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Democratic and Judicial Review of Enacted Laws in Australia: A Case Study of the Rights Scrutiny Work of Australian Parliamentary Committees

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Article abstract

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Dr. Sarah Moulds*

ABSTRACT

This article explores the relationship between different forms of review of enacted legislation in Australia and provides fresh perspective from which other parliamentary democracies may consider the role of parliamentary committees play in rights protection. Using three case study examples from Australia, this article explores the concept of democratic post-legislative scrutiny and its relationship with other forms of review of enacted laws, including judicial review. The article challenges the conventional view that parliamentary models of legislative scrutiny are inherently vulnerable to executive dominance, and argues that democratic review of enacted laws, particularly that conducted by parliamentary committees, has distinct advantages over judicial or tribunal-based review of enacted laws, and provides beneficial supplement to other forms of rights protection in Australia. The article argues that the flexibility and responsiveness of Australian forms of parliamentary post-legislative scrutiny, that are decidedly lacking in structured procedural frameworks, make the case studies particularly interesting to Canadian scholars and practitioners as they underscore the benefits of direct engagement with citizens and experts in the process of post-legislative scrutiny, when compared to other more tightly controlled forms of legislative review. In this way, this article responds to the long-standing scholarship in Canada relating to the increasingly deteriorating capacity of members of Parliament to act as legislators rather than government cheerleaders when it comes to parliamentary scrutiny of proposed and existing laws.

KEYWORDS:

Australia, parliamentary committees, post-legislative scrutiny, judicial review, legislative review, deliberation.

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RÉSUMÉ

Cet article explore la relation entre les différentes formes d'examen des lois adoptées en Australie et offre une nouvelle perspective dont les autres démocraties parlementaires peuvent s'inspirer quant au rôle que les comités parlementaires peuvent jouer en matière de protection des droits. En se fondant sur trois études de cas de l'Australie, cet article explore le concept d'examen démocratique postérieur à l'adoption de mesures législatives et sa relation avec d'autres formes d'examen des lois adoptées, dont le contrôle judiciaire. L'article remet en question le point de vue conventionnel selon lequel les modèles parlementaires d'examen législatif soient, de manière inhérente, vulnérables à la domination de l'exécutif. On y soutient que l'examen démocratique des lois adoptées, particulièrement celui effectué par les comités parlementaires, présente des avantages distincts par rapport au contrôle judiciaire ou exercé par un tribunal, et qu'il offre un supplément bénéfique à d'autres formes de protection des droits en Australie. Dans cet article, on soutient que la flexibilité et la réceptivité des formes d'examen parlementaire postérieur à l'adoption de mesures législatives utilisées en Australie, qui manquent décidément de cadres méthodologiques structurés, rendent les études de cas particulièrement intéressantes pour les universitaires et les praticiens canadiens. En effet, elles témoignent des avantages de l'engagement direct des citoyens et des experts dans le processus d'examen postérieur à l'adoption des mesures législatives, par rapport à d'autres formes d'examen législatif plus étroitement contrôlées. De cette manière, cet article répond à ce que l'on sait depuis longtemps au Canada concernant la capacité de plus en plus défaillante des députés d'agir en tant que législateurs plutôt qu'en tant que meneurs de claque du gouvernement lorsqu'il s'agit de procéder à l'examen parlementaire des lois proposées et existantes.

MOTS-CLÉS :

Australie, comités parlementaires, examen postérieur à l'adoption de mesures législatives, contrôle judiciaire, examen législatif, délibération.

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INTRODUCTION

This article explores the relationship between different forms of review of enacted legislation in Australia and provides fresh perspective from which other parliamentary democracies may consider the role of parliamentary committees play in rights protection. The article challenges the conventional view that parliamentary models of legislative scrutiny are inherently vulnerable to executive dominance,[1] and argues that *democratic* review of enacted laws, particularly that conducted by parliamentary committees, has distinct advantages over *judicial* or tribunal-based review of enacted laws, and provides beneficial supplement to other forms of rights protection in Australia. In this way, this article responds to the long-standing scholarship in Canada relating to the increasingly deteriorating capacity of members of Parliament to act as *legislators* rather than government cheerleaders when it comes to parliamentary scrutiny of proposed and existing laws.[2]

While conscious of the limitations associated with parliamentary-based forms of legislative review, this article suggests that the

1. See e.g. C E S Franks, "The Decline of the Canadian Parliament", *The Hill Times* (25 May 1998); Mark Shephard & Paul Cairney, "Consensual or Dominant Relationships with Parliament? A Comparison of Administrations and Ministers in Scotland" (2004) 82:4 Public Administration 831; David Feldman "Democracy, Law and Human Rights: Politics as Challenge and Opportunity" in Murray Hunt, Hailey J Cooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (London, UK: Hart Publishing 2015) 95 at 98.

2. See e.g. C.E.S. Franks *The Parliament of Canada* (Toronto: University of Toronto Press, 1987); Donald J Savoie, "The Rise of Court Government in Canada" (1999) 32:4 Canadian Journal of Political Science 635; Kelly Blidook, "Exploring the Role of 'Legislators' in Canada: Do Members of Parliament Influence Policy?" (2010) 16:1 Journal of Legislative Studies 32.

post-legislative scrutiny conducted by Australian parliamentary committees can have a right-enhancing impact, even in the context of politically popular lawmaking such as legislative responses to international terrorism or health pandemics. The article also highlights some of the deliberative benefits associated with this form of *democratic* review, particularly when different parliamentary committees work together as a system.

Using three case study examples from Australia, this article explores the concept of democratic post-legislative scrutiny and its relationship with other forms of review of enacted laws, including judicial review. By looking at the role Australian parliamentary committees played in scrutinizing federal laws relating to counter-terrorism, automated social security systems and the COVID-19 pandemic, it is possible to see how democratic forms of post-legislative review intersect with and supplement other forms of scrutiny and oversight, including as that conducted by the courts. The article concludes by observing that while the work of parliamentary committees should never *replace* the important review function courts play within a parliamentary democracy dependent on the doctrine of separation of powers, it is an increasingly important mechanism for enhancing the rights of individuals. Before introducing the three Australian case studies, the article introduces the concept of democratic post-legislative review within the Australian institutional context and offers some thoughts as to why this model might be of particular interest to Canadian scholars and practitioners.

I. DEMOCRATIC REVIEW OF ENACTED LAWS IN AUSTRALIA

A. What is meant by "democratic review" of enacted laws?

This article uses the term "democratic" review of enacted laws to denote a focus on *parliamentary-based* review of laws and to distinguish between other forms of review, including review by the courts (commonly referred to "judicial review") or review authorized by statute, such as that conducted by administrative tribunals, ombudsmen or royal commissions. As discussed further below, in Australia, parliamentary committees play a central role in conducting *democratic* review of proposed and enacted laws, and this forms the basis of an exclusively parliamentary model of rights protection at the federal level in Australia.

Democratic review of enacted laws can also be equated with the term "post-legislative scrutiny" or PLS, which refers to the practice of reviewing enacted laws to determine whether the provisions have been implemented or enforced, and to evaluate their impact or effectiveness. The term "PLS" has become increasingly popular in academic commentary[3] and development discourse following the work of the Law Commission of England and Wales on the topic in 2006, and more recently through the international development activities led by the Westminster Foundation for Democracy (WFD). Given its origins within the United Kingdom (UK) Parliament, PLS often denotes a formalized or systematic approach to reviewing legislation within a prescribed time period and against a prescribed set of criteria[4] that is conducted primarily by parliamentary committees with input from key government departments or portfolios. While this type of approach to PLS is well entrenched in the UK and some other parliaments including in Indonesia, Lebanon and Montenegro, where specialist parliamentary committees exist to conduct PLS on a systematic basis, it is not present in the Australian system.[5] It is also possible for the term PLS to give rise to disparate meanings depending on the audience and jurisdiction. For example, a lawyer may take the view that PLS should focus on judicial review of the *constitutionality* or *lawfulness* of the enacted law; an economist may consider the term to involve a cost-benefit analysis of the law's implementation; and a sociologist may seek to evaluate its impact on the community. For these reasons, the term "*democratic* review" is chosen for use in this article, with the hope that it better captures Australia's *parliamentary* model of review of enacted laws, which centres on the work of parliamentary committees.[6]

Executive dominance and parliamentary-based reviews of proposed and enacted laws have often been described inherently and unavoidably

3. See e.g. Tom Caygill, "Legislation Under Review: An Assessment of *Post Legislative Scrutiny* Recommendations in the UK Parliament" (2019) 25:2 Journal of Legislative Studies 295; Lydia Calpinska, "Post-Legislative Scrutiny of Acts of Parliament" (2006) 32:3 Commonwealth Law Bulletin 191; Kelly Richard & Michael Everett, "Post-Legislative Scrutiny", Australia, House of Commons Library Standard Note SN/PC/05232, 23 May 2013; Sarah Moulds, "Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia" (2019) 3:2 Journal of Southeast Asian Human Rights 185 [Moulds, "Parliamentary Rights Scrutiny"].

4. See e.g. Kelly & Everett, *supra* note 3.

5. Franklin De Vrieze & Philip Norton, *Principles of Post-Legislative Scrutiny by Parliaments* (London, UK: Westminster Foundation for Democracy, 2018) at 22–31.

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

weakened by executive dominance, particularly when it comes to delivering meaningful rights outcomes or legislative change.[7] As many Canadian scholars have observed[8] the combination of the principle of responsible government, and the need for Executive Government to hold a majority of seats within the Parliament, means that the Canadian parliamentary system is "one in which the Executive is highly dominant." As Blidook explains, the "particular nature of the fusion of the Executive and Legislature in the Westminster parliamentary system" can give rise to an "apparent lack of meaningful legislative activity undertaken by MPs."[9]

Similar observations have been made in Australia, where, as Feldman explains, governments generally seek to avoid scrutiny because they "value the freedom to make policy and to use their party's majority in the Parliament to give legislative force to it."[10] This executive control can dominate the outcomes generated by parliamentary committees, particularly when combined with the "fact that Australian political

7. E.g. Adam Fletcher, *Australia's Human Rights Scrutiny Regime* (Carlton, Victoria: Melbourne University Press, 2018); Carolyn Evans & Simon Evans, "Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights" (2006) Public Law 785; James Stellios & Michael Palfrey, "A New Federal Scheme for the Protection of Human Rights" (2012) 69:1 Austl Inst Admin LF 13; David Kinley & Christine Ernst, "Exile on Main Street: Australia's Legislative Agenda for Human Rights" (2012) 1:1 Eur HRL Rev 58; Rosalind Dixon, "A New (Inter)national Human Rights Experiment for Australia" (2012) 33:1 Pub L Rev 75; Hugh Mannreitz, "Commonwealth Statements of Compatibility—Small Steps, Early Days" (2012) 17:1 HR LC Bull 8; Bryan Horrigan, "Reforming Rights-Based Scrutiny and Interpretation of Legislation" (2012) 37:1 Alternative LJ 228; Lisa Burton & George Williams, "Australia's Exclusive Parliamentary Model of Rights Protection" (2013) 34:1 Statute Law Review 58; Julie Debeljak & Laura Grenfell, eds, *Law Making and Human Rights* (Toronto: Thompson Reuters, 2020) at 3 and 7; Andrew C Banfield & Rainer Knopff, "Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes" (2009) 44:1 Austl J Poli-Sci 13.

8. See e.g. Franks , *supra* note 2; Michael M Atkinson & Paul G Thomas, "Studying the Canadian Parliament" (1993) 18:3 Legis Stud Q 423; David C Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons* (Vancouver: UBC Press, 1997), online: <www.ubcpress.ca/mr-smith-goes-to-ottawa>; Savoie, *supra* note 2.

9. Blidook, *supra* note 2 at 32. Although this claim is challenged by Blidook's own research into the direct influence Canadian MPs have on policy outcomes including through the introduction of Private Members bills: *supra* note 2 at 4.

10. Feldman, *supra* note 1 at 98.

parties have some of the strongest party discipline among their Westminster cousins in the UK, Canada and New Zealand."[11]

In this article, we argue that this risk of executive dominance in Westminster parliaments—while ever present—is not insurmountable, particularly when post-legislative review occurs within a system of parliamentary committees working together. In so doing, an important distinction is drawn between the act of *introducing* a new law into Parliament (an almost exclusively *executive act*) and the process of *reviewing* or *scrutinizing* an existing law (which in Australia, takes place by members of Parliament groups together in parliamentary committees). The Australian experience suggests that while parliamentary review of enacted laws cannot be exclusively relied upon to improve rights scrutiny of existing laws, it can provide a beneficial supplement to other forms of rights scrutiny, including that conduct by the courts. In this way, the Australian experience offers a new perspective from which to consider Canada's approach to post-legislative review, and a challenge to the orthodox view that parliamentary-based reviews of proposed and enacted laws are fatally weakened by executive dominance. Moreover, it is argued that the flexibility and responsiveness of Australian forms of parliamentary post-legislative scrutiny, that are decidedly lacking in structured procedural frameworks (hence described as *ad hoc* in this article), make the below case studies particularly interesting to Canadian scholars and practitioners as they underscore the benefits of direct engagement with citizens and experts in the process of post-legislative scrutiny, when compared to other more tightly controlled forms of parliamentary committee review. In particular, as outlined below, it is the combination of deliberative and authoritative features of the Australian federal parliamentary committee system, along with the accepted scrutiny principles entrenched by the Scrutiny of Bills committee and the practice of appointing non-government chairs to Senate standing committees, that make it particularly well placed to offer effective post-enactment review.

At this point it is important to underscore the clear limitations of *democratic* review of enacted laws in Australia. Even the most well-regarded parliamentary committee lacks the legal and political authority to directly modify the content of the law or the way it is

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

implemented in practice. Parliamentary committees can make recommendations—which as the below case studies show are sometimes translated into legislative amendment or policy change—but are dependent on the Parliament itself to effect this change. For this reason, this article does not suggest that *democratic* review of enacted laws is a *sufficient* form of rights protection in Australia. Rather, it seeks to highlight how *democratic* review—even if occurring in an *ad hoc* way—can be a beneficial supplement to other forms of review of enacted laws, including judicial review, and can play an important role in reconnecting the people to the Parliament that represents them. In this way, it has parallels with the work of Canadian scholars such as Savoie,[12] Blidook,[13] Hiebert[14] and McKinnon[15] who each seek to identify ways in which the Canadian parliamentary system can effectively resist executive dominance and play a more active role in legislative scrutiny for the benefit of the community.

B. Judicial review of laws in Australia

Australia is a constitutional monarchy with a federal system of states and territories as well as a Federal Parliament. In each Australian jurisdiction, the doctrine of separation of powers applies to empower State Supreme Courts to determine whether the Executive and the Legislature have stayed within the boundaries of lawmaking power set out in each State's *constitution*.

At the inception of the Commonwealth of Australia in 1901, Chapter III of the *Australian Constitution* gave jurisdiction to the High Court of Australia to determine disputes involving challenges to the *constitutionality* of any federal law. This form of judicial review—in the mould of *Marbury v Madison*[16]—has proven to be a powerful limitation on the lawmaking power of the Federal Parliament and continues to define the federal relationship in Australia.

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12. Savoie, *supra* note 2.

13. Blidook, *supra* note 2.

14. Janet L Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82:7 Tex L Rev 1963 [Hiebert, "New Constitutional Ideas"].

15. Janice MacKinnon, "Breaking the Bargain: Public Servants, Ministers, and Parliament" (2005) 31:1 Canadian Public Policy/Analyse de politiques 120.

16. *Marbury v Madison*, 5 US 137, Cranch 137, 2 L Ed 60, 1803 US LEXIS 352.

The *Australian Constitution* also invests the High Court with the power to review administrative action and issue remedies against an officer of the Commonwealth "in all matters in which a writ of *mandamus* or prohibition or an injunction is sought" (s 75(v)). This means, for example, that an Australian citizen can access the High Court to challenge the *lawfulness* of a decision made about him or her by a federal minister under a federal statute, such as the *Social Security Act 1991* (Commonwealth of Australia). Similar avenues for judicial review exist at the state and territory level.

This provides two separate, constitutionally entrenched pathways for individuals to seek judicial review of enacted laws in Australia, however, in practice costs, legal technicalities,[17] and other factors combine to make judicial review a "technical and complex process."[18] A range of reforms have been implemented since federation to address these practical problems,[19] including establishing the Federal Court as a cheaper, faster forum to access judicial review of administrative decisions and enact the *Administrative Decisions (Judicial Review) Act 1977* (Commonwealth of Australia) to streamline the process at the federal level.[20] Despite these efforts, accessing judicial review as a practical form of post-enactment review of legislation remains largely out of reach for many Australians.

Judicial review as a practical forum for challenging the policy merits, effectiveness or rights impacts of enacted laws in Australia is also severely limited by the fact that the inherent jurisdiction provided to federal and state courts to conduct judicial review in Australia is limited

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17. For example, there are legal limits on accessing judicial review including limitations on standing—that is "who" can initiate judicial review of existing laws in Australia. The general rule is that an application must be made by a "person aggrieved" by a decision made or power exercised under the law being challenged or have a sufficient or "special" interest that matter to bring an action for judicial review (see e.g. *Administrative Decisions (Judicial Review) Act 1977* (Commonwealth of Australia), s 5; *Onus v Alcoa of Australia Ltd* [1981] HCA 50.1981 149 CLR 27 at 35-7 [Gibbs CJ]; Nathan Van Wees, "The Zone of Interests Test and Standing for Judicial Review in Australia" (2016) 39:3 UNSWLJ 1127.

18. Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Report No 129, (6 March 2016), c 15, "Judicial Review" at 415–416, online: <www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>.

19. Administrative Review Council Reference, ARC Consultation Paper No 1—Judicial Review in Australia (2011) at 20–22.

20. Robin Creyke & John McMillan, "Administrative Law Assumptions… Then and Now" in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Canberra: Australian National University, 1998) 1.

to either reviewing (a) the *constitutionality* of the law (which means establishing that the Parliament had no relevant "head of power" to authorize the legislation or that it breached an explicit or implied constitutional protection such as the implied right to vote) or (b) the *legality of the administrative decision* (that is whether the decision-maker stayed within the scope of statutory power, rather than whether the decision was good or bad). In addition, at the federal level, this system of judicial review exists without any constitutional bill of rights or legislative *Human Rights Act*. This means that the criteria applied by the courts when conducting judicial review of the *constitutionality* of an enacted law is *not* based on internationally recognized individual rights but instead focused on the delineation of legislative and executive power set out in the *Constitution*. Similarly, when determining the *lawfulness* of administrative action, the court's focus is not on whether the individual's human rights have been abrogated or ignored, but on whether the decision-maker has stayed within the boundaries of his or her statutory power.

This means that judicial review is unlikely to be a useful legal pathway for contesting that an existing Australian law has not been fully implemented, is having unintended consequences or disproportionately limits individual rights.

This is not to suggest that Australian judicial review can *never* deliver rights outcomes or lead to improvements in the merits or effectiveness of enacted laws. There have been examples of the decisions of the Australian High Court, resulting in significant and substantive rights protections for Australians.[21] However, the practical and legal limitations associated with judicial review in Australia highlight the value of supplementing this form of post-enactment legislative scrutiny with other forms of rights-based review, including review by parliamentary committees. It is these alternative, democratic modes of post-enactment review that this article turns.

C. Democratic review of laws in Australia

At the federal level, the Australian Parliament comprises two Houses—the House of Representatives (with members elected by constituents from equally sized electorates) and the Senate (with members elected

21. See e.g. *Lange v Australian Broadcasting Corporation*, (1997) 189 CLR 520; *Brown v Tasmania* (2017) 261 CLR 328; *Kable v Director of Public Prosecutions NSW* (1996) 189 CR 51.

on a proportional basis, to provide equal representation for each State, and members from the two territories).[22] The Senate is often described as a "House of Review"[23] and plays a central role in scrutinizing proposed and enacted laws. Each of the six states and territories have their own parliaments and their own systems of legislative scrutiny, some of which share features with this federal system.[24]

As noted above, there is no human rights legislation or constitutionally entrenched bill of rights at the federal level in Australia. Instead, Australia relies upon a combination of constitutional limitations on legislative power,[25] specific legislative provisions (such as anti-discrimination laws)[26] and common law principles[27] to protect and promote the individual rights of its people. Under this model, the Parliament effectively has the "final say" on any conflicting rights issues: provided it stays within the legislative limits set out in the *Constitution*, it can override common law protections and amend statutory provisions. The court's role in enforcing or upholding individual rights is far more limited and indirect than in jurisdictions with constitutional or legislative bills of rights. These features of the Australian legal system, which were complemented in 2011 by the establishment of a Parliamentary Joint Committee on Human Rights, have been described by Burton & Williams[28] as an "exclusively parliamentary model of rights protection." As Davis observes:

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22. Gabrielle Appleby, Laura Grenfell & Alexander Reilly, eds, *Australian Public Law*, 3rd ed (Oxford: Oxford University Press, 2018); Gabrielle Appleby, Laura Grenfell & Alexander Reilly, eds, *Australian Public Law*, revised 3rd ed (Oxford: Oxford University Press, 2019).

23. James R Odgers, *Australian Senate Practice*, 13th ed (Commonwealth of Australia: 2012) at 4–5.

24. Laura Grenfell, "An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?" (2015) 26:1 Public Law Review 19; Laura Grenfell & Sarah Moulds, "The Role of Committees in Rights Protection in Federal and State Parliaments in Australia" (2018) 41:1 University of New South Wales Law Journal 40.

25. For example, section 51 of the *Constitution* sets out the subject areas in which the federal parliament can validly enact laws; section 116 of the *Constitution* places limits on the federal parliament's power to make laws with respect to religion; and section 92 of the *Constitution* prohibits the making of laws that would impermissibly interfere with interstate trade.

26. For example, the *Race Discrimination Act 1975* (Commonwealth of Australia), the *Sex Discrimination Act 1984* (Commonwealth of Australia).

27. For example, Australian common law recognizes the "principle of legality," which can be applied by the courts as a tool for interpreting ambiguous legislation (*Re Bolton, Ex parte Beane* (1987) 162 CLR 514, 523; *Coco v R* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

28. Burton & Williams, *supra* note 7.

> [A]n historic commitment to parliamentary sovereignty has resulted in the Federal Parliament rejecting *judicial* oversight of human rights. Instead, Australia has a firm commitment to political rights review. Federal Parliament is empowered […] to act as the sole body responsible for the scrutiny of legislation to ensure compliance with human rights standards.[29]

Parliamentary committees—whether specifically assigned a rights protecting role or performing another scrutiny or inquiry function—are central to this parliamentary model as they provide the most practical forum for detailed consideration of the effectiveness, implementation and impact of existing laws. They also provide a source of concrete recommendations for legislative or policy changes that regularly have the effect of improving the rights compliance of proposed federal laws.

As Fletcher[30] and Feldman[31] observe, parliamentary-based reviews of proposed and enacted laws for human rights compliance are subject to significant limitations, particularly when it comes to delivering meaningful rights outcomes or legislative change. They warn that even if a parliamentary committee has the power to conduct an inquiry into an existing law and hear the views of experts and community members on its implementation, it will be unable to resist the political discipline applied to its membership. This means that its recommendations are unlikely to be critical of position held by the majority of its members, and its recommendations will not be enacted into law without support from those yielding political power in the Parliament. While this article contests the extent to which these warnings have been realized in the Australian experience, it is clear that parliamentary-based forms of rights scrutiny lack the direct enforceability of judicial-based forms of review and remain reliant on the exercise of legislative power by the Parliament as a whole. The relationship between different parliamentary committees and the executive and legislative branches of government in Australia is outlined in further detail below.

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29. Fergal F Davis, "Political Rights Review and Political Party Cohesion" (2016) 69:2 Parliamentary Affairs 213 [emphasis added].

30. Fletcher, *supra* note 7.

31. Feldman, *supra* note 1.

1. The federal parliamentary committee system in Australia

At the federal level, there is a sophisticated system of parliamentary committees that includes standing committees in both Houses, joint committees with members from both the House of Representatives and the Senate, and select committees established for particular purposes.[32] Within this system, there are committees with broad powers to conduct public inquiries into bills and other matters (described as "inquiry-based committees") and committees that scrutinize proposed laws with reference to certain prescribed criteria (described as "scrutiny committees"). The inquiry-based committees, such as the Senate Standing Committees on Legal and Constitutional Affairs (the Legal and Constitutional Affairs Committees), have powers to hold public inquiries into any bills or existing laws that are referred to them by Parliament[33] and can sometimes be referred to in legislative provisions as providing a post-enactment review function.[34] These committees can call for written submissions and invite witnesses to provide oral evidence and answer the committee members' questions. The membership of these committees is prescribed by the relevant Standing Orders, and sometimes includes a majority of government members and sometimes a non-government majority. These committees can also include "participating members" (other members of Parliament who join the committee for a particular inquiry), making them politically diverse and dynamic forums for engaging with contested policy issues.[35]

The Federal Parliament also includes a number of specialists, joint committees established by statute with specific functions and powers, including the power to conduct public and private inquiries into proposed and existing laws. One such committee is the Parliamentary Joint Committee on Intelligence and Security (the Intelligence and Security Committee), which is established under the *Intelligence Services Act 2001*(Commonwealth of Australia)[36] and is given a specific mandate to review the operation, effectiveness and implications of a number of specific national security laws. The Intelligence and Security Committee has a government chair and a majority of government members

32. Grenfell, *supra* note 24.

33. See e.g. Senate, *Standing Order No 5*: *Legislative and General Purpose*, Parliament of Australia.

34. See e.g. *Crimes Act 1914* (Commonwealth of Australia), Division 3A of Part IAA.

35. Sarah Moulds, *Committees of Influence* (Cham, Switzerland: Springer International, 2020), c 3 Moulds, [Moulds, "*Committees of Influence*"].

36. *Intelligence Services Act 2001* (Commonwealth of Australia), Part 4.

and is supported by a secretary and professional secretariat staff, including on occasion "secondee" staff from law enforcement and intelligence agencies who provide technical assistance to the secretariat.

These inquiry-based committees work closely with the *scrutiny-based* committees in the federal system, which include the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) established by Senate Standing Order No 24[37] and the Parliamentary Joint Committee on Human Rights (the Human Rights Committee) established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth of Australia) (s 4). While the Scrutiny of Bills Committee focuses only on *proposed* legislation, the Human Rights Committee can also examine existing acts for compatibility with human rights (s 7(b)) however, in practice it has exercised this power only rarely. This means that there is no *systematic* approach to reviewing enacted laws against rights criteria in Australia. In addition, the Australian Parliaments does not mandate post-enactment scrutiny as part of any committee's primary role, like the British Parliament or Indonesian *Badan Legislasi*[38] a range of different "trigger points"[39] for *democratic* review of enacted legislation at the federal level in Australia.

D. Trigger points for review of enacted laws outside of the courts in Australia

There are three main "trigger points" review of enacted legislation outside of the courts in Australia: the inclusion of a sunset clause in the original legislation; the inclusion of a review provision in the original legislation; and a specific referral by Parliament to an external review body empowered to undertake post-legislative scrutiny.

"Sunset clause" provisions come in many different forms: they can list a date when the whole act ceases to have legal effect (akin to automatic repeal); they can specify a date on which the legislation will lapse unless proactively reviewed and renewed by the Parliament (akin to a prompt for legislative affirmation).[40] In Australia, the latter approach

37. Senate, *Standing Order No 24: Scrutiny of Bills*, Parliament of Australia.

38. Franklin De Vrieze & Victoria Hasson, *Post-Legislative Scrutiny: Comparative Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for its Place in Democracy Assistance* (London, UK: Westminster Foundation for Democracy, 2017) at 14–17, 24–26.

39. De Vrieze, *supra* note 5 at 5.

40. Rishi Gulati, Nicola McGarrity & George Williams, "Sunset Clauses in Australian Anti-Terror Laws" (2012) 33 Adelaide Law Review 307 at 307.

to sunset clauses is most common, particularly with respect to legislation that is considered "extraordinary" in nature, or enacted in response to an emergency situation. Sunset clauses featured prominently in counter-terrorism case study below. In this context, sunset clauses were often included in original or amending legislation as a way for the Parliament (and in particular the non-government members of Parliament) to hold the Executive Government and its agencies to account for the extra-ordinary powers it was granted to investigate, prosecute, prevent and deter terrorism activity in Australia.[41]

In addition to sunset clauses, an increasingly common practice in Australian legislation is the use of explicit review clauses that mandate review of the entire act or parts of the act within a certain time period, by a particular review body. As discussed below, often a parliamentary committee is the review body referred to such review clauses, however, in certain subject areas (such as counter-terrorism) there is an emerging trend towards including external review bodies in addition, or as alternatives, to parliamentary bodies such as the Independent National Security Legislation Monitor or the Inspector General of Intelligence and Security (IGIS), both independent statutory office holders authorized to review aspects of Australia's counter-terrorism frameworks.

Other statutory bodies have review mandates that encompass a wide range of thematic areas of law making and are designed to "sound the alarm" about laws that are not being implemented correctly, having unintended consequences, or unduly infringing on individual rights. For example, the Australian Human Rights Commission (AHRC) has an explicit statutory mandate to provide advice about the human rights compliance of Australia's federal laws.[42] This power is often exercised in the form of a public inquiry into a gap in the law which culminates in a written report containing recommendations for legislative and policy change.

In addition to statutory bodies, the Australian federal system also provides opportunities for intergovernmental collaboration,[43] including

41. Moulds, *Committees of Influence*, *supra* note 35, c 3–5; see also Finn, John E, "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation" (2010) 48:3 Columbia Journal of Transnational Law 442; John Ip, "Sunset Clauses and Counterterrorism Legislation" (2013) 1 Public Law 74.

42. *Australian Human Rights Commission Act 1986* (Commonwealth of Australia), s 11.

43. Nicole Bolleyer, "Why Legislatures Organise: Inter-Parliamentary Activism in Federal Systems and its Consequences" (2010) 16:4 Journal of Legislative Studies 411.

through the Council of Australian Governments (COAG), which provides a forum for ministers and senior government officials from each of the Australian states and territories to join with their federal counterparts to develop nationally consistent approaches to legislative design or policy implementation. Sometimes the COAG has also provided a forum for post-enactment review. For example, the COAG played an important role in the development and review of Australia's counter-terrorism laws, particularly in the context of considerations of the referral of state powers and the enactment of complementary state and territory laws but was largely replaced by a "National Cabinet" approach in response to the COVID-19 pandemic.[44]

These different trigger points for review of existing laws outside of the courts in Australia underscore the dynamic nature of the concept of post-legislative scrutiny and its close relationship with the constitutional culture of the particular jurisdiction in which it is being carried out.[45] In jurisdictions such as Australia, where there is a general scepticism of the need for mandated or systematic approaches to post-enactment legislative review, it is not surprising that there often appears to be a blurry line between pre-enactment and post-enactment legislative scrutiny. As the case studies set out below demonstrate, it is often hard to distinguish between an organically driven process of law reform and what might be described as "formal" post-legislative scrutiny. This makes the Australian experience different to that in other parliaments that have more systematic approaches to both pre-enactment and post-enactment legislative scrutiny, and more clearly prescribed scrutiny criteria (such as human rights legislation or prescribed legislative standards). While this distinction has led some in Australia to advocate for significant changes to be made to the way laws are scrutinized before and after enactment,[46] this article suggests that despite its vulnerabilities and limitations the Australian experience has something to offer practitioners and scholars interested in evaluating or improving existing models of *democratic* review of existing laws.

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44. Jennifer Menzies, "Explainer: What Is the National Cabinet and Is It Democratic?" *The Conversation* (31 March 2020), online: <theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>.

45. Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Alexandria, Australia: Federation Press, 2016).

46. E.g. Fletcher, *supra* note 7; Debeljak & Grenfell, *supra* note 7.

1. Methodology

As Russell and Benton[47] observe in their work on legislative scrutiny in the UK, the complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means that evaluating their performance is not always straightforward. In particular, the potential for parliamentary committees to be dominated by party politics and/or by the Executive Government of the day is a real and significant risk. Many scholars[48] have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas. The evaluation framework employed in this research aims to address these challenges by adopting a multi-staged consideration of the impact of democratic legislative review by parliamentary committees that looks for three tiers of "impacts" and has regard to the views of relevant stakeholders and constituencies.[49] The three tiers of impacts considered are legislative impact (whether the review undertaken has directly changed the content of a law); public impact (whether the work of the committee has influenced or been considered in public or parliamentary debate or in subsequent commentary or review of the act); and hidden impact (whether those at the coalface of developing and drafting new laws turn their mind to the work of parliamentary committees when undertaking their tasks). This methodology also includes identifying the *key participants* in the legislative scrutiny system and looks for evidence of whether components of this system are seen as *legitimate* by some or all of these participants.

2. Case study 1: democratic review of enacted counter-terrorism laws

Australia's counter-terrorism laws provide a useful canvas for evaluating the effectiveness and impact of *democratic* review of enacted laws in Australia, and in particular, for considering the role parliamentary

47. Meg Russell & Meghan Benton, "Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches", Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London (UK) (24 June 2009).

48. Including: Malcolm Aldons, "Rating the Effectiveness of Parliamentary Committee Reports: The Methodology" (2000) 15:1 Legislative Studies 15(1) 22; Malcolm Aldons, "Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?" (2003) 18:1 Australasian Parliamentary Review 79; Michael C Tolley, "Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights" (2009) 44:1 Australian Journal of Political Science 41; Thomas Campbell & Stephen Morris, "Human Rights for Democracies: A Provisional Assessment of the Australian *Human Rights (Parliamentary Scrutiny) Act 2011*" (2015) 34:1 University of Queensland Law Journal 7; Evans & Evans, *supra* note 7.

49. Moulds, *Committees of Influence*, *supra* note 35, c 2.

committees play in this process and in rights protection.[50] Many of Australia's counter-terrorism laws were introduced in response to extraordinary international or domestic events or particular threats to Australia's national security,[51] and propose novel powers for intelligence and law enforcement agencies, and/or new criminal offences.[52] The majority of these laws remove or at least limit a large number of individual rights and freedoms, change the parameters of criminal liability and extend the powers of law enforcement and intelligence agencies. This makes studying the impact of parliamentary committees on the content and development of counter-terrorism laws not just interesting, but also critically important.

Previous research[53] has found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact. This is because a diverse range of participants in inquiries into proposed or existing laws provides "an opportunity for proponents of divergent views to find common ground" or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to "strike the right balance" between safeguarding security and preserving individual liberty when enacting counter-terrorism laws. This means that scrutiny bodies with the powers, functions and membership to attract a diverse range of participants have important strengths when it comes to contributing to the overall impact and effectiveness of the scrutiny system. A good example of a scrutiny body with these strengths in the Australian system is the Legal and Constitutional Affairs Committee. This inquiry-based Senate Committee has a high overall participation rate, engaging a broad range of senators,

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50. *Ibid*, c 1.

51. For example, the *Security Legislation Amendment (Terrorism) Bill 2002* (Commonwealth of Australia) (and related bills) were introduced as the Howard Government's legislative response to the 11 September 2001 terrorist attack on the United States; and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Commonwealth of Australia) was introduced in response to the threat posed by Australians engaged in terrorist activity overseas.

52. For example, the *Anti-Terrorism Bill (No 2) 2005* (Commonwealth of Australia) introduced a system of control orders and preventative detention orders available to law enforcement officers; and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003* (ASIO) introduced questioning and detention powers for ASIO officers.

53. Moulds, *Committees of Influence*, *supra* note 35, c 4; Kelly Paxman, "Referral of Bills to Senate Committees: An Evaluation", *Papers on Parliament*, No. 31, (1998) 76; Dominique Dalla-Pozza, "Refining the Australian Counter-Terrorism Framework: How Deliberative Has Parliament Been?" (2016) 27:4 Pub L Rev 271 at 273 ; Anthony Marinac, "The Usual Suspects? 'Civil society' and Senate Committees", Paper submitted for the Senate Baker Prize, (2003) at 129, online: <www.aph.gov.au/binaries/senate/pubs/pops/pop42/marinac.pdf>.

public servants and submission makers. Unlike some other parliamentary committees in the Australian system, this committee was also able to attract participation from a broader cross section of the community, rather than rely on "the usual suspects"[54] such groups or individuals who are already aware of the bill's existence, or who are contacted by politicians or their staff, or by the committee secretariat. However, our research also found that scrutiny bodies that focused on preserving and strengthening relationships with a smaller, less diverse group of decision-makers also played an important role in the broader legislative scrutiny system, particularly when those relationships were with government agencies or expert advisers. This is illustrated by the influential nature of the recommendations made by the specialist Intelligence and Security Committee, which has a tightly prescribed membership (*Intelligence Services Act 2001* (Commonwealth of Australia), Part 4, s 28(2)) and works closely with staff from law enforcement and intelligence agencies when inquiring into existing national security laws.[55]

This reveals an important tension in the role and impact of different types of *democratic* review bodies and highlights a particular strength of parliamentary committees working together as a system. On the one hand, the ability to attract and reflect upon a diverse range of perspectives when inquiring into a particular law has positive deliberative implications for the capacity of the scrutiny system to improve the overall quality of the law-making *process*, and to identify rights concerns or other problems with the content and implementation of the law. On the other hand, other committee attributes, such as specialist skills and trusted relationships with the Executive, can also lead to a consistently strong legislative impact, which can also have important, positive results.

One of the most surprising findings of past research into the impact of *democratic* review of enacted counter-terrorism laws relates to the significant legislative impact different components of the scrutiny system, and in particular parliamentary committees, were able to have on the content of Australia's counter-terrorism law. For example, in many instances, the recommendations for legislative change made by parliamentary committees were implemented in full by the Parliament

54. *Ibid*; Paxman, *supra* note 53 at 81.

55. Sarah Moulds, "Forum of Choice? The Legislative Impact of the Parliamentary Joint Committee of Intelligence and Security" (2018) 29:4 Public Law Review 41.

in the form of amendments to an act.[56] In addition, the types of changes recommended by parliamentary committees were generally rights-*enhancing*. In other words, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny)—but the legislative changes made as a result of scrutiny were significant and positive from a rights perspective. For example, past research[57] suggests that the work of parliamentary committees directly contributed to amendments that:

i) narrowed the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of "terrorist act";

ii) inserted defences within the terrorist act offences for the provision of humanitarian aid;

iii) ensured the power to proscribe terrorist organizations is subject to parliamentary review; and

iv) reinstated the court's discretion to ensure that a person receives a fair trial when certain national security information is handled in "closed court," and limited the potential to exclude relevant information from the defendant in counter-terrorism trials.

These findings can be described as "surprising" because they challenge the orthodox view that governments generally resist making changes to legislation that they have already publicly committed to and introduced into Parliament.[58] In this way, they speak to what Blidook[59] has described as MP's role as *legislators* and *policy actors* rather than merely onlookers to Savoie's Executive dominated "court government".

Interestingly, this research also found that the strength of this legislative impact varied from committee to committee. For example, the Intelligence and Security Committee was a particularly strong performer when it came to translating recommendations into legislative change

56. For a detailed list of examples, see Moulds, *Committees of Influence*, *supra* note 35, c 5.

57. *Ibid*.

58. Feldman, *supra* note 1; see Janet L Hiebert, "Governing Like Judges" in Tom Campbell, Keith D Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 40; Janet L Hiebert, "Legislative Rights Review: Addressing the Gap Between Ideals and Constraints" in Hunt, Cooper & Yowell, *supra* note 1, 39.

59. Blidook, *supra* note 2, 33; Donald J Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

(achieving a 100% strike rate during the period from 2013 to 2018) and improving the rights compliance of the laws.[60] The committees with broader mandates and more open membership, such as the Legal and Constitutional Affairs Committees, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law making, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes. Our research further suggests that the scrutiny experience studied also makes it clear that it was not just the inquiry-based committees that had a legislative influence on the case study acts; the technical scrutiny committees (such as the Scrutiny of Bills Committee) also played an important, if less direct, role. It appears that the work of these committees armed the inquiry-based committees and their submission makers with the information and analysis they needed to substantiate and justify the legislative changes they recommended.

The counter-terrorism laws case study also demonstrates the impact of post-enactment review by parliamentary committees on the way laws are debated in the parliament and the community and the role these committees play in establishing a "culture of rights scrutiny" by providing a forum for parliamentarians to share their views on the effectiveness, impact and rights implications of existing laws law. This because the Australian system of parliamentary committees helps parliamentarians to weigh competing arguments or different policy options,[61] either through the public process conducted by the inquiry-based committees, or through the consideration of written analysis previously provided by the technical scrutiny committees, including the Scrutiny of Bills or Human Rights Committees. This weighing process becomes particularly relevant when considering the enactment of counter-terrorism laws which, as Dalla-Pozza[62] explains, are regularly accompanied by the claim that counter-terrorism laws must strike an appropriate "balance" between safeguarding Australia's national security and preserving individual rights and liberties.

Another area of public impact considered in past research relates to the way *intra-parliamentary* and *extra-parliamentary* components of the scrutiny system work together to effect legislative change when

60. Moulds, *Committees of Influence*, *supra* note 35, c 5.

61. See John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge: Cambridge University Press, 1998); Dalla-Pozza, *supra* note 53.

62. Dalla-Pozza, *supra* note 53.

reviewing counter-terrorism laws,[63] including review by the courts and review by specific statutory agencies. Judicial review of Australia's counter-terrorism laws during the period of 2002 to 2008 provided an interesting insight into the relationship between the post-enactment review work of parliamentary committees and that conducted by the courts, and the relevant strengths and weaknesses when it comes to rights protection. In particular, the counter-terrorism cases from this period reveal, on the one hand, decidedly weak outcomes when it comes to improving the rights compliance of Australia counter-terrorism laws, but on the other, important trigger points for additional democratic forms of post-enactment review to take place, including by parliamentary committees. For example, in *Thomas v Mowbray*[64] the Australian High Court was asked to determine whether the control order regime set out in the *Commonwealth Criminal Code* was consistent with the constitutionally entrenched doctrine of separation of powers.[65] The majority of the High Court upheld the validity of the control order regime, despite strong concerns from rights advocates about its potential to allow police to deprive someone of their liberty prior to being charged with a criminal offence.[66] While not often directly referring to the work of parliamentary committees, the Justices of the High Court and counsel appearing drew attention to the same features of the control order regime that had previously attracted the attention of the Scrutiny of Bills Committee, the Legal and Constitutional Affairs Committee and the Parliamentary Joint Committee on Intelligence and Security.

The prosecution and conviction of Faheem Khalid Lodhi also provided one of the earliest opportunities for procedure-related terrorism laws to be implemented in practice, including the use of closed court proceedings and substantial in camera argument.[67] Lohdi was convicted of 3 of 4 terrorism offences charged, and sentenced to 20 years' imprisonment. This sentence was upheld on appeal,[68] despite the court finding that Lohdi's conduct was at the early stages of planning. This successful

63. Moulds, *Committees of Influence, supra* note 35, c 6.

64. *Thomas v Mowbray* (2007) 233 CLR 307.

65. Andrew Lynch, "Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law" (2008) 8:2 OUCLJ 159.

66. See e.g. Geoffrey Lindell, "The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*" (2008) 10:3 Constitutional Law and Policy Review 42.

67. *R v Lodhi* [2006] NSWSC 691.

68. *Lodhi v R* [2007] NSWCCA 360 [Lodhi CA].

prosecution provided an important early insight into how the courts would approach the relatively "novel" aspects of the preparatory terrorist offences and the new procedural rules introduced during the Howard period.[69] It also gave rise to a separate challenge[70] to the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Commonwealth of Australia) on the ground that these laws permitted a person accused of committing terrorist offences to be sentenced through a process incompatible with the exercise of federal judicial power.[71] The Act was found not to be inconsistent with the exercise of judicial power, on the basis that it was concerned with pre-trial disclosure of evidence rather than setting out a process for excluding evidence during the trial itself.[72]

The prosecution of Izhar ul-Haque in 2006, charged with training with a terrorist organization while overseas, also led to a constitutional challenge—this time relating to whether the Commonwealth had the power to legislate terrorist-related offences with extraterritorial reach. The constitutional validity of the terrorist organization offences was ultimately upheld in the case of *Ul-Haque v R*,[73] where the laws were found to be validly enacted under the Commonwealth's "external affairs" power. This case also led to an independent inquiry that prompted a broader review into the activities and oversight of intelligence agencies, and their relationship with law enforcement, in light of their new legislative powers.[74]

In the counter-terrorism case study, it is also possible to identify important relationships between the post-enactment review conducted by parliamentary committees and that conducted by external statutory agencies. For example, when reviewing proposed new sedition offences, the Legal and Constitutional Affairs Committee recommended that they

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69. Nicholas Broadbent, "*Lodhi v R* [2007] NSWCCA 360" (2007) 14:1 Austl ILJ 227, online: <www.austlii.edu.au/au/journals/AUIntLawJl/recent.html>.

70. *R v Lodhi* [2006] NSWSC 571; *Lodhi* CA *supra* note 68.

71. George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35:3 Melbourne University Law Review, pp 1136–1176 at 1156, online: <webcache.googleusercontent.com/search?q=cache:LMTk-mCej-4J:https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1703437/35_3_13.pdf+&cd=3&hl=en&ct=clnk&gl=au>.

72. *Lodhi* CA, *supra* note 68.

73. *Ul-Haque v R*, [2006] NSWCCA 241.

74. Robert Cornall, & Rufus Black, *Independent Review of the Intelligence Community, Australian Government Department of Prime Minister and Cabinet, Australian Government* (16 November 2011), online: <www.pmc.gov.au/resource-centre/national-security/2011-independent-review-intelligence-community>.

be examined by the Australian Law Reform Commission (ALRC), which in turn made a number of recommendations for substantive changes to be made.[75] These ALRC recommendations were later implemented into law in the form of a new law, introduced some five years after the original offences were introduced.

Another way inter-parliamentary and extra-parliamentary scrutiny bodies work together is for the extra-parliamentary body to draw upon the materials prepared by and for parliamentary committees when conducting their post-enactment scrutiny of particular laws. For example, the 2006 Sheller Review drew extensively upon the work of previous parliamentary committee inquiries when engaging in post-enactment scrutiny of the first tranche of Australia's counter-terrorism laws, that included powers to question and detain persons suspected of engaging in terrorist activity, and powers to proscribe organizations as "terrorist organizations." While many improvements had already been made to these laws at the pre-enactment scrutiny stage, the Sheller Review was able to give added force to parliamentary committee recommendations previously rejected or incompletely implemented at the time of enactment. These recommendations were later reflected in the provisions contained in the *National Security Legislation Amendment Act 2010* (Commonwealth of Australia).

The impact of the post-enactment review of Australian counter-terrorism laws by parliamentary committees is not always in plain view, but that should not dilute the potential for this democratic form of review to offer an important supplement to other forms of rights protection and post-legislative scrutiny. Investigations into the "hidden" or "behind the scenes" impact of parliamentary committee review of Australia's counter-terrorism laws suggest that scrutiny bodies that attract a high rate of participation will be in the minds of those responsible for developing and implementing legislation, and prudent proponents of bills will adopt strategies to anticipate or avoid public criticism by such bodies. In this way, the inquiry-based parliamentary committees (like the Legal and Constitutional Affairs Committee) can have a strong "hidden impact" on the development of laws.[76] In addition, this research shows that the "technical scrutiny" committees (such as the Scrutiny of Bills Committee) can also generate a strong hidden impact—not because of

75. Australian Law Reform Commission (ALRC), *Fighting Words: A Review of Sedition Laws in Australia*, Report 104, 2006.

76. Moulds, *Committees of Influence*, *supra* note 35, c 7.

their capacity to generate public interest, but rather because the "technical scrutiny" criteria these bodies apply is entrenched in the practices of public servants and parliamentary counsel.

Investigating "hidden impact" also revealed written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments. Some of these documents, in particular the *Legislation Handbook*, *Drafting Directions and Guide to Commonwealth Offences*,[77] translate the abstract principles underpinning the scrutiny bodies' mandates into practical checklists to be applied during particular stages of the legislation development process. In this way, these documents may help create a "culture of rights scrutiny" within the public service. Understanding these different forms of "hidden impact" helps uncover new opportunities to improve the effectiveness and impact of *democratic* review of existing laws, in addition to exposing some of the Australian system's key challenges and weaknesses.

3. Case Study 2: Parliamentary review of automated government decision-making and social security debts (the "Robodebt" experience)

The next case study explored in this article is distinctly different in character to the counter-terrorism example because it also showcases the role parliamentary committees play in post-enacted review in Australia, and the intersection between democratic and judicial forms of review of existing laws.

The phrase "Robodebt" has entered the Australian lexicon as a short cut reference to the use of automated decision-making systems by Australia's Department of Human Services (DHS) to identify overpayments and debts among clients and to generate letters to clients requiring repayments be made. The legal authority for this form of debt recovery and automated information matching system were supported by the provisions of the *Social Security (Administration) Act 1999* (Commonwealth of Australia) and the *Guidelines on Data Matching in Australian Government Administration*[78]. The use of this automated decision-making

77. Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook,* (February 2017), online: <www.pmc.gov.au/resource-centre/government/legislation-handbook>.

78. Australian Government, Office of the Australian Information Commissioner, *Guidelines on Data Matching in Australian Government Administration*, 24 June 2014.

system attracted media attention, and gave rise to public complaints that erroneous letters were being sent to current and former Centrelink recipients demanding the repayment of purported debts.[79] In these media reports, it was asserted that the DHS had replaced human oversight of debt notifications with an online porthole that had to be used to resolve a contested debt. During the period from November 2016 to March 2017, the Australian Council for Social Services estimated that around 200 000 social security recipients or former recipients were affected by the Overseas Citizens of India (OCI) program, with DHS sending approximately 20 000 letters per week.[80] The purported debts raised by the OCI program came to be known colloquially as "Robodebt."

On 8 February 2017, the Australian Senate referred the issues relating to the use of the OCI program and the implementation of the "Better Management of Social Welfare System" initiative to the Community Affairs References Committee for inquiry and report by 10 May 2017.[81] The Community Affairs References Committee is an inquiry-based committee with broad powers to call for submissions, examine witnesses and hold public hearings. As a "references" committee, it also has a non-government majority and a non-government chair, as its membership often includes a number of "participating members," particularly those senators from minor parties or the opposition.

The Committee's terms of reference were broad and included a focus on the impact of the automated debt collection processes on those individuals receiving debt notices and their families, as well as the administration and management of customers' records by DHS, including provision of information by DHS to customers receiving multiple payments. The terms of reference also included the adequacy of Centrelink complaint and review processes, and the accuracy of the data

79. See e.g. Christopher Knaus, "Centrelink Urged to Stop Collecting Welfare Debts After Compliance System Errors", *The Guardian* (14 December 2016), online: <www.theguardian.com/australia-news/2016/dec/14/centrelink-urged-to-stop-collecting-welfare-debts-after-compliance-system-errors>; Henry Belot, "Centrelink Debt Recovery: Government Knew of Potential Problems with Automated Program", Australian Broadcasting Corporation (11 January 2017), online: <www.abc.net.au/news/2017-01-12/government-knew-of-potential-problems-with-centrelink-system/8177988>.

80. Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Service, *Committee Hansard*, 8 March 2017 at 1.

81. Parliament of Australia, Senate Standing Committee on Community Affairs Committee, *Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative*, Report (21 June 2017.)

matching between DHS and the Australian Taxation Office, including the error rates in issuing of debt notices.

Running concurrently to the Community Affairs Committee's inquiry was a Commonwealth Ombudsman investigation into the operation of automated debt recovery system.[82] The Ombudsman's Office reported on its findings on 10 April 2017, making eight recommendations to DHS to improve the operation of the OCI system.

Following an extensive, four-month-long public inquiry that included nine public hearings, 156 submissions, 1 400 emails from the public and the examination of 140 witnesses, the Community Affairs Committee made three "headline" recommendations, starting with the recommendation that automated debt recovery program should be "put on hold until all procedural fairness flaws are addressed, and the other recommendations of this report are implemented."[83] These "headline" recommendations were accompanied by further detailed recommendations. For example, the Community Affairs Committee made it clear that DHS was bound to adhere to "all relevant legislation, guidelines and protocols"[84] when seeking to prove that a client owed a debt, including verifying income data in order to calculate it. In other words, DHS was required to take additional human-based steps to satisfactorily discharge the legal burden of proof it held with respect verifying income data in order to calculate a debt.[85]

The Community Affairs Committee's report also included a strong focus on the right to procedural fairness—a central principle in *judicial* oversight of executive decision-making, particularly judicial review. In its concluding paragraphs, the Committee observed that:

> [a] lack of procedural fairness is evident in every stage of the [automated debt recovery process]. The system was so flawed that it was set up to fail.[86]

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82. The Ombudsman initiated the own-motion investigation in January 2017 in response to an increase in the number of complaints made to that office from people who had incurred debts under the OCI system. Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System, Report No 02, Commonwealth Ombudsman* (April 2017), online: <www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

83. The Senate, Community Affairs References, *supra* note 78, Recommendation 1 at 9.

84. *Ibid*, Recommendation 2 at 6.12.

85. *Ibid*, Recommendations 4–6.

86. *Ibid*, Conclusion at 6.2.

Problems with procedural fairness standards extended beyond communication and also infected the process of challenging debts, with the Committee observing that "many individuals were unaware of the possibility of an error in the calculations, their right to have a review of that purported debt or how to undertake a review" and that some were "so daunted by what they saw as an insurmountable task, to challenge a large government department, they simply gave up and paid what they felt was a debt they did not owe."[87] This led the Committee to recommend that Centrelink provides anyone impacted by the automated debt recovery process with "clear and comprehensive advice on the internal and external reassessment, review rights and processes."[88] The Community Affairs Committee further recommended that community legal services be provided with additional funding to "meet the community need for legal advice,"[89] and that the Administrative Appeals (AAT) Tribunal's budget also be increased to deal with increased workload.[90] In this way, the committees' report indicated an attempt to have an indirect dialogue with the administrative and judicial review process—highlighting both legal and practical aspects of the "Robodebt" experience that would require future consideration by the courts or tribunals.

Following the tabling of the Community Affairs Committee's report, the "Robodebt" issue continued to attract political attention, particularly in the Senate, where in July 2019 a second reference was made to the Community Affairs Committee to conduct an inquiry into the matter. Within the Committee's terms of reference were the "review process and appeals process for debt notices" and "the use and legality of the debt collection processes"[91] used by DHS. The Community Affairs Committee's public hearings with respect to this second reference focused heavily on: the legal basis of the online compliance program; the progress in implementing the changes announced in response to the earlier parliamentary inquiry; and the impact that these changes have had on individuals, the community sector and Centrelink staff.

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87. *Ibid*, Recommendation 12 at 6.25.

88. *Ibid*, Recommendation 14 at 6.30.

89. *Ibid*, Recommendation 15 at 6.31.

90. *Ibid*, Recommendation 16.

91. Dr Darren O'Donovan, *Submission to the Senate Community Affairs Committee Inquiry into Centrelink's Compliance Programme Community Affairs Committee*, Centrelink's compliance program Submission 15 at 11–13, online: <www.aph.gov.au/DocumentStore.ashx?id=*209fc70d*-5e95-4ce3-908a-808e50c70997&subId=670261>.

By this time many of those affected by the "Robodebt" program, and those responsible for its development and implementation, had begun to seek legal advice about their options or liability pursuant to judicial review proceedings in court. A class action for those Centrelink clients affected was launched by Gordon Legal in 2018,[92] and by November 2019, Services Australia announced that it would no longer raise compliance debts based only on averaged income data, and that it would suspend its debt recovery process while it reviewed debts based on averaged income data.[93] On 29 May 2020, the Commonwealth made a statement accepting that many of the "Robodebts" were unlawful and, consequently, that it will refund 470 000 debts to 373 000 people.[94] Claimants in the class action continue to pursue damages against the Commonwealth for negligence in the operation of the "Robodebt" scheme.[95]

This case study highlights the particular strengths parliamentary forms of review of existing laws might hold over alternative forms of oversight of administrative action, such as merits or judicial review, and how the two forms of legislative review might work together to complement each other. In particular, the *deliberative capacity* of the Community Affairs Committee in the "Robodebt" Inquiry, as evidenced by its ability to attract very large numbers of public submissions, provided a solid basis for individuals affected by the automated government decision-making system to identify each other and share experiences, which in turn provided a strong foundation for class action to proceed in the courts. This is particularly evident from the sections of the Committee's report and recommendations that relate to procedural fairness. These passages reflect and refine the direct voices of individuals who were denied procedural fairness as a result of the reliance on automated decision-making process. This type of democratic engagement with social security rights and procedural

92. *Amato v Commonwealth of Australia* [2019] FCA 611.

93. Terry Carney, "Government to Repay 470,000 Unlawful Robodebts in What Might Be Australia's Biggest-Ever Financial Backdown", *The Conversation* (29 May 2020), online: <theconversation.com/government-to-repay-470-000-unlawful-robodebts-in-what-might-be-australias-biggest-ever-financial-backdown-139668>.

94. Luke Henriques-Gomes, "Robodebt: Government to Refund 470,000 Unlawful Centrelink Debts Worth $721M", *The Guardian* (29 May 2020), online: <www.theguardian.com/australia-news/2020/may/29/robodebt-government-to-repay-470000-unlawful-centrelink-debts-worth-721m>.

95. Luke Henriques-Gomes, "Government Argues Centrelink Robodebt Letter Did Not 'Compel' Recipients to Provide Documents", *The Guardian* (31 July 2020), online: <www.theguardian.com/australia-news/2020/jul/31/government-argues-centrelink-robodebt-letter-did-not-compel-recipients-to-provide-documents>.

fairness facilitated by the non-government chaired Committee on Community Affairs can be seen as distinct from, but supplementary to the work of the courts or statutory oversight bodies such as the Ombudsman, whose remit and communication style is circumscribed by more specific legal tests or criteria. In addition, the Committee's extensive access to both compelling individual stories (which attracted strong media attention) and subject-area experts (which highlighted technical flaws in the automated systems) provides a "safe space" for government members of the Committee to challenge party political discipline and advocates for policy and legislative change. In other words, even the government members of the Committee on Community Affairs had incentives to be *legislators* instead of government cheerleaders, providing a form of meaningful post-enactment review that supplemented other forms of *judicial* or tribunal based review.

4. Case study 3: parliamentary review of the Australian federal government's response to the COVID-19 pandemic

Another lens through which to observe Australia's approach to democratic scrutiny of existing laws can be seen in the context of the federal government's response to the COVID-19 pandemic. Unlike the other two case studies considered in this article, this example remains highly dynamic in nature, making it unreasonable to draw anything else than preliminary observations. However, even at this relatively early stage it is possible to see trends emerging that replicate those described above and appear to support the findings discussed below when it comes to the important role parliamentary committees play in *democratic* review of enacted laws in Australia.

On 8 April 2020, the Australian Senate resolved to establish a Select Committee on COVID-19 ("the COVID-19 Committee") to inquire into the federal government's response to the COVID-19 pandemic (Parliament of Australia, *Senate Journal*, 2020). The Senate has given the COVID-19 Committee a long lead time to report, with a deadline of 30 June 2022; however the Committee has been receiving submissions from the public on a rolling basis. The terms of reference of this special committee include "the Australian Government's response to the COVID-19 pandemic" and "any related matters."[96] The Senate COVID-19

96. Parliament of Australia, "Journals of the Senate – 2020", Parliament of Australia (2020), online: <www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate/2020>.

Committee has a majority of non-government senators and is chaired by Senator Katy Gallagher, Labour Party Senator from the Australian Capital Territory. A long list of other senators can be part of the work of the COVID-19 Committee as "participating" members—an interesting feature of the Senate Committee system not replicated in all Australian states.

The breadth of the COVID-19 Committee's mandate is deliberately wide and does not denote a specialist "rights" focus nor demand technical scrutiny of existing legislation. Instead, it is designed to provide a forum for a broader discussion of the impacts and effectiveness of the Government's COVID-19 response. On the one hand, this broad mandate suggests that the Committee may be well placed to respond to the dynamic features of the Government's COVID-19 response, and question and test a wide range policy and legislative measures. On the other hand, it gives rise to genuine questions as to whether the Committee has the capacity to undertake a detailed or holistic analysis of the Government's response, or whether key components of existing or proposed laws and policies made in this area will slip through without adequate scrutiny.

While it is clear that the COVID-19 Committee does not have a "technical scrutiny" role, this does not exclude or limit the Committee from reviewing the extent to which any laws made or proposed to be made in response to the pandemic impact or infringe on individual rights. As noted above with respect to the counter-terrorism case study, other forms of emergency law making suggest that it is the way different committees within the federal parliamentary system work together that influences the quality of rights scrutiny that occurs, rather than the work of any one individual committee alone.[97] A preliminary look at the work of federal parliamentary committees in response to the COVID-19 pandemic suggests that this type of multi-committee engagement may also be a determinative factor when it comes to rights scrutiny in this context.

Like the counter-terrorism case study, scrutiny of Australia's legislative response to COVID-19 has involved a number of different committees working together, including inquiry-based committees (predominately the COVID-19 Committee) working with technical scrutiny committees

97. Moulds, *Committees of Influence*, *supra* note 35, c 8.

such as the Standing Committee for Delegated Legislation (the "Delegated Legislation Committee"), and the statutory-based Human Rights Committee, both of which have reviewed pre-existing emergency management laws relied upon to authorize swift government action in response to the pandemic (such as the *Biosecurity Act*) as well as newly enacted laws and regulations rushed through to fill the legal gaps in the policy response to COVID-19. The Delegated Legislation Committee has also "sounded the alarm" on the concerning trend towards exempting key parts of the Government's COVID-19 response from the scope of its scrutiny through the process of exempting certain forms of delegated legislation (such as directives or determinations) from the operation of the standard disallowance process.[98]

This form of *democratic* review of pandemic response legislative is particularly critical in the Australian context where the *Australian Constitution* specifically authorizes the Executive Government to "respond to a crisis be it war, natural disaster or a financial crisis."[99] This limits the prospects of successful judicial review actions to challenge the scope of lawmaking power delegated to governments under emergency management legislation; however, at the same time this unprecedented transfer of power to the Executive pulls against Australia's well-entrenched doctrine of separation of powers, giving rise to strong public demands for corresponding increases in parliamentary scrutiny and external, independent oversight. This makes the work of parliamentary committees, such as the Senate Select Committee on COVID-19 (the COVID-19 Committee), particularly critical—especially at the federal level where there is no statutory or constitutional framework to protect human rights.

So far, the Senate Select Committee on COVID-19 has been a particularly strong performer when it comes to providing robust scrutiny of the Federal Australian Government's legislative response to COVID-19 and when holding members of the Executive account for their decision-making.[100] The Committee has also been active in sharing its work with the community, including through a variety of online and social media platforms, which has helped to generate

98. Parliament of Australia, "Senate Standing Committee for the Scrutiny of the Delegated Legislation", Parliament of Australia (2020), online: <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation>.

99. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at para 233.

100. Moulds, "A Deliberative Approach", *supra* note 6.

sustained media and public interest in its work. At the time of issuing its Interim Report (8 December 2020) the opposition-chaired, non-government-controlled committee has received 505 written submissions, held 37 public hearings (conducted via video link and other related technologies), handled hundreds of questions taken on notice by government agencies and provided daily social media and email updates to submission makers and other interested parties. While it has yet to issue a final report, the work of the Senate Select Committee on COVID-19 has already influenced the shape of key legislation (for example the legislation providing the legal framework for the COVIDSafeApp and the JobKeeper and JobSeeker support programs) and played a central role in the public debate on the responsibility for particularly vulnerable sectors within the Australian community and economy (including the aged care sector and child-care sector).

The COVID-19 Committee's approach to scrutinizing COVID-19 legislation is relatively *ad hoc* and includes a heavy reliance on the written submissions of key legal organizations and bodies (such as the Law Council of Australia) and the work of the "technical scrutiny" committees. This can be seen in the context of the COVIDSafeApp implemented by the Australian Government with the objective of enhancing pre-existing contact tracing techniques designed to limit the spread of the COVID-19 virus. The COVIDSafeApp was initially introduced without a legislative framework, and was instead supported by a Declaration by the Minister for Health[101] that set out some limits on the use and sharing of information collected via the app, and was referred to by the Government as providing important privacy safeguards. The lack of legislative framework for the app was recognized by many legal experts as a serious shortcoming and was the subject of questioning by the COVID-19 Committee which eventually led to the introduction and enactment of the *Privacy Amendment (Public Health Contact Information) Act 2020*, demonstrating early evidence of the legislative impact of this committee. The work of the COVID-19 Committee also provided the backdrop for a broader public debate in Australia about whether the COVIDSafeApp is necessary having regard to the nature of the threat posed by the COVID-19 and whether the app constitutes a *proportionate* way to respond to the COVID-19 virus. These questions

101. Australian Government, Federal Register of Legislation, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020* (Commonwealth of Australia).

formed part of the Senate Select Committee's public inquiry hearings in April and May 2020, which drew from the analysis contained in the following two reports from the Human Rights Committee.[102]

These criteria (relating to necessity and proportionality) have become an important feature of the scrutiny provided by parliamentary committees when evaluating the Australian Government's response to the pandemic. The COVID-19 Committee has been in a strong position to detail information from the Government on these matters, to supplement information already contained in the Statements of Compatibility with Human Rights that must be included when a bill is tabled. Although focused on *proposed* rather than existing legislation, the Statements of Compatibility—and perhaps more importantly the Human Rights Committee's consideration of these statements—have helped to develop within the Parliament a familiarity with the concepts of legitimacy, necessity and proportionality—even if these concepts are not always explicitly associated with international human rights law. For example, past Statements of Compatibility and previous Human Rights Committee reports can be used to assist committees such as the COVID-19 Committee and its submission makers to make an informed assessment as to the legitimate objectives being sought by the proposed statutory provision or delegated legislation, and whether alternative, less rights-restrictive means might exist for achieving the same legitimate end.

The Senate Select Committee on COVID-19 has also shown promising signs of generating and testing legislative and policy alternatives when scrutinizing laws involving excessive or unjustified interference with individual rights, or excessive transfers of power to the Executive. For example, alternatives to the Australian COVIDSafeApp have been and continue to be developed around the world, including in Germany, that offer lessons for Australia about how to refine and recalibrate contact tracing efforts to minimize impacts on personal privacy.[103] These models were put to Government officials by the Senate Select Committee during its April and May 2020 hearings, and the efficacy of the

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102. Parliamentary Joint Committee of Human Rights, *Report 5 of 2020: Human Rights Scrutiny of COVID-19 Legislation*, Commonwealth of Australia, 2020; Parliamentary Joint Committee of Human Rights, *Report 6 of 2020: Human Rights Scrutiny*, Commonwealth of Australia, 2020.

103. Caroline Compton, "Trust, COVIDSafe, and the Role of Government" (11 May 2020), online (blog): *Australian Public Law* <auspublaw.org/2020/05/trust,-covidsafe,-and-the-role-of-government/>.

COVIDSafeApp, as well as the way COVIDSafeApp status is treated in the community, has continued to feature in the questions posed by the COVID-19 Committee.

The Australian Government's swift response to the COVID-19 pandemic has depended in large part upon the utilization of delegated powers conferred on it by pre-existing public health emergency legislation. Parliament has also enacted new legislation that delegates additional powers to the Government, resulting in a combined delegation of power to government officials not seen since the Second World War.

The capacity of the Australian legal system to facilitate such rapid and extensive delegation of power to the Executive may well be one of the nation's key strengths when it comes to responding quickly and flexibly to crises and emergencies. However, it also gives rise to serious risks if this delegation is not also accompanied by corresponding measures to ensure Government accountability and to give meaning to the constitutionally entrenched principle of responsible government.[104] This can be seen with respect to legislative instruments made under authority of the *Biosecurity Act 2015* (Commonwealth of Australia) following the 18 March 2020 Declaration by the Governor General that a human biosecurity emergency exists in Australia. The Declaration triggers sweeping powers (some powers are referred to as "special emergency powers") for the Health Minister to determine any requirements necessary to prevent or control the "emergence, establishment or spread" of COVID-19 within, or in a part of, Australian territory, or to another country.

The federal Health Minister has issued several Determinations (a form of legislative instrument) under these powers. The Determinations have included: a ban on overseas travel; restrictions on cruise ships entering or leaving Australia; the introduction of the COVIDSafeApp (discussed above); and restrictions placed on remote communities populated by Aboriginal and Torres Strait Islander communities. In addition, several "human health response zones" have also been declared that provide for the detention and treatment of people within a designated area who have entered Australia during the emergency period. The Determinations are limited insofar as they operate only within the declared period of the pandemic emergency, although the

104. *Williams v Commonwealth of Australia [No 1]* (2012) 248 CLR 156 at para 61 (French CJ).

Act makes provision for extension of the emergency period. In making the determinations, the Health Minister is required only to be "satisfied" that they are "necessary" to prevent or control the disease.

These Determinations are exempted from the usual pre-legislative oversight of legislative instruments and are not disallowable by Parliament[105] (*Biosecurity Act 2015* (Commonwealth of Australia), s 477(2). As a consequence the Determinations have not been placed before the Senate Scrutiny of Delegated Legislation Committee, and nor has the Health Minister provided a statement of compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth of Australia) on their proportionate compliance with international human rights standards.

The importance of this pre-legislative oversight of powers has been highlighted by the Human Rights Committee's reports into the Determinations that have sought the Minister's response in regard to their compatibility with certain human rights, particularly freedom of movement, equality and non-discrimination. Even more significantly, the Act makes provision for the Determinations to prevail over "any other Australian law" in a "Henry VIII" clause that elevates the Determinations as primary law that overrides enactments of the Commonwealth and State parliaments.

The lack of full parliamentary oversight of these Determinations, combined with the relatively low standards by which the Health Minister is to determine the necessity of issuing the Determinations, gives rise to significant concerns that the extraordinary scope of power bestowed on the Executive in terms of emergency will not be subject to robust parliamentary oversight or review and highlights the limits of Australia's "exclusively parliamentary" model of rights protection. However, this example also shows the potential for the *system* of committees within the Australian Parliament to work together to provide *democratic* review of existing laws, including legislative instruments. This can be seen by the fact that the scope of the Determinations made under the *Biosecurity Act* and their impact on individual rights has been the topic of some focus for the Senate Select Committee on COVID-19 in its deliberations, and has led to public examination of key members of the Executive responsible for developing and implementing these

105. *Biosecurity Act 2015* (Commonwealth of Australia), s 477(2).

laws.[106] In addition, while the Delegated Legislation Committee may have been excluded from reviewing the Determinations, the Human Rights Committee was able to review these instruments and issued a report highlighting the fact that these powers have coercive force with strong criminal penalties for failure to comply and also operate to override all other laws. The government-majority Human Rights Committee warned that the promulgation of these laws must not be done for reasons of expediency at the expense of rigorous legislative oversight. While this warning failed to change the content of the legislative instrument, it continues to provide a powerful example of the potential for meaningful *democratic* review of enacted laws by parliamentary committees in Australia, and the ability of members of Parliament to act as *legislators* (rather than government cheerleaders) even in the context of emergency lawmaking. Executive dominance may have secured the passage of the law, but the process of *democratic* review revealed important tensions within the government's legislative response to the COVID-19 pandemic and provided a safe space for senior and junior government MPs to agitate for a more nuanced approach to balancing competing human rights.

II. DEMOCRATIC POST-LEGISLATIVE REVIEW AS A BENEFICIAL SUPPLEMENT TO JUDICIAL REVIEW OF ENACTED LAWS

This article has sought to challenge the conventional view that parliamentary-based review of legislation is inherently vulnerable to Executive dominance in Westminster-inspired parliaments like those in Australia and Canada. Using three case study examples, this article aims to highlight how parliamentarians *can* actively participate as "*legislators* and *legitimate policy* actors"[107] and shift the "centre of government" away from what Savoie has described as "court government"[108] towards a more participatory, deliberative form of *democratic* review.

It is important not to overstate the findings from the three case studies. The role of the Executive remains powerful throughout each

106. Sarah Moulds, "Scrutinising COVID-19 Laws: An Early Glimpse Into the Scrutiny Work of Federal Parliamentary Committees" (2020) Alternative Law Journal 1 [Moulds, "Scrutinising COVID-19"].

107. Blidook, *supra* note 2 at 33.

108. Savoie, *supra note* 2 at 635

of the experiences described above, and the rights outcomes deriving from parliamentary-based post-enactment review remain largely dependent on implementation by Executive Government. However, the Australian experience shows that parliamentary committees can work together *as a system* when reviewing existing laws—interacting in an *ad hoc* way with each other and other forms of review and oversight—in a way that can have rights enhancing results. The outcomes are not always predictable, and certainly further improvements are needed to build the rights-protecting capacity of the Australian parliamentary committee system;[109] however, the three case studies explored in this article provide an insight into the conditions or features of a parliamentary committee system that works to enhance its overall impact on the shape of existing laws, and the way laws are made in the future. This includes *deliberative capacity*, as evidenced by the Community Affairs Committee in the "Robodebt" Inquiry, to attract large numbers of public submissions and to provide a solid basis for individuals affected by automated government decision-making systems to identify each other and share experiences. It also includes the authoritative capacity to influence legislative outcomes and develop meaningful relationships with public servants responsible for developing and implementing new and existing laws. For example, the political characteristics of the Parliamentary Joint Committee of Intelligence and Security (PJCIS) gave it particular strength when scrutinizing existing counter-terrorism law, as did the PJCIS's access to relevant executive agencies, capacity to hold "private briefings" and track record of developing practical recommendations that can be readily implemented by government. The findings from the case studies discussed above demonstrate, for example, that when undertaking their post-enactment scrutiny role, parliamentary committees can:

i) document in detail the impact of the proposed law on the legal rights and interests of individual citizens, and "sound the alarm" when executive powers are introduced and used within insufficient safeguards to define their scope and oversee their use;

il) identify, articulate and recommend amendments to more precisely define the limits of executive power and provide more "trigger points" for parliamentary oversight of executive power;

109. Moulds, *Committees of Influence*, *supr*a note 35, c 8–10.

iii) increase the nature and extent of parliamentary oversight of executive power, by introducing changes to proposed legislation that place enforceable limits on executive powers, and introduce mechanisms to disallow delegated legislation or "sunset" aspects of primary legislation; and

iv) improve political accountability by providing an evidence-based decision-making forum to test assumptions and generate new, less rights intrusive legislation options to achieve legitimate policy ends.

Perhaps most importantly, these three examples demonstrate the role parliamentary committees play in giving an accessible, practical, democratic "voice" to the task of reviewing and amending existing laws that are either not working effectively, having unintended consequences or disproportionate impacts on individual rights. As the Law Commission of England and Wales[110] has explained, parliamentary-based review of existing laws has advantages over court-based review as it is not confined to limited legal criteria related to "*lawfulness*" or "standing" but enables more holistic consideration of whether the enacted laws are being implemented in practice and whether they are giving effect to the "policy aims avowed" and not having any unintended consequences. When parliamentary committees engage in this type of review, the process can also provide a "new and significant role for Parliament" by closing the "scrutiny loop" that begins with pre-enactment scrutiny and ends with post-enactment review.[111]

Democratic review of enacted laws also works as a safeguard against the misuse of power by governments and as a way to monitor whether laws are benefiting citizens as originally intended[112] and in this way has the potential to "increase legislators" focus on implementation and delivery of policy aims and to improve government accountability.[113] This can be quite different from the experience of judicial review, where the focus of governments and legislators is on avoiding liability for a particular action or inaction in an acutely adversarial environment.

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110. Law Commission of England and Wales, "Post-Legislative Scrutiny", Legislationline (October 2006), online: <www.legislationline.org/download/id/2124/file/UK_Post_Legislative_Scrutiny_2006.pdf>.

111. Calpinska, *supra* note 3.

112. De Vrieze, *supra* note 5.

113. *Ibid*.

While *judicial* or court-based review often involves a "trade off" between rights and interests, where one clear legal pathway is endorsed or declared, *democratic* review of existing laws has the potential to engage participants in an active search for a common ground between different values or interests.[114] This in turn sees decision-makers engaging in reflection and sometimes, changing their mind. This approach is in line with legal empowerment and social justice theorists who suggest that a more *engaged* electorate, with greater access to the law-making *process*, could improve the legitimacy of parliamentary law-making and thus enhance the levels of trust associated with key political and law-making institutions.[115] To this end, even the *ad hoc* Australian system of post-legislative scrutiny offers real benefits when it comes to generating public confidence in democratic institutions and rebuilding a positive relationship between the governors and the governed.

Taken together these experiences suggest that parliamentary committees can and do play an important role when it comes to providing *democratic* review of existing laws in Australia, and when it comes developing a culture of rights scrutiny inside and outside of the Parliament. They suggest, for example, that the Australian scrutiny culture is primarily concerned with the need to ensure that:

i) the expansion of executive power comes with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to judicial review;

ii) Parliament has access to information about how government departments and agencies are using their powers and if the law is designed to respond to an extraordinary set of circumstances, Parliament should be required to revisit the law to determine whether it is still needed; and

iii) any departure from established common law principles (such as the establishment of new criminal offences or restrictions on freedom of movement or speech) must be clearly defined, justified and accompanied by safeguards and independent oversight.[116]

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114. Ron Levy & Graeme Orr, *The Law of Deliberative Democracy* (London, UK: Routledge Publishing 2016).

115. See e.g. Sandra Liebenberg, "Participatory Justice in Social Rights Adjudication" (2018) 18:4 Human Rights Law Review 623 at 633.

116. Moulds, "Parliamentary Rights Scrutiny", *supra* note 3.

These features of the emerging rights scrutiny culture within the Australian Parliament draw upon well-established scrutiny criteria applied by one of Australia's very first parliamentary committees—the Scrutiny of Bills committee—and feed into rather than pull against the principle of parliamentary sovereignty that continues to resonate with parliamentarians across the political divide in Australia. This gives this democratic form of legislative review distinct cultural advantages over judicial-based forms of rights review that are common in other Westminster democracies' (namely constitutional or legislative) bills of rights and that has been repeatedly rejected at the federal level in Australia. The emerging rights scrutiny culture within the Australian Parliament also has the potential to appeal to members of the Executive Government in their role as *legislators* and *policy actors*,[117] by focusing on increasing parliamentary oversight of executive action (which can be responsive to changes in political or popular discourse), rather than empowering the courts to enforce more rigid limitations on governmental power or executive policy making.

Of course, the Australian *ad hoc* approach to post-enactment review can also be described as unsystematic and inconsistent, and decidedly parochial in nature.[118] This is undoubtedly true when Australia's human rights record is scrutinized by international human rights bodies who have long criticized the lack of structural, systematic protection of individual rights within the Australian legal system. Rather than contest this criticism, this article aims to provide a new perspective from which to judge Australia's approach to post-enactment review. It aims to shine a light on the valuable (if unpredictable) interaction between parliamentary committees, rights scrutiny principles and the Australian community and the potential for this form of democratic rights review to complement other forms of review within the Australian system. Just as Canadian scholars such as Blidook and Savoie sought to uncover the direct and indirect contribution Canadian MPs make in the legislative process, this article highlights the uniquely Australian approach to navigating the "fusion of the Executive and Legislature"[119] within the Australian parliamentary system.

117. Blidook, *supra* note 2 at 33.

118. See e.g. Fletcher, *supra* note 7; Burton & Williams, *supra* note 7.

119. Blidook, *supra* note 2 at 32.

CONCLUSION

By providing a glimpse into the democratic scrutiny of three very different areas of federal law making in Australia, this article has offered a fresh perspective from which to evaluate the role of parliamentary committees in post-legislative review and explored the relationship between different forms of review of enacted legislation in Australia. It has emphasized the benefits of engaging a range of different parliamentary committees and extra-parliamentary bodies in the process of legislative review and challenged the assumption that the dynamic political nature of parliamentary committees renders them largely ineffective at rights protection and inherently difficult to evaluate or measure. The article has also recognized the key limitations of relying on *democratic* review of existing legislation as a form of robust rights protection, while at the same time attempting to document some of the emerging features of the particularly Australian rights scrutiny culture at the federal level.

It is important to note that the research summarized in this article does not seek to provide a comprehensive account of *democratic* review of enacted laws in Australia or a holistic account of the legal and political frameworks and debates associated with the case studies. Rather it seeks to provide a snapshot or glimpse into some of the central (and often surprising) features of the Australia approach to *democratic* review of existing laws, and offers some preliminary thoughts on how this Australian experience might be relevant to others seeking to evaluate or improve the quality of review of enacted laws in other comparative jurisdictions.

Rather than dismissing the value of other forms of review of existing laws or other forms of rights protection, the article has argued that *democratic* review of enacted laws, particularly that conducted by parliamentary committees, has distinct advantages over *judicial* or tribunal-based review of enacted laws, and provides beneficial supplement to other forms of rights protection in Australia.

Moreover, it is argued that the flexibility and responsiveness of Australian forms of parliamentary post-legislative scrutiny, that are decidedly lacking in structured procedural frameworks, make the case studies particularly interesting to Canadian scholars and practitioners as they underscore the benefits of direct engagement with citizens and experts in the process of post-legislative scrutiny, when compared with other more tightly controlled forms of legislative review. In particular,

it is the following features of the Australian federal parliamentary committee system that make it particularly well placed to offer effective post-enactment review:

i) committees with a combination of deliberative and authoritative attributes that can interact with each other when reviewing enacted laws;[120]

ii) committees with access to private briefings by senior public servants and other senior officials and the capacity to create a safe space for key (political) decision-makers to change their minds;[121] and

iii) committees that are willing to experiment with innovative means of engaging with the community, particularly with witnesses and submissions makers that transcend the "usual suspects."[122]

As emphasized throughout this article, it is not argued that *democratic* review of enacted laws in Australia is *sufficient* to address the gap in other legal protections for human rights or to provide holistic improvement of existing laws. Rather, this article seeks to highlight how *democratic* review—even if occurring in an *ad hoc* way—can be a beneficial supplement to other forms of review of enacted laws and can play an important role in reconnecting the people to the Parliament that represents them. In this way, it has parallels with the work of Canadian scholars as such as Savoie[123], Blidook[124], Hiebert[125] and McKinnon[126] who each seeks to identify ways in which the Canadian parliamentary system can effectively resist executive dominance and play a more active role in legislative scrutiny for the benefit of the community.

120. Moulds, "A Deliberative Approach", *supra* note 6.
121. Grenfell & Moulds, *supra* note 24.
122. Marinac, *supra* note 53; Paxman, *supra* note 53.
123. Savoie, *supra* note 2.
124. Blidook, *supra* note 2.
125. Hiebert, "New Constitutional Ideas", *supra* note 14.
126. MacKinnon, *supra* note 15.