

# Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia: A Framework for Evaluating Legislative Scrutiny in Modern Democracies

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## Abstract

This Paper evaluates the impact of pre and post enactment scrutiny of Australia's counter-terrorism laws enacted from 2001 until 2018. Parliamentary scrutiny of rights-engaging laws is particularly critical in the Australian context, as Australia relies on a parliamentary model of rights protection at the federal level. The evaluation framework employed in this Paper considers a range of evidence to provide a holistic account of the impact of legislative scrutiny on the content, development and implementation of Australia's counter-terrorism laws. This includes consideration of the *legislative impact* of scrutiny on the content of the law, the role scrutiny plays in the *public and parliamentary debate* on the law, as well as the *hidden impact* scrutiny may be having on policy development and legislative drafting. The results are surprising. This study finds that parliamentary rights scrutiny, particularly by parliamentary committees, has had a rights-enhancing (although rarely rights-remedying) impact on the counter-terrorism laws. Further, this research finds that the hidden or behind-the-scenes impact of parliamentary scrutiny provides a particularly fertile ground for improving the rights-protecting capacity of the Australian legislative scrutiny system. These findings and the evaluation framework employed in this Paper have application and benefits for other jurisdictions seeking to understand and improve the quality of their legislative scrutiny regimes.

Keywords: *Parliament of Australia, Scrutiny, Legislation, Evaluation, Impact Counter-terrorism*

## I. INTRODUCTION

As Lord Norton of Louth recently reflected, scrutiny of proposed or existing legislation has become 'an essential part of parliamentary oversight and a natural evolution of the functions of parliament'.<sup>1</sup> This makes understanding and evaluating scrutiny systems critical for all modern democracies, including those in the Asian region, which face a complex range of legislative, institutional and governance challenges. In this context, sharing insights and frameworks for

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1 "Engaging parliaments on reviewing legislative impact" Westminster Foundation for Democracy Blog, (9 May 2019), online: Westminster Foundation for Democracy <<https://www.wfd.org/2019/05/09/reviewing-legislative-impact/>>.

evaluating scrutiny systems is inherently valuable, not just for jurisdictions like Australia, whose institutional heritage and federal structure provides multiple points of comparison and distinction, but also for the many diverse democracies across the Asian region.

Unlike many other modern parliamentary democracies, Australia does not have a constitutional or statutory Bill of Rights at the federal level, or a prescribed, systematic approach to legislative scrutiny. Instead, Australia relies on an ‘exclusively parliamentary’ model of rights protection<sup>2</sup> and an ad hoc approach to legislative scrutiny to identify and address rights engaging laws. In practice this translates into parliamentary committees and a handful of statutory bodies reviewing proposed or existing laws against a diverse array of criteria, some of which is rights-related. It is through this form of legislative scrutiny that the Australian Parliament seeks to assure its citizens that its laws are effective at achieving their policy aims and any impact on individual rights is justified by legitimate objectives.

This Paper suggests articulates and implements a framework for evaluating the effectiveness and impact of legislative scrutiny in Australia with a particular focus on rights outcomes.<sup>3</sup> This framework considers a range of evidence to provide a holistic account of the impact of legislative scrutiny on the content, development and implementation of federal laws. This holistic, system wide approach identifies particular strengths and weaknesses across different bodies undertaking legislative scrutiny in Australia, and provides new opportunities for improvements and reform. It also looks ‘behind-the-scenes’ to uncover whether legislative scrutiny has an influence on the way laws are developed, implemented or amended.

This Paper briefly describes the various forms of legislative scrutiny that take place at the federal level in Australia, and introduce the key features of the evaluation framework. Part 2 then explains how this framework applies to the case study of counter-terrorism law making in Australia, and discusses the key findings with respect to the impact of legislative scrutiny on rights protection at the federal level. The Paper concludes by highlighting the benefits this evaluation framework may hold for other jurisdictions seeking to evaluate the impact and effectiveness of their own legislative scrutiny systems.

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2 George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34(1) *Statute Law Review* 58.

3 See Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, 2018); Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Federal and State Parliaments in Australia’ (2018) 41(1) *University of New South Wales Law Journal* 40; Sarah Moulds ‘Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security’ (2018) 29(4) *Public Law Review* 41; Sarah Moulds ‘The Role of Commonwealth Parliamentary Committees in Facilitating Parliamentary Deliberation: A case study of Marriage Equality Reform’ in Laura Grenfell and Julie Debeljak (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, forthcoming).

## 1. Legislative Scrutiny and the Australian Parliament

Unsurprisingly for a former British colony, the Australian Parliament shares many structural, legal and cultural features with the British Parliament and embodies many aspects of the 'Westminster tradition'<sup>4</sup> when it comes to parliamentary practices. However, unlike the United Kingdom (UK), Australia has a written Constitution and a federal structure comprising of six states, two territories and a central, federal Parliament. At the federal level, the Parliament comprises of two Houses - the House of Representatives (with members elected by constituents from equally sized electorates) and the Senate (with members elected on a proportional basis, to provide equal representation for each state, and members from the two territories).<sup>5</sup> The Senate is often described as a *House of Review*,<sup>6</sup> and plays a central role in scrutinising proposed laws and executive action. Each of the six states and territories have their own parliaments and their own systems of legislative scrutiny with features that appear similar from an outside perspective. For example, each of the Australian parliaments have a system of parliamentary committees, each adopt the practice of including sunset clauses in legislation from time to time, and each invest statutory bodies with various powers to review enacted legislation against a range of prescribed criteria.<sup>7</sup> Look a little closer, however, and key differences can be observed. For example, two Australian jurisdictions, Victoria and the Australian Capital Territory, have human rights legislation that empowers specially formed human rights committees to undertake scrutiny of proposed laws for compliance with human rights standards, and invests the courts with limited powers to interpret laws consistently with human rights.<sup>8</sup> Other jurisdictions invest

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4 For a description of the 'Westminster tradition' in Australian context see eg David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *The Journal of Legislative Studies* 1.

5 For an overview of the structure of the Australian federation see Appleby, Gabrielle, Laura Grenfell and Alexander Reilly (eds), *Australian Public Law* (Oxford University Press, 3rd ed, 2019) at 130-143.

6 See e.g. Richard Mulgan 'The Australian Senate as a 'House of Review', (1996) 31(2) *Australian Journal of Political Science*, 191-204. For an overview of the parliamentary dimensions of federalism and bicameralism see James Odgers, *Australian Senate Practice* (Commonwealth of Australia, 13th ed, 2012) ch 1, in particular 4-5. See also D Shell, 'The history of bicameralism' (2001) 7(1) *Journal of Legislative Studies* 13; S Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Parliament of Australia, 2004) 2. For judicial consideration of the bicameral features of the *Constitution* see, eg, *Western Australia v Commonwealth* (1975) 134 CLR 201 (Barkwick CJ); *Egan v Willis* (1998) 195 CLR 424; *McGinty v Western Australia* (1996) 186 CLR 140; *Victoria v Commonwealth* (1975) 134 CLR 81.

7 For an overview of the legislative scrutiny systems at the state and territory level in Australia see Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?' (2015) 26(1) *Public Law Review* 19.

8 For example, under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) the Scrutiny of Acts and Regulations Committee has pre enactment review powers (s30) and the court is given the power to interpret laws consistently with human rights, having regard to the purpose of the statute (s32); similarly, under the *Human Rights Act 2004* (ACT) pre-enactment rights scrutiny is conducted by the Standing Committee of the Legislative Assembly (s38) and s30 provides that 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.'

parliamentary committees with specific scrutiny roles<sup>9</sup> and some jurisdictions take an ad hoc approach to scrutiny, which is largely dependent on parliament itself referring matters to thematic parliamentary committees for review, usually prior to enactment.<sup>10</sup> The most sophisticated system of legislative scrutiny occurs at the federal level,<sup>11</sup> and for that reason, this research focuses on the effectiveness and impact of scrutiny in the Australian Parliament.

## 2. The Australian Parliamentary Model of Rights Protection

As noted above, there is no human rights legislation or constitutionally entrenched Bill of Rights at the federal level in Australia. Instead, Australia relies upon an ‘exclusively’ parliamentary model of rights protection,<sup>12</sup> which exists within a constitutional framework that limits the law-making powers of the federal Parliament. Under this model, the federal Parliament is the *only* legitimate arbiter of human rights. The judicial contribution to the conversation on rights is restricted to the resolution of particular disputes, the application of established rules of statutory interpretation,<sup>13</sup> and the determination of a more limited range of constitutional or common law rights.<sup>14</sup> While these constitutional and common law rights may cross over with the list of rights contained in international human rights instruments, they are nonetheless considered quite separate in both a legal and normative sense. This means that from a practical point of view, the federal Parliament in Australia is heavily reliant upon legislative scrutiny processes to draw attention to aspects of proposed or existing laws that abrogate or unjustifiably infringe upon individual rights, and to provide information about how these laws work in practice.

Parliamentary committees – whether specifically assigned a rights-protecting role, or performing another scrutiny or inquiry function – are central to this parliamentary model as they provide the most practical forum for detailed consideration of the purpose, content and rights impact of proposed new laws.

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9 See eg the Queensland Parliament’s Legal Affairs and Community Safety Committee which among other functions examines Bills for the application of the fundamental legislative principles set out in section 4 of the *Legislative Standards Act 1992* (Qld).

10 See eg Laura Grenfell and Sarah Moulds, ‘Youth Treatment Orders Bill highlights ad hoc approach to rights-scrutiny of bills’ (2019) 41(4) *Bulletin: Law Society of South Australia Journal* 36.

11 Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Federal and State Parliaments in Australia’ (2018) 41(1) *University of New South Wales Law Journal* 40.

12 George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34(1) *Statute Law Review* 58.

13 These include the common law principle of legality (discussed in 38) and the presumption of compliance with treaty obligations, see *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, at [26] (Mason CJ and Deane J).

14 James Spigelman, ‘The Common Law Bill of Rights’ (Speech delivered at the University of Queensland, Brisbane, 10 March 2008). See also Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo-Australasian Lawyers Society, Sydney, 4 September 2009) 2; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

They also provide a source of concrete recommendations for legislative or policy change that regularly have the effect of improving the rights compliance of proposed federal laws. For these reasons, studying the impact of parliamentary committees is crucial to any evaluation of Australia's approach to rights protection and legislative scrutiny.

### 3. Parliamentary-based Post-legislative Scrutiny

At the federal level, there is a sophisticated system of parliamentary committees that includes standing committees in both Houses, joint committees with members from both the House of Representatives and the Senate, and select committees established for particular purposes.<sup>15</sup> Within this system, there are committees with broad powers to conduct public inquiries into Bills and other matters (described as 'inquiry-based committees') and committees that scrutinise proposed laws with reference to certain prescribed criteria (described as 'scrutiny-committees'). The *inquiry-based* committees, such as the Senate Standing Committees on Legal and Constitutional Affairs ), have powers to hold public inquiries into any Bills or existing laws that are referred to them by Parliament.<sup>16</sup> These powers include calling for written submissions and inviting witnesses to provide oral evidence and answer the committee members' questions.<sup>17</sup> These inquiry-based committees have strong deliberative attributes,<sup>18</sup> and often develop very specific recommendations for legislative change, which they set out in comprehensive reports that also document the differing views of the key participants. The membership of these committees is prescribed by the relevant Standing Orders,<sup>19</sup> and sometimes includes a majority of government members and sometimes includes a non-government majority.<sup>20</sup> These committees can also include 'participating members'<sup>21</sup> (other members of parliament who join the committee for a particular inquiry), making them politically diverse and dynamic forums for engaging with contested policy issues.

The federal Parliament also includes a number of specialist, joint committees established by statute with specific functions and powers, including the power to conduct public and private inquiries into proposed and existing laws. One such

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15 For an overview of the parliamentary committee systems at the Commonwealth, State and Territory level see Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?' (2015) 26(1) *Public Law Review* 19.

16 See e.g. Senate, Parliament of Australia, *Standing Order 25* (2000).

17 Ibid.

18 For further discussion of the characteristics of deliberative decision making and deliberative law making see Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 4, 22-23; James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 39.

19 For example, Senate, Parliament of Australia, *Standing Order 25* (2000).

20 For example, the Senate Legal and Constitutional Affairs Legislation Committee has a government Chair and a majority of government members, while the Senate Legal and Constitutional Affairs References Committee has an Opposition Senator as Chair and a majority of non-government members. Both committees are established by Senate, Parliament of Australia, *Standing Order 25* (2000).

21 See e.g., House of Representatives, Parliament of Australia, *Standing Order 241* (2017).

committee is the Parliamentary Joint Committee on Intelligence and Security (the Intelligence and Security Committee),<sup>22</sup> which is given a specific mandate to review the operation, effectiveness and implications of a number of specific national security laws.<sup>23</sup> The Committee's membership is prescribed by statute<sup>24</sup> and comprises 11 members (five Senators and six members of the House) with a government Chair<sup>25</sup> and a majority of government members.<sup>26</sup> A secretary and professional secretariat staff support the Intelligence and Security Committee, including on occasion 'seconded' staff from law enforcement and intelligence agencies who provide technical assistance to the secretariat.<sup>27</sup>

These inquiry-based committees work closely with the *scrutiny-based* committees in the federal system, which include the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee)<sup>28</sup> and the Parliamentary Joint Committee on Human Rights (the Human Rights Committee).<sup>29</sup> These scrutiny-based committees are required to review every single Bill (and in the case of the Human Rights Committee, all legislative instruments) for compliance with a range of scrutiny criteria, including criteria that relate to individual rights and liberties.<sup>30</sup> These committees rarely hold public inquiries, but they regularly produce written reports and engage in correspondence with proponents of the Bill, highlighting any areas of concern or non-compliance with the scrutiny criteria. These scrutiny reports can then be used by the inquiry-based committees, or submission-makers to the inquiry-based committees, to draw attention to particularly concerning features of the proposed law or policy.

It is important to note that while both of these Committees are *required* to scrutinise Bills, there is no corresponding duty to engage in scrutiny of *enacted* provisions. The Scrutiny of Bills Committee is given no powers to initiate inquiries into enacted legislation, and while the Human Rights Committee can review existing

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22 Part 4 of the *Intelligence Services Act 2001* (Cth) establishes the Parliamentary Joint Committee on Intelligence and Security and prescribes its membership and key functions. Schedule 1 of the Act provides further detail on how the Committee will go about its work. The predecessor to this Parliamentary Joint Committee was the Parliamentary Joint Committee on ASIO, ASIS and DSD.

23 *Intelligence Services Act 2001* (Cth) s29. The Intelligence and Security Committee is not authorised to initiate its own references, but may request the responsible Minister to refer a particular matter to it for review.

24 *Ibid*, Part 4, s 28(2), Schedule 1 Part 3. Members must be nominated by the Prime Minister and the Leader of the Government in the Senate. Ministers, Speakers and Presidents of the Senate are not eligible to become members.

25 *Ibid*, sch 1, 16. The Chair of the Parliamentary Joint Committee on Intelligence and Security must be a government member elected by the members of the committee

26 *Ibid*, Schedule 1, 14.

27 *Ibid*, sch 1, 21.

28 Senate, Parliament of Australia, *Standing Order 24(2)(a)* (2017);

29 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.

30 The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The scrutiny criteria applied by the Human Rights Committee is outlined in s3 of the Act and includes the human rights and freedoms contained in seven core human rights treaties to which Australia is a party.

legislation for compliance with prescribed human rights,<sup>31</sup> in practice it has exercised this power only very rarely.<sup>32</sup> This means that there is no *systematic* approach to post-legislative scrutiny in Australia. In addition, the Australian Parliament does not employ the practice of memorandums of implementation like the British Parliament, or mandate post-enactment scrutiny as part of a committee's primary role, like the Indonesian *Badan Legislasi*.<sup>33</sup> Instead there are a range of different 'trigger points'<sup>34</sup> for post legislative scrutiny at the federal level in Australia - almost all of which engage the parliamentary committee system in some way - which is why it is so important to take a holistic approach to evaluating the effectiveness and impact of legislative scrutiny in Australia. The next section of this Paper briefly describes the most common of these 'trigger points' before setting out the key features of the evaluation framework.

#### a. Trigger-Points for Post Legislative Scrutiny

In the Australian context there are three main 'trigger points'<sup>35</sup> for post-enactment scrutiny of legislation: the inclusion of a sunset clause in the original legislation; the inclusion of a review provision in the original legislation; and a specific referral by parliament to an external review body empowered to undertake post legislative scrutiny. It is useful to briefly describe how each one of these triggers works in practice at the federal level in Australia.

##### i. Sunset clauses

'Sunset clause' is the name given to a legal provision which provides for the expiry of a law at a future point in time, conjuring images of a romantic skyline descending on an Act of Parliament, before dark descends completely on its legal effect. These types of provisions come in many different forms: they can list a date when the whole Act ceases to have legal effect (akin to automatic repeal); they can specify a date on which the legislation will lapse unless proactively reviewed and renewed by the Parliament (akin to a prompt for legislative affirmation).<sup>36</sup> In Australia, the latter approach to sunset clauses is most common, particularly with respect to legislation that is considered 'extraordinary' in nature, or enacted in response to an emergency situation, or containing features that abrogate or unduly infringe on individual

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31 *Human Rights (Parliamentary Scrutiny) Act 2011* s7 (b).

32 See e.g. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017).

33 Franklin De Vrieze and Victoria Hasson, *Post Legislative Scrutiny: Comparative Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for its Place in Democracy Assistance* (2018, Westminster Foundation for Democracy, London) at 14-17 and 24-26.

34 Franklin De Vrieze, *Principles of Post Legislative Scrutiny by Parliaments* (2018, Westminster Foundation for Democracy) at 5.

35 *Ibid.*

36 Gulati, Rishi, Nicola McGarrity and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307 at 307.

rights.<sup>37</sup> Sunset clauses featured prominently in Australian counter-terrorism laws.<sup>38</sup> In many of the case study Acts, sunset clauses were included in original or amending legislation as a way for the Parliament (and in particular the non-government members of Parliament) to hold the Executive Government and its agencies to account for the extraordinary powers it was granted to investigate, prosecute, prevent and deter terrorism activity in Australia.<sup>39</sup>

## ii. Review clauses

An increasingly common practice in Australian legislation that engages individual rights, such as counter-terrorism law-making, is the use of explicit review clauses that mandate review of the entire Act or parts of the Act within a certain time period, by a particular review body.<sup>40</sup> Often a parliamentary committee is the review body referred to such review clauses, however in certain subject areas (such as counterterrorism) there is an emerging trend towards including external review bodies in addition, or as alternatives, to parliamentary bodies. For example, each major tranche of counter-terrorism legislation has been subject to mandatory and regular parliamentary review, through the use of specific review clauses<sup>41</sup> or referral to the specialist Intelligence and Security Committee or to external statutory review bodies such as the Independent National Security Legislation Monitor (discussed below).<sup>42</sup>

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37 Ibid.

38 See eg Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendations 6, 1, 3, 15, 10, 12. See also Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth) Items 23–4. For further discussion see Gulati, Rishi, Nicola McGarrity and George Williams, ‘Sunset Clauses in Australian Anti-Terror Laws’ (2012) 33 *Adelaide Law Review* 307 at 311.

39 for discussion of effectiveness of sunset clauses in Australia and elsewhere Gulati, Rishi, Nicola McGarrity and George Williams, ‘Sunset Clauses in Australian Anti-Terror Laws’ (2012) 33 *Adelaide Law Review* 307; John E Finn ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 *Columbia Journal of Transnational Law* 442; John Ip, ‘Sunset Clauses and Counterterrorism legislation’ [2013] (1) *Public Law* 74.

40 See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report into the provisions of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018) [1.10]; Supplementary Explanatory Memorandum *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018)

41 See e.g. see ASIO Amendment (Terrorism) Bill 2003 (Cth) adopting Senate Standing Committee on Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, (2002) Recommendation 27.

42 See e.g. George Brandis and Malcolm Turnbull, ‘Government response to committee report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014’ (Media Release, 3 April 2015); George Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014’ (Media Release, 25 November 2014).

### iii. Referral to external review body

In addition to parliamentary committees, some bodies outside of the Australian Parliament have been granted a mandate or power to review enacted legislation against certain prescribed criteria, giving rise to an ad hoc system of extra-parliamentary post-legislative scrutiny at the federal level in Australia. Often these extra-parliamentary bodies have a statutory framework, with prescribed mandates, functions and powers that focus on a particular subject area or component of the Executive Government. For example, the Inspector General of Intelligence and Security (the IGIS) is an independent statutory office holder who is authorised to review the activities of the Australian Intelligence Community 'to ensure that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights'.<sup>43</sup> Part of this role involves assessing and reporting on the practical implementation of counter-terrorism laws, and the effectiveness of the counter-terrorism legislation at achieving its stated policy aims.

The Independent National Security Legislation Monitor (INSLM) is another example of a statutory office established to review and report on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis, including the impact of these laws on individual rights.<sup>44</sup> Established in 2010 in response to what has been described as period of 'hyper-legislating' from successive Australian governments in the area,<sup>45</sup> the Australian INSLM is loosely based on the UK Independent Reviewer of Terrorism Legislation, but lacks some of the judicial-intervention-related powers of its British counterpart.<sup>46</sup> While some have questioned the overall impact of the INSLM's recommendations on the shape of counter-terrorism law in Australia, and criticised the consistent lack of timely response to the INSLM's reports by the Executive Government, it is clear that the establishment of the office has had a significant impact on the quality of post legislative scrutiny that occurs in Australia in the national security context.<sup>47</sup> As discussed later in this paper, the work of the INSLM

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43 The functions of the IGIS are prescribed under the *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 8, 9, 9A. See also. Office of the Inspector-General of Intelligence and Security, *About IGIS*, Australian Government (2016) <<https://www.igis.gov.au/about>>.

44 *Independent Monitor of National Security Legislation Act 2010* (Cth) Part II. See also Australian Government, *About the Independent Monitor of National Security Legislation*, Independent Monitor of National Security Legislation (2017) <<http://www.inslm.gov.au/>>. Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, 4260 (Penny Wong) - see also Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation', (2014) 67(4) *Parliamentary Affairs* 955 at 976.

45 Ken Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1139-40.

46 Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation', (2014) 67(4) *Parliamentary Affairs* 955 at 976. See also Jessie Blackbourn, 'Accountability, Counter-Terrorism and Civil Liberties' (2018) 29(2) *Kings Law Journal* 297.

47 Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation', (2014) 67(4) *Parliamentary Affairs* 955 at 976. See also see Jessie Blackbourn, 'Independent Reviewers as Alternative: An Empirical Study from Australian and the UK' in Fergal F Davies

has also contributed to the deliberative and authoritative quality of parliamentary scrutiny of Australia's counter-terrorism laws.

Other statutory bodies have review mandates covering a wide range of thematic areas of law making and are designed to 'sound the alarm' about laws that are not being implemented correctly, have unintended consequences, or unduly infringe on individual rights. For example, the Australian Human Rights Commission (AHRC), has an explicit statutory mandate to provide advice about the human rights compliance of Australia's federal laws.<sup>48</sup> This power is often exercised in the form of a public inquiry into a gap in the law which culminates in a written report containing recommendations for legislative and policy change.<sup>49</sup> The Australian Law Reform Commission (ALRC) also has statutory power to make recommendations for reform on topics selected by the Attorney-General. Over time the ALRC has proven to be a highly 'influential agent for legal reform in Australia', with over 85 per cent of its recommendations either substantially or partially implemented by successive Australian governments.<sup>50</sup> While both the AHRC and the ALRC can have powerful legislative impacts, in practice the legislative scrutiny they conduct is confined to only a very small handful of federal laws and is conducted on a thematic rather than systematic basis.

The Australian scrutiny landscape also includes a collection of extra-parliamentary committees that have been invested with powers and functions to review or inquire into existing laws and make recommendations for reform. Like the statutory bodies described above, these extra-parliamentary committees operate on a largely ad hoc basis and are generally organised around thematic areas. In the counter-terrorism context, there are a number of examples of these types of extra-parliamentary scrutiny bodies including:

1. The Council of Australian Governments (COAG), which has played an important role in the development and review of Australia's counter-terrorism laws, particularly in the context of considerations of the referral of state powers and the enactment of complementary state and territory laws. COAG invests its

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and Fiona de Londras (eds) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge University Press 2014) at 161-82.

48 *Australian Human Rights Commission Act 1986* (Cth) s11. See also Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter Terrorism Laws* (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/counter-terrorism-and-human-rights>>.

49 See e.g. Australian Human Rights Commission, *Same-Sex: Same Entitlements Final Report* (2007) <https://www.humanrights.gov.au/our-work/lgbti/publications/same-sex-same-entitlements>

50 "Australian Human Rights Commission: About" *Australian Human Rights Commission* (25 May 2019) online: Australian Human Rights Commission <<https://www.humanrights.gov.au/about>>; Robert French, "ALRC 40th Anniversary Celebration" (Speech delivered at the Australian Law Reform Commission, Sydney, 23 October 2015) online: Australian Law Reform Commission <<https://www.alrc.gov.au/news-media/speech/alrc-40th-anniversary-celebration-french>>.

specialist committees with specific mandates which can include the consideration of the human rights implications of proposed or existing counter-terrorism laws.<sup>51</sup>

2. The 2008 inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (the Haneef Inquiry);<sup>52</sup> and
3. 2006 report of the Security Legislation Review Committee (the Sheller Committee) into the operation, effectiveness and implications of the package of anti-terrorism legislation introduced during 2002 and 2003.<sup>53</sup>

The recommendations contained in the reports of these bodies, combined with previous recommendations made by parliamentary committees, led to important changes in Australia's counter-terrorism legislative framework and cemented the already popular view that rigorous independent oversight was necessary if executive agencies were to be invested with extraordinary and intrusive investigative powers.

## II. A FRAMEWORK FOR EVALUATING LEGISLATIVE SCRUTINY IN AUSTRALIA AND ELSEWHERE

As shown above, the Australian parliamentary model of rights protection is heavily dependent on pre and post legislative scrutiny occurring within and outside of Parliament. The Australian approach to legislative scrutiny is ad hoc in nature, with the parliamentary committee system providing the most consistent, sophisticated source of scrutiny at the federal level, supplemented by less frequent, often thematically focused detailed reports by extra-parliamentary bodies. These two features of legislative scrutiny in Australia give rise to particular challenges when

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51 The Council of Australian Governments has members from each Australian government, including the Prime Minister, state and territory Premiers and Chief Ministers and the President of the Australian Local Government Association. The decisions of COAG are reflected in communiqués or sometimes including National Agreements and National Partnership Agreements. See e.g. Council of Australian Governments, *Agreement on Counter-terrorism Laws* (25 June 2004) 1. <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/InterGovernmentalAgreementonCounterTerrorismLaws.pdf>>

52 The Haneef case involved the use of the so called 'dead time' provisions of Part IC of the *Crimes Act*, introduced by the *Anti-Terrorism Act 2004* (Cth), which allowed Indian born Dr Haneef to be detained by police for a prolonged period without charge. Dr Haneef was eventually charged with the offence of 'providing support to a terrorist organisation' and granted bail, but the Minister for Immigration then decided to cancel his visa on character grounds. Haneef was eventually charged with the offence of 'providing support to a terrorist organisation' and granted bail, but the Minister for Immigration then decided to cancel his visa on character grounds. An inquiry conducted by Michael John Clarke made a number of findings that were critical of the handling of the case by key government agencies and included recommendations for legislative and policy reform.

53 Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006). The package of laws reviewed were: *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

seeking to evaluate effectiveness and impact, but also underscore the urgency and importance of this evaluation task.

As Russell and Benton observe in their work on legislative scrutiny in the UK, the complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means evaluating their performance is not always straightforward.<sup>54</sup> Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.<sup>55</sup> The evaluation framework employed in this study aims to address these challenges. For example, it tests findings relating to the legislative impact of parliamentary committees against empirical evidence obtained through interviews with public servants, parliamentary staff, submission makers and parliamentarians. This is in line with the approach endorsed by Tolley,<sup>56</sup> Aldons,<sup>57</sup> and Benton and Russell,<sup>58</sup> who suggest that this kind of qualitative approach is crucial to making an objective and holistic assessment of a committee's impact.

The evaluation framework is also multi-staged and specifically designed to take account of the 'particular conceptual complexities of rights and the institutional

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- 54 Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009), cited in Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111, 131. See Phillip Larkin, Andrew Hindmoor and Andrew Kenyon, 'Assessing the Influence of Select Committees in the UK: The Education and Skills Committee 1997-2005' (2009) 15(1) *Journal of Legislative Studies* 71; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41; Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785; J Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny' (2006) 59 *Parliamentary Affairs* 522.. See also George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.
- 55 See, eg, Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees' (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23(2) *Australasian Parliamentary Review* 135; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41.
- 56 Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41 at 48.
- 57 Malcolm Aldons, 'Rating the Effectiveness of Parliamentary Committee Reports: The Methodology' (2000) 15(1) *Legislative Studies* 22; Malcolm Aldons, 'Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?' (2003) 18(1) *Australasian Parliamentary Review* 79.
- 58 Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', n 54, at 793.

peculiarities of legislatures'.<sup>59</sup> For example, the contextualised features of the evaluation framework allow for considerations of what Campbell and Morris have described as the 'political approach' to human rights, where value is attributed to the political protection and promotion of human rights, as an alternative to, or in addition to, specific legislative or judicial protection of legally enforceable rights.<sup>60</sup> This framework draws on the international rights-mechanism evaluation model developed by the Dickson Poon School of Law, which looks for three tiers of 'impacts' and has regard to the views of relevant stakeholders and constituencies.<sup>61</sup> The four key steps of the evaluation framework are summarised below.

1. Step 1: Set out the institutional context in which the scrutiny takes place

Understanding the institutional context in which models of legislative scrutiny operate allows the investigator to collect and reflect upon important contextual information about why and when a particular scrutiny body was established and the role the body plays within the broader parliamentary and political landscape.

2. Step 2: Identify the role, functions and objectives of the scrutiny body

This step requires the investigator to clearly articulate the role, function and objective of each of the scrutiny bodies studied, and explain how these individual scrutiny bodies feed into the broader scrutiny system. This is important as it demonstrates that not all scrutiny bodies have the same membership, functions, powers or priorities: some may be specifically designed to undertake post legislative review or to consider the rights compatibility of proposed laws, others may have a range of different roles, only one of which is the power to review or inquiry into the implementation of existing laws. As discussed below, these varying roles and priorities give rise to different attributes and relationships, which in turn offer important opportunities for individual components of the scrutiny system to work together and add value to the system as a whole.

3. Step 3: Identify key participants and determine legitimacy

The next step in the evaluation framework identifies the *key participants*<sup>62</sup> in the legislative scrutiny system and looks for evidence of whether components of this

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59 Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', n 54, at 569.

60 Tom Campbell and Stephen Morris, 'Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7, 10; David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999); David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58.

61 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Paper presented at the Dickson Poon School of Law, King's College London, University of London, June 2014) 3 <<https://www.kcl.ac.uk/sspp/policy-institute/projects/government/assets/Human-Rights-Policy-DocumentV5.pdf>>.

62 For example, the key participants in the Australian parliamentary committee system include parliamentarians, elected members of the executive government, submission makers and witnesses to parliamentary committee inquiries, public servants and government officers, independent oversight bodies and the media.

system are seen as *legitimate*<sup>63</sup> by some or all of these participants. This provides important insights into the strengths and weaknesses of each component of the scrutiny system and can offer important new perspectives from which to consider reforms, particularly those that aim to improve the breadth and diversity of community engagement with the legislative scrutiny process.

#### 4. Step 4: Measuring the impact of the scrutiny system

Step 4 is the most intensive and detailed step in the evaluation framework. It aims to determine what impact a particular component of the scrutiny system is having on the development and content of the law. It includes consideration of the following three ‘tiers’ of impact (a) legislative impact (whether the scrutiny undertaken has directly changed the content of a law); (b) public impact (whether the work of the scrutiny has influenced or been considered in public or parliamentary debate on a Bill, or in subsequent commentary or review of an Act); and (c) hidden impact (whether those at the coalface of developing and drafting counter-terrorism laws turn their mind to the work of legislative scrutiny bodies when undertaking their tasks).<sup>64</sup> The next part of this Paper provides an illustration of how this evaluation framework was applied in the context of legislative scrutiny of Australia’s counter-terrorism laws.

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63 A wealth of literature exists on the topic of political legitimacy and the meaning attributed to this term has been contested and developed over time. It is beyond the scope of this paper to explore these different articulations; however, the use of the term in this paper is infused with both descriptive and normative aspects and has a clear connection to deliberative democracy theory, particularly in so far as it intersects with the above discussion relating to rates of participation. See, eg, David Beetham, *The Legitimation of Power* (Palgrave, 2002); Allan Buchanan, ‘Political Legitimacy and Democracy’ (2002) 112(4) *Ethics* 689; Immanuel Kant, *Practical Philosophy* (Mary J Gregor ed, Cambridge University Press, 1999); Jack Knight and James Johnson, ‘Aggregation and Deliberation: On the Possibility of Democratic Legitimacy’ (1994) 22 *Political Theory* 277; Bernard Manin, ‘On Legitimacy and Political Deliberation’ (1987) 15 *Political Theory* 338; Thomas Nagel, ‘Moral Conflict and Political Legitimacy’ (1987) 16(3) *Philosophy and Public Affairs* 215; Patrick Riley, *Will and Political Legitimacy* (Harvard University Press, 1982); Piers Norris Turner, ‘“Harm” and Mill’s Harm Principle’ (2014) 124(2) *Ethics* 299; Francis Fukuyama, ‘Why Is Democracy Performing So Poorly?’ (2015) 26(1) *Journal of Democracy* 11.

64 Collecting evidence of the hidden impact of parliamentary committees can be challenging due to the need to look beyond documentary sources and consider more subjective material including interviews but, as Evans and Evans and Benton and Russell have shown in their empirical-based work it is not impossible. In Australia at least, much publicly available material exists that points to the hidden impacts of scrutiny, including training manuals, published guidelines, information in annual reports, and submissions and oral evidence given at parliamentary and other public inquiries and hearings. This material can then be tested against a range of targeted individual interviews conducted with key participants in the scrutiny process. Benton and Russell, ‘Assessing the Impact of Parliamentary Oversight Committees’ above n54; Evans and Evans, ‘Evaluating the Human Rights Performance of Legislatures’, above n54.

### III. CASE STUDY: COUNTER-TERRORISM LAW MAKING IN AUSTRALIA

This section of the Paper outlines how the evaluation framework discussed above applies to the case study of Australia's counter-terrorism laws.<sup>65</sup> These laws include: Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth); Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth); Counter-Terrorism Legislation Amendment Act (No 1) 2014 (Cth); Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth); National Security Legislation Amendment Act 2010 (Cth); Independent National Security Legislation Monitor Act 2010 (Cth); Anti-Terrorism Act (No 2) 2005 (Cth); National Security Information (Criminal Proceedings) Act 2004 (Cth); Anti-terrorism Act 2004 (Cth); Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth); Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002 (Cth); Security Legislation Amendment (Terrorism) Act 2002 (Cth) (and related Acts) Criminal Code Amendment (High Risk Offenders) Act 2016 (Cth); Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth).

Australia's counter-terrorism laws provide the perfect canvas for evaluating the effectiveness and impact of Australia's largely ad hoc system of legislative scrutiny and parliamentary model of rights protection. Many of Australia's counter-terrorism laws were introduced in response to extraordinary international or domestic events or particular threats to Australia's national security,<sup>66</sup> and propose novel powers for intelligence and law enforcement agencies, and/or new criminal offences.<sup>67</sup> The majority of these laws remove or at least limit a large number of individual rights and freedoms, change the parameters of criminal liability and extend the powers of law enforcement and intelligence agencies. This makes studying the impact of parliamentary committees on the content and development of counter-terrorism laws not just interesting, but also critically important. It also provides a useful example of how the four key steps work in practice.

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65 One of the case study 'Acts', the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth), is more correctly described as a 'Bill' as it was not enacted into legislation.

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

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

## 1. Participation and legitimacy

Looking for evidence of legitimacy within the scrutiny system illustrates the important tension between the *deliberative* and *authoritative* attributes of scrutiny bodies. On the one hand, it is important to have committees that are respected and trusted by key decision makers, and have the political status to turn their recommendations into legislative change. On the other hand, it is important that the broader Australian public is able to utilise the committee system to engage directly with Parliament, and to provide the information and varied perspectives necessary to allow for meaningful deliberation to occur. These two attributes of the Australian committee system are explored in detail below, commencing with a consideration of rates of participation in the committee system.

This research found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact.<sup>68</sup> This is because a diverse range of participants in inquiries into proposed or existing laws provides ‘an opportunity for proponents of divergent views to find common ground’<sup>69</sup> or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to ‘strike the right balance’ between safeguarding security and preserving individual liberty when enacting counter-terrorism laws.<sup>70</sup> This means that scrutiny bodies with the powers, functions and membership to attract a diverse range of participants have important strengths when it comes to contributing to the overall impact and effectiveness of the scrutiny system. A good example of a scrutiny body with these strengths in the Australian system is the Legal and Constitutional Affairs References Committee. This inquiry-based Senate Committee has a high overall participation rate, engaging a broad range of Senators, public servants and submission makers. For example, in two counter-terrorism Bill inquiries, the Legal and Constitutional Affairs Legislation Committee attracted over 400 submissions and heard from well over 20 witnesses.<sup>71</sup> Unlike some other parliamentary committees, this committee was able to attract participation from a broader cross section of the community, rather than rely on ‘the usual suspects’ (such groups or individuals who are already aware of the bill’s existence, or who are

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68 This finding is consistent with the discussion in Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76.

69 Harry Evans (ed), *Odgers’ Australian Senate Procedure* (Commonwealth of Australia, 10th ed, 2001) at 366; see also Anthony Marinac, ‘The Usual Suspects? “Civil society” and Senate Committees’ (Paper submitted for the Senate Baker Prize, 2003) 129 <<http://www.aph.gov.au/binaries/senate/pubs/pops/pop42/marinac.pdf>>.

70 Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 273.

71 Senate Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002). In this inquiry, the Senate Standing Committee on Legal and Constitutional Affairs References Committee received 431 submissions and heard from 65 witnesses. See also Senate Committee on Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002). In this inquiry the Committee received 435 submissions and heard from 22 organisations.

contacted by politicians or their staff, or by the committee secretariat).<sup>72</sup> However, this research also found that scrutiny bodies that focused on preserving and strengthening relationships with a smaller, less diverse group of decision makers also played an important role in the broader legislative scrutiny system, particularly when those relationships were with government agencies or expert advisers. This is illustrated by the influential nature of the recommendations made by the specialist Intelligence and Security Committee, which has a tightly prescribed membership<sup>73</sup> and works closely with staff from law enforcement and intelligence agencies when inquiring into proposed or existing national security laws.<sup>74</sup>

This reveals an important tension in the role and impact of different types of scrutiny bodies. On the one hand, the ability to attract and reflect upon a diverse range of perspectives when inquiring into a particular law has positive deliberative implications for the capacity of the scrutiny system to improve the overall quality of the law making process, and to identify rights concerns or other problems with the content and implementation of the law. On the other hand, other committee attributes, such as specialist skills and trusted relationships with the executive, can also lead to a consistently strong legislative impact, which can also have important, positive results. Of course, committees with close relationships with executive agencies, such as the Intelligence and Security Committee, can give rise to concerns about their capacity to undertake independent oversight or robust scrutiny of executive action.<sup>75</sup> Interestingly, (as discussed in detailed below), this research suggests that the types of changes recommended by the Australian Intelligence and Security Committee to the case study laws were rights-*enhancing* in nature and had the effect of limiting (rather than extending) the scope of executive power and improving (rather than diluting) oversight mechanisms and safeguards.

This research also found that whether or not key participants consider the legislative scrutiny system, or particular components of the system, to play a *legitimate* role within the broader institutional landscape is also critical to determining effectiveness and impact. In the Australian context, a spectrum of scrutiny experiences emerges. At one end are the parliamentary committees with tightly prescribed mandates and controlled membership (such as the Intelligence and Security Committee and the Scrutiny of Bills Committee), which are attributed high levels of legitimacy by almost all categories of participants, and particularly by those directly involved in the law-making process. At the other end of the 'legitimacy spectrum' is the specialist Human Rights Committee, a much newer

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72 Paxman, Kelly, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) at 81.

73 *Intelligence Services Act 2001* (Cth) pt 4, s 28 (2).

74 For further discussion of the role and impact of the Parliamentary Joint Committee of Intelligence and Security see Sarah Moulds 'Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security' (2018) 29(4) *Public Law Review* 41.

75 See eg Dobson, Melina J. (2019) 'The last forum of accountability? State secrecy, intelligence and freedom of information in the United Kingdom' 21:2 *The British Journal of Politics and International Relations* 312-329; Bolto, Richard (2019) Accountability and secrecy in the Australian Intelligence Community: the Parliamentary Joint Committee on Intelligence and Security 85: *International Review of Administrative Sciences* 137-153.

scrutiny body with an international human rights law inspired mandate and broader policy focus, which is struggling to gain legitimacy in the eyes of a wide range of participants. As discussed below, this struggle for legitimacy appears to arise from two related factors (1) an absence of broad political acceptance and understanding of the international human rights law principles underpinning the Human Rights Committee's mandate and (2) an scepticism about whether the Committee is engaged in 'technical scrutiny' or undertaking a broader policy analysis role. In the middle of the spectrum are those scrutiny bodies such as the Legal and Constitutional Affairs References Committee, whose legitimacy is sometimes questioned by the government of the day, but whose relatively broad and diverse range of participants consistently attribute at least moderate levels of legitimacy across a wide range of participants.

## 2. Legislative Impact

One of the most surprising findings of this study relates to the significant legislative impact different components of the scrutiny system were able to have on the content of Australia's counter-terrorism law. For example, I found that in many instances, the recommendations for legislative change made by scrutiny bodies (and in particular parliamentary committees) were implemented in full by the Parliament in the form of amendments to the Bill or Act.<sup>76</sup> In addition, the types of changes recommended by these scrutiny bodies were generally rights-*enhancing*. In other words, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny) - but the legislative changes made as result of scrutiny were significant and positive from a rights perspective. For example, this research suggests that the work of parliamentary committees directly contributed to amendments that:

1. Narrowed the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of 'terrorist act';<sup>77</sup>
2. Removed absolute liability and reverse onus of proof provisions from the terrorist act related offence;<sup>78</sup>

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76 Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, 2018) Chapter 5 and Table 5.1.

77 Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) and Related Bills, Items 5 and 8; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 2.

78 Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth), Items 11, 13, 14; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 3.

3. Inserted defences within the terrorist act offences for the provision of humanitarian aid;<sup>79</sup>
4. Ensured the power to proscribe terrorist organisations is subject to parliamentary review;<sup>80</sup>
5. Subjected each new law enforcement and intelligence agency power to a raft of detailed reporting requirements and oversight by independent statutory officers;<sup>81</sup>
6. Ensured persons detained under questioning and detention warrant have access to legal representation, are protected against self-incrimination and have access to judicial review of detention at regular intervals;<sup>82</sup>
7. Ensured that pre-charge detention of people thought to have information relevant to terrorist investigations is subject to judicial oversight and maximum time limits;<sup>83</sup>
8. Re-instated the court's discretion to ensure that a person receives a fair trial when certain national security information is handled in 'closed court', and limited the potential to exclude relevant information from the defendant in counter-terrorism trials;<sup>84</sup>

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79 Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and (Cth), Item 4, in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 1.

80 See e.g. Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See also Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002).

81 Ibid, see also Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

82 See Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth) and Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendations at viii-ix. See also ASIO Amendment (Terrorism) Bill 2003 (Cth).

83 See e.g. Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Items 4, 5, 6, 7 and 8 which implement Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004*, (2004) Recommendations 1-4.

84 Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline' and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004).

9. Ensured people subject to control orders and preventative detention orders can understand and challenge the material relied upon to make the order and limited the regime to adults only;<sup>85</sup> and
10. Narrowed the circumstances in which a dual national can have their citizenship 'renounced' by doing something terrorist-related overseas, including by narrowing the range of conduct that can trigger the provisions; and making it clear that the laws cannot be applied to children under 14.<sup>86</sup>

As discussed further in Part 4, these findings are surprising because they challenge the orthodox view that governments generally resist making changes to legislation that they have already publicly committed to and introduced into Parliament.<sup>87</sup>

Interestingly, this research also found that the strength of this legislative impact varied from committee to committee. For example, the Intelligence and Security Committee was a particularly strong performer when it came to translating recommendations into legislative change (achieving an 100% strike rate during the period from 2013-2018) and improving the rights compliance of the law.<sup>88</sup> The committees with broader mandates and more open membership, such as the Legal and Constitutional Affairs References Committee, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law making, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes.<sup>89</sup> This further suggests that it was not just the inquiry-based committees that had a legislative influence on the case study Acts; the technical scrutiny committees (such as the Scrutiny of Bills Committee) also played an important, if less direct, role. It appears that the work of these committees armed the inquiry-based committees and their submission makers with the

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85 See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 Bill and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Provisions of the Anti-Terrorism Bill (No 2) 2005, (2005).

86 See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended clause 33AA(1); see also Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

87 As discussed below, this orthodox view suggests that within Westminster systems, parliamentary committees, and in particular government-dominated committees, will be seriously compromised as a form of rights protection, especially when scrutinising laws that affect electorally unpopular groups, such as bikies and terrorists. See e.g. Janet Hiebert, 'Governing Like Judges' in Tom Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 39 at 52.

88 Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, Chapter 5 and Table 5.1).

89 Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, Chapter 5 and Table 5.1).

information and analysis they needed to substantiate and justify the legislative changes they recommended.

These findings suggest that when multiple components of the scrutiny system work together to scrutinise and review an existing or proposed law, a more significant legislative impact is felt.<sup>90</sup> As discussed below in Part 4, this has important implications for the types of changes that could be adopted in Australia and elsewhere to improve the overall effectiveness of legislative scrutiny systems.

### 3. Public Impact

As noted above, examining the impact of legislative scrutiny on the way laws are debated in the parliament and the community is particularly important for understanding how legislative scrutiny bodies, and in particular parliamentary committees, contribute to the parliamentary model of rights protection in Australia. This suggests that parliamentary committees can help establish a ‘culture of rights scrutiny’ by providing a forum for parliamentarians to share their views on a proposed or existing law, including pointing out what they consider to be the rights implications of the proposed law. This can help identify any unintended or unjustified rights implications arising from a proposed law, and generate new, less rights-intrusive, legislative or policy options. Parliamentary committees can also help parliamentarians to weigh competing arguments or different policy options,<sup>91</sup> either through the public process conducted by the inquiry-based committees, or through the consideration of written analysis provided by the technical scrutiny committees. This weighing process becomes particularly relevant when considering the enactment of counter-terrorism laws which, as Dalla-Pozza explains, are regularly accompanied by the claim that counter-terrorism laws must strike an appropriate ‘balance’<sup>92</sup> between safeguarding Australia’s national security and preserving individual rights and liberties.<sup>93</sup> This bipartisan commitment to ‘striking the right balance’ when enacting counter-terrorism laws is evident from Dalla-Pozza’s earlier

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90 This is evident in both the early cases of the Control Order Bill and ASIO Bill 2002, which were considered by the Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on ASIO and the Senate Standing Committee on Legal and Constitutional Affairs Committee, and in the post-2013 Bills which were considered by the Parliamentary Joint Committee on Intelligence and Security, Senate Standing Committee for the Scrutiny of Bills, and the Parliamentary Joint Committee on Human Rights. See also Moulds, Sarah, ‘Committees of Influence: Parliamentary Committees with the Capacity to Change Australia’s Counter-Terrorism Laws’ (Paper presented at the Australasian Parliamentary Study Group’s Annual Conference, ‘The Restoration and Enhancement of Parliaments’ Reputation’, Adelaide, October 2016)

91 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 25; Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 274

92 As will be explored further below, the bipartisan parliamentary focus on ‘striking the right balance’ when enacting counter-terrorism laws comes through strongly in the language used in Hansard when debating the case study Acts.

93 Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework’, above n 90 at 272-4.

study<sup>94</sup> and this research,<sup>95</sup> even if the enacted outcomes leave some commentators sceptical of the efficacy of this process.<sup>96</sup>

A number of scholars have cited short time frames between the referral and reporting date (sometimes a matter of days or weeks)<sup>97</sup> as a fundamental flaw in the Australian ad hoc approach to legislative scrutiny.<sup>98</sup> Concerns have been raised that such short time frames effectively exclude non-government actors from fully participating in the scrutiny process. However, this research suggests that at least within the Australian ad hoc system – where multiple committees may be involved in scrutinising the same bill – factors other than time periods may have an influence on the quality of scrutiny a law receives, and on the legislative impact the scrutiny body can have.<sup>99</sup> For example, in the case of the *Foreign Fighters Bill*, certain influential submission makers (such as the Law Council of Australia) were able to respond with relatively detailed submissions despite the short time frames.<sup>100</sup> The scrutiny-based committees were also able to issue preliminary reports prior to the conclusion of parliamentary debate. This multi-layered committee scrutiny can have a cumulative rights-enhancing effect by increasing the volume of public debate on the proposed or existing law, and providing important political incentives for parliamentarians to carefully ‘weigh’ competing public interests and policy options when making decisions about a proposed or existing law.<sup>101</sup> This suggests that while

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94 Ibid. See also Dominique Dalla-Pozza, ‘Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws’ (2008) 23(1) *Australasian Parliamentary Review* 39.

95 This is discussed further below, including by reference to Table 6.2. See also the following Hansard debates on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13558 (Warren Entsch); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13326 (Lisa Chesters); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13117–18, 9504. (Michael Danby).

96 See, eg, George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35(3) *Melbourne University Law Review* 1136; Andrew Lynch, ‘Legislating with urgency – the enactment of the Anti-Terrorism Act (No 1) 2005’ (2006) 30(3) *Melbourne University Law Review* 747; Shawn Rajanayagam, ‘Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act’ (2015) 38(3) *University of New South Wales Law Journal* 1046.

97 For example, only 9 days were provided to submissions makers to respond to the Intelligence and Security Committee’s inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Bill was passed in 39 days (from introduction to enactment). For a comprehensive analysis of the time frames for debate and scrutiny of the case study laws see Table 6.1

98 See eg Dominique Dalla-Pozza, ‘Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws’ (2008) 23(1) *Australasian Parliamentary Review* 39.

99 Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, Chapter 6 and Table 6.1.

100 See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014)

101 This is apparent in the Senate Standing Committee on Legal and Constitutional Affairs Committee’ and Parliamentary Joint Committee on Intelligence and Security’s inquiries into

short time frames for committee scrutiny are certainly not ideal (and should be avoided wherever possible) rates of engagement and participation may be just as important as time period for conducting meaningful legislative scrutiny.

Another area of public impact considered relates to the way *intra-parliamentary* and *extra-parliamentary* components of the scrutiny system work together to effect legislative change. This involved evaluating the role parliamentary committees play in post-enactment review of the counter-terrorism Acts studied. For example, when reviewing proposed new sedition offences, the Legal and Constitutional Affairs References Committee recommended that they be examined by the Australian Law Reform Commission, which in turn made a number of recommendations for substantive changes to be made.<sup>102</sup> These ALRC recommendations were later implemented into law in the form of amending legislation, introduced some five years after the original offences were introduced.<sup>103</sup>

Another way intra-parliamentary and extra-parliamentary scrutiny bodies work together is for the extra-parliamentary body to draw upon the materials prepared by and for parliamentary committees when conducting their post-enactment scrutiny of particular laws. For example the 2006 Sheller Review,<sup>104</sup> drew extensively upon the work of previous parliamentary committee inquiries when engaging in post-enactment scrutiny of the first tranche of Australia's counter-terrorism laws, that included powers to question and detain persons suspected of engaging in terrorist activity, and powers to proscribe organisations as 'terrorist organisations'. While many improvements had already been made to these laws at the pre-enactment scrutiny stage, the Sheller Review was able to give added force to parliamentary committee recommendations previously rejected or incompletely implemented at the time of enactment. For example, it recommended that the process for proscribing a terrorist organisation be made more transparent by providing persons affected with notification and the right to be heard in opposition.<sup>105</sup> It also recommended that the term 'threat of action' be removed from the definition of 'terrorist act',<sup>106</sup> and the advocating terrorism offence be narrowed.<sup>107</sup> These

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the most controversial case study Acts, such as the ASIO Bills, the Control Order Bill and the Citizenship Bill, but also in the context of less controversial Bills, such as the National Security Information (Criminal Proceedings) Bill 2004.

102 ALRC, *Fighting Words: A review of sedition laws in Australia*, Report No 104 (2006) particularly Recommendations 1, 2, 3 and 9.

103 Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005). The Senate Standing Committee on Legal and Constitutional Affairs Committee's report on the Control Orders Bill also featured prominently in the following inquiries into counter-terrorism laws: Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6; COAG, *Review of Counter Terrorism Legislation* (2012); Bret Walker, *Independent National Security Legislation Monitor: Annual Report 2011* (2011); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

104 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6.

105 Ibid Recommendation 3.

106 Ibid Recommendation 7.

107 Ibid Recommendation 9.

recommendations were later reflected in the provisions contained in the *National Security Legislation Amendment Act 2010* (Cth).

The work of parliamentary committees also featured in the 2008 extra-parliamentary, independent inquiry into the use of certain counter-terrorism provisions with respect to an Indian born doctor, Mohamed Haneef, who was detained without charge (and faced deportation from Australia) on suspicion of involvement in or knowledge of terrorist activity occurring in the UK.<sup>108</sup> The independent inquiry into the use of these laws echoed concerns made by the Legal and Constitutional Affairs Legislation Committee at the time the questioning and detention powers were introduced.<sup>109</sup> The Haneef Report also recommended that consideration be given to the appointment of an Independent Reviewer of counter-terrorism laws,<sup>110</sup> which as discussed above, was eventually implemented into law in 2010.

The 2012 COAG Review of Counter Terrorism Legislation<sup>111</sup> also referred to past parliamentary committee scrutiny of the control order and preventative detention order regimes.<sup>112</sup> The COAG Committee recommended 47 changes to a range of counter-terrorism provisions subject to the review, many of which reflected the recommendations previously made by parliamentary committees.<sup>113</sup> Although the federal government of the day only supported a handful of the COAG Committee recommendations, the recommendation for the introduction of a nationwide system of ‘Special Advocates’<sup>114</sup> to participate in control order proceedings has featured in many subsequent parliamentary committee inquiries into counter-terrorism laws, demonstrating how different components of the

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108 Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef, Volume One* (2008).

109 Ibid 242-3.

110 Ibid Recommendation 4.

111 COAG, *Review of Counter Terrorism Legislation* (2012). The legislation covered by the COAG Review included divs 101, 102, 104 and 105 of the *Criminal Code Act 1995* (Cth), s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and ss 3C, 3D and Division 3A of the *Crimes Act 1914* (Cth) as well as a range of corresponding state and territory laws.

112 Ibid. Eg 33 references were made to the work of the Parliamentary Joint Committee on Intelligence and Security, with much less frequent reference being made to the Senate Standing Committee on Legal and Constitutional Affairs Committee. Other independent post-enactment reviews were also discussed, including the Sheller Review.

113 Ibid. For example, the COAG Committee recommended changes to clarify and narrow the scope of the definition of ‘advocates’ in the advocating terrorism offence in s 102.1(1A) of the Criminal Code (Recommendation 13). The Senate Standing Committee on Legal and Constitutional Affairs Committee (Recommendation 31) made a similar recommendation in its report on the Control Orders Bill. The COAG Committee also recommended the removal of strict liability elements in the terrorist organisation offences (Recommendation 18), similar to recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs Committee in its report on the SLAT Bills (Recommendations 3 and 4).

114 Ibid Recommendations 13.

Australian ad hoc approach to legislative scrutiny can work together to generate appetite for significant, rights-enhancing legislative change.<sup>115</sup>

#### 4. Hidden Impact

As noted above, the evaluation framework looks to test findings of legislative and public impact with information gleaned from listening to those working 'behind the scenes' in the law making and scrutiny process.<sup>116</sup> This type of impact is described as 'hidden' as it often occurs prior to a Bill or amendment being introduced into Parliament and concerns the activities of public servants and parliamentary counsel, outside of the public gaze.<sup>117</sup>

Investigations into the hidden impact of legislative scrutiny on Australia's counter-terrorism laws suggest the work of parliamentary committees is giving rise to a 'culture of rights compliance' among those responsible for developing, drafting and reviewing federal laws that is particularly influenced by the broadly framed, common law informed mandate of the Scrutiny of Bills Committee. The influence of this Committee on those working 'behind-the-scenes' stems from two important features. The first is the 'technical' nature of the Committee's work. It aims to produce unanimous, objectively framed reports that highlight any legal shortcomings with the proposed law without engaging in a discussion of the merits of the policy objective behind the proposed law. The second feature that gives the Scrutiny of Bills Committee a particularly strong 'hidden impact' is the nature of its scrutiny mandate. Unlike the Human Rights Committee,<sup>118</sup> the Scrutiny of Bills

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115 Ibid Recommendations 19–24. See also Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the 'declared area' provisions* (2018). See Independent National Security Legislation Monitor, Commonwealth, *Report on Certain Questioning and Detention Powers in Relation to Terrorism*, (2016) 51–52, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *ASIO's questioning and detention powers* (2018) Recommendation 1 [2.22].

116 As part of this research, I interviewed public servants who were directly responsible for developing or drafting the case study Bills, including those from the AGD, Department of Immigration and Border Protection (DIBP), AFP and OPC. I also conducted interviews with current and past parliamentarians and parliamentary staff. Although not statistically representative, these interviews provide a useful insight into the role parliamentary committees play in the development of proposed laws from the perspective of a broad range of players in the legislative development and drafting process. Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide) Appendix A.

117 The political Party Room also plays a central role in this behind-the-scenes lawmaking process but remains 'off-limits' to almost all researchers, due to its highly politically charged and confidential nature. This work focuses particularly on the role of public servants, parliamentary counsel and parliamentary committee staff and gathers evidence and insights from interviews with these key players in the process.

118 The criteria to be applied by the Human Rights Committee are drawn from the seven core human rights Conventions to which Australia is a party = the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40); the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); the Convention on

Committee is not required to engage with complex and detailed international law principles when scrutinising laws. Instead, the Scrutiny of Bills Committee applies criteria drawn from well-accepted, broadly framed accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary scrutiny. These include assessing proposed laws to determine whether administrative powers are defined with sufficient precision, and whether administrative decisions are subject to appropriate review.

These standards are incorporated into written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments and some of these documents, in particular the *Legislation Handbook*, *Drafting Directions* and *Guide to Commonwealth Offences*, translate the abstract principles underpinning the scrutiny bodies' mandates into practical checklists to be applied during particular stages of the legislation development process. When used by those developing and drafting laws, these documents may help create a 'culture of rights compliance' within the public service. Over time, they also give rise to the shared view that the scrutiny criteria applied by the scrutiny committees (particularly the Scrutiny of Bills Committee) reflect 'best practice' when it comes to developing laws.

This is not to suggest that the Human Rights Committee, which assesses proposed laws with reference to the full range of international human rights treaties to which Australia is a party, has no influence on the development of law in Australia. The interview material suggests that the requirement to introduce all Bills with explanatory material and statements of compliance with international human rights standards<sup>119</sup> has, at the very least, required policy officers to turn their minds to the human rights implications of the legislation they are developing, even if the quality of engagement with human rights concepts varies significantly across departments and ministerial portfolios. The interview material further suggests that the prospect of a public inquiry can sharpen policy officers' focus on the right implications of proposed new provisions and encourage them to develop safeguards or other rights-protecting mechanisms when seeking to translate operational need into legislative form. It is also important to acknowledge the overlap between the two Committee's mandates – both have a focus on the impact of the law on individual rights and liberties. However, it is clear that many Australian parliamentarians remain sceptical of the relevance of internationally formulated standards and tests to the Australian legal system, and are more comfortable

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the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21); the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

119 The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s6 also introduced the requirement for all Bills and disallowable instruments to be introduced with a Statement of Compatibility with Human Rights. .

accepting recommendations for reform developed on the basis of broadly framed, common law informed criteria such as the need to ensure adequate review of administrative decisions.

Understanding these different forms of ‘hidden impact’ helps uncover new opportunities to improve the effectiveness and impact of the scrutiny system, in addition to exposing some of the system’s key challenges and weaknesses. In particular, these findings warn against reforms that radically alter the features of the scrutiny system that currently resonate strongly with those responsible for developing and drafting proposed laws. For this reason, instead of relying on one particular scrutiny body, such as the Human Rights Committee, to generate a culture of rights compliance among law makers in Australia, it may be more useful to consider how the *system* of legislative scrutiny could be adjusted or changed to encourage rights considerations at the pre-introduction phase. This provides more scope for an indigenous ‘culture of rights compliance’ to emerge (based on entrenched common law principles and accepted accountability standards), that is robust enough to withstand the types of criticisms previously levelled at international human rights standards in Australia.

While these findings are compelling, it is important to note that the interview material also reveals that the rights-enhancing hidden impact of parliamentary committees remains vulnerable to a number of dynamic factors, including the degree to which the policy officers are able to present alternative policy and legislative options to the Minister for consideration and the expertise and experience of the policy officers and parliamentary counsel involved in the development and drafting of the Bill. These factors point to significant limitations when it comes to generating a sufficiently strong rights-scrutiny culture at the federal level, and it is important to emphasise that these findings, with their focus on rights-*enhancing* impact, do not go so far as to suggest that investing in the committee-system *alone* has the capacity to provide comprehensive rights protection at the federal level in Australia. Broader structural reforms, such as the introduction of a more explicit role for the judiciary in rights protection, may still be necessary in addition to investment in the parliamentary committee system to guarantee comprehensive rights protection in Australia. However, at the very least, this research suggests that understanding the rights-enhancing impact of the legislative scrutiny system is fundamental for any rights advocates developing or evaluating options for improving or replacing Australia’s parliamentary model of rights protection, and may in fact offer new opportunities for structural or cultural change.

#### IV. RELEVANCE FOR LEGISLATIVE SCRUTINY SYSTEMS IN OTHER JURISDICTIONS

Part 4 of this Paper seeks to extrapolate why the evaluation framework described above is useful for other jurisdictions seeking to understand and improve the quality of their legislative scrutiny regimes. In particular, the evaluation framework introduced in this Paper has relevance beyond the Australian for the following three reasons:

1. Legislative scrutiny systems cannot be divorced from their institutional context, and a contextualised evaluation framework helps to reveal important insights into the 'culture of scrutiny' that exists in any given jurisdiction;
2. Adopting a rigorous, holistic approach to evaluating legislative scrutiny systems that looks 'behind the scenes' is particularly critical when seeking to improve the quality of legislative scrutiny in the future; and
3. Rigorous, holistic evaluation of the effectiveness and impact of legislative scrutiny systems can challenge orthodox assumptions and provide new opportunities for improvement and change.

Each of these propositions will be explored further below.

### 1. The Central Importance of Understanding Institutional Context and 'Culture of Scrutiny'

As scholars such as Russell and Gover have explored, in order to set realistic parameters around what different forms of pre or post legislative scrutiny can achieve, it is important to understand how particularly scrutiny bodies fit in within the particular institutional context.<sup>120</sup> This is reflected in step 1 of the evaluation framework, and should be a pre-requisite consideration for any investigator looking to improve the quality of legislative scrutiny in their jurisdiction. For example, this research has highlighted that efforts to 'parachute in' or 'transplant' scrutiny bodies from one particular institutional context into another, can fail to deliver meaningful outcomes if the local institutional landscape is ignored or misunderstood. In the Australian context, this can be seen with respect to the specialist Human Rights Committee, established in 2012, with powers to scrutinise all proposed and existing laws for compliance with human rights standards. It suggests that it is unrealistic to expect this committee to have an immediate, substantive effect on the development, content or implementation of Australian law given the Australian institutional context, where the language of international human rights law remains viewed with suspicion by some, and where law makers and public servants are far more familiar with broadly formulated, common law informed standards that feature in the Scrutiny of Bills mandate.<sup>121</sup> It is hoped by many that as the Parliament and civil society become more familiar with the work of the Human Rights Committee and the requirement to issue Statements of Compatibility this hostility or scepticism to international human rights law will change.

This research also highlights the dominant role the Executive Government holds within the Australian parliamentary system and warns that in order to be effective, any rights scrutiny regime must have components that develop relationships of trust with the Executive and its agencies.. This may appear to pull against the convention wisdom that close relationships between oversight bodies

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120 Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law*, (2017, Oxford University Press).

121 For a different perspective see George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

and the executive *dilute* the effectiveness of scrutiny and give rise to risks of corruption or undue influence. However, this research suggests that provided specialist committees with close relationships with executive agencies exist alongside other more independently constituted scrutiny and oversight bodies (such as statutory oversight bodies or inquiry-based committees), they have an important role to play and can in fact improve the rights quality of proposed laws. This is because they can create a safe political space in which key members of the Executive (such as proponent Ministers) can change their mind or adopt policy alternatives with a lesser impact on individual rights. In other words, setting up a scrutiny body that is openly antagonistic towards the Executive Government may be of limited use in Australia. In fact, positive rights outcomes may be more likely if the scrutiny body has developed positive working relationships with the executive agencies involved in the implementation of laws ‘on the ground’. It does not follow that Australia should not adopt measures to openly contest the rights compatibility of proposed laws, but rather that the roles, functions and powers of the broader rights scrutiny must be developed in a way that *recognises and enhances* (rather than disrupts or displaces) the existing institutional landscape and its associated scrutiny culture.

This echoes the findings of Stephenson who explains that if improving the quality of rights scrutiny is understood as an inherently positive goal, the process of identifying reform options must be sensitive to the constitutional principles and values of the particular jurisdiction being considered.<sup>122</sup> This is because these principles and values govern how the institutions of government interact with each other on rights issues. As Stephenson warns, once established, the practices and structures that govern dialogue between different institutions of government are extremely difficult to shift,<sup>123</sup> and thus rights advocates should make sure that they fully understand the pre-existing institutional dynamic within the jurisdiction they are studying before developing options for reform. To be clear, this is not a recommendation to retain the status quo and accept intrusive, rights abrogating terrorism laws. Rather it is a strategy to help ensure that reforms designed to improve the rights-compliance of these laws are effective and sustainable within the Australian Parliamentary context.

The evaluation framework outlined in this Paper specifically prompts investigators to consider these matters when evaluating scrutiny bodies or scrutiny systems. This occurs in each step of the evaluation framework, and the tiered approach to identifying impact helps to reveal elements of the scrutiny culture that exists within the particular jurisdiction. For example, analysis of the parliamentary debates relating to counter-terrorism laws in Australia reveals that the vast majority of parliamentarians expressed an apparent preference for discussing rights with reference to the broad language featuring in the Scrutiny of Bills Committee’s mandate (such as ‘whether administrative powers are defined with sufficient precision’ and ‘whether the exercise of legislative powers is subject to sufficient

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122 Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) at 212.

123 *Ibid* 8.

parliamentary scrutiny' ) as opposed to referring directly to international human rights law (such as 'Article 14 of the ICCPR').<sup>124</sup> In addition, this analysis revealed repeated references to the same types of rights scrutiny principles across the second reading speeches each of the counter-terrorism laws that I considered. These rights and scrutiny principles closely reflect the type of rights analysis found in reports of the scrutiny bodies described in Part 1 of this Paper, and closely reflect Australia's institutional context. They suggest, for example, that the Australian scrutiny culture is primarily concerned with the need to ensure that:

1. The expansion of executive power comes with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to judicial review.<sup>125</sup>
2. Parliament has access to information about how government departments and agencies are using their powers<sup>126</sup> and that if the law is designed to respond to an extraordinary set of circumstances, Parliament should be required to revisit the law to determine whether it is still needed.<sup>127</sup>
3. Any departure from established common law principles (such as the establishment of new criminal offences<sup>128</sup> or restrictions on free speech<sup>129</sup> or

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124 For example, of the 334 second reading speeches made on the case study Acts, this analysis suggests that around 70 per cent included some discussion of 'rights' and the need to consider these rights in light of competing public interests. Among these speeches there were 232 general rights references (69%) and 101 references to international human rights (30%). Interestingly, there was no dramatic increase in references to international human rights concepts following the establishment of the Parliamentary Joint Committee on Human Rights, suggesting that, outside of a handful of human rights 'champions' the work of the Parliamentary Joint Committee on Human Rights was not able to generate a strong response from parliamentarians in the context of debating the case study Acts. This is consistent with the findings of George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

125 See e.g. Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 4; See Senate Standing Committee on Legal and Constitutional Affairs Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Chapter 3 [3.22]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter- Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

126 See e.g. Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) vii; Senate Standing Committee On Legal And Constitutional Affairs Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, (2008); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015) Recommendation 10.

127 See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 13; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirteenth Report of 2014*, (28 October 2014); Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendation 12.

128 See e.g. Anti-Terrorism Bill (No. 2) 2005 Bill, Schedule of the amendments made by the Senate, Items 68-72; Senate Standing Committee for the Scrutiny of Bills, Parliament of

freedom of association<sup>130</sup>) must be clearly defined, justified and accompanied by safeguards and independent oversight.<sup>131</sup>

Of course, further research needs to be undertaken to confirm that these rights and scrutiny principles are applicable across a broad range of law making areas in Australia.<sup>132</sup> However, these principles tell an important story about what forms of legislative scrutiny are likely to be seen as legitimate and deliver meaningful results in Australia, and what reform proposals are likely to be rejected or sidelined due to their unnatural fit with the Australian institutional context and scrutiny culture. These same insights may also be pertinent to other jurisdictions in the region that are looking to improve or invest in existing systems of parliamentary scrutiny or parliamentary model of rights protection. Applying the multi-layered evaluation framework set out in Part 2 of this Paper allows those advocating for change to identify what reform options might be most likely to succeed, having regard to the existing institutional landscape and scrutiny culture. This suggests that where the existing landscape or scrutiny culture is problematic or hostile to efforts to improve the quality of legislative scrutiny, such as in jurisdictions transitioning towards democratic parliamentary processes, reform attempts must be approached with a view to generating a sense of legitimacy among key participants in the law making process, including those working 'behind-the-scenes'. As discussed further below, gaining the trust and support of those involved in developing, drafting and

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Australia, *Alert Digest No 13 of 2005*, (9 November 2005) 8, 14-16; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

129 See e.g. Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 7 of 2015*, (12 August 2015) 3, 10; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Recommendations 27 and 28, see also Chapter 5; Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

130 See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of 44th Parliament* (14 November 2014) 10, 16-17; Senate Standing Committee on Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32-44.

131 See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of 44th Parliament* (14 November 2014) 10, 16-17; Senate Standing Committee on Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32-44.

132 I have commenced the task of exploring whether similar principles may be present in other contexts. See e.g. Moulds, Sarah 'The Role of Commonwealth Parliamentary Committees in Facilitating Parliamentary Deliberation: A case study of Marriage Equality Reform' in Laura Grenfell and Julie Debeljak (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, forthcoming).

implementing laws is crucial to improving the long-term quality of legislative scrutiny at both the pre and post enactment stage.

## 2. The Benefits of Looking 'Behind the Scenes' When Seeking to Improve the Quality of Legislative Scrutiny

Like previous scholars of parliamentary scrutiny in Westminster parliaments,<sup>133</sup> the evaluation framework emphasises the need to go beyond a simple inquiry into whether or not the scrutiny process has led to legislative change or amendment. Each step of the framework invites the investigator to consider (a) what is happening 'behind the scenes' and (b) how different components of the scrutiny system work together to influence or impact the context, shape or future development of the law. This is supported by an explicit investigation into whether key participants in the scrutiny process, such as parliamentarians, public servants, parliamentary counsel and civil society, consider different components of the system to be *legitimate*.

This allows for evidence to be collected about whether a 'culture of rights scrutiny' exists among those directly involved in the legislative and policy development process, and whether scrutiny principles or criteria have been considered or anticipated in the legislative and policy development process. As Hiebert's work on parliamentary rights protection in Canada and the UK reveals, the culture of rights protection observed and practiced by public servants, parliamentary counsel and others working behind the scenes has a profound impact on the quality and nature of rights outcomes.<sup>134</sup> Looking for hidden impact is particularly relevant when considering the parliamentary committee system's contribution to rights protection in Australia. This is because, for many commentators, the best opportunity to effect rights-enhancing change within an exclusively parliamentary model of rights protection is at the pre-introduction stage.<sup>135</sup> Once a Bill has been introduced into Parliament, the proponent Minister has made a public political commitment to its policy objectives that can be very hard to shift even in the face of compelling arguments about the Bill's negative rights consequences.<sup>136</sup> Conversely, a proposed Bill can be adjusted to lessen the potential rights impact or to improve rights protection at the pre-introduction stage

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133 Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees' n 54; Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', n 54 .

134 See e.g. Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 39; Janet Hiebert, 'Parliamentary Engagement with the Charter' (2012) 58 *Supreme Court Law Review* 87; Janet L Hiebert, 'Governing Like Judges?' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40.

135 See, eg, Hiebert, 'Parliamentary Engagement with the Charter', n 130. See also discussion in Chapter 1.

136 See, eg, Hiebert, 'Legislative Rights Review', n 130, 52; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1, 7; David Feldman, 'Democracy, Law and Human Rights: Politics as Challenge and Opportunity' in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 95, 108.

with far less political risk for the proponent. Pursuant to this approach, the people best able to achieve this rights-enhancing change are those working behind the scenes such as public servants or parliamentary counsel, rather than those involved in the post-introduction public debate on the Bill, who are necessarily curtailed by the political realities of the day. This behind-the-scenes rights-enhancing change is sometimes described as a ‘culture of rights compliance’ and is seen by some as a key component of successful rights protection.<sup>137</sup>

Looking for hidden impact of legislative scrutiny also guards against some of the methodological challenges identified by other scholars,<sup>138</sup> particularly those relating to the structural power dynamic occurring between the Parliament and the executive and within the executive itself. This is because the level of legitimacy attributed to a particular scrutiny body can both indicate and reflect a shift in this structural power dynamic that will be relevant to evaluating the impact and influence of legislative scrutiny in the future. For example, when submission makers consistently prioritise one parliamentary committee over another (extending it greater legitimacy), the preferred committee has a much stronger legislative impact, and important rights-enhancing changes can be made to the laws it scrutinises or reviews. Similarly, when the Executive Government consistently responds to requests for information from one scrutiny body and ignores the demands of another, it becomes clear that the first body is seen as more legitimate in the eyes of the Government, and therefore has a greater capacity to influence the shape and content of the law.

Looking for evidence of legitimacy within the scrutiny system also illustrates the important tension between the *deliberative* and *authoritative* attributes of scrutiny bodies. The deliberative attributes of the system are those that facilitate meaningful forums for the public and a diverse range of key participants (parliamentarians, civil society, experts) to engage in and contribute to the law-making process.<sup>139</sup> The authoritative attributes of the scrutiny system are those features of individual scrutiny bodies, including membership, processes and relationships with the executive, that command respect among key decision makers in the system. This authority can manifest in terms of legislative impact (such as amendments being made to implement committee recommendations) or behind-the-scenes influence (such as public servants developing legislation in line with the standards set by scrutiny committees). Both of these attributes – deliberative and authoritative – can generate legitimacy for a particular scrutiny body, and sometimes pull against each other to reduce or dilute the respect or political authority a committee demands.

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137 See, eg, Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Lawbook Co, 2013) 37, 59; Simon Evans and Carolyn Evans, ‘Australian Parliaments and the Protection of Human Rights’ (Paper presented in the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 8 December 2006).

138 See those scholars listed above n 54. See also George Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2016) 41(2) *Monash University Law Review* 469.

139 See Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 4 at 22-23.

Unlike other forms of evaluation, the framework set out in Part 2 of this paper allows for these attributes to be identified, and tensions within the system to be resolved or capitalised on to improve the overall quality of the scrutiny system, regardless of the jurisdiction.

### 3. Rigorous, Holistic Evaluation of Can Challenge Orthodox Assumptions and Provide New Opportunities for Improvement and Change

The evaluation framework outlined in Part 2 of this Paper offers benefits for those working within or studying post-legislative scrutiny regimes because it provides an evidence base from which to investigate and challenge previously held assumptions about the value, impact and effectiveness of such regimes. For example, some scholars point to the challenge of overcoming the perceived structural weakness in the Australian Westminster system, derived from the dominance of the executive government over the legislature.<sup>140</sup> As Feldman explains, governments generally seek to avoid scrutiny because they ‘value the freedom to make policy and to use their party’s majority in the Parliament to give legislative force to it’.<sup>141</sup> This executive control can dominate the outcomes generated by parliamentary-based scrutiny bodies, particularly when combined with the ‘fact that Australian political parties have some of the strongest party discipline among their Westminster cousins in the UK, Canada and New Zealand’.<sup>142</sup> This can lead to findings that parliamentary committees in Australia generally enjoy a low level of influence and generate relatively few legislative amendments.<sup>143</sup> It can also lead some to query the viability and desirability of measuring the impact of parliamentary based scrutiny bodies at all.<sup>144</sup>

As discussed in Parts 3 of this Paper, by adopting a holistic approach to evaluation, the framework has the potential to challenge this orthodox view and

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140 See, eg, Janet Hiebert, ‘Legislative Rights Review: Addressing the Gap Between Ideals and Constraints’ in Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 39, 41; David Monk, ‘A Framework for Evaluating the Performance of Committees in Westminster Parliaments’ (2010) 16 *The Journal of Legislative Studies* 1, 7.

141 David Feldman, ‘Democracy, Law and Human Rights: Politics as Challenge and Opportunity’ in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 95, 98,

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

143 Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2016) 41(2) *Monash University Law Review* 469; . See also Franklin De Vrieze and Victoria Hasson, *Post Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance*, ( Westminster Foundation for Democracy, London, 2019) at 12; K Patchett, *Preparing, drafting and management of legislative projects, paper for Workshop on the development of legislative drafting*, (Beruit 2003) at 35.

144 Geoffrey Lindell, ‘How (and Whether?) to Evaluate Parliamentary Committees - From a Lawyer’s Perspective’ (2005) August *About the House* 55.

explore whether scrutiny bodies like parliamentary committees can provide the deliberative space and political incentives for individual parliamentarians to engage in robust review of proposed or existing legislation. For example, this research highlighted the fact that the committee system provides a safe space for members of the Executive to change their mind and to adjust their legislative agenda to pay closer regard to the need to balance popular policy imperatives (such as addressing terrorism) with individual rights (such as freedom from arbitrary detention). This nuanced, ad hoc approach to rights scrutiny is not without weaknesses, but also offers new opportunities to engage the full spectrum of parliamentarians with rights issues (not just those aligned with the progressive side of politics) as it has a strong focus on improving the effectiveness and quality of laws through deliberation and reflection, rather than seeking to publicly condemn the policy choices of an elected national government with reference to international human rights standards (which could occur through a system where the courts are empowered to declare proposed laws as incompatible with rights standards). As noted above, for this reason, the Australian committee system offers important insights for those seeking to implement long-term, sustainable rights reforms in similarly Executive-dominated parliaments.

The evaluation framework outlined above also invites investigators to challenge the orthodox view that short time frames for pre or post enactment scrutiny lead to poor scrutiny outcomes.<sup>145</sup> This is because the evaluation framework includes a focus on factors such as (1) the level of participation in scrutiny activity by key participants and (2) the impact scrutiny has on the way laws are developed behind the scenes and debated in the parliament and the community. In other words, at least in the Australian context, while very short time frames *can* have an influence on the nature and quality of parliamentary scrutiny, they do not necessarily *determine* the strength of the public or legislative impact a committee can have.<sup>146</sup> This suggests that scrutiny can continue to have a positive, rights-enhancing influence on the shape and context of laws, even when it occurs in restricted time frames, provided some components of the scrutiny system are able to generate, publicise and share information or analysis on the content and rights implications of the proposed or existing law.

The evaluation framework outlined in this Paper also challenges the assumption that a close relationship between the executive branch of government and the scrutinising body will necessarily dilute the effectiveness of the scrutiny.<sup>147</sup>

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145 Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework' n 90.

146 Table 6.1 in Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, 2018). See also Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia', (2018) 41(1) *University of New South Wales Law Review* 40.

147 For further discussion of these themes see eg Appleby, Gabrielle, 'Horizontal Accountability: The Rights Protective Promise and Fragility of the Executive Integrity Institutions' (2017) 23 *Australian Journal of Human Rights* 168; Dalla-Pozza, Dominique, 'Refining the Australian Counter-Terrorism Legislative Framework: How Deliberative has Parliament Been?' (2016) 27(4) *Public Law Review* 271.

This is because the evaluation framework focuses on how different components of a scrutiny system work together, and seeks to understand the particular strengths and weaknesses of different scrutiny bodies within a scrutiny system. This approach reveals that where individual scrutiny bodies maintain a close working relationship with the Executive and its agencies they can have a strong influence on the content of the laws they review, provided that they are seen as legitimate by other key participants in the system, and supplemented by other scrutiny bodies with different attributes, such as the capacity to provide a meaningful deliberative forum, where diverse voices are able to be heard. In this way, the evaluation framework demonstrates the value of designing a legislative scrutiny system that incorporates both *authoritative* attributes (such as the capacity to translate recommendations into legislative amendments) and *deliberative* attributes (such as the capacity to hold public inquiries and attract a broad range of participants).<sup>148</sup>

## V. CONCLUSION

If we accept Lord Norton's observation that legislative scrutiny is an essential and desirable feature of any modern parliamentary democracy,<sup>149</sup> then it is critical that we carefully evaluate the effectiveness and impact of legislative scrutiny systems.<sup>150</sup> This is particularly important in the Australian context, where legislative scrutiny forms a central component of Australia's parliamentary model of rights protection.

In this Paper I have outlined a unique evaluation framework designed to achieve this task, whilst also avoiding the pitfalls identified by past scholars of parliamentary scrutiny systems. This framework is multi-layered and holistic in nature, encouraging investigation not only of legislative impact, but also exploring how scrutiny processes impact on the way laws are developed and debated, and reflecting on the role scrutiny bodies play within the broader institutional landscape.

As discussed in Parts 3 and 4 of the Paper, the evaluation framework applied in this research reveals a number of important insights into the effectiveness and impact of legislative scrutiny in Australia, and has application and benefits for other jurisdictions. These benefits include encouraging a thoughtful reflection on the place different scrutiny bodies hold within the broader institutional context and the role they play in developing and contributing to the 'culture of scrutiny' of the

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148 For further discussion of these attributes see Sarah Moulds 'The Role of Commonwealth Parliamentary Committees in Facilitating Parliamentary Deliberation: A case study of Marriage Equality Reform' in Laura Grenfell and Julie Debeljak (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, forthcoming).

149 "Engaging parliaments on reviewing legislative impact" Westminster Foundation for Democracy Blog, (9 May 2019), online: Westminster Foundation for Democracy <<https://www.wfd.org/2019/05/09/reviewing-legislative-impact/>>.

150 Franklin De Vrieze and Victoria Hasson, *Post Legislative Scrutiny: Comparative Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for its Place in Democracy Assistance* (2018, Westminster Foundation for Democracy, London) at 13.

particular jurisdiction. The evaluation framework also provides a rigorous, holistic approach to evaluating legislative scrutiny systems that looks 'behind-the-scenes' to understand the ways in which scrutiny bodies influence the development of laws. This is particularly critical when seeking to improve the quality of legislative scrutiny in the future. Finally, the evaluation framework outlined in this Paper provides an opportunity to challenge orthodox assumptions about what makes 'good' and 'bad' scrutiny bodies and provides new opportunities for improvement and change.

In these ways, this Paper aims to contribute to the broader conversation taking place among jurisdictions in the Asian region about which structures, parliamentary procedures, emerging methodologies and resources are shaping parliaments' ability to conduct meaningful post-legislative scrutiny, and how to identify best practice in terms of procedures, structures and institutionalisation of legislative scrutiny in Asia.

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