

2. Scrutiny Mechanisms

Contents

A culture of justification	37
Policy development and legislative drafting	38
Drafting guidance	38
Explanatory material	39
Consultation on draft bills	40
Parliamentary scrutiny processes	40
Senate Standing Committee on Regulations and Ordinances	41
Senate Standing Committee for the Scrutiny of Bills	41
Parliamentary Joint Committee on Human Rights	42
Senate Standing Committee on Legal and Constitutional Affairs	44
Parliamentary Joint Committee on Intelligence and Security	45
Parliamentary Joint Committee on Law Enforcement	46
Other review mechanisms	47
Australian Human Rights Commission	47
Independent National Security Legislation Monitor	47
Australian Law Reform Commission	47
Efficacy of scrutiny and review mechanisms	48
Overlapping parliamentary scrutiny	48
Statements of compatibility and explanatory memoranda	50
Time constraints and parliamentary consideration of committee reports	51
Conclusions	54

A culture of justification

2.1 In Australia, existing and proposed laws are scrutinised for compatibility with fundamental rights and principles at a number of stages and by a number of different 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.

2.2 Scrutiny of laws for compatibility with fundamental 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

2.3 Such scrutiny can provide a meaningful check on unjustified legislative intrusions on traditional rights and freedoms. 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.

2.4 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

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

Policy development and legislative drafting

2.6 Policy development and legislative drafting does not occur in a rights vacuum. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook*,⁴ in drafting directions prepared by the Office of Parliamentary Counsel (OPC), and other guidance documents.⁵

Drafting guidance

2.7 The drafting directions specifically alert policy makers to the types of provisions which draw adverse comment from the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).⁶ Policy makers are also encouraged to seek advice from the relevant sections of the Attorney-General’s Department, and engage with drafters at OPC on these issues.

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.

3 Ibid.

4 Department of Prime Minister and Cabinet, *Legislation Handbook* (1999), [8.19].

5 See, eg, Attorney-General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011).

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

2.8 The *Legislation Handbook* provides 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*]'.⁷

2.9 While some rights-encroaching legislation includes a time limit or 'sunset clause',⁸ or review or reporting mechanism,⁹ there is no general guidance included in either the *Legislation Handbook* or OPC's *Drafting Directions* relating to the inclusion of sunset clauses or review mechanisms where legislation is likely to be inconsistent with fundamental rights, freedoms or privileges.

Explanatory material

2.10 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 span back to 1932 and the 1950s respectively.¹⁰

2.11 These are prepared by the government department with policy responsibility for the bill or instrument, for approval by the relevant Minister. Explanatory memoranda ought, where possible, to address matters considered by the Scrutiny of Bills Committee or Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee). The Attorney-General's Department provides advice and guidance on the drafting of explanatory memoranda.

2.12 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.¹¹ These are also prepared by the department developing a bill or disallowable instrument, for approval by the relevant Minister.

2.13 Following the introduction of this requirement, the Attorney-General's Department developed a tool for assessing human rights compatibility, and a number of guidance documents. A non-exhaustive list of policy triggers which may give rise to human rights concerns seeks to engage policy makers on human rights issues from the initial stages of policy development.¹² Templates and example statements of

7 Department of Prime Minister and Cabinet, above n 4, [6.34].

8 See, eg, *Criminal Code* (Cth) ss 119.2, 105.53.

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

10 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).

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

12 Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <www.ag.gov.au>.

compatibility¹³ assist departments in the drafting of statements of compatibility. The Attorney-General's Department also provides specific assistance and advice to departments on statements of compatibility where requested.

2.14 Additionally, the Parliamentary Joint Committee on Human Rights (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'.¹⁴

Consultation on draft bills

2.15 In addition to consultation with other government agencies, 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'.¹⁵ Cabinet endorsement or Prime Ministerial approval (for bills that do not include measures endorsed by Cabinet) is required before an exposure draft is released.¹⁶

Parliamentary scrutiny processes

2.16 Parliamentary debate during the passage of legislation is the ultimate forum for the scrutiny of, and judgments about, encroachments on fundamental rights, freedoms and privileges. 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 fundamental rights, freedoms and privileges. This began with the Regulations and Ordinances Committee, established in 1932 to review disallowable instruments. The scrutiny function was expanded to the Scrutiny of Bills Committee in 1981. Both committees have a long-standing history of conducting a technical scrutiny function, which does not delve into the policy merits of a particular provision.¹⁷ In 2011, the Human Rights Committee was established to consider a wider range of human rights—specifically tied to Australia's international human rights obligations—in conducting its review. The Human Rights Committee specifically considers the policy merits of provisions as part of its scrutiny.¹⁸

2.17 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 Affairs (Legal and Constitutional Affairs Committee) review legislation which impact on fundamental rights, freedoms and privileges, particularly in relation to migration, counter-terrorism and national security legislation.

13 Ibid.

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

15 Department of Prime Minister and Cabinet, above n 4, [4.7(i)].

16 Ibid [7.9].

17 Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19, 22, 27.

18 Ibid 27.

Senate Standing Committee on Regulations and Ordinances

2.18 The Regulations and Ordinances Committee was established in 1932. It is required to review, and, if necessary, report on whether disallowable instruments:

- are in accordance with the statute;
- unduly trespass on personal rights and liberties;
- 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; or
- contain matter more appropriate for parliamentary enactment.¹⁹

2.19 The Regulations and Ordinances Committee is comprised of six members supported by a legal adviser who reviews all disallowable instruments against the principles above, and provides a report on compliance.²⁰

2.20 Where an instrument raises a concern with respect to the matters being tested, the Regulations and Ordinances Committee usually writes to the responsible Minister for further explanation, or to seek an undertaking for specific action to resolve the concern.²¹ 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. 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.²²

Senate Standing Committee for the Scrutiny of Bills

2.21 The Scrutiny of Bills Committee was established in 1981, on a six month probationary basis, with its functions carried out by the Constitutional and Legal Affairs Committee.²³ In May 1982, the Scrutiny of Bills Committee was constituted as a separate committee, but it was not until 1987 that it was made a standing committee of the Senate.²⁴ The scrutiny principles applied by the Committee are drawn from those applied by the Regulations and Ordinances Committee, and require it to consider whether bills or Acts:

- trespass unduly on personal rights and liberties;

19 Senate, Parliament of Australia, *Standing Order 23* (24 August 1994). The overlap between these scrutiny principles and the Terms of Reference for this ALRC Inquiry are discussed in text below.

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

21 Ibid [1.13].

22 Ibid [1.14]–[1.15].

23 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.

24 Ibid 5–7.

- 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.²⁵

2.22 The Committee is comprised of six members, supported by a legal adviser 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 Scrutiny of Bills Committee publishes, on each Wednesday of a sitting week, an *Alert Digest* containing an outline of each of the Bills introduced in the previous sitting week, along with any comments it wants to make in relation to a particular Bill.

2.23 If concerns are raised in the *Digest*, the Scrutiny of Bills Committee writes to the Minister responsible for the bill, inviting a response to its concerns, and sometimes suggests an amendment. The Minister's response may include a revised version of a section of legislation, a slight alteration to the legislation or explanatory memorandum, or the response may better explain why the bill has appeared in its current form. If these responses do not allay the Scrutiny of Bills 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.

2.24 The Scrutiny of Bills Committee's concerns, the Minister's responses and the Committee's conclusions are published in a Report. Since February 2015, the Scrutiny of Bills Committee also publishes a newsletter highlighting key scrutiny issues. It focuses on 'information that may be useful when bills are debated'.²⁶

Parliamentary Joint Committee on Human Rights

2.25 The Human Rights Committee was established under section 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*Parliamentary Scrutiny Act*). The Human Rights Committee must examine all bills and legislative instruments that come before either House of Parliament for compatibility with human rights, and report to both Houses on that issue.²⁷ It is an extension of existing parliamentary rights review

25 Senate, Parliament of Australia, *Standing Order 24* (15 July 2014). The overlap between these scrutiny principles and the Terms of Reference for this ALRC Inquiry are discussed in text below.

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

27 *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 Victorian and ACT charters. It extends the existing parliamentary rights review model, rather than adopting a judicial review model of rights protection. The overlap between the human rights considered by the Human Rights Committee and the Terms of Reference for this ALRC Inquiry are discussed in text below.

mechanisms, and draws an explicit connection with international human rights instruments.

2.26 Unlike the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, which draw their scrutiny principles broadly from the *International Covenant on Civil and Political Rights* (ICCPR),²⁸ the Human Rights Committee's scrutiny is tied directly to international human rights instruments. The *Parliamentary Scrutiny Act* defines human rights as those rights and freedoms declared in the ICCPR and *International Covenant on Economic, Social and Cultural Rights* (ICESR),²⁹ as well as a number of other international instruments which relate to the rights in the ICCPR and ICESR.³⁰

2.27 The Committee is comprised of 10 members,³¹ and is supported by a legal adviser and secretariat. If the Human Rights Committee is not initially satisfied with the human rights compatibility of a bill, it will write to the relevant Minister seeking further detail about the bill. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and/or call for witnesses.³²

2.28 On each Tuesday of a sitting week, the Human Rights 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. It also comments on responses received in response to comments in earlier reports.

2.29 In conducting its examination, the Human Rights Committee categorises bills and instruments into three groups: legislation which does not give rise to human rights concerns; legislation which potentially raises human rights concerns; and legislation that raises human rights concerns the Committee considers require closer examination.³³ The third category refers to those pieces of legislation that raise human rights concerns of such significance or complexity that the Committee may examine it more closely, and use its powers to hold hearings or request a briefing.³⁴

28 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

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

30 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); *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

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

32 Commonwealth, *Hansard*, House of Representatives, 20 June 2012, 7177 (Mr Harry Jenkins).

33 Parliamentary Joint Committee on Human Rights, *Annual Report 2012–13* (2013), [1.19].

34 *Ibid* [1.27].

2.30 The primary focus of the Committee is ‘determining whether any identified limitation of a human right is justifiable’.³⁵ It does so by reference to what are known as the Siracusa Principles,³⁶ 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.³⁷

Senate Standing Committee on Legal and Constitutional Affairs

2.31 First established in 1970, eight legislative and general purpose standing committees, including the Legal and Constitutional Affairs Committee, are appointed under Senate Standing Order 25.³⁸ It is comprised of a pair of committees, the Legislation Committee, which deals with bills, estimates processes and oversees departmental performance, and the References Committee, which deals with references from the Senate.³⁹ The Legislation Committee is required to take into account, in its review of bills, comments made by the Scrutiny of Bills Committee.⁴⁰ As a result, the Constitutional and Legal Affairs Committee considers encroachments on fundamental rights, freedoms and privileges 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.

2.32 Each committee is allocated a group of departments and agencies to oversee.⁴¹ The Legal and Constitutional Affairs Committee has coverage of the Attorney-General’s Department and Department of Immigration and Border Protection.⁴² As part of its oversight, it scrutinises a number of legislative frameworks which may have an impact upon fundamental rights, freedoms and privileges, such as migration law, and counter-terrorism and national security legislation.

2.33 The Legislation and References Committees of the Legal and Constitutional Affairs committee are comprised of six members each, with a Government majority in the Legislation Committee and an Opposition majority in the References Committee.⁴³ In the Legislation Committee, three of the members are nominated by the Leader of the Government in the Senate, two are nominated by the Leader of the Opposition in the Senate and one by minority groups and independent senators.⁴⁴ In the References Committee, three members are nominated by the Leader of the Opposition in the Senate, two by the Leader of the Government and one by minority groups and

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

36 See Ch 1.

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

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

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

40 *Ibid* cl 2B.

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

42 *Ibid*.

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

44 *Ibid* cl 5(a).

independent senators.⁴⁵ The Committees have the power to appoint persons with specialist knowledge.⁴⁶

Parliamentary Joint Committee on Intelligence and Security

2.34 The Intelligence Committee was established in 2001, under s 28 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*). It is comprised of eleven members, the majority of whom must be Government members.⁴⁷ Five members are drawn from the Senate and six from the House of Representatives.⁴⁸

2.35 The Intelligence Committee is required to review any matter, including bills before the Parliament, relating to Australia's intelligence and security agencies referred to it by the Attorney-General or a resolution of either House of Parliament.⁴⁹ It may also request the Attorney-General to refer a matter to it.⁵⁰ 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).

2.36 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 May 2018:

- pt III div 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth);
- pt 1AA div 3A of the *Crimes Act 1914* (Cth);
- divs 104 and 105 of the *Criminal Code 1995*;⁵¹ and
- ss 119.2 and 119.3 of the *Criminal Code 1995*.⁵²

2.37 While the *Intelligence Services Act* does not expressly require that the Intelligence Committee consider fundamental rights, freedoms and privileges as part of its review of bills, in practice, the Committee considers whether the bill provides adequate safeguards and accountability mechanisms.⁵³ These are matters that are relevant to whether encroachments on fundamental rights, freedoms and privileges are

45 Ibid cl 5(b).

46 Ibid cl 17.

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

48 Ibid s 28(2).

49 Ibid s 28(1)(b).

50 Ibid s 28(2).

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

52 *Intelligence Services Act 2001* s 29(1)(bb).

53 See, eg, Parliamentary Joint Committee on Intelligence and Security, 'Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014' (Parliamentary Paper 199/2014, 17 September 2014), 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 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.

justified.⁵⁴ The Intelligence Committee has the power to conduct private hearings,⁵⁵ which may allow it to conduct a more thorough evidence-based review of justifications for encroachments on fundamental rights, freedoms and privileges based on national security concerns.

Parliamentary Joint Committee on Law Enforcement

2.38 The Law Enforcement Committee was established in December 2013, and is comprised of ten members,⁵⁶ with a Government majority. Five members are drawn from the House of Representatives and five from the Senate.⁵⁷ The five members of the House of Representatives are comprised of three members nominated by the Government Whip and two by the Opposition Whip. The five members of the Senate are comprised of two members nominated by the Leader of the Government in the Senate, two members by the Leader of the Opposition in the Senate and one by any minority group or independent senator.⁵⁸ The Committee is chaired by a Government member,⁵⁹ and a non-Government member is the deputy chair.⁶⁰

2.39 The Law Enforcement Committee is concerned mostly with the activities of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). It reviews annual reports of the ACC and the AFP, providing additional oversight of agencies with ‘strong, coercive powers’.⁶¹ 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.⁶² It is also required to oversee the operation of pt 2–6 and s 20A of the *Proceeds of Crime Act 2002* (Cth).⁶³

2.40 The Law Enforcement Committee is not expressly required, under the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth), to consider fundamental rights, freedoms and privileges as part of its review. However, its oversight functions are designed to monitor the implementation and operation of legislative frameworks which may encroach upon fundamental rights, freedoms and privileges.⁶⁴

54 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’.

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

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

57 *Ibid* s 5(2).

58 Commonwealth *Hansard*, House of Representatives, 21 November 2013, 968-9 (The Hon. Chris Pyne MP) cl 1(a).

59 *Ibid* cl 1(c)(i).

60 *Ibid*.

61 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Examination of the Australian Crime Commission Annual Report of the 2014*, June 2015, [1.3].

62 *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 7(1)(g).

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

64 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 of the 2014*, June 2015, [1.3].

Other review mechanisms

Australian Human Rights Commission

2.41 The Australian Human Rights Commission (AHRC), as part of its role under the *Australian Human Rights Commission Act 1986* (Cth), has the power to review laws. This may be conducted under a reference from the Attorney-General, or because it appears to the AHRC desirable to do so, to determine whether it is compatible with Australia's international human rights obligations.⁶⁵ It is required to report to the Attorney-General on its review,⁶⁶ and shall include any recommendations for amendments of an enactment to ensure it is not inconsistent with or contrary to any human right.⁶⁷ The Minister is required to table a copy of any such report within 15 sitting days of receipt of the report.⁶⁸

Independent National Security Legislation Monitor

2.42 The Independent National Security Legislation Monitor (INSLM) must review, on his or her own initiative, or arising from a reference from the Prime Minister or the Committee on Intelligence and Security, 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.⁶⁹ As part of its review, the INSLM must consider whether these provisions contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.⁷⁰ The INSLM is required to give the Prime Minister an annual report relating to the above functions.⁷¹ The Prime Minister must table the annual report before Parliament within 15 sitting days of receipt.⁷²

2.43 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

2.44 The ALRC conducts reviews into matters referred to it by the Attorney-General.⁷³ In conducting a review, the ALRC must aim to ensure that the laws, proposals and recommendations it reviews 'do not trespass unduly on personal rights and liberties'.⁷⁴ It is required to report on its review to the Attorney-General,⁷⁵ who must table the report within 15 sitting days of receipt of the report.⁷⁶

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

66 *Ibid.*

67 *Ibid* s 29(1).

68 *Ibid* s 46.

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

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

71 *Ibid* s 29(1).

72 *Ibid* s 29(5).

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

74 *Ibid* s 24.

75 *Ibid* s 21(2).

76 *Ibid* s 23.

Efficacy of scrutiny and review mechanisms

Overlapping parliamentary scrutiny

2.45 Since the establishment of the Human Rights Committee, the overwhelming majority of bills which have an impact on the rights, freedoms and privileges listed in the Terms of Reference have been subject to at least two separate streams of parliamentary committee review. Table 1 sets out the extent of overlap in the consideration of these rights by the three parliamentary rights scrutiny committees.

Table 1 Parliamentary scrutiny of fundamental rights, freedoms and privileges⁷⁷

ALRC Terms of Reference	Human Rights Committee	Scrutiny of Bills Committee	Regulations and Ordinances Committee
Freedom of speech	✓	✓	✓
Freedom of religion	✓	✓	✓
Freedom of association	✓	✓	✓
Freedom of movement	✓	✓	✓
Vested property rights	✗	✓	✓
Retrospective offences	✓	✓	✓
Retrospective application of obligations (civil)	✗	✓	✓
Fair trial	✓	✓	✓
Burden of proof	✓	✓	✓
Privilege against self-incrimination	✓	✓	✓
Client legal privilege	✓ ⁷⁸	✓	✓
Strict and absolute liability	✓	✓	✓
Appeal from acquittal	✓	✓	✓
Procedural fairness	✓	✓	✓
Judicial review	✓ ⁷⁹	✓	✓
Delegating legislative power	✗	✓	✓
Authorising what would otherwise be a tort	Limited ⁸⁰	✓	✓
Executive immunities	Limited ⁸¹	✓	✓

77 This table is derived from: the definition of human rights in *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3; the scrutiny principles listed in Senate, Parliament of Australia, *Standing Order 23* (24 August 1994); Senate, Parliament of Australia, *Standing Order 24* (15 July 2014); and the reports of the relevant committees.

78 Respect for professional duties of confidentiality (such as the confidentiality of legal communications) is considered to fall under the category of a 'right to privacy': See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifteenth Report of the 44th Parliament* (November 2014), [1.52].

79 Parliamentary Joint Committee on Human Rights, above n 33, 18.

80 Where a contravention of the ICCPR would constitute a tort, authorisation of such conduct falls within the purview of art 2(3)(a) of the ICCPR, which requires that an effective remedy be available.

81 Executive immunities for actions which contravene the ICCPR fall within the purview of art 2(3)(a) of the ICCPR, which requires that an effective remedy be available.

2.46 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 for why a law that limits fundamental rights, freedoms or privileges is justified.⁸²

2.47 However, where stronger concerns about human rights impacts arise, it seems that only the Human Rights Committee seeks empirical evidence to justify an encroachment, and focuses on the measure as a whole, while the Scrutiny of Bills Committee conducts a more technical analysis.⁸³

2.48 A similar approach appears to be reflected in considering disallowable instruments, with the Regulations and Ordinances Committee focused on technical scrutiny.⁸⁴ Of the 283 instruments the Regulations and Ordinances Committee commented on in 2012–13, 70 related to a failure to provide sufficient information on consultation.⁸⁵

2.49 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.⁸⁶ In light of this, it may be useful to consider reviewing the scope 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 human rights, while the Scrutiny of Bills Committee and Regulations and Ordinances Committees might continue to undertake a technical review of all bills and disallowable instruments. Another possible approach could see the requirement to conduct a human rights compatibility analysis added to the scope of the Scrutiny of Bills Committee's work.

2.50 The United Kingdom's experience provides an instructive precedent. The Joint Committee on Human Rights (UK Human Rights Committee) was established in

82 Cf 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.

83 Cf 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.

84 Cf Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013), [3.11], [3.19]; Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor No. 6 of 2013' (Parliament of Australia, 20 June 2013), 403–4.

85 Senate Standing Committee on Regulations and Ordinances—Report on the Work of the Committee in 2012–13. Report No. 118, [3.7].

86 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].

2001.⁸⁷ The UK Human Rights Committee has, since its inception, focused only on bills which appear to raise ‘significant questions of human rights’.⁸⁸ The legal adviser to the UK Human Rights Committee reviews all bills at an early stage, and brings those bills which raise significant concerns to the Committee’s attention.⁸⁹ 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.⁹⁰

2.51 Since 2006, the UK Human Rights Committee has begun an additional sifting process, to further target those bills to concentrate upon. 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 broader public or media attention;
- ‘reputable’ stakeholders such as non-governmental organisations have commented on the Bill;
- the Explanatory Notes are incomplete so as to necessitate an inquiry into the relevant human rights issues; 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.⁹¹

2.52 Similar criteria adapted for Australia could, for example, be used by the Human Rights Committee.

Statements of compatibility and explanatory memoranda

2.53 Since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.⁹² 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.⁹³

87 Joint Committee on Human Rights, ‘The Work of the Committee in the 2001–2005 Parliament—19th Report of the 2004–05 Session’, [1].

88 Ibid [46].

89 Joint Committee on Human Rights, above n 87, [47].

90 Ibid.

91 House of Lords House of Commons Joint Committee on Human Rights, ‘The Committee’s Future Working Practices—Twenty Third Report of Session 2005–06’ (Report No 239, 24 July 2006), [29].

92 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.

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

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

the provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the [scrutiny process].⁹⁴

2.55 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.⁹⁵

2.56 In 2004, the Scrutiny of Bills Committee specifically considered the quality of explanatory memoranda. It recommended:

Before a Bill is introduced into the Parliament, an appropriately qualified person should check the explanatory memorandum accompanying the Bill to ensure it explains fully the effect and operation of the proposed legislation and complies with the requirements contained in [a new *Legislation Handbook* which consolidates the information contained in the *Legislation Handbook*, Legislation Circulars and Office of Parliamentary Counsel *Drafting Directions*].⁹⁶

2.57 The Human Rights Committee has also emphasised the need for detailed and evidence-based assessments in statements of compatibility.⁹⁷

2.58 Additional procedures could be put in place to improve the rigour of statements of compatibility and explanatory memoranda to assist Parliament in understanding the impact of proposed legislation on fundamental rights, freedoms and privileges. 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 fundamental rights, freedoms and privileges to allow the parliamentary scrutiny committees to complete their review.

Time constraints and parliamentary consideration of committee reports

2.59 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’.⁹⁸ Bills may pass into

94 House of Lords House of Commons Joint Committee on Human Rights, above n 91, [41].

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

96 Senate Standing Committee for the Scrutiny of Bills, ‘The Quality of Explanatory Memoranda Accompanying Bills—Third Report of 2004’ (Parliament of Australia), 31.

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

98 Carolyn Evans & 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.

legislation with little or no consideration of the committees' reports.⁹⁹ An extreme example of this arises where bills are 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.

2.60 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 of 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.

2.61 However, a number of parliamentarians¹⁰⁰ and commentators¹⁰¹ support the imposition of minimum timeframes for scrutiny committees to consider bills.

2.62 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'.¹⁰² A review of bills before the Commonwealth 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.¹⁰³

99 See, eg, 'Ten Years of Scrutiny—a Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills', above n 23, 33, 96–7; Carolyn Evans & 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.

100 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': Carolyn Evans & 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, 343.

101 See, eg, Law Council of Australia, Submission 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 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 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 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 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.

102 Professor George Williams, *Submission 76*.

103 Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' *Papers on Parliament No 47*, figure 1.

2.63 In the United Kingdom, 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.¹⁰⁴ In a further seven instances, the Government issued guidance based on the UK Human Rights Committee's reports.¹⁰⁵

2.64 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.¹⁰⁶

2.65 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'.¹⁰⁷ 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.

2.66 However, Michael Tolley, in his consideration of the effectiveness of the UK Human Rights Committee concluded that 'the jury is still out on the JCHR's effectiveness',¹⁰⁸ suggesting:

in most instances ... the JCHR is unable to get the government to consider its views during the drafting stage ... [and] is unable to prevent the Government from passing the bills it wants.¹⁰⁹

2.67 The UK Human Rights Committee has, since 2005, 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.¹¹⁰ This has contributed to a dramatic increase in parliamentary

104 Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council, 18 April 2012) 43–4.

105 Ibid 44.

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

107 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.

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

109 Ibid 54.

110 Murray Hunt, Hayley Hooper and Paul Yowell, above n 104, 22.

consideration of its reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.¹¹¹

2.68 A more radical suggestion to facilitate greater parliamentary consideration of committee reports is to, in effect, incorporate the scrutiny process into a bill’s passage through Parliament, with scrutiny committees empowered to amend the text of the Bill. These amendments would be subject to rejection in a vote before the Parliament.¹¹² However, this has the potential to result in more politically partisan scrutiny committees, subject to greater executive control.¹¹³ Alternatively, it may also be useful to provide 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’.¹¹⁴

2.69 The ALRC considers that it may be constructive to consider reviewing the operations of the committees and Senate procedure 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.

2.70 A number of submissions to the Scrutiny of Bills Committee’s inquiry into its future role and direction, including that of the ALRC, also noted that the Scrutiny of Bills Committee should have access to adequate resources to complete its scrutiny task.¹¹⁵

Conclusions

2.71 The processes and mechanisms for developing and scrutinising Commonwealth laws aim to encourage public and political officials to assess policies and laws to determine whether an encroachment on a fundamental right, freedom or privilege is justified. The following areas may be reviewed to enhance the ability of committees to perform a constructive role in the scrutiny of legislation:

111 Ibid 41.

112 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.

113 Ibid.

114 ‘Ten Years of Scrutiny—a Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills’, above n 23, 97.

115 Australian Law Reform Commission, Submission 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 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 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 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 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 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; Rev Prof the Honourable Michael Tate AO, Submission 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.

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- guidance materials and assistance at the legislative drafting and policy development stages, particularly in relation to the application of post-implementation review mechanisms or sunset clauses for legislation which intrudes on fundamental, rights freedoms and privileges;
 - oversight of explanatory material and statements of compatibility prior to parliamentary committee scrutiny;
 - the scope of and relationship between the committees, with particular attention on what each of the scrutiny committees focuses upon;
 - the procedures of scrutiny committees, particularly in relation to minimum timeframes for committee scrutiny, and the role of committee members in bringing the committee's concerns to the Parliament's attention.

