactically designed to amplify the Government's analysis. This is but a hiccup on the path to developing a culture of respect for the value of formal parliamentary scrutiny.

### **E Generation of a Particular Rights Discourse in Parliamentary Debates**

In the Commonwealth and Victorian Parliaments it is possible to discern a small but steady increase in the familiarity of parliamentarians with international human rights law concepts used primarily by the PJCHR and SARC.<sup>150</sup> At the federal level, the multi-committee system means there is a possible convergence of parliamentary scrutiny focus on a set of common themes (such as access to judicial review and protection of the rights of children) that can be seen as politically legitimate without undermining the popular policy imperatives of the proposed law. This convergence is arguably developing from the growing interaction between the PJCHR and other federal parliamentary committees.<sup>151</sup>

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149 It must be noted that at least a couple of members of the Australian Labor Party continued to express opposition to the Bill despite the amendments made in response to the PJCIS recommendations. For example, Melissa Parke described the Bill as likely to be unconstitutional and contrary to the rule of law and principles of natural justice, and argued that it should not be passed: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13288 (Melissa Parke). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13 117–18 (Michael Danby). See also Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015, 9493–4 (Katy Gallagher).

150 At the Commonwealth level this is confirmed by a survey conducted by Williams and Reynolds, above n 12.

151 For example, while the findings of human rights compatibility made by the PJCHR with respect to the Citizenship Bill were generally ignored by the government and rarely referred to in Hansard, the PJCHR strongly criticised the Statement of Compatibility accompanying the Bill and was relatively strident in expressing its concerns about the human rights compatibility of the Bill. Both the reports of the Scrutiny of Bills Committee and the PJCIS refer multiple times to the PJCHR report and the Statement of Compatibility and the features of the Bill attracting most detailed consideration by the PJCHR align closely with the focus of the PJCIS recommendations and the resulting legislative amendments: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 7*, above n 36, 6, 7, 9; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 56, 146, 156, 169, 170–1, 177. Similar experiences are evident in the parliamentary scrutiny of other recent counter-terrorism Bills where the findings of the PJCHR were given little public acknowledgement, but the issues raised in its report were

More optimistically, it can be read as the start of a productive intra-parliamentary human rights dialogue and discourse that given time may mature into a robust culture of rights scrutiny.<sup>152</sup>

At the Commonwealth level, the Hansard indicates that a particular rights discourse is developing. This is apparent in the speeches of members with respect to the Citizenship Bill and the other major counter-terrorism Bills enacted in the 2014–16 tranche. This discourse permeates beyond political lines, and it is heavily influenced by the mandate and language of the more traditional parliamentary scrutiny committees, particularly the Scrutiny of Bills Committee but also the PJCIS. These committees generally demonstrate a preference for invoking common law rights and ‘big picture’ principles such as the rule of law, over more explicit reference to international human rights concepts, although there is often some crossover between the two. In some respects, this discourse shares many similarities with the speeches of the Queensland LNP in opposing the 2009 anti-bikie Bill even though the very short-lived nature of this LNP strategy undermines its genuine force. Overall, it is difficult to say that this discourse aims for the type of legislative change that would remedy the most serious intrusions into individual rights.

This feature of the rights-scrutiny culture at the Commonwealth level requires testing beyond the particular experience of the Citizenship Bill and its unique capacity to invoke the type of patriotic rhetoric that may give rise to a higher than usual reference to rights and freedoms. However, it is hard to dismiss the suggestion that a systematic rights-scrutiny culture is emerging at the Commonwealth level, even if it remains open to strategic manipulation by both sides of politics to further various political imperatives. It is possible that it is generating a narrow and distinctly Australian rights discourse, based on rule of law values and, in particular, parliamentary oversight of executive power, which needs further examination through a broader set of case studies. However, if such a discourse is emerging, it may have the potential to assist state parliaments to cast off their reluctance to embrace the use of rights discourse when debating popular ‘law and order’ Bills.

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relatively well-traversed by submission-makers to the PJCIS, and by the PJCIS itself. For example, the PJCIS’s reports with respect to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) and the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth) contained subheadings relating to general or specific human rights issues, and under each of these subheadings, reference was made to the work of the PJCHR, and to the submissions made by organisations with particular perspectives or views on the matters raised in the relevant PJCHR reports: see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (2016) 21 (‘International Human Rights Considerations’); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) 38 (‘Can Data Retention Meet the Test as Being Necessary for a Legitimate Aim?’).

152 Rajanayagam, ‘Does Parliament Do Enough?’, above n 70.

## VIII CONCLUSION

This article's snapshot comparison offers glimpses of the parliamentary model of rights protection working in practice in the context of case studies that have deep rights impacts and that significantly change the scope and shape of our criminal laws. These case studies are not chosen because they are representative of the work of parliamentary committees in Australia, but rather to highlight the points at which parliamentary scrutiny might matter most. By looking across jurisdictions, the case studies allow us to examine different systems of committees, each grappling with somewhat similar rights issues in the context of politically popular legislative proposals. From these case studies, we can see signs of what works when it comes to parliamentary rights protection.

Overall, the federal case study indicates that there is some cause for slight and cautious optimism in regard to the parliamentary model of rights protection in Australia. A culture of rights scrutiny is developing at the Commonwealth level, and over time it is possible that this culture may spill over into state Parliaments which generally show interest in adopting federal practices. Currently, this culture does not appear to be capable of preventing the most serious intrusions into individual rights, but it may at least be capable of moderating these intrusions, particularly where public input is encouraged and where, at the federal level, individual committees have regard to the work of other committees within the scrutiny system.

By understanding how each committee fits within the broader formal parliamentary scrutiny landscape, it is possible to identify opportunities for structural and cultural change, whilst at the same time being realistic about the outcomes this system can deliver in terms of rights protection. Deliberately creating a committee culture where members feel comfortable raising rights issues and negotiating compromised legislative changes, such as in the case of the PJCIS, may be a valuable lesson to consider in other jurisdictions where the legislative impact of parliamentary committees remains low.<sup>153</sup> At the federal level, it is important that interested individuals and groups have an opportunity to access, and contribute to, the type of detailed rights analysis prepared by the PJCHR and the Scrutiny of Bills Committee, and to present this analysis to other parliamentary committees. The Citizenship Bill case study suggests this may lead to stronger rights outcomes, even in the context of politically popular legislative proposals.

While Australian parliamentary committees may never 'block the road' when it comes to legislating away rights and freedoms in favour of 'law and order' policies, they can work as effective safeguards in the democratic process – and,

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153 The relationship between effective models of rights protection and pre-existing rights scrutiny cultures within parliaments has been considered by Scott Stephenson in his work exploring how different jurisdictions approach rights disagreements between institutions of government. Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016). For example, Stephenson explains that '[t]he process of identification and resolution [of rights issues] must be sensitive to the needs of individual jurisdictions': at 211.

as the Citizenship Bill example shows – they can have a tangible impact on the final shape of significant legislative reform.

For state governments who may be sceptical of the value of parliamentary committees, the federal experience demonstrates that formal parliamentary scrutiny can achieve important legislative improvements, including rights-enhancing improvements, without undermining the core policy goal of a Bill. The case studies in this article suggest that even in highly controversial areas, state parliaments could benefit from allowing scrutiny committees to engage with external stakeholders and to recommend amendments which transparently seek to balance individual rights protection with security. Unfortunately, the reluctance shown by state governments to allow proper scrutiny to take place in the post-introduction phase threatens to undermine the legitimacy of the Westminster parliamentary process as one that is capable of protecting rights in state parliaments.