

3. Scrutiny Mechanisms

Contents

Summary	53
Policy development and legislative drafting	55
Drafting and policy development	55
Explanatory material	56
Consultation on draft Bills	57
Parliamentary scrutiny processes	58
Senate Standing Committee on Regulations and Ordinances	58
Senate Standing Committee for the Scrutiny of Bills	60
Parliamentary Joint Committee on Human Rights	61
Senate Standing Committee on Legal and Constitutional Affairs	62
Parliamentary Joint Committee on Intelligence and Security	63
Parliamentary Joint Committee on Law Enforcement	64
Other review mechanisms	65
Australian Human Rights Commission	65
Independent National Security Legislation Monitor	65
Australian Law Reform Commission	65
Efficacy of guidance materials and pre-legislative processes	66
Efficacy of scrutiny and review mechanisms	67
Overlapping parliamentary scrutiny	67
Statements of compatibility and explanatory memoranda	69
Time constraints and parliamentary consideration of Committee reports	71
Review bodies	75
Conclusion	75

Summary

3.1 Existing and proposed laws are scrutinised for compatibility with rights and principles, including the traditional rights and freedoms identified in the Terms of Reference for this Inquiry, at a number of stages and by a number of different agencies, bodies and institutions. This chapter outlines some of these processes for testing compatibility, with a particular focus on scrutiny of draft legislation by parliamentary Committees, and considers how the processes may be improved.

3.2 Scrutiny of laws for compatibility with rights may be seen as part of a ‘democratic culture of justification’—that is, a culture in which ‘every exercise of public power is expected to be justified by reference to reasons which are publicly

available to be independently scrutinised for compatibility with society's fundamental commitments'.¹

3.3 Such scrutiny can provide a check on legislative interferences with rights. There is also an important democratic rights value in good, transparent processes and debate about all laws, but particularly those laws that limit long-held and fundamental individual rights and freedoms.

3.4 Professor Janet Hiebert and others have written about processes of 'legislative rights review' and the 'importance of confronting whether and how proposed legislation implicates rights adversely and engaging in reasoned judgment about whether the initiative should be amended or is nevertheless justified'.² This can happen throughout the legislative process:

From the early stages of bureaucratic policy development of identifying compatibility issues and advising on more compliant ways to achieve a legislative initiative, through to the Cabinet process of deciding whether to proceed with legislative bills, and ultimately in parliamentary deliberation about whether to approve legislation or put pressure on the government to make amendments.³

3.5 Scrutiny can also continue after a law is enacted. This chapter discusses the role and functions of some of the agencies and institutions that scrutinise existing laws for compatibility with rights.

3.6 Policy makers are provided with assistance at the policy development and legislative drafting stages. Additionally, there is a long history of subjecting bills to scrutiny by parliamentary committees. Scrutiny may also continue after enactment where bodies such as the Australian Law Reform Commission (ALRC) and the Australian Human Rights Commission (AHRC) review legislation. Others such as the Independent National Security Legislation Monitor (INSLM) are tasked with undertaking reviews for specific areas warranting particular attention.

3.7 This chapter discusses a number of areas for further improvements in the processes that provide checks on legislative encroachments on rights. These include:

- additional guidance and assistance for policy makers during the policy development and legislative drafting stages;

1 Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

2 Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39, 40. See also, Hunt, above n 1; David Kinley, Finding and Filling the Democratic Deficit in Human Rights in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 29; John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Adrienne Stone, Jeffrey Goldsworthy and Tom D Campbell (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, Ltd., 2013).

3 Hiebert, above n 2, 40.

- the quality of explanatory material and statements of compatibility, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- the level of overlap between the work of the three parliamentary scrutiny committees;⁴
- the time available for scrutiny committees to conduct their scrutiny; and
- the extent to which the Parliament considers scrutiny committee reports.

3.8 This chapter discusses a variety of approaches to implement such further improvement. In doing so, it draws upon analogous approaches in other jurisdictions, parliamentary inquiries and expert commentators.

Policy development and legislative drafting

3.9 Policy is usually developed by government departments. The Office of Parliamentary Counsel (OPC) drafts legislation on instructions provided by the government department with policy responsibility. Policy development and legislative drafting are not undertaken in a rights vacuum. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook* and *Legislative Instruments Handbook*,⁵ in drafting directions prepared by the OPC,⁶ and other guidance documents.⁷

Drafting and policy development

3.10 The *Legislation Handbook* published by the Department of Prime Minister and Cabinet states that the Attorney-General's Department should be consulted on legislative proposals which may be 'inconsistent with or contrary to an international instrument relating to human rights,' in particular the *International Covenant on Civil and Political Rights* (ICCPR).⁸

3.11 The drafting directions prepared by the OPC specifically alert policy makers to the types of provisions that have drawn adverse comment from the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).⁹

4 The Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on Human Rights and Senate Standing Committee on Regulations and Ordinances are required to scrutinise Commonwealth laws for encroachments on rights.

5 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999) [8.19]; Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) ch 6.

6 Office of Parliamentary Counsel (Cth), *Drafting Directions*.

7 See, eg, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011); Office of Parliamentary Counsel (Cth), *OPC's Drafting Services—A Guide for Clients* (2012).

8 Department of the Prime Minister and Cabinet (Cth), above n 5, [6.34].

9 See, eg, *Drafting Direction No 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* 2013 pt 7.

3.12 The Attorney-General's Department has published a number of guidance documents for policy makers about human rights issues.¹⁰ Guidance sheets are available on a range of issues including, fair trial and fair hearing rights, the presumption of innocence, retrospective criminal laws, and freedom of movement.¹¹ The Attorney-General's Department also provides guidance on 'permissible limitations' on rights included in the ICCPR.¹² This is based on the Siracusa Principles,¹³ which broadly invite an analysis of whether the limitation is prescribed by law, in pursuit of a legitimate objective, rationally connected to its stated objective, and proportionate to the achievement of the objective. The guidance sets out useful questions to ask in conducting this analysis.

3.13 The Attorney-General's Department also provides guidance and performs a scrutiny role in specific subject areas. For example, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides guidance on a variety of issues relating to criminal offences, including when it is appropriate to: impose strict or absolute liability; reverse the burden of proof; or abrogate the privilege against self-incrimination.¹⁴ It also guides policy makers to relevant areas within the Attorney-General's Department for other issues, such as when it may be appropriate to abrogate legal professional privilege.¹⁵ The Security and Intelligence Law Branch of the Attorney-General's Department scrutinises all draft Bills and legislative instruments containing secrecy provisions. It provides an advisory assessment as to whether the provision is appropriately tailored and adequately justified and may also suggest alternative drafting.

Explanatory material

3.14 Since 1983, it has been standard practice for government Bills to be accompanied by an explanatory memorandum, and since 2003, all Commonwealth regulations must be accompanied by an explanatory statement. However, the history of explanatory statements and explanatory memoranda goes back to 1932 and the 1950s respectively.¹⁶

10 Attorney-General's Department, *Tool for Assessing Human Rights Compatibility* <www.ag.gov.au>. This includes guidance sheets on a number of issues, including, for example, fair trial and fair hearing rights, the presumption of innocence, prohibition on retrospective criminal laws, and freedom of movement.

11 Ibid.

12 Attorney-General's Department, *Permissible Limitations* <<http://www.ag.gov.au>>.

13 See Ch 2.

14 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.2.6], [4.3], [9.5].

15 Ibid [9.5.8].

16 Explanatory statements have accompanied Commonwealth regulations since the inception of the Regulations and Ordinances Committee in 1932. Explanatory memoranda in the modern sense have commonly accompanied government bills since the 1950s. In the first half of the 20th Century, they took the form of comparative memoranda, which inserted the proposed amendments into the parent Act, demarking the proposed additions and deletions: Patrick O'Neill, 'Was There an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament' (Parliamentary Library, Parliament of Australia, 2006).

3.15 Explanatory material is prepared by the government department with policy responsibility for the Bill or instrument, for approval by the relevant Minister. It contains the policy objectives of the Bill or legislative instrument, and contains a short explanation about each of the clauses. Explanatory material ought, where possible, to address matters relating to the principles considered by the Scrutiny of Bills Committee¹⁷ or Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee).¹⁸

3.16 The OPC may also indicate, as part of the drafting process, that particular matters—such as those that have been of interest to the Scrutiny of Bills Committee—should be explained in the explanatory memorandum.¹⁹

3.17 Since 2011, all legislation and disallowable instruments must also be accompanied by a ‘statement of compatibility’. Statements of compatibility must include an assessment of whether a Bill or disallowable instrument is compatible with human rights.²⁰ These are prepared by the relevant department for approval by the relevant Minister.

3.18 Following the introduction of this requirement, the Attorney-General’s Department developed a tool for assessing human rights compatibility. Templates and example statements of compatibility assist departments in the drafting of statements of compatibility.²¹ The Attorney-General’s Department provides specific assistance and advice to departments on statements of compatibility where requested and assists policy makers in responding to requests for further information from the Parliamentary Joint Committee on Human Rights (Human Rights Committee).²²

3.19 Additionally, the Human Rights Committee has published a guidance note on drafting statements of compatibility, setting out ‘the Committee’s approach to human rights assessments and its requirements for statements of compatibility’.²³

Consultation on draft Bills

3.20 A draft version of a Bill (an exposure draft) will sometimes be released to the public, particularly where ‘the proposed measures will have a significant impact on groups in the community’.²⁴ Cabinet endorsement or Prime Ministerial approval (for Bills that do not include measures endorsed by Cabinet) is required before an exposure draft is released.²⁵ This is in addition to consultation with other government agencies, which provides an additional opportunity for potential encroachments on rights to be brought to the attention of policy makers.

17 Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19].

18 Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) [177].

19 Office of Parliamentary Counsel (Cth), above n 7, [68].

20 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8–9.

21 Attorney-General’s Department, above n 10.

22 The Human Rights Committee’s scrutiny role and processes are discussed below.

23 Parliamentary Joint Committee on Human Rights, *Drafting Statements of Compatibility* (Guidance Note No 1, Parliament of Australia, 2014).

24 Department of the Prime Minister and Cabinet (Cth), above n 5, [4.7(i)].

25 *Ibid* [7.9].

Parliamentary scrutiny processes

3.21 Parliamentary debate is the ultimate forum for the scrutiny of, and judgments about, encroachments on rights. However, in order to ensure the Parliament is well-informed in conducting such debates, a number of scrutiny committees specifically consider whether Commonwealth laws encroach upon rights. This process began with the Regulations and Ordinances Committee, established in 1932, to review delegated legislation.²⁶ The scrutiny function was expanded with the introduction of the Scrutiny of Bills Committee in 1981. Both Committees have a longstanding history of conducting a technical scrutiny function, without specifically assessing the policy merits of a particular provision.²⁷ In 2011, the Human Rights Committee was established to consider a set of human rights specifically tied to Australia's international human rights obligations.

3.22 Additionally, the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee), Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) and the Senate Standing Committee on Legal and Constitutional Affairs²⁸ (Legal and Constitutional Affairs Committee) review legislation which may have an impact on rights, including in relation to migration, counter-terrorism and national security legislation.

Senate Standing Committee on Regulations and Ordinances

3.23 The Regulations and Ordinances Committee was established in 1932. It is comprised of six Senators. It is required to review and, if necessary, report on whether disallowable instruments:²⁹

- are in accordance with the applicable statute;

26 The original terms of reference provided for the referral of '[a]ll Regulations and Ordinances' to the committee "for consideration and, if necessary, report there on. In 1979 A disallowable instrument is a legislative instrument subject to disallowance under the *Legislative Instruments Act 2003* (Cth). Under s 42 of the Act, a Senator or MP may, within 15 days of the tabling of a legislative instrument, move a notice of motion to disallow the instrument. If the motion is agreed to, the instrument is disallowed, and ceases to have effect. If the motion is not resolved or withdrawn within 15 days, the instrument is deemed to be disallowed, and ceases to have effect. A similar instrument cannot be made within six months after disallowance, unless the House that disallowed the regulation provides approval.

27 Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19, 22; Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

28 At the commencement of each parliament, eight legislative and general purpose committees are appointed. These are the Community Affairs, Economics, Education and Employment, Environment and Communications, Legal and Constitutional Affairs and Rural and Regional Affairs committees. Each of these committees is comprised of a legislation committee and a references committee. The legislation committee deals with bills, estimates processes and departmental oversight. The references committee conducts inquiries into matters referred to it by the Senate.

29 Under s 44 of the *Legislative Instruments Act 2003* (Cth), a number of legislative instruments are not subject to disallowance (exempt instruments). The Regulations and Ordinances Committee does not scrutinise such instruments. However, the Human Rights Committee is required to examine all legislative instruments (including exempt instruments), as part of its scrutiny function.

- unduly trespass on personal rights and liberties;³⁰
- unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal;³¹ or
- contain matters more appropriate for parliamentary enactment.³²

3.24 The Committee is supported by a secretariat and a legal adviser.³³ The legal adviser reviews all disallowable instruments against the Committee's scrutiny principles, and provides a report on compliance.³⁴

3.25 Legislative instruments must be registered, and then tabled before both Houses of Parliament within 6 days of registration. Copies of the instruments are sent to the legal adviser, who provides the Committee with a report on compliance with the Committee's scrutiny principles.

3.26 Where an instrument raises a concern with respect to the matters being tested, the Regulations and Ordinances Committee usually writes to the relevant rule-maker³⁵ for further explanation, or to seek an undertaking for specific action to resolve the concern.³⁶ This process is usually completed within 15 sitting days of the instrument being tabled, to allow the Committee to seek disallowance of an instrument if its concerns are not allayed.

3.27 Where the scrutiny process is not completed, the Regulations and Ordinances Committee may move a notice of motion for disallowance in order to provide it with sufficient time to complete its review, and retain its power to seek disallowance if concerns about compliance with its scrutiny principles are not addressed.³⁷ The power to seek disallowance is a powerful tool, which acts as a discipline on rule-makers. The Senate has adopted all disallowance motions recommended by the Regulations and Ordinances Committee.³⁸

30 The Regulations and Ordinances Committee appears to have interpreted this statement broadly, allowing the Committee to scrutinise disallowable instruments to determine whether they encroach upon a variety of rights-type issues.

31 Scrutiny under this principle reflects the development of administrative law and its greater emphasis on merits and judicial review of government decisions.

32 Senate, Parliament of Australia, *Standing Order 23* (24 August 1994).

33 The appointment must be approved by the President of the Senate: *Ibid* cl (9).

34 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013), [1.12].

35 Delegated legislation is made by a wide variety of executive and administrative authorities, including Ministers, Heads of Departments and agencies, and their delegates.

36 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013) [1.13].

37 *Ibid* [1.14]–[1.15].

38 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 424.

Senate Standing Committee for the Scrutiny of Bills

3.28 The Scrutiny of Bills Committee was established in 1981, with its functions at first carried out by the Legal and Constitutional Affairs Committee.³⁹ In May 1982, the Scrutiny of Bills Committee was constituted as a separate Committee, and in 1987 as a Standing Committee of the Senate.⁴⁰ The scrutiny principles applied by the Committee are drawn from those of the Regulations and Ordinances Committee, and require it to consider whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.⁴¹

3.29 The Committee is comprised of six Senators, and is supported by a secretariat made up of a secretary, principal research officer and legislative research officer. The Committee is also supported by a legal adviser,⁴² who reviews all Bills against the scrutiny principles, and provides a report on whether and how the principles are breached. Based on this advice, the Committee publishes, on each Wednesday of a Parliamentary sitting week, an *Alert Digest* containing an outline of each of the Bills introduced in the previous sitting week, along with any comments in relation to a particular Bill.

3.30 If concerns are raised in the *Digest*, the Committee writes to the Minister responsible for the Bill, inviting a response to its concerns, and sometimes suggesting an amendment. The Minister's response may include a revised version of a section of legislation or explanatory memorandum, or may better explain why the Bill has appeared in its current form. If the response does not allay the Committee's concerns, it will draw the provisions in question to the Senate's attention through its Report, and leave it to the Senate to determine the appropriateness of the relevant encroachment on rights and freedoms in the Bill.

3.31 The Committee's concerns, the Minister's responses and the Committee's conclusions are published in a Report. Since February 2015, the Committee also

39 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny—A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills* (Senate, Parliament of Australia, 1991), 6.

40 Ibid 5–7.

41 Senate, Parliament of Australia, *Standing Order 24* (15 July 2014).

42 Ibid cl (8).

publishes a newsletter highlighting key scrutiny issues. It focuses on ‘information that may be useful when Bills are debated’.⁴³

Parliamentary Joint Committee on Human Rights

3.32 The Human Rights Committee was established under s 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*Parliamentary Scrutiny Act*). It must examine all Bills and legislative instruments (including exempt instruments) that come before either House of Parliament for compatibility with human rights, and report to both Houses on that issue.⁴⁴ The Human Rights Committee is an extension of existing parliamentary rights review mechanisms, and is explicitly focused on international human rights instruments.

3.33 The *Parliamentary Scrutiny Act* defines human rights as those rights and freedoms declared in the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESR),⁴⁵ as well as a number of other international instruments relating to rights in the ICCPR and ICESR.⁴⁶

3.34 The Committee is comprised of 10 members, drawn from the Senate and the House of Representatives,⁴⁷ and is supported by a legal adviser and secretariat, which includes two human rights lawyers.⁴⁸ If the Committee is not initially satisfied with the human rights compatibility of a Bill, it will write to the relevant Minister seeking further detail. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and call for witnesses.⁴⁹

3.35 On each Tuesday of a Parliamentary sitting week, the Committee publishes a report commenting on provisions raising human rights concerns, or where insufficient information has been provided to allow it to undertake an analysis. The Committee also comments on responses received to comments it has made in earlier reports.

43 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Senate Scrutiny of Bills Committee News* (2015), 1.

44 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a). The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) formed part of the government response to the National Human Rights Consultation. The National Human Rights Consultation Committee recommended the adoption of federal human rights legislation modelled on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT): Attorney-General’s Department *National Human Rights Consultation Report* (2009).

45 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

46 Namely, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

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

48 Parliamentary Joint Committee on Human Rights, *Annual Report 2012–13* (2013) [1.15]. The appointment of the legal adviser must be approved by the Presiding Officers.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7177 (Harry Jenkins).

3.36 The Committee seeks to determine ‘whether any identified limitation of a human right is justifiable’⁵⁰ by reference to a proportionality analysis.⁵¹

Senate Standing Committee on Legal and Constitutional Affairs

3.37 The Senate Legal and Constitutional Affairs Committee (Legal and Constitutional Affairs Committee) is one of eight legislative and general purpose Standing Committees first established in 1970. Each Committee is allocated a group of departments and agencies to oversee.⁵² The Legal and Constitutional Affairs Committee oversees the Attorney-General’s Department and Department of Immigration and Border Protection.⁵³ It scrutinises a number of laws which have a significant impact on rights, such as migration law, and counter-terrorism and national security legislation.

3.38 These Committees are appointed under Senate Standing Order 25 at the commencement of each Parliament,⁵⁴ and are comprised of a pair of sub-committees, the Legislation sub-committee, which deals with Bills,⁵⁵ estimates processes and oversees departmental performance, and the References sub-committee, which deals with references from the Senate.⁵⁶

3.39 In reviewing Bills, the Legislation and References Committee is required to take into account comments made by the Scrutiny of Bills Committee.⁵⁷ Consideration of the Bill on the floor of the Parliament is suspended while a legislative or general purpose Committee is scrutinising a Bill.⁵⁸ As a result, the Constitutional and Legal Affairs Committee must consider encroachments on rights to the extent that the Scrutiny of Bills Committee raises these issues in its reports. As discussed above, the Scrutiny of Bills Committee is specifically required to review Bills to determine whether they trespass on personal rights and liberties.

50 See, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—Nineteenth Report of the 44th Parliament* (2015), v.

51 In considering whether a limitation on a right may be proportionate, the key factors the Human Rights Committee considers are whether there are less restrictive ways to achieve the policy objective, whether there are effective safeguards and controls over the measure, and the extent of the interference with a right: Parliamentary Joint Committee on Human Rights, ‘Drafting Statements of Compatibility’ (Guidance Note No 1, Parliament of Australia, 2014) pp 2–3. See ch 2 for a further discussion on proportionality tests.

52 Harry Evans and Rosemary Laing, above n 38, ch 16.

53 *Ibid.*

54 Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th ed, 2012), ch 16.

55 The Senate Standing Committee on the Selection of Bills selects the bills that will be considered by a legal and general purpose committee. It is comprised of the whips of the Government, Opposition and minor parties, and two government members, and two opposition members.

56 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 2.

57 *Ibid* cl 2B.

58 Senate, Parliament of Australia, *Standing Order 115* (14 August 2006).

3.40 Each of the legislative and general purpose committees (including the Legal and Constitutional Affairs Committee) has six Senators.⁵⁹ The Committees have the power to appoint persons with specialist knowledge.⁶⁰

Parliamentary Joint Committee on Intelligence and Security

3.41 The Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee) was established in 2001, under s 28 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*). It has eleven members.⁶¹ Five members are drawn from the Senate and six from the House of Representatives.⁶²

3.42 The Intelligence Committee is required to review any matter relating to Australia's intelligence and security agencies that is referred to it by the Attorney-General or a resolution of either House of Parliament.⁶³ This includes reviewing Bills relating to national security that come before the Parliament. The Committee may also request the Attorney-General to refer a matter to it.⁶⁴ Some examples of Bills the Intelligence Committee has reviewed since January 2014 include the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth), *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth), and the *National Security Legislation Amendment Bill (No. 1) 2014* (Cth).

3.43 The Intelligence Committee also has a role in post-implementation review. It is required, under s 29 of the *Intelligence Services Act*, to review the operation, effectiveness and implications of the following provisions by 7 March 2018:⁶⁵

- *Australian Security Intelligence Organisation Act 1979* (Cth): pt III div 3;
- *Crimes Act 1914* (Cth): pt 1AA div 3A;
- *Criminal Code*: divs 104 and 105;⁶⁶ and
- *Criminal Code*: ss 119.2 and 119.3.

3.44 The Intelligence Committee is required to review pt 5-1A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (*Interception and Access Act*) by 13 April 2020. Additionally, where a Bill seeks to amend provisions in the *Interception and Access Act* that would expand the scope of data retention powers, that Bill must be referred to the Intelligence Committee for review.⁶⁷

59 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 5.

60 *Ibid* cl 17. The appointment must be approved by the President of the Senate.

61 *Intelligence Services Act 2001* (Cth) s 28(3).

62 *Ibid* s 28(2).

63 *Ibid* s 28(1)(b).

64 *Ibid* s 28(2).

65 *Ibid* s 29(1)(bb).

66 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*).

67 See, eg, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 187AA(4).

3.45 The Intelligence Committee is also required to monitor and review the performance of the Australian Federal Police's functions under pt 5.3 of the *Criminal Code*.⁶⁸

3.46 While the *Intelligence Services Act* does not expressly require that the Intelligence Committee consider rights as part of its review of Bills, in practice the Committee considers whether the Bill provides adequate safeguards and accountability mechanisms.⁶⁹ These are matters that are relevant to whether encroachments on rights are justified.⁷⁰ The Intelligence Committee has the power to conduct private hearings,⁷¹ which may allow it to conduct a more thorough evidence-based review of justifications for encroachments on rights based on national security concerns, as it can hear and take into account sensitive matters of national security that cannot be made public.

Parliamentary Joint Committee on Law Enforcement

3.47 The Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) was established in December 2013, and is comprised of ten members.⁷² Five members are drawn from the House of Representatives and five from the Senate.⁷³

3.48 The Law Enforcement Committee is concerned mostly with the activities of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). It is required, among other things, to examine trends and changes in criminal activities, practices and methods and report on changes it thinks desirable to the structure, functions, powers and procedures of the ACC and AFP.⁷⁴ It is also required to oversee the operation of pt 2–6 and s 20A of the *Proceeds of Crime Act 2002* (Cth).⁷⁵

3.49 The Law Enforcement Committee is not expressly required to consider rights as part of its review. However, its oversight functions are designed to monitor the implementation and operation of legislative frameworks which may encroach upon rights.⁷⁶

68 *Intelligence Services Act 2001* (Cth) s 29(1)(baa).

69 See, eg, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (September 2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) 2.

70 This is reflected in the Terms of Reference to this ALRC Inquiry, which requires the ALRC to consider 'any safeguards provided in the laws, such as rights of review or other accountability mechanisms'.

71 *Intelligence Services Act 2001* (Cth) sch 1, cl 6–7.

72 *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 5.

73 *Ibid* s 5(2).

74 *Ibid* s 7(1)(g).

75 *Proceeds of Crime Act 2002* (Cth) s 179U.

76 The Attorney-General, in discussing the Law Enforcement committee's role, stated that it exemplifies the 'commitment to improving oversight and accountability in relation to the exercise of the functions of Commonwealth agencies': Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Examination of the Australian Crime Commission Annual Report 2013–2014* (June 2015) [1.3].

Other review mechanisms

Australian Human Rights Commission

3.50 The AHRC, as part of its role under the *Australian Human Rights Commission Act 1986* (Cth), has the power to review laws to determine whether they are compatible with Australia's human rights obligations. Such a review may be conducted under a reference from the Attorney-General, or because it appears to the AHRC desirable to do so.⁷⁷ It is required to report to the Attorney-General on its review,⁷⁸ and to include any recommendations for amendments of an enactment to ensure it is not inconsistent with, or contrary to, any human right.⁷⁹ The Attorney-General is required to table a copy of any such report within 15 sitting days of receipt of the report.⁸⁰

Independent National Security Legislation Monitor

3.51 The INSLM must review, on his or her own initiative, or arising from a reference from the Prime Minister or the Intelligence Committee, the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation, and any other laws which relate to counter-terrorism or national security.⁸¹ As part of its review, the INSLM must consider whether these laws contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.⁸² The INSLM is required to give the Prime Minister an annual report relating to the above functions.⁸³ The Prime Minister must table the annual report before Parliament within 15 sitting days.⁸⁴

3.52 As discussed above, the Intelligence Committee is also specifically tasked with a post-implementation review of a number of provisions relating to counter-terrorism and national security.

Australian Law Reform Commission

3.53 The ALRC conducts reviews into matters referred to it by the Attorney-General.⁸⁵ In conducting a review, the ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes 'do not trespass unduly on personal rights and liberties'.⁸⁶ It is required to report on its review to the Attorney-General,⁸⁷ who must table the report within 15 sitting days.⁸⁸

77 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(e).

78 *Ibid.*

79 *Ibid* s 29(1).

80 *Ibid* s 46.

81 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).

82 *Ibid* s 6(1)(b).

83 *Ibid* s 29(1).

84 *Ibid* s 29(5).

85 *Australian Law Reform Commission Act 1996* (Cth) s 21.

86 *Ibid* s 24(1)(a).

87 *Ibid* s 21(2).

88 *Ibid* s 23.

Efficacy of guidance materials and pre-legislative processes

3.54 This section considers how guidance materials for policy makers may be further improved and supplemented.

3.55 As set out above, there is a lot of guidance available to policy makers as they develop policy and prepare drafting instructions for OPC. The Attorney-General's Department has indicated, as at 1 November 2015, that it is in the process of updating it.

3.56 However, these materials may not be easily discoverable for policy makers as they begin the policy-making process. The guidance material is prepared by a number of government departments and agencies, and sometimes, by the relevant parliamentary scrutiny committee. It is sometimes organised by subject matter, and sometimes by reference to human rights.

3.57 The *Legislation Handbook*, which provides an overview of legislative processes, was last updated in 2000, before the establishment of the Human Rights Committee in 2011.⁸⁹ The *Legislation Handbook* would benefit from being updated, with specific reference to the approach to rights encroachments, the justifications for such encroachments, and the role of the various parliamentary scrutiny committees. It should also contain an up to date list of the additional guidance material available to assist in the legislative drafting process.⁹⁰

3.58 One example of useful additional guidance relates to sunset clauses and review mechanisms. While some rights-encroaching legislation include time limits or 'sunset clauses',⁹¹ and review or reporting mechanisms,⁹² there is no general guidance about when sunset clauses or review mechanisms may be an appropriate safeguard for legislation identified as likely to be inconsistent with rights. Such guidance could be included in the *Legislation Handbook*, and might be an issue dealt with in guidance material published by the Attorney-General's Department.

3.59 The OPC has indicated that its role is to assist policy makers to translate their policy goals into a Bill. It seeks 'to assist instructors to develop and refine the policy so that the legislation is effective, clear and introduced within required timeframes'.⁹³ The OPC could provide further advice to departments about how avoid or minimise legislative encroachments on rights by, for instance, setting out whether less

89 The *Legislation Handbook* discusses the role of the Scrutiny of Bills Committee and provides guidance on information that ought to be included in explanatory memoranda. Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19], [14.53].

90 A recent report on reducing red tape recommended that the *Legislation Handbook* be amended. It also recommended that the information required to support the legislation process be streamlined, including by way of an electronic system: Barbara Belcher, *Independent Review of Whole of Government Internal Regulation* (2015) vol 1, [15.1]–[15.2]. The changes recommended here could be incorporated into any decision by the Government to adopt the recommendations made in that report.

91 See, eg, *Criminal Code* ss 119.2, 105.53.

92 See, eg, *Ibid* s 105.47; *Personal Property Securities Act 2009* (Cth) s 343.

93 Office of Parliamentary Counsel (Cth), above n 7, [64].

encroaching drafting options are available, and the relative merits of such options. The OPC currently takes this approach where policy makers know their desired outcome, but do not have detailed views on how to implement them.⁹⁴ Alternatively, the OPC may wish to follow the approach it takes where questions of constitutional validity arise. While the OPC does not refuse to draft ‘constitutionally suspect provisions’,⁹⁵ it will:

- draw attention to the constitutional doubts;
- ensure legal advice is obtained from the Australian Government Solicitor, Solicitor-General or Attorney-General; and
- where appropriate, advise on alternative approaches.⁹⁶

3.60 Under such a model, the OPC might, for instance, draw attention to potential encroachments, direct the policymaker to relevant advisers (for example, the relevant sections of the Attorney-General’s Department), and where appropriate, advise on alternative approaches. If the policymaker decides to continue with the rights encroaching approach, the OPC would follow such instructions.

Efficacy of scrutiny and review mechanisms

Overlapping parliamentary scrutiny

3.61 Since the establishment of the Human Rights Committee, the overwhelming majority of Bills which have an impact on the traditional rights, freedoms and privileges listed in the Terms of Reference have been subject to at least two separate streams of parliamentary committee review. This section considers the level of overlap, and whether streamlining the functions of the committees may be useful.

3.62 Where no concerns arise about human rights compatibility, or where further information is required before a determination on compatibility can be made, the work of the Human Rights Committee, in practice, appears quite similar to the work of the Scrutiny of Bills Committee. In particular, the reports of each Committee reflect that both Committees commonly write to the Minister seeking additional information or explanation as to why a law that limits rights is justified.⁹⁷

94 Ibid [58]–[60].

95 Ibid [27]–[28]. As set out above, it is not the role of the OPC to determine constitutional validity, and the drafting of provisions by OPC is not an assertion that the provision is constitutionally valid. It is the role of the Commonwealth’s primary advisers to ensure that the government does not propose legislation which it considers may be constitutionally invalid.

96 Ibid [28].

97 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.317]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2014* (June 2014), 238–9.

3.63 However, where there are stronger concerns about the impact of a proposed law on human rights, it seems that only the Human Rights Committee regularly seeks evidence to justify an encroachment, and focuses on the measure as a whole.⁹⁸ A similar approach appears to be reflected in considering legislative instruments.⁹⁹

3.64 The Scrutiny of Bills Committee, in its own Inquiry into the future role and direction of the Committee, recognised the potential for significant overlap in the work of the Committees.¹⁰⁰ However, the Committee also noted that there were significant areas of difference. The Scrutiny of Bills Committee does not conduct its scrutiny function by reference to international law, and potentially does not cover many of the economic, social and cultural rights considered by the Human Rights Committee. Similarly, the Human Rights Committee does not usually address matters like administrative law principles that are covered by the Scrutiny of Bills Committee. This can result in the two Committees focusing on very different issues. Additionally, even where the two Committees consider the same right, the scope of the right discussed may vary. For example, in looking at provisions which have retrospective effect, the Human Rights Committee focuses only on retrospective criminal offences. By contrast, the Scrutiny of Bills Committee considers retrospective civil provisions, as well as other matters such as ‘legislation by press release’ in taxation matters.¹⁰¹

3.65 It may be useful to consider reviewing the scope of the work of the Committees, and the relationship between them. For instance, the Human Rights Committee might focus its attention only on the most significant limitations on a set of identified rights and liberties, while the Scrutiny of Bills Committee and Regulations and Ordinances Committees might continue to undertake a technical review of all Bills and disallowable instruments. Any consideration of the scope of the Committees and their relationship should take into account the range of rights considered by each Committee, and the application of each Committee’s scrutiny principles.

3.66 The United Kingdom’s experience provides an instructive precedent. The Joint Committee on Human Rights (UK Human Rights Committee) was established in 2001.¹⁰² The UK Human Rights Committee has, since its inception, focused only on Bills which appear to raise ‘significant questions of human rights’.¹⁰³ The legal adviser to the UK Human Rights Committee reviews all Bills at an early stage, and brings

98 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.37]–[1.42]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (March 2014), 94–126.

99 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 10th Report of 2013* (June 2013) [3.11], [3.19]; Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No 6 of 2013* (June 2013) 2013 403–4.

100 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012), [3.12].

101 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

102 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [1].

103 *Ibid* [46].

those Bills which raise significant concerns to the Committee's attention.¹⁰⁴ Significance is determined by reference to various criteria, including

how important is the right affected, how serious is the interference with it, and in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.¹⁰⁵

3.67 Since 2006, the UK Human Rights Committee has begun an additional sifting process, to further target its scrutiny. The additional criteria used to determine its work program include whether:

- the European Court of Human Rights or United Kingdom higher courts have recently given a judgment on the issue raised;
- the Bill has attracted broad public or media attention;
- 'reputable' stakeholders such as non-governmental organisations have commented on the Bill;
- the Explanatory Notes are incomplete; and
- the Bill raises an issue that has consistently been a concern for the UK Human Rights Committee in the past, but which the Government does not appear to have addressed.¹⁰⁶

3.68 Similar criteria adapted for Australia could, for example, be used by the Human Rights Committee. However, any such approach would need to be carefully adapted, given the comparative sizes of the two Parliaments, and the respective workloads of Parliamentarians.

Statements of compatibility and explanatory memoranda

3.69 Since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.¹⁰⁷ The Scrutiny of Bills Committee, in the same period, asked the relevant Minister to include further information and justification in explanatory memoranda for 78 Bills.¹⁰⁸

104 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [47].

105 Ibid.

106 Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices—23rd Report of Session 2005–06* (July 2006) [29].

107 This figure is derived from a review of reports of the Human Rights Committee. Where a number of bills are introduced as part of a package, it has been counted as a single bill. Data has been collected from January 2013 because the Human Rights Committee began regularly drawing attention to statements of compatibility it judged inadequate from its first report of 2013 onwards.

108 This figure is derived from a review of reports of the Scrutiny of Bills Committee from January 2013 onwards.

3.70 The need for explanatory material that sets out adequate justification for encroachments on rights is well documented. In its 2006 report on future approaches to scrutiny, the UK Human Rights Committee noted:

[t]he provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the [scrutiny process].¹⁰⁹

3.71 Such concerns have been echoed in the Australian context:

Deficient [explanatory memoranda] means that committees are required to seek additional information from agencies about the proposed legislation. This delays the scrutiny process and could have been avoided had a sufficient EM been provided. This is not an ideal outcome given the tight timeframes under which committees often operate when reporting to Parliament.¹¹⁰

3.72 In 2004, the Scrutiny of Bills Committee specifically considered the quality of explanatory memoranda. It recommended that an ‘appropriately qualified person’ check that the explanatory memorandum complies with requirements set out in a new Legislation Handbook, which would consolidate material contained in the existing *Legislation Handbook*, Legislation Circular and the OPC’s *Drafting Directions*.¹¹¹

3.73 The Human Rights Committee has also emphasised the need to include, in statements of compatibility, a detailed and evidence-based assessment of proposed provisions that interfere with rights.¹¹²

3.74 Statements of compatibility are also required in New Zealand, the UK, ACT and Victoria. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility. In Victoria and the United Kingdom, as in the Commonwealth, it is the Minister or the sponsor of the Bill who prepares the statement of compatibility.

3.75 The Law Council of Australia (Law Council) submitted that a more centralised approach to preparing statements of compatibility—for example, by an independent statutory body such as the AHRC—should be considered.¹¹³

3.76 At the Commonwealth level, the *Parliamentary Scrutiny Act* was designed to ‘deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process’.¹¹⁴ Centralising the preparation of statements of compatibility, however, may reduce the extent to which a culture of human rights permeates among policy makers as a whole.

109 Joint Committee on Human Rights, UK Parliament, *The Committee’s Future Working Practices—23rd Report of Session 2005–06* (July 2006) [41].

110 Alex Hickman, ‘Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?’ (2014) 29 *Australasian Parliamentary Review* 116, 120.

111 Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills—Third Report of 2004* (2004), 31.

112 Parliamentary Joint Committee on Human Rights, ‘Drafting Statements of Compatibility’ (Guidance Note No 1, Parliament of Australia, 2014), 1.

113 Law Council of Australia, *Submission 140*. This was supported in Civil Liberties Australia, *Submission 94*.

114 Commonwealth, *Parliamentary Debates* House of Representatives Human Rights (Parliamentary Scrutiny) Bill 2010, Second Reading Speech, 30 September 2010, (Robert McClelland) 271.

3.77 Training for policy makers and parliamentarians on human rights and proportionality analyses may be useful. The Law Council submitted that the Attorney-General's Department should be provided with additional resources to conduct such training.¹¹⁵ Other bodies such as the AHRC may also be well placed to conduct such training. The Human Rights Law Centre supported this approach.¹¹⁶

3.78 Additionally, it may be useful to consider stipulating in (primary or delegated) legislation, what must be included in statements of compatibility.¹¹⁷ One approach may be to incorporate the Committee's expectations into pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹¹⁸ The object of such procedures would be to ensure that statements of compatibility and explanatory memoranda provide sufficiently detailed and evidence-based rationales for encroachments on rights to allow the parliamentary scrutiny Committees to complete their review.

Time constraints and parliamentary consideration of Committee reports

3.79 Parliamentary Committees tasked with legislative scrutiny are subject to significant time constraints. Parliamentarians have identified that 'the main thing that would make parliamentary scrutiny more effective is more time'.¹¹⁹ Bills may pass into legislation with little or no consideration of the committees' reports.¹²⁰ Bills may even be passed into legislation before the Scrutiny of Bills Committee has published its reports. Since 2000, this has occurred in relation to 109 of the Bills considered in the Scrutiny of Bills Committee's reports. Since its inception, over 50 Bills have been passed before the Human Rights Committee completed its review. The Scrutiny of Bills Committee has indicated that the 'main difficulty the Committee encounters is

115 Law Council of Australia, *Submission 140*.

116 Human Rights Law Centre, *Submission 148*.

117 There is some question about what is necessary for the Human Rights Committee to conduct its scrutiny role. For example, the Attorney-General, in responding to additional information and justification sought by the Human Rights Committee, wrote that while a detailed analysis 'is the Committee's preference based on its interpretation of [the relevant guidance materials], I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure which may limit human rights". More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge or document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights)': Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) 38.

118 Such a legislative codification of the Committee's expectations is likely to have persuasive effect. However, the lack of consequences for a failure to lodge a statement of compatibility, or lodging an inadequate statement of compatibility would remain a structural issue: Shawn Rajanayagam, 'Does Parliament Do Enough: Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38 *UNSWLJ* 1046, 1073.

119 Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives of Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

120 See, eg, Senate Standing Committee for the Scrutiny of Bills, above n 39, 33, 96–7; Evans and Evans, above n 119, 342.

when legislation is introduced and passed before the Committee can complete its scrutiny process'.¹²¹

3.80 The Scrutiny of Bills Committee, in its own Inquiry into its future role and direction, concluded that minimum timeframes for Committee consideration of legislation were not appropriate, on the basis that its role is not to delay the passage of legislation, but to provide timely reports which alert the Senate to the need for possible further examination of provisions of concern. It also noted that the Scrutiny of Bills Committee retains the discretion to set its own timeframe for considering and reporting on a Bill, while acknowledging that the passage of legislation is not deferred pending the Committee's views.¹²²

3.81 A number of parliamentarians¹²³ and commentators¹²⁴ support the imposition of minimum timeframes for scrutiny Committees to consider Bills.

3.82 As discussed above, where the Senate Standing Committee for Selection of Bills (Selection of Bills Committee) refers a Bill to a legislative or general purpose Committee for review, that Committee must take into account any comments made by the Scrutiny of Bills Committee. While the legislative or general purpose Committee is reviewing the Bill, debate in relation to the Bill is suspended. However, the Selection of Bills Committee has not published any guidance on its criteria for determining which Bills should be referred. One approach to ensure that sufficient time is provided may be to amend the Standing Orders to require all Bills which attract adverse comment by the parliamentary scrutiny Committees (Scrutiny of Bills Committee and Human Rights Committee) to be referred for review by a legislative or general purpose Committee.

3.83 A separate concern is the extent to which Parliament takes into account reports of the Scrutiny of Bills Committee and Human Rights Committee in passing legislation. Speaking about the Human Rights Committee, Professor George Williams noted that 'there is little or no evidence that [the reports of the Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights'.¹²⁵ A review of Bills before the Commonwealth

121 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

122 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) [4.26].

123 A number of parliamentarians interviewed by Professors Carolyn and Simon Evans indicated that 'there was a need for parliamentarians, and parliamentary committees, to be given sufficient time to carry out their role seriously and responsibly': Evans and Evans, above n 119, 343.

124 See, eg, Law Council of Australia, Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Amnesty International, Submission No 18 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Combined Community Legal Centres NSW, Submission No 16 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 1 April 2010; Australian Human Rights Commission, Submission No 11 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, Submission No 7 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010.

125 G Williams, *Submission 76*.

Parliament in the three year period from 2001 to 2003 found that, of the 63 Bills considered to burden human rights, 43 (or approximately 68%) were enacted.¹²⁶

3.84 In the UK, of 1,006 substantive references to the UK Human Rights Committee's reports during debate in Parliament, only 16 resulted in the Government offering amendments.¹²⁷ In a further seven instances, the Government issued guidance based on the UK Human Rights Committee's reports.¹²⁸

3.85 The effectiveness of the scrutiny process was also queried in the context of the *Anti-Terrorist, Crime and Security Act 2001* (UK):

[A]ll 124 clauses of the ATCSA 2001 were discussed in sixteen hours, which resulted in no amendments to the Government's proposal. If parliamentary debate is unable to effect changes to potential legislation that breaches human rights standards, its effectiveness must be questioned. One possibility for the complacency of the Commons might be that the s 19 Declaration of Compatibility gives the impression that the Act has already been 'proofed' for human rights compliance. Thus it may serve as a 'legitimizing cloak' which detracts from the quality of debate.¹²⁹

3.86 However, determining the efficacy of scrutiny Committees solely, or even primarily, by reference to the number of amendments resulting from consideration of Committee reports is not necessarily appropriate. As noted by political scientists Meghan Benton and Meg Russell, 'take-up by government of recommendations is only one form of Committee influence and arguably not even the most important'.¹³⁰ Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the Committee, are all examples of other important functions of scrutiny Committees.

3.87 Since 2005, the UK Human Rights Committee has adopted the practice of recommending amendments to Bills in its reports to give effect to its recommendations, and encourages its members to table these amendments before both Houses of Parliament.¹³¹ This has contributed to a dramatic increase in parliamentary consideration of its reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.¹³²

126 Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006–2007* (Department of the Senate, 2007) figure 1.

127 Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council Public Policy Series No 5, Arts & Humanities Research Council, 2012) 43–4.

128 Ibid 44.

129 Rhonda Powell, 'Human Rights, Derogations and Anti-Terrorist Detention' 69 *Saskatchewan Law Review* 79, 98.

130 Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' [2012] *Parliamentary Affairs* 1, 26.

131 Murray Hunt, Hayley Hooper and Paul Yowell, above n 127, 22.

132 Ibid 41.

3.88 A more radical suggestion to facilitate greater parliamentary consideration of Committee reports is, in effect, to incorporate the scrutiny process into a Bill's passage through Parliament, with scrutiny Committees empowered to amend the text of a Bill. These amendments would be subject to rejection in a vote before the Parliament.¹³³ However, this has the potential to result in more politically partisan scrutiny Committees, subject to greater executive control.¹³⁴

3.89 Alternatively, consideration might be given to providing that the Senate 'cannot deal with a Bill until the Committee has presented a report which in itself has been dealt with by the parliament'.¹³⁵ A number of stakeholders supported this approach.¹³⁶ For example, the Public Interest Advocacy Centre (PIAC) submitted that, outside of a 'clearly defined emergency', a Bill should not be passed unless the relevant parliamentary scrutiny Committee has considered the Bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any report of such Committees.¹³⁷

3.90 It may be constructive to consider reviewing the operations of the Committees and Senate procedures to ensure that the relevant parliamentary scrutiny bodies have sufficient time to conduct their reviews, and to facilitate adequate consideration of scrutiny reports during parliamentary debates. While political interests may, in some circumstances, result in a Bill being passed without adequate time for review, or consideration by the Parliament, such procedures may assist in creating a rights-minded culture, and facilitate more informed decision-making by the legislature.

3.91 A number of submissions to the Scrutiny of Bills Committee's Inquiry into its future role and direction also noted that the Scrutiny of Bills Committee should have access to adequate resources to complete its scrutiny task.¹³⁸ The Law Council submitted to this Inquiry that the Human Rights Committee should be better resourced.¹³⁹ The need for specialist assistance for the Intelligence Committee was also

133 Jonathan Morgan, 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 428, 444.

134 Ibid.

135 Senate Standing Committee for the Scrutiny of Bills, above n 39, 97.

136 Human Rights Law Centre, *Submission 148*; Public Interest Advocacy Centre, *Submission 133*.

137 Public Interest Advocacy Centre, *Submission 133*.

138 Australian Law Reform Commission, *Submission No 32 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 April 2010; Rule of Law Institute of Australia, *Submission No 28a to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 24 June 2010; Australian Lawyers for Human Rights, *Submission No 24a to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 July 2010; Law Council of Australia, *Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Australian Human Rights Commission, *Submission No 11 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, *Submission No 7 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Michael Tate, *Submission No 2 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 2 March 2010.

139 Law Council of Australia, *Submission 140*.

raised in consultations during this Inquiry. In particular, it was suggested that the Intelligence Committee may benefit from specialist intelligence assistance provided by seconding members of the intelligence community to work with the Committee.

Review bodies

3.92 Some stakeholders raised questions about the capacity of the INSLM to conduct comprehensive and transparent reviews of counter-terrorism and national security laws. PIAC, for example, expressed concern about scrutiny being ‘left to a body that only recently was entirely defunded by the Government, the position only being restored when the Government sought to pass a number of controversial counter-terror laws’.¹⁴⁰ The National Association of Community Legal Centres stated that ongoing support and funding for the INSLM is required.¹⁴¹

3.93 The INSLM noted, in its 2014 Annual report, that there has been no Government response to any of the INSLM’s recommendations.¹⁴² Since this statement, while the INSLM has commenced a number of inquiries, these are still ongoing. The Law Council submitted that this highlighted a need for the *Independent National Security Legislation Monitor Act 2010* (Cth) to be strengthened, for example, by requiring the Government to respond to the INSLM’s recommendations within certain timeframes.¹⁴³

3.94 The Law Council also noted reductions in the budget for the Australian Human Rights Commission, and the lack of government response to a number of its reports and publications. It submitted that the government should be required to table a response to any report on complaints within six months of receiving the report.¹⁴⁴

Conclusion

3.95 The mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by, for example:

- providing additional guidance and assistance for policy makers during the policy development and legislative drafting;
- improving the quality of explanatory material and statements of compatibility;

140 Public Interest Advocacy Centre, *Submission 133*. PIAC supported ‘a stand-alone reference to the ALRC to investigate the impact of counter-terrorism laws on human rights and the broader implications for the community’. These concerns were echoed in Monash University Castan Centre for Human Rights, *Submission 99*.

141 National Association of Community Legal Centres, *Submission 143*.

142 See Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2014) 2. The INSLM has not concluded any further inquiries since the statement in the 2014 Annual report.

143 Law Council of Australia, *Submission 140*.

144 Ibid. The National Association of Community Legal Centres supports this approach, and suggests extending the requirement to respond to ALRC reports: National Association of Community Legal Centres, *Submission 143*.

- considering the level of overlap between the work of the three scrutiny Committees, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- increasing the time available for scrutiny committees to conduct its scrutiny; and
- improving the extent to which the Parliament considers scrutiny committee reports.