Committees of influence: The impact of parliamentary committees on law making and rights protection in Australia

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For many public and administrative lawyers, it is easy to take the process of parliamentary law-making for granted and to focus on the outcome rather than the process. However, the *process* of parliamentary law making is central to Australia's system of rights protection and constitutes one of the clearest practical expressions of the core values that underpin administrative law in Australia. For these reasons, evaluating the effectiveness and impact of different components of the parliamentary law making has relevance for public and administrative law scholars and rights advocates. Using two very different case studies, this article explores the federal parliamentary law-making landscape with a particular focus on the work of parliamentary committees and the impact they have on the content and development of federal laws. This in turn reveals new opportunities to improve the quality of parliamentary law making at the federal level and new insights into the way administrative law values shape (and can be shaped by) parliamentary scrutiny activities.

The article begins by briefly explaining the key features of the parliamentary committee system at the federal level and the value of assessing the effectiveness and impact of parliamentary committees in law making in Australia. It then briefly describes the evaluation framework with reference to features that seek to overcome the challenges identified by past scholars. The framework aims to provide a holistic account of the impact of the work of parliamentary committees on the content, development and implementation of federal 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, and the *hidden impact* scrutiny may be having on policy development and legislative drafting. This research also explicitly recognises that individual components of the legislative scrutiny system have distinct functions and goals, which allow them to contribute in different ways to the broader legislative scrutiny system.

The article then introduces two case studies — marriage equality reforms and counter-terrorism law making — and provides a brief overview of the impact that parliamentary committees had on these laws with reference to the evaluation framework that was introduced. The case studies chosen for this evaluation deliberately focus on laws that involve balancing the rights of minority groups in the community with broader public interests or values. This goes to the heart of parliamentary law making but also underscores the important role that administrative law principles and values play in the scrutiny, implementation and review of proposed new laws.

The article concludes with a discussion of the implications of this research for administrative law scholars, public servants, parliamentarians and those contemplating new models of rights protection in Australia. It does this by reflecting on three key administrative law values — the rule of law, accountability and engagement — and considering the way these values shape (and can be shaped by) parliamentary scrutiny activities. This part also offers practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms and looking for ways to improve rights protection and the deliberative quality of law making at the parliamentary level.

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The importance of evaluating the impact of parliamentary committees on law making in Australia

For many, parliamentary committees are not inherently interesting institutions. However, a closer look reveals that they both reflect and feed into the key values underpinning administrative law, including values associated with rule of law, accountability and engagement between the governors and the governed (discussed further below). Parliamentary committees also give practical effect to key aspects of our parliamentary democracy. They provide a forum for all parliamentarians to play a role in the legislative process. Parliamentary committees also analyse proposed laws and policies and generate reports containing information about the purpose, effectiveness and impact of those laws and policies.[1] Moreover, they provide a forum for experts and members of the community to share their views on a proposed policy or law, and they document the views of a wide range of individuals and organisations on matters critical to the lives and rights of Australians. In this way, parliamentary committees have both *deliberative* attributes (facilitating forums for the public to engage in the law-making process) and *authoritative* attributes (the capacity to generate political support for legislative or policy change).

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.[2] Within this system, there are committees with a broad mandate 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 the 'scrutiny committees'). Interestingly, the different attributes of individual committees often work in complementary ways to those of other committees within the system.[3] For example, this article focuses on the work of a pair of committees — the Senate Legal and Constitutional Affairs Legislation Committee (the LCA Legislation Committee) and the Senate Legal and Constitutional Affairs References Committee (the LCA References Committee), as well as the House Standing Committee on Social Policy and Legal Affairs (the House Committee). These committees are all inquiry-based committees with powers to conduct public inquiries into the Bills or issues referred to them by Parliament, including calling for written submissions and inviting witnesses to provide oral evidence and answer the committee members' questions. These committees have strong deliberative attributes 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.[4] Membership sometimes includes a majority of government members (such as in the case of the House Committee[5]

1 See eg K Barton, 'Community Participation in Parliamentary Committees: Opportunities and Barriers', *Department of the Parliament Library Research Paper* No 10, 1999; Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?' (Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004) 5; P Lobban, 'Who Cares Wins: Parliamentary Committees and the Executive' (2012) 27(1) *Australasian Parliamentary Review* 190.

2 For an overview of the parliamentary committee systems at the 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.

3 This theme is explored further in 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; Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-terrorism Laws' (2016) 31(2) *Australasian Parliamentary Review* 46.

4 For example, The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25.

5 The House Standing Committee on Social Policy and Legal Affairs is established by House of Representatives, *Standing Orders* (Parliament of Australia, Canberra, 2019), Standing Orders 215 and 229. The committee has a government Chair and a majority of government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Committee_Membership>.

and the LCA Legislation Committee)[6] and sometimes includes a non-government majority (such as in the case of the LCA References Committee).[7] These committees can also include 'participating members'[8] — 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.

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) and the Parliamentary Joint Committee on Human Rights (the Human Rights Committee).[9] 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.[10]

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 noncompliance 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.

Whether specifically assigned a rights-protecting role (such as the Human Rights Committee) or performing a broader inquiry function (such as LCA References Committee), parliamentary committees are a key aspect of a parliamentary model of rights protection.[11] Within this model, parliamentary committees provide the most practical forum for detailed consideration of the purpose, content and rights impact of proposed new laws. 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.[12] This is particularly apparent when committees work together in a *system* that allows for both committees with strong deliberative qualities (such as the LCA committees) to work together with committees with strong authoritative features (such as the Scrutiny of Bills Committee) to scrutinise proposed laws for their impact on individual rights and to develop alternative, less rights-intrusive legislative options for the Parliament to consider and

6 The Senate Legal and Constitutional Affairs Legislation Committee (LCA Legislation Committee) is established by The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25. The committee has a government Chair and a majority of government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Legislation_Committee_Membership>.

7 The Senate Legal and Constitutional Affairs References Committee (LCA References Committee) is established by The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25. The committee has an opposition senator as Chair and a majority of non-government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/References_Committee_Membership>.

8 See eg House of Representatives, *Standing Orders* (Parliament of Australia, Canberra, 2019) Standing Order 241.

9 The Senate Standing Committee on Regulations and Ordinances is also a scrutiny-based committee with a mandate to scrutinise delegated legislation.

10 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The scrutiny criteria applied by the Human Rights Committee is outlined in s 3 of the Act and includes the human rights and freedoms contained in seven core human rights treaties to which Australia is a party.

11 Under this model, judicial contribution to the conversation on rights is restricted and, provided it stays within its constitutional limits, Parliament is the branch of government with the 'final say' on how to protect and promote individual rights. See eg George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 258.

12 For examples of the rights-enhancing effect of parliamentary committees see Grenfell and Moulds, above n 3; Moulds, above n 3. Cf the arguments explored by Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', Ch 2, and George Williams and Daniel Reynolds, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', Ch 3, in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights* (Thomson Reuters, 2019).

act upon. In this way, parliamentary committees 'sound the alarm' about laws that might impact on individual rights and provide the forum for interested members of the community to express their views on how Parliament should respond.

The contribution of the committee system to the process of law making can also enhance the *deliberative* quality of decision-making in the Australian Parliament, providing a vital connection between the 'governed and the governors'[13] on the development of laws and policies that may have a direct impact on their individual rights. As discussed further below, it is these characteristics that a number of parliamentary committees displayed during the case study examples and that add value to other participatory democracy mechanisms designed to gauge public interest in legal or social reform.

It is important not to overstate the impact of parliamentary committees on the law-making experiences covered in this article. As past studies have noted,[14] it is not easy to attribute a particular 'impact' to one component of a complex and dynamic system, such as parliamentary democracy, particularly when it comes to politically charged issues like counter-terrorism and marriage equality.[15] Political factors are also powerful catalysts for change,[16] and often recommendations are rejected or ignored by the government of the day.[17] Sometimes reports are issued too late to be of any direct influence on parliamentary debate on the Bill.[18] For these reasons, it is not argued that parliamentary committees played the *pivotal* or even most influential role in determining the contours of Australia's counter-terrorism legislation or the enactment of amendments to the *Marriage Act 1961* (Cth) in 2017. Rather, it is argued that the work of the parliamentary committees created the right conditions for legal and political change because of their particular capacity to provide meaningful deliberative forums for community members and parliamentarians to consider competing rights issues and due to their unique place in Australia's parliamentary model of rights protection.

This article aims to demonstrate that, when considered over time, the role these committees play in collecting, presenting, and analysing different views on the merits of proposed changes to the law can be significant and should not be ignored by those seeking to evaluate or reform Australia's parliamentary model of law making and rights protection. This makes studying the impact of parliamentary committees on the development of

13 P Cane, L McDonald, K Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 2–4 and Ch 12, particularly 306, 351–355.

14 See eg 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 Hunt, Hooper and Yowell (eds), above n 11, 111, 131. 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.

15 For example, many actors and institutions contributed to the marriage equality legislative reforms, including individuals directly affected by discrimination on the grounds of their sexual orientation or gender identity. The contribution of many of these groups and individuals is documented in detailed in Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (NewSouth Books, 2018).

16 For further discussion of these issues see John Hirst, 'A Chance to End the Mindless Allegiance of Party Discipline', *Sydney Morning Herald* (Sydney), 25 August 2010; Bruce Stone, 'Size and Executive-Legislative Relations in Australian Parliaments' (1998) 33(1) *Australian Journal of Political Science* 37; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Hunt, Hooper and Yowell (eds), above n 11, 39; David Feldman, 'Democracy, Law and Human Rights: Politics and Challenge and Opportunity' in Hunt, Hooper and Yowell (eds), above n 11, 95; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1.

17 See eg Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009* (2009).

18 The issue of delayed reporting (and in particular the problem of tabling reports *after* the second reading debate on the particular Bill has ended) has been a particular concern raised with respect to the Human Rights Committee. For further discussion of how this issue may impact on the overall effectiveness of the Human Rights Committee, see Williams and Reynolds, above n 14.

counter-terrorism laws and marriage equality reforms particularly relevant to public and administrative law scholars in Australia and elsewhere.

Outline of the evaluation framework

The federal parliamentary committee system is relatively sophisticated, particularly when compared with committee systems at the state and territory level.[19] However its legislative scrutiny function is still best described as 'ad hoc' in nature rather than systematic. While the scrutiny-based committees must undertake at least a preliminary review of all Bills, the legislative review activities of the other committees in the system are generally dependent on referrals from either the House of Representatives or the Senate. This gives rise to particular challenges when seeking to evaluate effectiveness and impact but also underscores the urgency and importance of this evaluation task.

As Russell and Benton observe in their work on legislative scrutiny in the United Kingdom (UK), the complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means evaluating their performance is not always straightforward.[20] Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.[21] The evaluation framework 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,[22] Aldons,[23] and Benton and Russell,[24] 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 used in this research is also multi-staged and specifically designed to take account of the 'particular conceptual complexities of rights and the institutional peculiarities of legislatures'.[25] For example, the contextualised features of the assessment 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.[26] The framework has also been developed with close regard to the international rights mechanism evaluation

19 Grenfell, above n 2, 19. See also Grenfell and Moulds, above n 3, 40.

20 Russell and Benton, above n 14, 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 Williams and Reynolds, above n 14, 469.

21 See, eg, Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Hunt, Hooper and Yowell (eds), above n 11, 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; Tolley, above n 20.

22 Tolley, above n 20, 48.

23 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.

24 Russell and Benton, above n 14, 793.

25 Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 546, 569.

26 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.

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.[27] The four key steps of the evaluation framework employed are summarised below.

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.

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

This step requires the investigator clearly to 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 inquire 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.

Step 3: Identify key participants and determine legitimacy

The next step in the evaluation framework identifies the *key participants*[28] in the legislative scrutiny system and looks for evidence of whether components of this system are seen as *legitimate*[29] 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.

Step 4: Measure 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:

27 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.

28 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.

29 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 article to explore these different articulations; however, the use of the term in this article 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.

1. legislative impact (whether the scrutiny undertaken has directly changed the content of a law);

2. 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

3. 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).[30]

The next part of this article provides an illustration of how this evaluation framework was applied in the context of legislative scrutiny of Australia's counter-terrorism laws and in the legislative journey towards marriage equality.

Evaluating impact: two case studies

This section provides a brief snapshot of how the evaluation framework applies in practice by investigating the impact of the parliamentary committee system on:

1. a selection of counter-terrorism laws introduced between 2001 and 2018;[31] and

2. amendments to the *Marriage Act 1961* (Cth) between 2004 and 2017.[32]

These two legislative experiences provide a useful canvas for evaluating the effectiveness and impact of Australia's largely ad hoc system of legislative scrutiny and parliamentary model of rights protection. This is because both case studies can be described as 'rights engaging'[33] and both legislative experiences engage a large range of intra-parliamentary and extra-parliamentary participants. In addition, both legislative experiences captured the attention of the nation's media and, most importantly, resonated strongly with the Australian community, with direct rights implications for many individuals and families. Both areas of law making also demanded legal expertise, including the occasional opinion from the High Court of Australia and comparative analysis of other jurisdictions that had already enacted laws in this area. In addition, the marriage equality reforms saw Australian governments

30 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 empirically 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. Russell and Benton, above n 14; see eg Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 546.

31 The 14 case study Acts considered are the *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); and *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). 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.

32 For a comprehensive overview of the legislative history of the marriage equality reforms see Robinson and Greenwich, above n 15; D McKeown, *A Chronology of Same-sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide*, Research paper series, Parliamentary Library, Canberra, 2016–17, updated February 2018.

33 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.

experiment with novel ways of engaging directly with the community, including plebiscites and postal surveys, as well as utilising traditional parliamentary mechanisms, including parliamentary committees, to gauge the public's appetite for reform. The next section of this article outlines some of the key findings arising from these case studies, having regard to the key steps in the evaluation framework described later.

Participation and legitimacy

This research found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact.[34] 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'[35] 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.[36] 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 is the Senate Legal and Constitutional Affairs Committee. This inquiry-based 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 Committee attracted over 400 submissions and heard from well over 20 witnesses.[37] This relatively high participation rate was dwarfed by the rates of participation experienced by the House Committee[38] in its inquiry into two cross-party marriage equality Bills in 2012,[39] which received 276 437 responses to its online survey, including 213 524 general comments and 86 991 comments on the legal and technical aspects of the Bills.[40] Never before had the Parliament provided a deliberative forum of this scale or attracted so many responses from interested members of the community.[41] Unlike some other parliamentary committees,

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

35 Harry Evans (ed), *Odgers' Australian Senate Procedure* (Commonwealth of Australia, 10th ed, 2001) 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>; see also Pauline Painter 'New Kids on the Block or the Usual Suspects? Is Public Engagement with Committees Changing or is Participation in Committee Inquiries Still Dominated by a Handful of Organisations and Academics?' (2016) 31(2) *Australasian Parliamentary Review*, 67–83.

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

37 Senate 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 LCA Legislation Committee received 431 submissions and heard from 65 witnesses. See also Senate 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 LCA References Committee received 435 submissions and heard from 22 organisations.

38 Like the LCA Legislation Committee, the House Committee has a government Chair and majority of government members. It also has broad powers to conduct public hearings into proposed legislation or other thematic issues referred to it by the House of Representatives and can include 'participating members' who can participate in proceedings without having a formal vote.

39 The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Mr Adam Bandt MP and Mr Andrew Wilkie MP. The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Mr Stephen Jones MP on 13 February 2012. Both of these Bills sought to amend the Marriage Act to remove reference to 'man and woman' and permit same-sex couples to marry. The Marriage Amendment Bill 2012 (Cth) also included proposed provisions that would have the effect of ensuring that authorised celebrants and ministers of religion are not required to solemnise a marriage where the parties to the marriage are of the same sex. Both Bills were referred to the House Standing Committee on Social Policy and Legal Affairs, which delivered its report on 18 June 2012. See House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012).

40 House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012) [1.1]–[1.7] and [33]–[37].

41 Ibid 34.

both the LCA committees and the House Committee were able to attract participation from a broader cross-section of the community rather than relying on 'the usual suspects' (such

groups or individuals who are already aware of the Bill's existence or who are contacted by politicians or their staff or by the committee secretariat).[42]

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 Parliamentary Joint Committee on Intelligence and Security (the Intelligence and Security Committee), which has a tightly prescribed membership[43] and works closely with staff from law enforcement and intelligence agencies when inquiring into proposed or existing national security laws.[44]

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.

The extent to which 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. At the federal level 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 Human Rights Committee — a much newer 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. In the middle of the spectrum are those scrutiny bodies such as the LCA committees, 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 functions.

Legislative impact

One of the most surprising findings relates to the significant legislative impact that different components of the scrutiny system were able to have on the content of Australia's counter-terrorism law. In the context of the counter-terrorism case study, many of 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.[45] In addition, the types of changes recommended by these scrutiny bodies were generally rights *enhancing*. In other words, at least in the

42 Paxman, above n 34, 81.

43 *Intelligence Services Act 2001* (Cth) Pt 4, s 28 (2).

44 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.

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

counter-terrorism context, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny) — but the legislative changes made as a result of scrutiny were significant and positive from a rights perspective. For example, this research suggests that the work of parliamentary committees directly contributed to amendments that:

- narrowed the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of 'terrorist act';[46]
- removed absolute liability and reverse onus of proof provisions from the terrorist act related offence;[47]
- inserted defences within the terrorist act offences for the provision of humanitarian aid;[48]
- ensured that the power to proscribe terrorist organisations is subject to parliamentary review;[49]
- subjected each new law enforcement and intelligence agency power to a raft of detailed reporting requirements and oversight by independent statutory officers;[50]
- ensured that 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; [51]
- ensured that pre-charge detention of people thought to have information relevant to terrorist investigations is subject to judicial oversight and maximum time limits;[52]
- reinstated the court's discretion to ensure that a person receives a fair trial when certain national security information is handled in 'closed court' and limited the potential to exclude relevant information from the defendant in counter-terrorism trials;[53]

46 Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) and Related Bills, Items 5 and 8, in response to Senate 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.

47 Ibid, Items 11, 13, 14, in response to Senate 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.

48 Ibid, Item 4, in response to Senate 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.

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

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

51 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).

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

53 Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline' and Senate 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).

- ensured that 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;[54] and

- 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.[55]

As discussed further below, 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.[56] Interestingly, 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 per cent strike rate during the period from 2013 to 2018) and improving the rights compliance of the law.[57] The committees with broader mandates and more open membership, such as the LCA committees, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law making, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes.[58] This 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 information and analysis they needed to substantiate and justify the legislative changes they recommended.

These observations are also apposite in the context of the marriage equality reforms, where there is also evidence that different parliamentary committees working together over time had a strong legislative impact. For example:

- The Marriage Legislation Amendment Bill 2015, supported by a cross-party group of parliamentarians,[59] directly incorporated the three key reforms that were supported by previous committee inquiries undertaken in 2009 and 2010[60] and became the legal template and political litmus test for the reforms that were ultimately passed by the Parliament in early 2017.

- The Exposure Draft Marriage Amendment (Same-Sex Marriage) Bill (the Exposure Draft Bill), introduced by the Hon George Brandis QC ahead of the failed attempt to establish

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

55 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).

56 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 eg 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 Hunt, Cooper and Yowell, above n 11, 39 at 52.

57 Moulds, above n 45, Ch 5 and Table 5.1.

58 Ibid.

59 This group comprised Warren Entsch MP (Lib); Teresa Gambaro MP (Lib); Terri Butler MP (ALP); Laurie Ferguson MP (ALP); Adam Bandt MP (Australian Greens); Cathy McGowan MP (Independent) and Andrew Wilkie MP (Independent).

60 This group comprised Warren Entsch MP (Lib); Teresa Gambaro MP (Lib); Terri Butler MP (ALP); Laurie Ferguson MP (ALP); Adam Bandt MP (Australian Greens); Cathy McGowan MP (Independent) and Andrew Wilkie MP (Independent). This Bill was preceded by the Marriage Amendment (Marriage Equality) Bill 2015 (Cth), which was introduced into the House of Representatives on 1 June 2015 by opposition leader Bill Shorten MP.

a plebiscite and the more successful voluntary postal vote on the issues of same-sex marriage,[61] also contained the three key legislative features previously recommended by the parliamentary committees, including a range of protections for religious freedoms.[62] This Exposure Draft Bill was later examined by a specially established Senate select committee,[63] which in turn directly influenced the content of the legislative amendments enacted in 2017.

- The Marriage Amendment (Definition and Religious Freedoms) Bill 2017, introduced by Liberal Senator Dean Smith,[64] contained the key legal features considered in detail by successive parliamentary committees,[65] including provisions that redefined marriage as 'a union of two people' regardless of gender; enabled same-sex marriages that have been, or will be, solemnised under the law of a foreign country to be recognised in Australia; and enabled ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds.[66] This Bill was ultimately enacted in on 7 December 2017, reflecting a culmination of over a decade of intensive parliamentary engagement with the issue of marriage equality.

When taken together, these findings suggest that, when multiple components of the scrutiny system work together to scrutinise and review an existing or proposed law, a more

61 Following the defeat of the Marriage Equality Plebiscite Bill 2015 (Cth), the government announced that the Australian Bureau of Statistics would be directed to conduct a voluntary postal survey of all Australians on the electoral roll as to their views on 'whether or not the law should be changed to allow same-sex couples to marry': McKeown, above n 32.

62 For example, the Exposure Draft would insert a new definition of marriage into the Marriage Act: 'the union of two people, to the exclusion of all others, voluntarily entered into for life' and it would repeal the existing ban on the recognition of same-sex marriages solemnised overseas. The Exposure Draft would also provide exemptions for marriage celebrants (both religious and civil) who may have religious or conscience objections to solemnising same-sex marriages. Religious bodies and religious organisations would also be able to refuse to provide facilities, goods or services for the purpose of solemnisation of a same-sex marriage. See Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Parliament of Australia, *Inquiry into Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, (2016) Executive Summary.

63 On 30 November 2016, the Senate resolved to establish the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill. The select committee had a government Chair and three other government members, two opposition senators and two cross-bench senators, and attracted more than 20 senators as participating members. Members of the committee were Senator David Fawcett (Chair, Lib) Senator Louise Pratt (Deputy Chair, ALP), Senator Skye Kakoschke-Moore (Independent), Senator Kimberley Kitching (ALP), Senator James Paterson (Lib), Senator Janet Rice (Australian Greens), Senator Dean Smith (Lib), and Senator John Williams (Nationals). The committee also attracted a large number of participating members.

64 This Bill was introduced immediately following the outcome of the voluntary postal vote, where 79.5 per cent of Australians had answered the survey and the majority indicated that the law should be changed to allow same-sex couples to marry, with 7 817 247 (61.6 per cent) responding 'Yes' and 4 873 987 (38.4 per cent) responding 'No'. Australian Bureau of Statistics, 'Australian Marriage Law Postal Survey, 2017' (Media Release, 1800.0, 15 November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

65 The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 was described by Senator Penny Wong as 'a bill based on the consensus report of a cross-party Senate select committee, a committee which undertook extensive consultations with groups supportive of and opposed to marriage equality, and its recommendations sought to balance these interests'. Commonwealth, *Parliamentary Debates*, Senate, 16 November 2017, 18619 (Penny Wong). See also McKeown, above n 32.

66 This included making amendments contingent on the commencement of the proposed *Civil Law and Justice Legislation Amendment Act 2017* (Cth) and *Sex Discrimination Act 1984* (Cth) to provide that a refusal by a minister of religion, religious marriage celebrant or chaplain to solemnise marriage in prescribed circumstances does not constitute unlawful discrimination.

significant legislative impact is felt.[67] As discussed below, 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.

Public impact

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 is because parliamentary committees can help to 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 to 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,[68] either through the public process conducted by the inquiry-based committees or through the consideration of written analysis provided by the technical scrutiny committees.

The strong public impact of the parliamentary committee system is particularly evident in the marriage equality case study, which demonstrates the potential capacity for parliamentary committees to provide a meaningful deliberative forum for community debate on contested rights issues that is subsequently reflected in (or reflects) the broader parliamentary and community debate on these matters. For example, almost immediately after the enactment of the Marriage Amendment Bill 2004, legislative efforts began to reverse or modify the changes to the definition of marriage, usually advanced in the form of private members' or private senators' Bills. These Bills attracted the support of many of the sophisticated submission makers to the 2004 LCA Legislation Committee inquiry.[69] These sophisticated submission makers include legal groups (such as the Castan Centre for Human Rights Law), human rights groups (such as Liberty Victoria) and religious groups (such as the Australian Christian Lobby), all of which have access to powerful and influential members and allies, as well as experience in engaging with the media and implementing advocacy campaigns.

As can be seen from the discussion below, by attracting and engaging with these types of submission makers, parliamentary committees can provide both a platform for these organisations to express their views and a source of information from which to launch future advocacy campaigns. This in turn can have an influence on how the relevant policy issues are debated in the media and provide incentives for parliamentarians to improve the deliberative quality of the law-making process. For example, the next year, Senator Hanson-Young introduced a similar Bill (the 2010 Bill), which was again referred to the

67 This is evident in both the early cases of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the Control Order Bill) and the Australian Security and Intelligence Agency Legislation (Amendment Bill) 2002 (Cth) (the 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 Committees; 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 Sarah Moulds, '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).

68 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 25; Dalla-Pozza, above n 37, 271, 274.

69 See eg those submission makers quoted extensively by the committee in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009* (2009) Chs 3 and 4, which include Dr Paula Gerber from the Castan Centre for Human Rights Law; Mr Gardiner, Vice President of Liberty Victoria; Law Council of Australia; Australian Coalition for Equality; Catholic Dioceses of Sydney and Melbourne; Australian Christian Lobby; and Family Voice Australia.

LCA Legislation Committee for inquiry and report.[70] The committee received approximately 79 200 submissions: approximately 46 400 submissions in support of the 2010 Bill and approximately 32 800 submissions opposed.[71] The sheer volume of submissions received (regardless of the existence of 'form letter' style submissions) made this inquiry a powerful indicator of a shift in public support in favour of marriage equality. This shift was reflected in the observations of the majority of the LCA Legislation Committee, which concluded that:

> providing true equality means that all couples should be treated 'equally' — 'separate, but equal' is simply inadequate. Marriage is about two people in a committed and loving life-long relationship, and it has nothing to do with sex, sexual orientation or gender identity. The time has come for same-sex couples to have their relationships treated with the dignity and respect that they deserve: the Marriage Act should be amended, and marriage equality should be provided for all couples who wish to marry in Australia.[72]

In addition to providing a forum for citizens to share their views directly with parliamentarians, the numerous public hearings held in Sydney and Melbourne[73] provided an important opportunity for the media to hear directly from individuals with experiences of discrimination on the grounds of sexual orientation,[74] as well as those with strong views on the need to preserve marriage as a heterosexual institution.[75] These personal stories would also play an important role in advancing the case for legislative change in the lead-up to the 2017 reforms.[76]

The inquiry process also allowed for legal experts and rights advocates — both proponents and opponents of marriage equality — to articulate their arguments with reference to evidence and the experiences of other jurisdictions.[77] This proved to be particularly significant for the development of concrete legislative proposals designed to address both the growing public demand for marriage equality and concerns associated with the impact of reform on religious rights and freedoms. For example, a range of legal issues were explored by the LCA Legislation Committee, including whether the Bill was constitutionally valid; the adequacy of protections for ministers of religion under the Bill; and the merits of removing the existing prohibitions on the legal recognition of same-sex marriages

70 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012). The Bill was referred to committee on 8 February 2012. The committee issued its report on 25 June 2012.

71 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [1.32]. The committee received approximately 75 100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43 800 supported the Bill and 31 300 opposed it. The committee received an additional 4100 submissions, of which 2600 supported the Bill and 1500 opposed it. This amounts to 79 200 submissions in total: 46 400, or approximately 59 per cent, supporting Senator Hanson-Young's Bill; and 32 800, or approximately 41 per cent, opposing it.

72 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.5].

73 A list of witnesses who appeared at the hearings is at Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) Appendix 3, and copies of the Hansard transcripts are available through the committee's website.

74 For example, Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby, Mr Malcolm McPherson from Australian Marriage Equality and Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, as quoted in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.3]–[2.6].

75 For example, Australian Christian Lobby, Rabbinical Council of Victoria, Episcopal Assembly of Oceania, and Presbyterian Church of Queensland as quoted in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.57]–[2.61].

76 See eg 'MP Stands with Son on Same-sex Marriage', *AAP Australian National News Wire* (Canberra) 10 October 2016; Sarah Whyte, 'Footballer's 10-minute Challenge to Change MPs' Views on Same-sex Marriage', *Sydney Morning Herald* (Sydney) 22 July 2015; Dan Harrison, 'Parents of Gays Make TV Pitch to Abbott on Same-sex Marriage Vote', *Sydney Morning Herald* (Sydney) 30 January 2012; Nina Lord, 'In Rainbow Families, the Kids are All Right', *The Age* (Melbourne) 28 September 2017.

77 At that time, marriage equality was recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the United States and Mexico City. Legalisation of marriage equality was also under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay — see Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.52].

conducted overseas.[78] As explored below, these issues became the defining features of the future marriage equality debate and influenced the shape and content of the legislative amendments passed in 2017.

Another area of public impact 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 LCA Legislation Committee recommended that they be examined by the Australian Law Reform Commission (ALRC), which in turn made a number of recommendations for substantive changes to be made.[79] These ALRC recommendations were later implemented into law in the form of a new law, introduced some five years after the original offences were introduced.[80] The 2012 COAG Review of Counter Terrorism Legislation[81] also referred to past parliamentary committee scrutiny of the control order and preventative detention order regimes.[82] 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.[83] 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'[84] to participate in control order proceedings has featured in many subsequent parliamentary committee inquiries into counter-terrorism laws, demonstrating how different components of the Australian ad hoc approach to legislative scrutiny can work together to generate appetite for significant, rights-enhancing legislative change.[85]

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

78 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [3.1]

79 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006), particularly Recommendations 1, 2, 3 and 9.

80 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005). The LCA Legislation Committee's report on the Control Order 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).

81 Council of Australian Governments (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 Div 3A of the *Crimes Act 1914* (Cth) as well as a range of corresponding state and territory laws.

82 Ibid. For example, 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 LCA committees. Other independent post-enactment reviews were also discussed, including the Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006) (Sheller Review).

83 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 Legal and Constitutional Affairs Legislation Committee (Recommendation 31) made a similar recommendation in its report on the Control Order Bill: see Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005* (28 November 2005). 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 Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters (2002)* (Recommendations 3 and 4).

84 Ibid Recommendations 13.

85 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].

law-making and scrutiny process.[86] 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.[87]

Investigations of the hidden impact of legislative scrutiny on Australia's counter-terrorism laws suggest that scrutiny bodies with high participation rates are in the minds of those responsible for developing and implementing legislation, and prudent proponents of Bills will adopt strategies to anticipate or avoid public criticism by such bodies. In this way, the inquiry-based parliamentary committees (like the Senate Legal and Constitutional Affairs Committees) can have a strong 'hidden impact' on the development of laws. The 'technical scrutiny' committees (such as the Scrutiny of Bills Committee) may also generate a strong hidden impact — not because of their capacity to generate public interest but, rather, because the 'technical scrutiny' criteria these bodies apply are entrenched in the practices of public servants and parliamentary counsel. In other words, the Scrutiny of Bills Committee commands political authority among this category of key participants precisely because it is seen to be removed from the political discourse on the Bill.

Investigating 'hidden impact' also reveals that written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments contain frequent references to the work of the 'technical' scrutiny bodies (such as the Scrutiny of Bills Committee) 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. In this way, 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 these bodies reflect 'best practice' when it comes to developing laws. The interview material also suggests that the requirement to introduce all Bills with explanatory material and statements of compliance with human rights standards[88] 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.

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. This suggests, for example, that, 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

86 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 Attorney-General's Department, the Department of Immigration and Border Protection, the Australian Federal Police and Office of Parliamentary Counsel. 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: Moulds, above n 45, Appendix A.

87 The political party room also plays a central role in this behind-the-scenes law-making 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.

88 The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 6 also introduced the requirement for all Bills and disallowable instruments to be introduced with a Statement of Compatibility with Human Rights.

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.

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 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 for any administrative lawyer looking to understand how administrative law values feature in the *parliamentary law-making process* as well as in the enacted law.

Relevance for administrative lawyers

The above findings give rise to a number of relevant observations for administrative lawyers. In particular, they suggest that the parliamentary committee system has the potential to improve the quality of law making at the federal level in line with administrative law values. These findings also provide practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms.

The findings point to the benefits in investing in parliamentary committee *systems* — rather than individual committees — to enable both practical forums for citizen engagement and deliberation to occur and to facilitate the provision of clear, impartial, technical advice about the content of the proposed law or policy or its compliance with set criteria or standards. This is not to suggest that investment in parliamentary committee systems *alone* is enough to address problems of lack of trust in parliamentary law making or accountability mechanisms. Rather, the themes explored in this part of the article aim to highlight the *benefits* of investing in parliamentary committees in combination with other strategies to improve citizen engagement with parliamentary law making (such as direct democracy mechanisms including plebiscites) or more radical structural reforms to improve rights protection (such as statutory charters of rights). It is from this standpoint that the following two key themes are explored.

Parliamentary committees and improving trust in existing accountability mechanisms

Across the country, and indeed more broadly around the democratic world, parliaments have been criticised for failing to engage in a successful and meaningful way with the community when it comes to legislating for social change.[89] At the same time, there appears to be a growing demand for more deliberative law making,[90] including in Australia,

89 Richard Edelman, *2017 Edelman Trust Barometer*, 15 January 2017, executive summary.

90 See eg Matt Ryan, 'Can Belgium's Deliberative Democracy Experiment Work in Australia?' *The Mandarin*, 12 April 2019 <https://www.themandarin.com.au/107169-can-belgiums-deliberative-democracy-experiment-work-in-australia>. For further general discussion of these themes see Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

as a way to stem the 'implosion of trust' among citizens in their political institutions and law-making bodies.[91] As discussed above, the idea is that a more *engaged* electorate, with greater access to the law-making *process*, could improve the legitimacy of parliamentary law making and thus enhance the levels of trust associated with key political and law-making institutions.[92] As Mashaw has observed in the context of administrative decision-making:

> 'Kafkaesque' procedures take away the participants' ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by 'the system'. To avoid contributing to this sense of alienation, terror and, ultimately, self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues and of how the decisional process itself works.[93]

The research set out in this article demonstrates how these comments can resonate equally within the legislative context. It suggests that, when key participants have the opportunity to express their views and 'be heard', they attribute greater legitimacy to the law-making process. This is because parliamentary committees can provide a meaningful *deliberative* forum for parliamentarians and community members to consider and debate competing rights issues.

The idea behind deliberative decision-making is that 'those subject to collective decisions should have voices in the process'.[94] When applied to the process of law making, the idea of deliberation implies that the final decision about what the law or policy should be is determined by 'an exchange of reasons in which participants persuade each other based on the force of the better argument'.[95] As Levy and Orr explain, deliberative law making requires an active search for a broad range of information, as well as a process for reflection by decision-makers and the opportunity to move towards a shared common ground.[96]

In modern parliaments, this deliberative task is generally undertaken by the inquiry-based committees (such as the LCA committees or select committees), which have broad powers to hold public hearings and call for submissions from the public; and flexible approaches to analysing and reporting on the rights impact of proposed laws or policies. The work of these committees can then be informed and supported by the work of the scrutiny committees (such as the Scrutiny of Bills Committee or Human Rights Committee), which can offer submission makers and parliamentarians detailed, technical advice about the compliance of the Bill with certain rights standards (described above as the 'authoritative' role of committees) and act as a forum for a public exchange of views on the impact of the proposed law on the rights of individuals or groups within the community (described above as the 'deliberative role' of committees).

Importantly, when the system of parliamentary committees works this way, it enhances the idea of engaged or deliberative decision-making. This is because the parliamentary committee system embodies the idea of democratic representation in both form and substance. The element of representation *informs not just the legislative outcome but also*

91 See eg Hugh MacKay, 'Distrustful Nation: Australians Lose Faith in Politics' *Sydney Morning Herald*, 18 January 2017 <http://www.smh.com.au/federal-politics/political-news/distrustful-nation-australians-lose-faith-in-politics-media-and-business-20170118-gttmpd.html>.

92 Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18(4) *Human Rights Law Review* 632, 633.

93 Jerry Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885, 901.

94 Graeme Orr and Ron Levy, 'Regulating Opinion Polling: A Deliberative Democratic Perspective' (2016) 39(1) *University of New South Wales Law Journal* 318; Jon Elster, 'Introduction' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 1, 8; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) 14.

95 See eg Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92 *Journal of Philosophy* 109, 124; Orr and Levy, above n 94, 318.

96 See also Levy and Orr, above n 90, 76–80.

the decision-making process.[97] This is evident in the comments from the LCA Legislation Committee in its inquiry into the 2010 Marriage Equality Bill and the House Committee in its 2012 inquiry, where both committees emphasised the value of providing a forum for different voices within the community to be heard and the need to ensure that the content of the legislative reforms pay particular regard to the views of those individuals whose rights would be directly affected by the proposed reforms and the views of the broader community.[98] In other words, parliamentary committees are not just a conduit for the views of the people; they also play an important role in moderating or filtering those views, having regard to other public values or interests.[99]

The findings in this article also suggest that the dual characteristics of parliamentary committees (as both authoritative and deliberative forums) can improve the deliberative quality of law making in Australia in a way that holds distinct advantages over other mechanisms designed directly to engage with citizens, such as plebiscites or postal surveys. This is because parliamentary committees have the characteristics of constraint that are needed to enable deliberative decision-making and a nuanced consideration of competing rights and interests to take place. They also provide a 'safe space' for parliamentarians to adjust or even shift their public position on a Bill or amendment. As was reported at the time the legislative reforms to the Marriage Act were enacted:

> [Senator Dean] Smith's real brainwave was the Senate inquiry into Brandis' draft marriage bill. It produced close to a cross-party consensus position on marriage reform eliminating what could have been a messy partisan battle in the wake of the 'yes' vote.[100]

The marriage equality experience also demonstrates the potential for the parliamentary committee system to interact successfully with mechanisms designed to give community members a more direct say in the law-making process and, in the process, ameliorate some of the concerning features of applying direct democracy approaches to issues involving minority rights.[101] The complex, deliberative law-making experience facilitated by the parliamentary committee system is in contrast to the experience of other forms of decision-making on contested issues of social policy, such as plebiscites or postal votes. By narrowing the policy choices down to essential 'yes' or 'no' questions, these mechanisms provide far more limited opportunities for decision-makers to state reasons or demonstrate reflection and, if relied upon exclusively to resolve complex issues of social policy, can hamper efforts to develop nuanced responses or to provide meaningful protection for minority rights.[102] With the advantages of a strong legitimacy within the Australian parliamentary system, committees act as a mediator of ideas and positions, regardless of

97 This aligns with what Stephens has described as the 'pedagogical' element of representation — see ABC Radio National, 'The Problem with Plebiscites: The Limits of Democracy and the Nature of Representation', *Religion and Ethics*, 2 September 2016 (Scott Stephens).

98 For example, in its recommendations with respect to the 2010 Marriage Equality Bill, the majority of the LCA Legislation Committee said that 'The committee acknowledges the passionate and heartfelt arguments presented on both sides of the debate during the course of this inquiry. The issue of marriage equality for same-sex couples in Australia provokes an emotive response, and this is strongly evidenced by the unprecedented number of submissions received by the committee for the inquiry': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.1].

99 For example, in the foreword to the House Committee's 2012 report, the committee Chair, Graham Perrett MP, said, 'To Members of Parliament, I encourage each of you to read this report before voting on the bills. I appreciate that there are many differences of opinion among us, as there is across the country. However, we have the weighty responsibility of upholding the views of the constituents who elected us to this position. We have a duty to lead as well as represent our constituents and to vote accordingly': House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012) Foreword.

100 Michael Koziol, 'Postal Survey Road to "Yes": A History of Rebels and Heroes', *The Age* (Melbourne) 18 November 2017, 8–9, 9.

101 See eg ABC Radio National, above n 97 (Waleed Aly) <https://www.abc.net.au/religion/the-problem-with-plebiscites-the-limits-of-democracy-and-the-nat/10096592>; Philip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24(3) *University of New South Wales Law Journal* 724, [24]–[27].

102 Paul Kidrea, 'Constitutional and Regulatory Dimensions of Plebiscites in Australia' (2016) 27 *Public Law Review* 290, 292–3.

whether these ideas and positions come in the form of traditional written submissions or more innovative forms such as opinion polling results or other surveys of community members.

When taken together, these themes suggest that states and territories seeking to improve citizen engagement with parliamentary law making and enhance public trust in political institutions may benefit from investing in parliamentary committee systems with both deliberative and authoritative attributes. As the next section of this article explores, investment in the parliamentary committee system with these attributes can also enhance the capacity of the parliamentary law-making process to reflect and adhere to administrative law values.

Parliamentary committees and administrative law values

As Cane, McDonald and Rundle have observed, there are many different ways of formulating and articulating the values that underpin administrative law.[103] These values range from ideas associated with the rule of law, protection of rights and fairness to ideas associated with 'good governance', such as accountability,[104] efficiency, transparency and impartiality. Many of these values are reflected in grounds of judicial review and are designed to help delineate the proper boundaries between the court's supervisory jurisdiction over the use of administrative power by the executive and the need for the executive to be empowered to give effect to and implement the law.[105]

In this article, the focus is less on the court's supervisory jurisdiction and more on the way administrative law values inform the relationship between the *Parliament* and the executive, and the relationship between the *citizens* and the *state*, or the *governed* and the *governors*. It is within this context that the role of parliamentary committees becomes particularly interesting and relevant. The findings discussed above demonstrate, for example, that, when undertaking their broader legislative scrutiny role, parliamentary committees can:

- identify, articulate and recommend legislative provisions more precisely to define the limits of executive power and provide more 'trigger points' for parliamentary oversight of executive power (reflecting the rule of law value of administrative law);[106]
- reflect and reinforce the doctrine of parliamentary supremacy, described as a 'foundational value' of Australian administrative law,[107] by introducing changes to proposed legislation that place enforceable limits on executive powers and introducing

103 See Cane, McDonald and Rundle, above n 13, 2–4 and Ch 12, particularly 306, 351–5. The authors note that locating and describing the values of administrative law is complex and linked to a range of different inspirational and ideological theories. See also P Cane, *Controlling Administrative Power: A Historical Comparison* (Cambridge University Press, 2016).

104 The idea of 'accountability' itself can take many different forms. See eg Jerry Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in MW Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, Cambridge, 2006) 115–38; R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 9.

105 See eg M Fordham, 'Surveying the Grounds: Key Themes in Judicial Intervention' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997) 199; Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2004) 161–89; Maurice Sunkin, 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2004) 43–72.

106 See eg Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth) and Related Bills, Items 5 and 8; in response to Senate 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.

107 Cane, McDonald and Rundle, above n 13, 351. For further discussion of formal and substantive aspects of the rule of law see BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) Chs 7 and 8.

mechanisms to disallow delegated legislation or 'sunset' aspects of primary legislation;[108]

- improve political accountability by providing an evidence-based decision-making forum to test assumptions and generate new legislative options to achieve legitimate policy ends (reflecting the rule of law value of administrative law);[109]
- provide an opportunity for citizens and groups to 'engage in dialogues about the public interest'[110] by providing forums for written and oral submissions to be received and for decision makers to deliberate on contested rights issues or complex questions of social policy (reflecting the engagement value of administrative law).[111]

The case studies discussed above also reveal important insights into the culture of rights scrutiny that may be emerging at the federal level in Australia, which is informed by administrative law values and particularly influenced by the values and principles reflected in the criteria applied by Scrutiny of Bills Committee. For example, the Scrutiny of Bills Committee considers whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.[112]

Similar scrutiny criteria are applied by scrutiny of Bills committees in Victoria, New South Wales, Queensland and the ACT, and some of these jurisdictions also require Bills to be introduced with statements of compatibility setting out their compliance or otherwise with these principles. A requirement to introduce Bills with statements of compatibility also now exists in the Northern Territory following changes to the Parliament's Sessional

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

109 For example, parliamentary committees can provide individual members of parliament (elected representatives) with a safe political space to change their view or position on a particular law or policy after having participated in a public inquiry process. See eg Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012), additional comments by Senator Birmingham and Senator Boyce [1.23]–[1.27].

110 Cane, McDonald and Rundle, above n 13, 353; M Seindenfeld, 'A Civic Republican Justification for the Bureaucratic State' (1992) 101 *Harvard Law Review* 1151, 1562–76.

111 For example, in its recommendations with respect to the 2010 Bill, the majority of the LCA Legislation Committee said that 'The committee acknowledges the passionate and heartfelt arguments presented on both sides of the debate during the course of this inquiry. The issue of marriage equality for same-sex couples in Australia provokes an emotive response, and this is strongly evidenced by the unprecedented number of submissions received by the committee for the inquiry': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.1].

112 Unlike the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) does not produce guidance material detailing the content of the scrutiny principles it applies; however, since 2015 it has published an online newsletter *Scrutiny News*, along with its regular alerts and reports to 'highlight key aspects of the Senate Scrutiny of Bills Committee's work'. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny News* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News>.

Orders.[113] The Queensland Scrutiny of Legislation Committee[114] has particularly relevant features when it comes to the reflection of and contribution to administrative law values. Like the Scrutiny of Bills Committee, the Queensland committee tables an 'alert' report to Parliament at the beginning of every sitting week, canvassing any concerns that the committee has about the compliance of Bills (introduced into the House in the previous sitting week) with 'fundamental legislative principles'[115] that form part of its scrutiny mandate.[116] These principles take their lead from the Scrutiny of Bills Committee mandated detailed above[117] but also include a range of specific principles directly relevant to administrative law values, including whether the legislation 'makes rights and liberties, or obligations, dependent on administrative power' and, if so, whether that power is sufficiently defined and subject to appropriate review.[118] It also includes administrative law based criteria, including the extent to which the proposed law is consistent with principles of natural justice and only allows the delegation of administrative power 'in appropriate cases and to appropriate persons'.[119]

These scrutiny principles have the potential to have a significant influence on the 'culture of scrutiny' at the federal and state and territory levels. For example, 69 per cent of the 334 second reading speeches made on the counter-terrorism Act studied suggest an apparent preference for discussing rights with reference to the broad language featuring in the Scrutiny of Bills Committee's mandate (such as 'individual rights and liberties' and 'limits on executive power') compared with around 30 per cent referring directly to international human rights law (such as 'Article 14 of the ICCPR').[120] The evidence collected with respect to the counter-terrorism case study also suggests that it may be possible to identify a common set of scrutiny principles that a wide range of parliamentarians, public servants and submission makers consider to be important when evaluating the merits of a proposed law. It suggests, for example, that a certain type of 'rights scrutiny culture' may be emerging at the federal level that is informed by and reflects administrative law principles, including the need to ensure that:

- the expansion of executive power comes with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to

113 In August 2017 the Northern Territory, through its Sessional Orders, put this system in place with reference to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which sets out seven core international human rights treaties by which to scrutinise Commonwealth laws.

114 The Scrutiny of Legislation Committee was established on 15 September 1995 pursuant to s 4 of the *Parliamentary Committees Act 1995* (Qld). It now operates under s 103 of the *Parliament of Queensland Act 2001* (Qld). It is an all-party committee made up of seven Queensland members of Parliament and is responsible for scrutinising both primary and subordinate legislation: <https://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC>.

115 *Legislative Standards Act 1992* (Qld) s 4.

116 See Queensland Parliament, 'Scrutiny of Legislation Committee', 2011 <https://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC>. The committee also examines subordinate legislation after it is made to assess its compliance with the fundamental legislative principles. Any concerns are raised with the relevant minister. Most problems are addressed by the provision of additional information or by undertakings from ministers to introduce amendments to the committee's satisfaction. If an issue remains unresolved, the committee may report to Parliament on the problem and/or move to disallow the instrument in question.

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

118 *Legislative Standards Act 1992* (Qld) s 4(3)

119 Ibid.

120 Interestingly, there was no dramatic increase in the number of references to international human rights concepts following the establishment of the Human Rights Committee, suggesting that, outside of a handful of human rights 'champions', the work of the Human Rights Committee 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.

judicial review;[121]

- Parliament has access to information about how government departments and agencies are using their powers[122] 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; and[123]
- any departure from established common law principles (such as the establishment of new criminal offences[124] or restrictions on free speech[125] or freedom of association[126]) must be clearly defined, justified and accompanied by safeguards and independent oversight.[127]

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.[128] However, these principles tell an important story about what forms of legislative scrutiny are likely to be seen as legitimate and deliver meaningful results and what reform proposals are likely to be rejected or sidelined due to their unnatural fit with this emerging scrutiny culture.

The case studies also suggest that the work of parliamentary committees reflects and contextualises the central value of 'procedural fairness' that infiltrates many aspects of

121 See eg 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; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Ch 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).

122 See eg Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) vii; Senate Legal And Constitutional Affairs Legislation 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.

123 See eg 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.

124 See eg Anti-Terrorism Bill (No 2) 2005, schedule of the amendments made by the Senate, Items 68–72; Senate Standing Committee for the Scrutiny of Bills, Parliament of 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).

125 See eg Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015) 3, 10; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), Recommendations 27 and 28, also Ch 5; Senate 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).

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

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

128 I have commenced the task of exploring whether similar principles may be present in other contexts. See eg 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 Reuteurs, forthcoming).

administrative law.[129] For example, the case studies reveal that parliamentary committees play an important role in:

- identifying the potential impact of the proposed grant of executive power on the rights and lives of citizens; and
- prescribing appropriate limits and safeguards to govern the exercise of the proposed executive power by administrative officers.

By providing a practical forum for citizens to present their views on a proposed law (the inquiry committees) or by equipping submission makers and parliamentarians with resources that articulate aspects of the law that fall short of rule of law or rights standards (the scrutiny committees), parliamentary committees give effect to the maxim underpinning the idea of procedural fairness: *audi alteram partem* ('hear the other side').[130] Parliamentary committees also allow space for legislators critically to assess government policies or legislative agendas and 'hear the other side'[131] and give effect to the essential element of fair administrative decision-making by providing citizens with 'an opportunity to participate in the decisions that will affect them, and — crucially — a chance of influencing the outcome of those decisions'.[132] This is not to suggest that *all* parliamentary committee processes embody the concept of procedural fairness. In fact, many parliamentary committee inquiries would be better described as partisan in nature rather than 'fair'. However, as demonstrated by the findings arising from the case studies, when different committees within the system work together it is possible to mitigate the potential for party politics to dominate law making by providing multiple forums — each with different attributes — in which legislative scrutiny can take place.

As discussed further below, it is this combination of *deliberative* attributes (visible in the case of the inquiry-based committees) and *authoritative* attributes (visible in the case of the Scrutiny of Bills Committee and the Intelligence and Security Committee) that give rise to particular strengths when it comes to giving practical effect to the administrative law value of 'procedural fairness' in the context of parliamentary law making. It means that the system is able to positively contribute to better quality decision-making by providing a clear pathway for relevant facts and arguments to be placed before legislative decision-makers, potentially acting as 'a counterweight to secret lobbying and influence-peddling'[133] in decision-making and enhancing the legitimacy of the law-making process.[134] As Tyler has explained in the administrative law context, this enhanced legitimacy can in turn generate 'greater public cooperation and compliance' with the outcome of the decision or, in the case of the work of parliamentary committees, with the legislation or policy ultimately enacted into law.[135]

129 While it is clear that when administrative lawyers talk about 'procedural fairness' they have in mind a standard of legal decision-making undertaken by administrative officers, the same concept can be readily applied to the legislative *process* of setting out the boundaries of executive decision-making power.

130 Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103; Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283; see also Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18(4) *Human Rights Law Review* 632.

131 Mashaw, above n 93, 901.

132 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283; see also Liebenberg, above n 130.

133 Liebenberg, above n 130.

134 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283.

135 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283. Lienbenberg has noted that these types of observations of ways in which procedural fairness enhances the efficacy and legitimacy of public decision-making have been supported by empirical research. This research is considered in Liebenberg, above n 130. See also Silvia Sutea, 'The Scottish Independence Referendum and the Participatory Turn in UK Constitution-making: The Move Towards a Constitutional Convention' (2011) 6(2) *Global Constitutionalism: Human Rights, Democracy and the Rule of Law* 201.

Many of the attributes and practices observable at the federal level are also present in varying degrees at the state and territory level, where parliamentary committee systems vary in structure and sophistication.[136] However, not all jurisdictions have such systems in place and not all jurisdictions actively foster both deliberative and authoritative attributes within the committee systems. For example, there is no scrutiny of Bills committee or human rights committee in South Australia and no indications that rights implications are systematically considered in the pre-legislative stages: the internal development stages of policy development or legislative drafting.[137] Some rights consideration may take place during these stages but on an ad hoc basis.[138] This means that, for jurisdictions like South Australia, the federal experience — and that of other states and territories — offers a range of important insights into how to improve the quality of law making and rights scrutiny in Parliament.

Conclusion

The work of parliamentary committees is fundamental to Australia's parliamentary model of rights protection and to the law-making process at the federal level. The parliamentary committee system also forms a central part of a largely ad hoc system of legislative scrutiny that is a much-needed feature of our modern parliamentary democracy and provides a practical forum for administrative law values to be reflected and implemented in practice. With this in mind, it is critical that we carefully evaluate the effectiveness and impact of the work of parliamentary committees at the federal level. This article outlines a unique evaluation framework designed to achieve this task while also avoiding the pitfalls identified by past scholars of parliamentary scrutiny systems.

As can be seen from the discussion above, when applied to the two case studies of counter-terrorism law making and marriage equality reforms, the evaluation framework reveals a number of important insights into the effectiveness and impact of legislative scrutiny at the federal level with application and benefits for other jurisdictions. As this article documents, when parliamentary committees work together over time, they have the potential to enhance the rights compliance and overall quality of law making at the federal level in Australia. As the two case studies show in different ways, reports and recommendations of committees, even if initially ignored by the government of the day, can provide the basis for submission makers to contribute to future committee inquiries and are an important source of information for other review bodies, journalists and non-government organisations to draw upon when identifying and implementing reform options. This article has also explored the contribution the parliamentary committee system makes to the way individuals and groups engage with the parliamentary law-making process and highlights the benefits this system offers over other mechanisms designed to resolve contested rights issues, such as plebiscites or postal surveys.

As this article explores, these findings also highlight the role parliamentary committees play in helping to reflect and inform the relationship between the *Parliament* and the executive, and the relationship between the *citizens* and the *state*, or the *governed* and the *governors*. As result, this work has broad implications for administrative law scholars, public servants, parliamentarians and those contemplating new models of rights protection

136 Grenfell, above n 2, 19; see also Grenfell and Moulds, above n 3, 40.

137 The 2006 South Australian Legislation Handbook explains that, in giving drafting instructions to parliamentary counsel, close attention should be given to whether 'there is a proper balance between the enforcement provisions and the protection of civil liberties' (p 30). See South Australia, Department of the Premier and Cabinet and Office of the Parliamentary Counsel, *Legislation Handbook* (April 2006). Unlike at the federal level, there is no requirement that the Attorney-General be consulted when a proposed provision may be inconsistent with, or contrary to, an international instrument relating to human rights. Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2017) 5.52.

138 See Laura Grenfell and Sarah Moulds, 'Legislative Review: Youth Treatment Orders Bill Highlights Ad Hoc Approach to Rights-scrutiny of Bills' (2019) 41(4) *Bulletin (Law Society of South Australia)* 36–8.

in Australia. It also offers important practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms and looking for ways to improve rights protection and the deliberative quality of law making at the parliamentary level.