

The role, operation and effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after five years

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Abstract

Australia has voluntarily accepted binding obligations under a number of international human rights treaties. While many of these obligations have not been specifically incorporated into Australian domestic law and Australia does not have a legislative or constitutional bill of rights at the national level, there is a Federal parliamentary mechanism which engages with these obligations: the Parliamentary Joint Committee on Human Rights (the PJCHR). In 2011 the requirement for a PJCHR was established by statute with a mandate to assess legislation for compatibility with seven core human rights treaties to which Australia is a party and report to parliament. The PJCHR has now been in operation for over five years, having commenced in March 2012 and tabled its first report in August 2012. This article contextualises the role of the PJCHR as a mechanism for parliament to engage with human rights, and from this foundation examines the PJCHR's role, operation and contribution since its inception. The article specifically explores the claim that the PJCHR is ineffective and concludes that this claim is not made out. In so doing, the article argues that, from an empirical perspective, it is essential to develop and apply criteria of effectiveness that are capable of taking the parliamentary context sufficiently into account.

Key words: 'human rights'; 'parliament' 'Commonwealth'; 'committee' 'Australia' 'parliamentary'

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Introduction

Australia has voluntarily accepted binding obligations under a number of international human rights treaties.¹ While it is the case that many of these obligations have not been directly incorporated into Australian domestic law and Australia does not have a legislative or constitutional bill of rights at the national level to protect human rights, there is a Federal parliamentary mechanism which engages with these obligations: the Parliamentary Joint Committee on Human Rights (the PJCHR).² In 2011 the requirement for a PJCHR was established by statute with a mandate to assess legislation for compatibility with seven core human rights treaties to which Australia is a party and report to parliament.³ The PJCHR has now been in operation for over five years, having commenced in March 2012 and tabled its first report in August 2012.⁴ Additionally, a number of United Nations (UN) treaty monitoring bodies have recently reported on Australia's compliance with its human rights obligations under these treaties including on the role of the PJCHR.⁵

This article contextualises the role of the PJCHR as a mechanism for parliament to engage with human rights, and from this foundation examines the role, operation and contribution of the PJCHR after over five years of operation. It does so by drawing on existing literature, and

¹ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force (23 March 1976) [1980] ATS 23 ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976) [1976] ATS 5 ('ICESCR'); *Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 21 December 1965 (entered into force 4 January 1969) [1975] ATS 40 ('CERD'); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979 (entered into force 3 September 1981) [1983] ATS 9 ('CEDAW'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984 (entered into force 26 June 1987) [1989] ATS 21 ('CAT'); *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990) [1991] ATS 4 ('CRC'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008) [2008] ATS 12 ('CRPD').

² See, National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) xxv; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017); David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 70(1) *European Human Rights Law Review* 58.

³ Human Rights (Parliamentary Scrutiny) Act 2011 (Parliamentary Scrutiny Act) ss 3, 4, 7.

⁴ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual report 2012-2013* (December 2013) [1.7]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 First Report of 2012* (22 August 2012).

⁵ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (23 June 2017) [5]-[6].

exploring the extent to which the PJCHR's working methods and operation achieve identified policy and statutory goals.

The article explores claims that the PJCHR is ineffective. In so doing, the article argues that, from an empirical perspective, it is essential to develop and apply criteria of effectiveness that are capable of taking the parliamentary context sufficiently into account.

PART 1 – ESTABLISHMENT OF THE PJCHR IN CONTEXT

Creation, goals and mandate of the PJCHR

The creation of the PJCHR followed an extensive National Human Rights Consultation (Consultation) which sought the views of the Australian community on human rights in Australia. Many participants in the Consultation raised concerns about the inadequacy of human rights protection and institutional failures to give systemic consideration to human rights issues in Australia.⁶ The Consultation culminated in a number of recommendations intended to contribute to creating a 'culture of human rights'.⁷ While the Federal government did not adopt the more sweeping recommendation that there be a legislative Human Rights Act at the national level, in April 2010 it launched the National Human Rights Framework which adopted a number of the Consultation's more modest recommendations. This included the creation of the PJCHR and a requirement for all legislation (both government and non-government) to be accompanied by a statement of compatibility with human rights prepared by the legislation proponent (usually the minister with portfolio responsibility for the specific item of legislation).⁸ These mechanisms were created through the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Parliamentary Scrutiny Act) in November 2011.

Submissions to the Senate Committee inquiry into the bill to establish the PJCHR showed significant support for both its creation and the requirement for statements of compatibility.⁹ The purpose of the PJCHR was described by the then Attorney-General as improving 'parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and

⁶ See, National Human Rights Consultation Committee, above n 2, 343-379.

⁷ See, Ibid 343-379.

⁸ See, Explanatory Memorandum, Human Rights Parliamentary Scrutiny Bill 2010 (Cth) 1 ('EM'); Parliamentary Scrutiny Act ss 8-9. A statement of compatibility provides an assessment of whether the proposed legislation is compatible with human rights.

⁹ See, Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, *Submissions received by the committee*, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/human_rights_bills/submissions>.

legislative development.¹⁰ It was also intended to establish 'a dialogue between the executive, the parliament and ultimately the citizens they represent'.¹¹

The 'dialogue model' under the Parliamentary Scrutiny Act shares some similarities with models of human rights protection in the United Kingdom (UK), the Australian Capital Territory (ACT) and Victoria.¹² Each of these other systems has a parliamentary committee with a mandate to examine legislation for human rights compatibility, coupled with a requirement for the preparation of statements of compatibility (at least in relation to government bills). As with these jurisdictions, a finding by the PJCHR that a measure may be incompatible with human rights is informative but does not directly affect the validity of the legislation or the capacity for a bill to pass parliament notwithstanding human rights concerns.¹³

However, there are also significant differences. The institutional context of the human rights 'dialogue model' in these other jurisdictions is that they also have legislative human rights Acts that impose obligations on public authorities to comply with human rights and mechanisms for judicial review of human rights in addition to parliamentary human rights committees and requirements for statements of compatibility.¹⁴ Models such as these are often put forward as alternatives to constitutionally entrenched human rights protections.¹⁵ Reflecting on the model legislated under the Parliamentary Scrutiny Act, Williams and Burton describe it as unique in that unlike similar systems it provides no role for the courts and, accordingly, gives parliament the exclusive role in ensuring human rights protection.¹⁶ More specifically, it is not the creation of the PJCHR which excluded the courts from this role but the decision by governments and parliament not to incorporate international human rights law directly into Australian domestic law (such as in the form of a human rights Act or other legislation).¹⁷ In this context, the Parliamentary Scrutiny Act creates a dialogue

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 30 September 2010, 271 (Robert McClelland, Attorney-General) ('Second reading speech').

¹¹ *Ibid* 271.

¹² The 'dialogue model' of human rights protection is usually one where legislation sets out rights to be protected and then gives roles to each arm of government in relation to those rights. The judiciary is required to interpret legislation in a manner consistent with human rights. However, it cannot strike down legislation and can only issue a declaration of incompatibility. If a court makes a declaration parliament can choose to amend the law or ignore the declaration. The executive when introducing new legislation is required to include a statement of human rights compatibility: National Human Rights Consultation Committee, above n 2, xxv.

¹³ See, Parliamentary Scrutiny Act ss 7-9.

¹⁴ See, *Human Rights Act 2004* (ACT) ss 8-27, ss 40B-40C; *Human Rights Act 1998* (UK) ss 6-9; *Charter of Human Rights and Responsibilities* 2006 (Vic) ss 38-39. See, also, Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, 2015).

¹⁵ Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *The Modern Law Review*, 1, 7-8; Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights', paper presented at the Department of the Senate Occasional Lecture Series, Parliament House (8 December 2006); Helen Watchirs and Gabrielle McKinnon, 'Five years of experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 136-139.

¹⁶ George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 58.

¹⁷ The courts do have a role adjudicating human rights where they have been incorporated into domestic law.

between the parliament and the executive, but generally establishes no such specific dialogue between the parliament and the courts (as occurs in the UK, Victoria or ACT).¹⁸

Mechanisms for parliament to engage in the consideration of human rights

Parliament can have a significant role in protecting and promoting human rights through the law making process.¹⁹ That is, the process of debating, amending, considering and ultimately passing legislation or declining to pass legislation. It also has the power to incorporate international human rights obligations into domestic law. Drawing on comparative research, Chang identifies a growing level of recognition that parliaments may play a critical role in pinpointing human rights issues, monitoring a nation state's compliance with international human rights obligations and legislating to prevent or address human rights violations.²⁰ The role of elected representatives in the protection of human rights may therefore be viewed as a shared responsibility with other branches of government.

There may also be a perception that there exists a 'democratic deficit' in models of human rights protection which grant a specific role to unelected courts in adjudicating on human rights matters.²¹ Hunt argues that these concerns should be addressed by giving consideration to providing institutional mechanisms and opportunities for parliamentarians to engage meaningfully with human rights.²² While Australia does not have a legislative bill of rights at the Federal level, providing mechanisms for elected representatives to meaningfully engage with human rights issues may to some extent be addressed through the PJCHR's broad goals of encouraging consideration of human rights, fostering a 'culture of rights,' and ensuring more systematic consideration of human rights issues.²³

Parliamentary committees are an established mechanism for members of parliament to examine particular issues in detail, supplementing the law making process when it occurs before the passage of legislation. With powers to receive advice, evidence and submissions and to hold hearings, parliamentary committees provide a space for more focused consideration of issues, policies, legislation and human rights than can occur on the floor of the parliament.²⁴ The parliamentary committee process usually results in a report that is tabled in parliament.²⁵ The work of parliamentary committees therefore not only provides scope for members of a particular committee to be better informed about an issue but also to assist in informing members of parliament and the public more broadly. Committee reports

¹⁸ Williams and Burton, above n 16, 265.

¹⁹ See, eg, Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing); Brian Chang, Global developments in the role of parliaments in the protection and promotion of human rights and the rule of law: An Emerging Consensus (2017) <<https://www.law.ox.ac.uk/research-and-subject-groups/parliaments-rule-law-and-human-rights-project/2017-paper-emerging>>.

²⁰ Chang, above n 19, 6, 36.

²¹ Murray Hunt 'Introduction' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing) 1, 6, 12.

²² Ibid 13.

²³ See, eg, Second reading speech, above n 10; EM, above n 8; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 1.

²⁴ See, Rosemary Laing (ed), 'Committees', *Odgers' Australian Senate Practice* (14th edition, 2016) 461, 475.

²⁵ See, Commonwealth, Parliament of Australia, Senate Standing Order 38.

and recommendations may therefore shape broader debates within parliament and beyond including potentially in relation to human rights considerations. However, such reports do not bind either chamber so whether recommendations or findings are adopted into legislation depends on the majority in the legislative chambers.²⁶ The work of the PJCHR should be understood within this context.

Prior to the creation of the PJCHR, parliament and parliamentary committees were still receiving some information about the human rights implications of proposed legislation. Much of this information was provided by submitters to parliamentary committees in the course of inquiries into proposed legislation.²⁷ This included submissions raising human rights concerns from statutory authorities such as the Australian Human Rights Commission, human rights non-government organisations such as Amnesty International, professional groups such as the Law Council of Australia and academics. However, the consideration of the human rights implications of proposed legislation in this context tended to be *ad hoc* and contingent for a number of reasons.

First, Senate committee inquiries into a particular bill (referred to as 'bill inquiries') are initiated by a referral from the Senate.²⁸ This means that a Senate committee inquiry is not mandatory even if legislation raises significant human rights concerns. Second, once proposed legislation is referred for inquiry, whether or not evidence on its human rights implications is received is contingent on the interest, capacity and expertise of relevant individuals and groups in making a submission to the inquiry. Third, the extent of consideration of human rights issues is influenced by the particular interests and capacities of committee chairs and other committee members.

In addition to bill inquiries, a further place for members of parliament to be informed about the human rights implications of proposed legislation was through the traditional Senate technical scrutiny committees. That is, the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances. However, in comparison to the seven human rights treaties that are the focus of the PJCHR, the terms of reference for these technical scrutiny committees is more narrowly focused on legislation that would 'trespass unduly on personal rights and liberties'²⁹ which is grounded in traditional common law rights. Further, the consideration of human rights is but one of the scrutiny

²⁶ See, Laing (ed), above n 24, 461.

²⁷ See, eg, Law Council of Australia, Submission 30 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 1; Amnesty International, Submission 141 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005*; Human Rights and Equal Opportunities Commission, Submission 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005*; Sydney University Centre for International Law, Submission 11 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Anti-People Smuggling and Other Measures Bill 2010*.

²⁸ Commonwealth, Parliament of Australia, Senate Standing Order 2A. The Senate Committee on the Selection of Bills consists of the Government Whip and 2 other senators nominated by the Leader of the Government in the Senate, the Opposition Whip and 2 other senators nominated by the Leader of the Opposition in the Senate, and the whips of any minority groups. It is responsible for recommending whether to refer a bill to a committee for inquiry: Laing (ed), above n 24, 473-474.

²⁹ See, Commonwealth, Parliament of Australia, Senate Standing Order 24.

principles these committees must apply to their scrutiny of legislation. As such, the mandate for these committees does not provide comprehensive consideration of human rights set out in international human rights law. In contrast to these processes, the PJCHR provides for a more consistent, systematic and comprehensive consideration of the human rights implications of legislation. Significantly, before the creation of the PJCHR and the requirement for legislation to be accompanied by a statement of compatibility, there was no specific imperative for legislation proponents or a parliamentary committee to consider the human rights implications of legislation and it was not usually apparent that these aspects had been assessed.

PART 2 – ASSESSING THE EFFECTIVENESS AND CONTRIBUTION OF THE PJCHR

Relevance, challenges and approaches to assessing the 'effectiveness' of the PJCHR

The Australian government, in reporting on Australia's compliance with its international human rights obligations to UN treaty monitoring bodies, has identified the work of the PJCHR as a mechanism to assist with ensuring consistency with its obligations.³⁰ Accordingly, issues of the PJCHR's effectiveness have implications for compliance with Australia's international obligations.³¹ However, in some key respects it is difficult to assess the practical 'effectiveness' of the role and operation of parliamentary committees.³² As Russell and Benton observe in the context of UK parliamentary committees 'much of Parliament's influence is subtle, largely invisible and frequently even immeasurable.'³³ Similarly, Webb and Roberts point to particular challenges in determining the effectiveness of parliamentary oversight of human rights more generally. These challenges include political realities, lack of independence and resourcing issues. They also note that the impact of parliamentary human rights scrutiny on legislative and policy reforms may be an 'iceberg phenomenon,' which is to say that the impacts of parliamentary human rights activity may

³⁰ See, Australia, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, fifth periodic report of Australia, UN Committee on Economic Social and Cultural Rights, E/C.12/AUS/5 (16 February 2017); Australia, *Consideration of reports submitted by States parties under article 40 of the Covenant*, sixth periodic report of Australia, UN Human Rights Committee, CCPR/C/AUS/6 (2 June 2016) 2; Australia, *Consideration of reports submitted by States parties under article 9 of the Convention Eighteenth to twentieth periodic reports of States parties due in 2014*, UN Committee on the Elimination of Racial Discrimination, CERD/C/AUS/18-20 (2 February 2016) 6-7.

³¹ That is, if the PJCHR is ineffective or does not make substantive contributions then it may not, in fact, be a mechanism to assist to ensure compliance with Australia's obligations.

³² See, eg, Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 545, 551, 545, 570; Meg Russell and Meghan Benton 'Assessing the Impact of Parliamentary Oversight Committees: the select committees in the British House of Commons' (2013) 66 *Parliamentary Affairs*, 772, 766; Aileen Kavanagh 'The Joint Committee on Human Rights: a Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing) 115; Malcolm Aldon, 'Rating the Effectiveness of Parliamentary Committee Reports: the Methodology' (2000) 15(1) *Legislative Studies* 22; Geoffrey Lindell, 'How (and Whether?) to evaluate Parliamentary Committees – from a Lawyer's perspective' (2005) *About the House* 55.

³³ Meg Russell and Megan Benton 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at the PSA Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009) cited in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing) 131.

not be in the public domain through such things as, for example, direct amendments to bills arising from parliamentary scrutiny.³⁴

This highlights the fact that an assessment of effectiveness that focuses solely on legislative outputs may only be capturing a small fraction of parliamentary activities. Relevantly, Sathanapally points to a gap in much of the existing literature which has assessed parliamentary models of human rights protection. She notes that such literature has tended, in large part, to focus predominately on legislative outputs to the detriment of issues of legislative deliberation or engagement in the parliamentary context.³⁵ Accordingly, there is a risk that applying criteria of effectiveness that are too narrow may neglect important aspects of the PJCHR and, as such, would be incomplete. In examining such issues, there is need to identify appropriate criteria to assess effectiveness which are suitable to the parliamentary context.

Perhaps in acknowledgement of these kinds of concerns, Webb and Roberts have contributed, as part of a research project with the Dickson Poon School of Law, to the development of a more comprehensive framework for determining the effectiveness of parliamentary human rights mechanisms (Dickson Poon Framework). Webb and Roberts suggest human rights oversight mechanisms be assessed by identifying 'core elements' such as particular goals and examining factors that influence achievement of such elements.³⁶ Importantly, the framework's emphasis on examining questions of effectiveness from multiple vantage points provides for the consideration of a range of evidence including impacts that may be less apparent.³⁷

In this respect, a metric against which the effectiveness of the PJCHR may be assessed is by examining whether, and the extent to which, the PJCHR's working methods and operation address identified goals. As discussed above (in Part 1), the background to the development of the Parliamentary Scrutiny Act, and the establishment of the PJCHR reveal some of the identifiable goals of the PJCHR. This includes establishing dialogue between the parliament and the executive, contributing to a 'culture of rights', informing parliament about the human rights implications of legislation and providing scope for greater engagement with human rights in policy and legislative processes.³⁸ The following section of this article examines a number of key aspects of the PJCHR's operation, approach and institutional context and the extent to which these address such identified goals including its:

³⁴ Philippa Webb and Kirsten Roberts, Kings College London, Dickson Poon School of Law, *Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness* (June 2014) 3 <<https://www.kcl.ac.uk/law/research/parliamentshr/assets/Outcome-Document---Advance-Copy-5-June-2014.pdf>>.

³⁵ Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2014) 50.

³⁶ Webb and Roberts, above n 34: Such factors may include relevant 'quality' 'resources', 'political support', 'partnerships', 'mandate/powers', 'approach', 'method of operation', 'politics' and 'national context.'

³⁷ *Ibid* 6.

³⁸ See, eg. Second reading speech, above n 10; EM, above n 8; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 1.

- role and operation as a technical scrutiny committee;
- reporting workload and time constraints;
- dialogue with legislation proponents; and
- analytical framework and focus.

The analysis will also specifically consider the PJCHR's contribution to, and impact on legislation, parliamentary processes and more broadly as potential indicators of whether identified goals are being addressed. By looking at questions of effectiveness from a range of vantage points, this article seeks to contribute to a contextually based understanding of the PJCHR and questions of effectiveness.

Role and operation as a technical scrutiny committee

Section 7 of the Parliamentary Scrutiny Act sets out the functions of the PJCHR and provides in particular that the PJCHR's functions are to examine bills and legislative instruments 'that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue'. The PJCHR also has a function to examine existing legislation and an inquiry function for matters which are referred to it by the Attorney-General. 'Human rights' are defined in section 3 of the Parliamentary Scrutiny Act as the rights and freedoms recognised or declared by seven core human rights treaties to which Australia is a party.³⁹ The PJCHR consists of 10 members, 5 from the House of Representatives and 5 from the Senate. It has 5 government members and 5 non-government members with the chair of the PJCHR being a member of the government and having a casting vote.⁴⁰

Since its inception, the PJCHR has undertaken its function of examining legislation against the seven core treaties as a technical 'scrutiny committee'. The PJCHR's technical scrutiny approach draws on the longstanding working methods of the Senate Regulations and Ordinances Committee established in 1932 and the Senate Scrutiny of Bills Committee established in 1981 (Senate scrutiny committees). A technical scrutiny committee approach is characterised by an assessment of the extent to which legislation complies with particular scrutiny principles⁴¹ or, in the case of the PJCHR, whether legislation complies with the seven core conventions. Beyond the essentials relevant to assessing this technical compliance, the assessment occurs without an inquiry into the broader policy merits of legislation.⁴² There are also similarities between the PJCHR approach and the type of technical scrutiny undertaken by the UK Joint Parliamentary Committee on Human Rights

³⁹ These treaties are the ICCPR; ICESCR; CERD; CEDAW; CAT; CRC; and CRPD: Parliamentary Scrutiny Act s 3.

⁴⁰ Parliamentary Scrutiny Act s 5; Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Resolution of Appointment, Parliamentary Joint Committee on Human Rights, 1 September 2016, 299 (Christopher Pyne).

⁴¹ See, Laing (ed), above n 24, 322.

⁴² See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 5.

(UK JCHR).⁴³ The PJCHR's annual report acknowledges the legacy of existing traditions of technical legislative scrutiny and states that 'in keeping with the longstanding conventions of the Senate scrutiny committees, the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.'⁴⁴

This technical approach puts the usual work of the PJCHR in contrast to the most widely understood committees in the Federal parliament: the Senate legislative and reference portfolio committees.⁴⁵ These portfolio committees, as part of their routine practice, call for submissions, hold public hearings and table a report, which routinely divides along policy or party political lines. The chair of the PJCHR has therefore further explained the essential difference between the role of a PJCHR member and the role of members of portfolio committees as follows:

Like all parliamentarians, scrutiny committee members may, and often do, have different views in relation to the policy merits of legislation. The report does not assess the broader merits or policy objectives of particular measures but rather seeks to provide parliament with a credible technical examination of the human rights implications of legislation. Committee members performing a scrutiny function are not, and have never been, bound by the contents or conclusions of scrutiny committee reports.⁴⁶

As such, the focus of the PJCHR's scrutiny reports is on technical compliance with the seven core human rights treaties. It is relevant in considering the committee's impact that some commentators have warned that an approach to human rights scrutiny that is divided or not consensus based could undermine the effectiveness of the PJCHR.⁴⁷ In the current 45th parliament to date between August 2016 and March 2018 all the PJCHR's 20 scrutiny reports have been by consensus on a non-partisan basis.⁴⁸ The PJCHR's working method has meant

⁴³ See, Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] 3 *European Human Rights Law Review* 232, 243; Kavanagh, above n 32, 128, 129; Hiebert, above n 15, 1, 17.

⁴⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 5.

⁴⁵ See, Laing (ed), above n 24, 461, 475-481. This is also the case in respect of the operation of House of Representatives and Joint Committees: See, House of Representatives, *Guide to Procedures* (6th edition, 2017) 115-121.

⁴⁶ *Chair's Tabling Statement for the House of Representatives: Human Rights Scrutiny Report 9 of 2017*, Parliamentary Joint Committee on Human Rights, Parliament of Australia (5 September 2017) <https://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2017/13_2017/TablingHouse.pdf?la=en>.

⁴⁷ George Williams and Daniel Reynolds (2015) 'The operation and impact of Australia's Parliamentary Scrutiny Regime for Human Rights' 41(2) *Monash University Law Review* 469, 481; Fergal Davis, 'Human rights in Australia will become a political play thing without consensus' *The Guardian* (9 March 2015).

⁴⁸ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 7 of 2016* (11 October 2016); *Human Rights Scrutiny Report 8 of 2016* (9 November 2016); *Human Rights Scrutiny Report 9 of 2016* (22 November 2016); *Human Rights Scrutiny Report 10 of 2016* (30 November 2016); *Human Rights Scrutiny Report 1 of 2017* (16 February 2017); *Human Rights Scrutiny Report 2 of 2017* (21 March 2017); *Human Rights Scrutiny Report 3 of 2017* (28 March 2017); *Human Rights Scrutiny Report 4 of 2017* (9 May 2017); *Human Rights Scrutiny Report 5 of 2017* (14 June 2017); *Human Rights Scrutiny Report 6 of 2017* (20 June 2017); *Human Rights Scrutiny Report 7 of 2017* (8 August 2017); *Report 8 of 2017* (15 August 2017); *Human Rights Scrutiny Report 9 of 2017* (5 September 2017); *Human Rights Scrutiny Report 10 of 2017* (12 September 2017); *Human Rights Scrutiny Report 11 of 2017* (17 October 2017); *Human Rights Scrutiny Report 12 of 2017* (28 November 2017); *Human Rights Scrutiny Report 13 of 2017* (5 December 2017) ('PJCHR Scrutiny Reports 45th Parliament October 2016 – December 2017'); *Human Rights*

that the overall trend in PJCHR reporting has been towards consensus under a number of different PJCHR chairs.⁴⁹ Even though the overall trend in PJCHR reporting has been

Scrutiny Report 1 of 2018 (6 February 2018); *Human Rights Scrutiny Report 2 of 2018* (13 February 2018); *Human Rights Scrutiny Report 3 of 2018* (27 March 2018) ('PJCHR Scrutiny Reports 45th Parliament October 2016 - March 2018').

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

⁴⁹ In the 43rd Parliament all the PJCHR's scrutiny reports were by consensus: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 First Report of 2012* (22 August 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Second Report of 2012* (12 September 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Third Report of 2012* (19 September 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fourth Report of 2012* (20 September 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fifth Report of 2012* (15 October 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Sixth Report of 2012* (31 October 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Seventh Report of 2012* (28 November 2012); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 First Report of 2013* (6 February 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Second Report of 2013* (13 February 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Third Report of 2013* (13 March 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fourth Report of 2013* (20 March 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fifth Report of 2013* (20 March 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Sixth Report of 2013* (15 May 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Seventh Report of 2013* (5 June 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Eighth Report of 2013* (19 June 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Ninth Report of 2013* (19 June 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Tenth Report of 2013* (26 June 2013); *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Eleventh Report of 2013* (26 June 2013) ('PJCHR Scrutiny Reports 43rd Parliament'). In the 44th Parliament the majority of the PJCHR's scrutiny reports were by consensus: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report First Report of the 44th Parliament* (10 December 2013); *Human Rights Scrutiny Report Second Report of the 44th Parliament* (11 February 2014); *Human Rights Scrutiny Report Third Report of the 44th Parliament* (4 March 2014); *Human Rights Scrutiny Report Fourth Report of the 44th Parliament* (18 March 2014); *Human Rights Scrutiny Report Fifth Report of the 44th Parliament* (25 March 2014); *Human Rights Scrutiny Report Sixth Report of the 44th Parliament* (14 May 2014); *Human Rights Scrutiny Report Seventh Report of the 44th Parliament* (18 June 2014); *Human Rights Scrutiny Report Eighth Report of the 44th Parliament* (24 June 2014); *Human Rights Scrutiny Report Ninth Report of the 44th Parliament* (15 July 2014); *Human Rights Scrutiny Report Tenth Report of the 44th Parliament* (26 August 2014); *Human Rights Scrutiny Report Eleventh Report of the 44th Parliament* (2 September 2014); *Human Rights Scrutiny Report Twelfth Report of the 44th Parliament* (24 September 2014); *Human Rights Scrutiny Report Thirteenth Report of the 44th Parliament* (1 October 2014); *Human Rights Scrutiny Report Fourteenth Report of the 44th Parliament* (28 October 2014); *Human Rights Scrutiny Report Fifteenth Report of the 44th Parliament* (14 November 2014); *Human Rights Scrutiny Report Sixteenth Report of the 44th Parliament* (25 November 2014); *Human Rights Scrutiny Report Seventeenth Report of the 44th Parliament* (2 December 2014); *Human Rights Scrutiny Report Eighteenth Report of the 44th Parliament* (10 February 2015); *Human Rights Scrutiny Report Nineteenth Report of the 44th Parliament* (3 March 2015); *Human Rights Scrutiny Report Twentieth Report of the 44th Parliament* (18 March 2015) *Human Rights Scrutiny Report Twenty-First Report of the 44th Parliament* (24 March 2015); *Human Rights Scrutiny Report Twenty-Second Report of the 44th Parliament* (13 May 2015); *Human Rights Scrutiny Report Twenty-Third Report of the 44th Parliament* (18 June 2015); *Human Rights Scrutiny Report Twenty-Fourth Report of the 44th Parliament* (24 June 2015); *Human Rights Scrutiny Report Twenty-Fifth Report of the 44th Parliament* (11 August 2015); *Human Rights Scrutiny Report Twenty-Sixth Report of the 44th Parliament* (18 August 2015); *Human Rights Scrutiny Report Twenty-Seventh Report of the 44th Parliament* (8 September 2015); *Human Rights Scrutiny Report Twenty-Eighth Report of the 44th Parliament* (17 September 2015); *Human Rights Scrutiny Report Twenty-Ninth Report of the 44th Parliament* (13 October 2015); *Human Rights Scrutiny Report Thirtieth Report*

towards consensus and this can be seen in a positive light, the particular concern, perhaps, should be less of consensus *per se*, but whether the PJCHR's reports are capable of being a useful resource to inform parliament more broadly which is considered further below.

A significant element of the technical scrutiny approach, which is also different to portfolio committees, is the provision of legal advice as a mechanism to support the PJCHR to perform its legislative scrutiny function. The PJCHR has an independent part-time legal adviser, as well as expert secretariat staff (which generally include two Principal Research Officers who have specialist legal expertise in international human rights law).⁵⁰ This enables the PJCHR reports to contain analysis and conclusions against the standards of the seven core human rights treaties that is rigorous. In a technical scrutiny context, the credibility of analysis is essential as it addresses the goal of informing parliament about the human rights implications of legislation as well as providing opportunities for informed engagement about human rights. There are a number of indications that generally the PJCHR reports have been recognised as containing credible analysis. This includes the analysis being referred to in submissions to the legislation inquiries of portfolio committees as well as the work of the PJCHR and its recommendations being referred to by UN treaty monitoring bodies in reviewing Australia's compliance with its obligations under human rights treaties.⁵¹ It is also expected that analysis that lacks legal credibility would attract criticism. Accordingly, these are indications that the technical scrutiny approach appears to contribute to the effectiveness of the PJCHR against the goals of informing parliament about the human rights implications of proposed legislation as well as contributing to more informed engagement around human rights issues.

of the 44th Parliament (10 November 2015); *Human Rights Scrutiny Report Thirtieth-First Report of the 44th Parliament* (24 November 2015); *Human Rights Scrutiny Report Thirtieth-Second Report of the 44th Parliament* (1 December 2015); *Human Rights Scrutiny Report Thirtieth-Third Report of the 44th Parliament* (2 February 2016); *Human Rights Scrutiny Report Thirtieth-Fourth Report of the 44th Parliament* (23 February 2016); *Human Rights Scrutiny Report Thirtieth-Fifth Report of the 44th Parliament* (25 February 2016); *Human Rights Scrutiny Report Thirtieth-Third Report of the 44th Parliament* (2 February 2016); *Human Rights Scrutiny Report Thirtieth-Fourth Report of the 44th Parliament* (23 February 2016); *Human Rights Scrutiny Report Thirtieth-Fifth Report of the 44th Parliament* (25 February 2016); *Human Rights Scrutiny Report Thirtieth-Sixth Report of the 44th Parliament* (16 March 2016); *Human Rights Scrutiny Report Thirtieth-Seventh Report of the 44th Parliament* (2 May 2016); *Human Rights Scrutiny Report Thirtieth-Eighth Report of the 44th Parliament* (3 May 2016) ('PJCHR Scrutiny Reports 44th Parliament').

⁵⁰ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) iv, 8.

⁵¹ See, UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (23 June 2017) [5]-[6]; Law Council of Australia, Submission 42 to Senate Standing Committee on Community Affairs, *Inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017*, 11 August 2017, 2; Australian Lawyers Alliance, Submission 14 to Senate Standing Legislation Committee on Community Affairs, *Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*, 23 July 2014, 11; Australian Human Rights Commission, Submission 163 to Senate Standing Legislation Committee on Legal and Constitutional Affairs, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, [183], [201].

While the technical scrutiny approach is used by the PJCHR in its regular work examining legislation for human rights compatibility, the PJCHR has on one occasion undertaken a broad based policy inquiry in response to a referral it received from the Attorney-General. The PJCHR, in the context of this inquiry, examined a broad range of policy issues related to human rights and focused on matters outside solely compliance with international obligations. As such, there can also be scope within the PJCHR's working methods to look at human rights matters more broadly. This may also have value in terms of the goal of engagement with human rights, particularly noting the large number of submissions that the PJCHR received to this inquiry.⁵²

Reporting, workload and time constraints

The PJCHR usually tables a scrutiny report every joint parliamentary sitting week which assesses the human rights compatibility of new bills and instruments since the previous report, any deferred matters and follow up responses from ministers or other legislation proponents.⁵³ During the current (45th) Parliament from August 2016 to March 2018 the PJCHR has tabled 20 scrutiny reports and examined⁵⁴ a very large volume of legislation: 463 bills and 3,286 instruments of delegated legislation.⁵⁵ Since its inception to March 2018 the PJCHR has examined 1,375 bills and 11,070 instruments.⁵⁶ This highlights the very significant volume of the PJCHR's work, particularly noting the detailed analysis contained in its reports in relation to legislation raising human rights concerns. Reporting on legislation in this manner is clearly the PJCHR's primary ongoing contribution, both to the parliament and more broadly. As discussed further below, the PJCHR's reporting on legislation that raises human rights concerns often occurs in two stages with both initial and concluding reports tabled.⁵⁷

There are a number of challenges for the PJCHR in performing these functions. In the context of its considerable workload, the issue of the timeliness of the PJCHR's reporting is

⁵² See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

⁵³ See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 13 of 2017* (5 December 2017) 1.

⁵⁴ The committee examines and reports on all these bills and instruments.

⁵⁵ See, Parliamentary Joint Committee on Human Rights, *Chair's tabling statement for the House of Representatives: Report 13 of 2017*, Parliament of Australia (5 December 2017) (Ian Goodenough) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements> ('chair's tabling statement'); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 1 of 2018* (6 February 2018); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 2 of 2018* (13 February 2018); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018* (27 March 2018) ('PJCHR reports February – March 2017'); Australian Government, Federal Register of Legislation, <<https://www.legislation.gov.au>>

⁵⁶ See, *Ibid*; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012 - 2013* (December 2013) 15; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013 -2014* (3 May 2016) 11; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014 -2015* (5 December 2017) 11; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 11.

⁵⁷ See, eg. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 4 of 2018* (8 May 2018).

significant. This is because if the PJCHR does not report in a timely manner then its reports may not be available to inform the deliberations of parliament or to assist with engagement around human rights before legislation is passed. It is therefore an important factor in relation to the effectiveness of the PJCHR against these goals. The PJCHR on its website explains that it 'works to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days).'⁵⁸

However, on occasion the PJCHR has faced criticism for bills having passed both houses of parliament before its concluding report is published in respect of this legislation.⁵⁹ It has also received criticism for deferring its consideration of legislation including high-profile or controversial legislation such as national security legislation.⁶⁰ The UN Human Rights Committee in its concluding observations on Australia also expressed concern 'that bills are sometimes passed into law before the conclusion of review by the PJCHR.'⁶¹

Unlike Senate legislation portfolio committees, there is no procedural impediment to a bill passing before the PJCHR reports. When a bill is referred to these other committees for inquiry, Senate Standing Order 115(3) operates and the bill may not be further considered by the Senate until the committee has reported.⁶² As the PJCHR does not receive bills until they are introduced into parliament, the PJCHR is engaged in a race to undertake its full analytical, information gathering and reporting processes (which frequently include complex human rights issues) before the passage of legislation. This also occurs in a broader context, including that the ten members of the PJCHR also have other substantial parliamentary commitments.

During 2017, 18 of the 270 new bills considered by PJCHR passed before the PJCHR published its *concluding* report (meaning 6.7 percent of bills passed prior to final reports).⁶³ However, for 8 of these 18 bills the PJCHR had published a detailed initial human rights analysis in advance of passage. This means that the in the calendar year 2017 significant reporting was available to inform members of parliament about the human rights implications

⁵⁸ Parliamentary Joint Committee on Human Rights, *Correspondence Register*, Parliament of Australia, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register> ('PJCHR correspondence register').

⁵⁹ See, eg. Williams and Reynolds, above n 47, 469 -479, 490; Fergal Davis, 'Political Rights Review and Political Party Cohesion,' (2016) 69(1) *Parliamentary Affairs*, 221.

⁶⁰ Ibid. Williams and Reynolds discuss the example of the National Security Legislation Amendment Bill (No 1) 2014 having been deferred three times by the PJCHR and then passing both houses of parliament prior to the PJCHR's final report.

⁶¹ UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [11].

⁶² See, Commonwealth, Parliament of Australia, Senate Standing Order 115(3).

⁶³ PJCHR Scrutiny Reports 45th Parliament October 2016 – December 2017, above n 48 (in particular Report 1 of 2017 – Report 13 of 2017); Senate Table Office, *Bills List: Bills Before Parliament for the Year 2017*, Parliament of Australia (13 December 2017); House of Representatives, *Daily Bills Lists*, Parliament of Australia, (13 December 2017); Parliamentary Joint Committee on Human Rights, *2017 Index of Bills Considered by the Committee*, Parliament of Australia <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments/Archive>.

of legislation for 96 percent of bills prior to passage.⁶⁴ It is not uncommon for the PJCHR's initial report on legislation, which is often detailed, to be utilised by members of parliament as a resource for analysis in relation to human rights issues.⁶⁵ For example, the PJCHR's report has been used to inform questioning in hearings before other committees.⁶⁶

There is an additional element that can substantially affect the timeliness of the PJCHR's concluding reports on legislation: the timeliness of responses to the PJCHR's requests for further information from legislation proponents.⁶⁷ As discussed further below, consistently with other technical scrutiny committees and in keeping with the 'dialogue model', the PJCHR's general approach, where particular legislation raises human rights concerns, is to table an initial report setting out detailed concerns and to seek further information from the legislation proponent. The response from the legislation proponent is then usually examined and reported on in a concluding report entry. This meant the PJCHR's concluding report entry could be delayed, and legislation passed, even if the delay in reporting was caused, at least in part, by the failure of the legislation proponent to furnish a response to the PJCHR. The PJCHR faced criticism for not developing approaches to draw matters to a close more quickly even where a response was not received.⁶⁸ In its 2015-2016 annual report the PJCHR explained that while it had stipulated deadlines for responses, only 8 percent of responses were provided by legislation proponents by the requested date.⁶⁹

Since this parliament commenced in August 2016, the PJCHR has adopted some additional measures to attempt to address this situation. Where the PJCHR prepares an initial report and seeks further information from the legislation proponent, the PJCHR now sets a date on which it will report on this legislation. Where a ministerial response is not received by the requested date the PJCHR may decide to conclude its examination in the absence of this further information. A register of correspondence published on the PJCHR's website has also been established to record whether responses have or have not been received.⁷⁰ Since instituting these mechanisms, there has been marked improvement in the timeliness of responses with 30 percent of responses received by the requested date during this period to

⁶⁴ PJCHR Scrutiny Reports 45th Parliament October 2016 – December 2017, above n 48.

⁶⁵ See, eg, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017, 73 (Jacinta Collins); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Validation of Decisions) Bill 2017, 16 August 2017, 8653 (Graham Perrett); Senate Education and Employment Legislation Committee, Inquiry into Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, Parliament of Australia, *Committee Hansard*, 28 September 2017, 66 (Sue Lines and Chris Ketter); *Journals of the Senate no. 58* (6 September 2017) 1182 (Rachel Siewert); Commonwealth, *Parliamentary Debates*, Senate Hansard, Second Reading Debate, Australian Border Force Amendment (Protected Information) Bill, 7463 (Senator Nick McKim).

⁶⁶ See, eg, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017, 73 (Jacinta Collins)

⁶⁷ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 20.

⁶⁸ Williams and Reynolds, above n 47, 479.

⁶⁹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 20.

⁷⁰ See, PJCHR correspondence register, above n 58.

the end of 2017.⁷¹ No other changes were made to the PJCHR's processes that could account for this variance, so the new mechanisms are the most likely cause.

Additionally, the above reporting statistics should be understood in the parliamentary context of the speed with which legislation may be passed. This is a factor over which the PJCHR has no direct control. In this respect, of the bills the PJCHR considered in 2017, 7 out of the 18 bills which passed both houses of parliament prior to the PJCHR reporting passed in fewer than 6 scheduled sitting days. This restricted the PJCHR's capacity to report on such legislation.⁷² Where legislation passes quickly there may be insufficient time for the PJCHR to fully consider and report on sometimes complex human rights matters raised by legislation.

However, notwithstanding these potential concerns, the fact that the PJCHR has reported on 96 percent of bills prior to passage in 2017 indicates that the current working methods of the PJCHR are generally effective in addressing the goal of informing parliament regarding the human rights implications of legislation. The changes to the PJCHR's approach to reporting on concluding matters also shows that its working methods have been responsive to concerns regarding timeliness.

At the same time, the fact that any bills raising human rights concerns may pass the parliament prior to the PJCHR's concluding report is still of concern. The UN Human Rights Committee has specifically recommended that Australia should 'strengthen its legislative scrutiny processes with a view to ensuring that no bills are adopted before the conclusion of a meaningful and well-informed review of their compatibility with the [International Covenant on Civil and Political Rights]'.⁷³

In this context, there is scope for further improvement through considering additional procedural or other mechanisms including those currently available in respect of other parliamentary committees. Newly permanent Senate Standing Order 24(1)(e)-(h) enables senators to ask the responsible minister why the Senate Scrutiny of Bills Committee has not received a response if that committee has not finally reported on a bill because a ministerial response has not been received. In reflecting on the effectiveness of this mechanism in its first year in operation, the Senate Scrutiny of Bills Committee noted that the proportion of

⁷¹ Unpublished statistics, compiled by the PJCHR secretariat for the period August 2016- December 2017: Responses were requested in relation to 54 bills in the reporting period. Responses in relation to 16 of these bills were received by the requested date. Responses were requested in relation to 35 instruments in the reporting period. Responses in relation to 11 of these instruments were received by the requested date.

⁷² See, PJCHR Scrutiny Reports 45th Parliament October 2016 – December 2017, above n 48; Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (introduced 8 February 2017 passed 15 February 2017); Human Rights Legislation Amendment Bill 2017 (Introduced 22 March 2017 passed 31 March 2017); Marriage Law Survey (Additional Safeguards) Bill 2017 (Introduced 13 September 2017 passed 13 September 2017); Parliamentary Entitlements Legislation Amendment Bill 2017 (Introduced 9 February 2017 passed 16 February 2017); Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (Introduced 14 June 2017 passed 20 June 2017); Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill (No. 2) 2016 (introduced 1 December 2016 passed 1 December 2016); Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2) (introduced 28 November passed 1 December 2016); Parliament of Australia, *Parliamentary sitting calendar 2017, Parliamentary sitting calendar 2016* <https://www.aph.gov.au/About_Parliament/Sitting_Calendar/Previous_sitting_calendars>.

⁷³ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [12].

ministerial responses that were received late had reduced from 44 percent to 22 percent.⁷⁴ This approach could similarly further improve the timeliness of responses to the PJCHR. However, a more far-reaching solution would be to introduce an equivalent to Senate Standing Order 115(3) which would have the effect of preventing the passage of legislation prior to the PJCHR's final report. This would also address issues of timeliness of reporting and also might allow further time for the PJCHR to consider legislation raising human rights concerns.

Dialogue with legislation proponents

As noted above, the Parliamentary Scrutiny Act requires that the legislation proponent for a bill or instrument prepare a statement of compatibility with human rights.⁷⁵ While the statement of compatibility is the legislation proponent's assessment or view on the human rights compatibility of legislation, it should be founded on a credible human rights analysis. The statement of compatibility is a key material for the PJCHR's analysis, but it is often only a starting point. Rather than relying only on statements of compatibility, in order to fulfil the PJCHR's mandate a large part of the PJCHR's work necessitates a transparent dialogue with, including seeking further information from, legislation proponents. As is the case with the Senate scrutiny committees, the PJCHR has also adopted a scrutiny dialogue-model which it explains as follows:

The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seeking further information from the legislation proponent.⁷⁶

The committee publishes its concluding analysis and also the responses it receives from legislation proponents in its reports and on its website.⁷⁷ Accordingly, the reports provide significant information about the application of Australia's human rights obligations from both the government's perspective as well as the PJCHR.

The further information sought by the PJCHR has generally been in relation to whether there is a sufficient basis for justifiably limiting human rights applying the PJCHR's analytical

⁷⁴ Senate Standing Committee on the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 13/17* (15 November 2017) 165.

⁷⁵ This does not include instruments that are exempt from disallowance: See, Parliamentary Scrutiny Act s 9(1).

⁷⁶ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016* (5 December 2017) 7.

⁷⁷ See, Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility*, Parliament of Australia (December 2014)

http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf ('Guidance note 1'). See, also, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report Thirty-Seventh Report of the 44th Parliament* (2 May 2016); Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report Eighteenth Report of the 44th Parliament* (10 February 2016); Parliamentary Joint Committee on Human Rights, *Index of Bills Considered by the Committee*, Parliament of Australia http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments.

framework (discussed below). This may be because the statement of compatibility did not identify a right as being engaged or limited. Alternatively, it may be because the assessment of a measure limiting human rights did not provide sufficient information to justify the limitation. There are numerous examples of the PJCHR concluding that a measure is compatible with human rights following an adequate response from a legislation proponent.⁷⁸

One such example arose during consideration of a measure which required newly arrived migrants to serve a waiting period prior to being able to access particular social security payments. The measure engaged and limited the right to social security and the right to an adequate standard of living. While the engagement of these rights was acknowledged in the statement of compatibility, the PJCHR initially noted that it was unclear from the information provided whether identified safeguards would enable families subject to the measure to meet basic necessities: adequate safeguards would support an assessment that the measure is a proportionate limitation on human rights.⁷⁹ The PJCHR therefore sought advice from the relevant minister including as to the effect of a type of Special Benefit social security payment. The minister's response provided a range of further information about the availability of Special Benefit payments and the level of income support provided in situations of financial hardship. On the basis of this further information, the PJCHR concluded that the measure was likely to be compatible with human rights noting that the 'Special Benefit appears to provide a safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship.'⁸⁰ An outcome of this process was a more detailed, reasoned explanation of the proportionality of the limitation on human rights that forms part of the public record.

The process of transparent dialogue can be seen as facilitating the goal of engagement around human rights. Given that, on some occasions, the PJCHR is able to conclude that a measure is compatible with human rights after such dialogue provides support for this view. The scrutiny-dialogue model also directly addresses the goal of providing for dialogue between the executive and parliament. It sits in contrast to the situation that existed prior to the creation of the PJCHR and the introduction of the requirement for legislation to be accompanied by statements of compatibility. Specifically, prior to the Parliamentary Scrutiny Act there was no requirement for legislation proponents to consider human rights at all, let alone whether limitations on human rights are justifiable.

The PJCHR raising questions and, where warranted, forming different conclusions to the legislation proponent is also a key aspect of the dialogue processes. There is a role for such

⁷⁸ See, eg. Parliamentary Joint Committee on Human Rights, *Senate Tabling Statement: Human Rights Scrutiny Report 12 of 2017*, Parliament of Australia (28 November 2017) (Ian Goodenough) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements>; Parliamentary Joint Committee on Human Rights, *Chair's Tabling Statement for the House of Representatives: Human Rights Scrutiny Report 11 of 2017*, Parliament of Australia (17 October 2017) (Ian Goodenough) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements>

⁷⁹ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 4 of 2017* (9 May 2017) 149-154.

⁸⁰ *Ibid* 154.

processes to support considered deliberation within parliament.⁸¹ This is because it allows for substantive exploration of issues but also for different sources of information to be provided as to matters of human rights compatibility. For example, in the course of its dialogue with legislation proponents, the PJCHR has consistently concluded across successive parliaments that, as a matter of international human rights law, Australian domestic law has insufficient procedural safeguards for the purpose of compliance with Australia's *non-refoulement*⁸² obligations under the ICCPR and the CAT.⁸³ However, ultimately whether a dialogue process is possible is dependent not only on the PJCHR, but on the willingness of legislation proponents to engage constructively in this process. As set out above, consideration could be given to additional procedural mechanisms to further facilitate this engagement.

PJCHR's analytical framework and focus

In the course of the PJCHR's work the PJCHR has developed, and uses, what it refers to as its 'analytical framework'.⁸⁴ The PJCHR's analytical framework is founded on international human rights law and the premise that Australia has voluntarily accepted international obligations under the seven core human rights treaties to respect, protect and fulfil human rights.⁸⁵

Although the PJCHR reports on all legislation that comes before the parliament it focusses its attention, resources and analysis in reports on legislation which raises human rights concerns.⁸⁶ As such, it has developed the practice of listing bills that do not raise human rights concerns ('because the bill does not engage or promotes human rights, and or permissibly limits human rights') and cross-referring to the *Federal Register of Legislation* in respect of such instruments rather than reporting on each in detail.⁸⁷ This is an important means for the PJCHR to prioritise its work effectively in the context of its mandate and

⁸¹ See, eg. Sathanapally, above n 35, 62, 65.

⁸² The obligation of non-refoulement is the obligation to not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

⁸³ See, eg. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report Second Report of the 44th Parliament* (February 2014) 45; *Human Rights Scrutiny Report Fourth Report of the 44th Parliament* (March 2014) 513; *Human Rights Scrutiny Report Nineteenth report of the 44th Parliament* (3 March 2015) 13-28; *Human Rights Scrutiny Report Thirty-sixth report of the 44th Parliament* (16 March 2016) 195-217; *Human Rights Scrutiny Report Thirty-sixth report of the 44th Parliament* (16 March 2016) 149-194; *Human Rights Scrutiny Report 2 of 2017* (21 March 2017) 10-17; *Human Rights Scrutiny Report 4 of 2017* (9 May 2017) 99-111.

⁸⁴ See, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual report 2012-2013*; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-sixth report of the 44th Parliament* (16 March 2016); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act: First Report of 2012* (22 August 2012).

⁸⁵ See, *Guidance note 1*, above n 77.

⁸⁶ See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report: Eighteenth report of the 44th Parliament* (10 February 2015) 1; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report: Twenty-First Report of the 44th Parliament* (24 March 2015) 1.

⁸⁷ See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018* (27 March 2018) 1, 137.

resources. In examining whether legislation raises human rights concerns the approach applied is to:

- **First**, identify whether human rights are engaged and may be limited or promoted by proposed legislation (with reference to the scope of human rights protections contained in the seven core conventions); and
- **Second**, assess whether any limitation is justifiable as a matter of international human rights law.⁸⁸

In relation to the second aspect of the task, as noted in the PJCHR's reports, international human rights law recognises that reasonable limits may be placed on most human rights. It is well accepted in international human rights law that there are very few absolute rights which can never be legitimately limited.⁸⁹ In line with this, where the PJCHR has considered legislative measures which engage absolute rights, it has generally approached its task from the perspective that there can never be acceptable justifications for limitations on these rights.⁹⁰

All other rights may be permissibly limited provided certain criteria are satisfied.⁹¹ In relation to rights that are not absolute, the PJCHR provides in *Guidance Note 1* that any measure that limits a human right must comply with the following criteria in order to be justifiable (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and

⁸⁸ See, Parliamentary Joint Committee on Human Rights, *Chair's Tabling Statement for the House of Representatives: Twenty-first Report of the 44th Parliament* (24 March 2015) (Philip Ruddock) <https://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2015/21_44/Tabling%20statement%20PDF.pdf?la=en>.

⁸⁹ See, *Guidance note 1*, above n 77: Absolute rights include, the prohibition on torture and cruel inhuman and degrading treatment, the prohibition on non-refoulement (the right not to be sent or returned to a place where there is a real risk that the person will face serious human rights abuses), freedom from slavery and servitude, the prohibition against retrospective criminal laws, the right to recognition before the law and freedom from imprisonment for inability to fulfil a contractual obligation.

⁹⁰ See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, 'Migration Amendment (Protection and Other Measures) Bill 2014', *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Ninth Report of the 44th Parliament* (15 July 2014); 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014' *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fourteen Report of the 44th Parliament* (28 October 2014).

⁹¹ See, eg, ICCPR arts 12(3), 13, 14(1), 18(3), 21, 22(2); ICESCR arts 8(1)(a), 8(1)(c). See, also, Alexandra C Kiss, 'Permissible Limitations on Rights,' in Louis Henkin, (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981).

- be a proportionate way to achieve that objective.⁹²

Examining whether measures in legislation permissibly limit human rights is the focus of much of the PJCHR's work.⁹³ Substantively, the limitation criteria draws on and distils international human rights law jurisprudence as to when and how it is permissible to limit human rights.⁹⁴ Unlike its counterpart human rights committees in other jurisdictions which focus more narrowly on civil and political rights, the PJCHR has a mandate to assess the human rights compatibility of civil and political as well as economic, social and cultural rights.⁹⁵ In distilling international human rights law, the PJCHR applies the limitation framework consistently across these rights.⁹⁶ Given the large volume of legislation the PJCHR considers, the detailed analysis in the PJCHR's reports contributes to the understanding of these rights in the context of their application to particular measures.⁹⁷

In popular discourse around human rights, criticisms are made about the difficulty of balancing what are seen as competing human rights.⁹⁸ This regularly arises in contentious policy areas, such as national security, where it may be seen as necessary to limit certain rights to achieve intended policy outcomes.⁹⁹ However, the analytical framework to some degree addresses this issue by focussing on whether a particular measure limiting a human right is justifiable. Justification is often a matter of evidence in terms of the extent of the problem being addressed and the efficacy of the proposed legislative response. Indeed, matters going to the limitation criteria are the focus of what the PJCHR explores in the context of dialogue with legislation proponents.¹⁰⁰ The analytical framework has allowed the PJCHR to focus the bulk of its scrutiny work on limitations that are of most concern. The analytical framework can also be seen in the context of the PJCHR's operation as a technical scrutiny committee and its scrutiny dialogue. In key respects it complements these processes

⁹² *Guidance note 1* sets out the committee's guidance on the specific elements of this criteria. The limitation criteria are consistent with the guidance provided by the Commonwealth Attorney-General's Department for government departments in relation to the preparation of statements of compatibility.

⁹³ See, eg, PJCHR Scrutiny Reports 45th Parliament October 2016 – March 2018, above n 48.

⁹⁴ See, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, E/CN.4/1984/4 (1984); *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Maastricht (2-6 June 1986); UN Human Rights Committee, *General Comment 16*, The right to respect for privacy, family, home, correspondence, and protection of honour and reputation (Article 17) (8 April 1988) UN Human Rights Committee, *General Comment 27*, Freedom of movement (Article 12); UN Human Rights Committee, *General Comment 22* (Article 18) (1993); *Pinkey v Canada*, UN Human Rights Committee, Communication No. 27/1978, final views of 29 October 1981 (CCPR/C/OP/1) 95. See also, in a comparative law context *Handyside v United Kingdom* (1978-1979) 1 EHRR 737; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491 (United Kingdom); *Brown v Stott* [2001] 2 WLR 817; *R v Oakes* [1986] 1 SCR. 103 (Canada); *Noort v MOT* [1992] 3 NZLR 260 (New Zealand).

⁹⁵ Gledhill, above n 14.

⁹⁶ This is subject to the nuances of the particular right and in the case of economic, social and cultural rights the obligation of progressive realisation.

⁹⁷ See, eg, PJCHR Scrutiny Reports 45th Parliament October 2016 - March 2018, above n 48.

⁹⁸ See, for example, Shaheen Azmi, Lorne Foster and Lesley A Jacobs (eds.), *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Federation Press, 2012).

⁹⁹ See, for example, Christopher Michaelson, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *University of New South Wales Law Journal* 1.

¹⁰⁰ See, PJCHR Scrutiny Reports 45th Parliament October 2016 - March 2018, above n 48.

by providing a focus for questions to legislation proponents. Accordingly, it addresses related goals of engagement and dialogue around human rights issues.

The impact of the PJCHR on legislation, parliamentary processes and more broadly

The impact and contribution of the PJCHR on parliamentary processes, legislation and more broadly is also relevant to consider against the identified goals of the PJCHR. There is some literature which has reflected on aspects related to the effectiveness of the scheme introduced under the Parliamentary Scrutiny Act against such factors.¹⁰¹

Legislative impact

The legislative impact of the PJCHR may be used as an indicator of whether the PJCHR achieves its goals. In this respect, one factor against which Williams and Reynolds, for example, assess effectiveness is the degree to which laws passed by parliament respect and promote human rights.¹⁰² In their study they conclude that the PJCHR has limited legislative impact as there is limited evidence that amendments or lack of passage result from PJCHR reports.¹⁰³ Such concerns were also reflected by the UN Committee on the Elimination of Racial Discrimination in its recent concluding observations on Australia's compliance with that treaty. While noting the role of the PJCHR in scrutinising the human rights compatibility of legislation, it was 'concerned that recommendations of the Joint Committee are often not given due consideration by legislators.'¹⁰⁴

While this may be a potential concern, there may also be dangers in concluding that the PJCHR is ineffective on this basis or in attributing too much value to whether PJCHR reports result in amendments.¹⁰⁵ As set out above, in considering issues of effectiveness it is important not only to consider legislative impact but also the capacities and opportunities for parliament to engage with human rights issues.¹⁰⁶ More specifically, framing criteria of effectiveness only against an expectation that laws passed by parliament be compatible with human rights may unduly lead to a conclusion that the PJCHR is ineffective. This is particularly in a context where the PJCHR only reports on legislation after it is introduced to parliament and its findings do not affect the ability of legislation to be passed or its legal validity. By contrast, as set out above, there is a range of processes which the PJCHR has developed which provide opportunities and capacities for engagement with the human rights implications of legislation.

¹⁰¹ See, Williams and Reynolds, above, n 47, 469; Dan Meagher, 'The human rights (parliamentary scrutiny) act 2011 (cth) and the courts', (2014) 42(1) *Federal Law Review* 1-25; Davis, above n 47; 213-229; Tom Campbell and Stephen Morris, 'Human rights for democracies: a provisional assessment of the human rights (parliamentary scrutiny) act 2011,' *University of Queensland Law Review* (2015) 7-27.

¹⁰² Williams and Reynolds, above n 47, 488.

¹⁰³ Ibid 488-494.

¹⁰⁴ UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) [6].

¹⁰⁵ See, for example, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Final Report*, ALRC Report 129 (December 2015) 73 [3.86]; Evans and Evans, above n 32, 551.

¹⁰⁶ See, Evans and Evans, above n 32, 551.

Further, as Benton and Russell explain 'it is impossible to determine accurately whether a committee was causally responsible for recommendations being implemented or whether the government was influenced by the wider policy community.'¹⁰⁷ For example, a PJCHR report may be one of many reasons that members of parliament choose to vote for or against a bill. This points to some of the difficulties in assessing the effectiveness of parliamentary committees particularly where, for example, a PJCHR report is not identified directly by the government as a reason for an amendment. That is, it is difficult to identify a causal relationship between a particular PJCHR report and legislative changes. As discussed below, it is possible that influence might arise from an analysis being adopted by a submitter to another inquiry. It also further indicates that it is important to look beyond the *direct* legislative impact in assessing matters of effectiveness or contribution. Indeed, it may be that the PJCHR is no less effective than other parliamentary committees in achieving amendments to legislation in a context where such amendments are not proposed by government.

This is not to suggest that legislative outcomes are unimportant, but rather that there is a range of factors that may account for them beyond the effectiveness or otherwise of the PJCHR. Unlike other 'dialogue models' of human rights protection the courts are provided no role in adjudicating human rights under the Parliamentary Scrutiny Act. Accordingly, there may also be fewer direct incentives for government to always address human rights concerns. In this context, ensuring legislative outcomes are compatible with human rights is arguably a responsibility shared with the parliament and the government.

While the PJCHR reports have not routinely lead directly to legislative amendments which can be causally attributed to it, there are some concrete examples of the PJCHR's views being taken into account in the development and refinement of legislation.¹⁰⁸ A specific example of where a PJCHR's report appears to have contributed to a legislative amendment occurred in relation to the Norfolk Island Legislation Amendment Bill 2015. This bill was first considered by the PJCHR in its *Twenty-second report of the 44th Parliament*.¹⁰⁹ The bill would have led to the exclusion of New Zealand citizens who are Australian permanent residents on Norfolk Island from eligibility for social security (all other Australian permanent residents on Norfolk Island had eligibility to them extended through the bill). The PJCHR's report noted that the measure engaged and limited the right to equality and non-discrimination and the right to social security. In his response, the Assistant Minister for Infrastructure and Regional Development noted the committee's concerns and agreed to amend the bill to ensure that New Zealand citizens living on Norfolk Island would enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.¹¹⁰

¹⁰⁷ Russell and Benton, above n 32, 766.

¹⁰⁸ See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, 'Australian Public Service Commissioner's Directions 2013', *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Tenth Report of 2013* (27 June 2013) 183-184.

¹⁰⁹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report Twenty-second Report of the 44th Parliament* (13 May 2015) 66.

¹¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-second report of the 44th Parliament* (1 December 2015) 87-90; Parliamentary Joint Committee on

Further, while evidence of legislative impact may be a relevant indicator, the absence of such evidence should not necessarily lead to a conclusion that the PJCHR is ineffective in its working methods or operation or is not making a contribution. This is because, as set out above, there are a number of factors that could account for this lack of evidence.

Impact in contributing to human rights consideration and debate

As noted above, a key goal of the PJCHR reports is to inform members of parliament about the human rights implications of legislation and consequentially to inform the deliberations of parliament more broadly. Reference made to the PJCHR's reports or underlying analysis could be one possible measure of the extent to which this goal is being addressed.¹¹¹ Williams and Reynolds assess the deliberative impact of the PJCHR against the frequency with which there were 'substantive references' in Hansard to either statements of compatibility or the PJCHR. They conclude that although substantive references to PJCHR reports have been increasing, with 106 substantive mentions up until 4 January 2016, overall there is relatively limited use of the PJCHR reports in parliamentary debate.¹¹²

However, it is possible that after only 4 years in operation it was premature to conclude that the PJCHR is ineffective on this basis. By way of comparison, research into the operation of the UK JCHR shows that in its first 5 years in operation there were only 23 substantive references to its reports in parliamentary debates but in the next five years there were over 1006 references to the UK JCHR's reports.¹¹³ At the end of 2017 the PJCHR has only been in operation for little over five years. However, examining 'substantive references'¹¹⁴ to the PJCHR in the 12 months up until the end of 2017 reveals that there continues to be an increase in members of parliament referring directly to PJCHR's reports and work in

Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-fifth report of the 44th Parliament* (25 February 2016) 1-2¹¹¹ See, Paul Yowell 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing) 141, 143.

¹¹¹ See, Paul Yowell 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015, Hart Publishing) 141, 143.

¹¹² Williams and Reynolds, above, n 47, 484 -488. Drawing on Yowell's definition of 'substantive reference' in the context of the UK JCHR Williams and Reynolds describe 'substantive references' as any mention in Parliament relating to: the specific content of a Committee report or an [statement of compatibility] SOC; the influence of a Committee report or an SOC on an issue; a finding by the Committee; the effect of a Committee report on legislative outcomes.' They describe 'Non-substantive' references as 'a mere acknowledgement of someone as a member of the Committee; generic praise for the Committee's work; indications that the Committee will scrutinise or has scrutinised a Bill; a mention of the Committee as one of a number of bodies that share a certain view; the tabling statement of each Committee report...a reference to an SOC in a first reading speech (rather than a second reading speech).'

¹¹³ Yowell above n 111, 141, 143; Kavanagh above n 32, 132.

¹¹⁴ This article defines 'substantive reference' as including reference to (a) the specific content of a PJCHR report; (b) the specific views, positions or analysis of the PJCHR on particular issues or legislation; (c) the influence of a PJCHR report or an SOC on an issue; (d) a finding or conclusion by the PJCHR; (e) the effect of a PJCHR report on legislative outcomes or amendments; (f) government responses to PJCHR reports; and (g) the PJCHR's reports to raise questions. This article includes additional criteria (g) as using the PJCHR's reports to raise questions relates to the substance of the PJCHR reports. It has been included for completeness as such references may also be captured by other categories.

parliamentary debates.¹¹⁵ Of these references, while many were made in the context of opposition to a particular legislative measure, others have occurred in the context of support for a bill or to highlight issues for consideration.¹¹⁶

Further deliberative impact may be seen outside of parliamentary debates. Another measure of the impact of the PJCHR is the use of its reports by other parliamentary committees.¹¹⁷ Significantly, there are examples of the PJCHR's report being used to provide portfolio and other committees information about human rights implications and being used by these other committee members as the basis for questioning witnesses in the course of committee inquiries.¹¹⁸ The PJCHR's reports and analysis are also often referred to and drawn upon by portfolio committee reports.¹¹⁹

¹¹⁵ See, eg, Commonwealth, *Parliamentary Debates*, Senate Hansard, Second Reading Debate, Social Services Legislation Amendment (Welfare Reform) Bill 2017, 7 December 2017, 80 (Jenny McAllister); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second reading debate, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, 26 October 2017, 12173 (Michael Freeland); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017, 19 October 2017, 11310 (Graham Perrett); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, 16 October 2017, 10616 (Brendan O'Connor); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, 16 October 2017, 10670 (Chris Hayes); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, 16 October 2017 10686 (Matt Keogh); Commonwealth, *Parliamentary Debates*, Senate Hansard, Second Reading Debate, Australian Border Force Amendment (Protected Information) Bill 2017, 16 October 2017, 7461 (Senator McKim); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Social Services Legislation Amendment (Welfare Reform) Bill 2017, (7 September 2017) 9630 (Graham Perrett); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Validation of Decisions) Bill 2017, 16 August 2017, 8653 (Graham Perrett); Commonwealth, *Parliamentary Debates*, Senate Hansard, Second reading Debate, Fair Work Amendment (Corrupting Benefits) Bill 2017, 9 August 2017, 5160, 5166 (Doug Cameron); Commonwealth, *Parliamentary Debates*, Senate Hansard, Second reading Debate, Fair Work Amendment (Corrupting Benefits) Bill 2017, 9 August 2017 4922 (Doug Cameron); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 358 (Andrew Giles); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 361 (Julian Hill); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 354 (Shayne Neumann).

¹¹⁶ Ibid.

¹¹⁷ References to the PJCHR in the Hansard of other committees or in other committee reports were not considered by Williams and Reynolds in their research.

¹¹⁸ See, for example, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017, 73 (Jacinta Collins); Education and Employment Legislation Committee, Inquiry into Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, Parliament of Australia, *Committee Hansard*, 28 September 2017, 66 (Sue Lines and Chris Ketter); Legal and Constitutional Affairs Legislation Committee, Inquiry into the Australian Citizenship Amendment (Intercountry Adoption) Bill 2014, Parliament of Australia, *Committee Hansard*, 28 July 2018, 15 (Senator Marshall).

¹¹⁹ See, for example, 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) 38, 63, 86, 98; Senate Legal and Constitutional Affairs Legislation Committee, Parliament

The PJCHR's reports may also be used to inform debates more broadly. The PJCHR's reports may be used as a resource by civil society organisations in their own consideration of proposed legislation. In this respect the PJCHR's reports are regularly referred to by non-government organisations in submissions and evidence to other parliamentary committees.¹²⁰

Impact on statements of compatibility and a culture of justification

Additionally, the PJCHR's reports may influence the quality of statements of compatibility or subsequent responses prepared by legislation proponents. For example, in its 2014-15 Annual Report, the committee noted that the 'quality of statements of compatibility continued to improve over the reporting period'.¹²¹ Part of any improvement (or otherwise) in the quality of statements of compatibility may relate to the willingness, resources and experience of legislation proponents to engage with this process.¹²² In this respect, the PJCHR has developed a number of resources to assist to educate and inform the Australian Public Service about human rights obligations and preparing statements of compatibility.¹²³

of Australia, *Inquiry into Australian Citizenship Amendment (Intercountry Adoption) Bill 2014* (August 2014) 5-6; Senate Education and Employment Legislation Committee, Parliament of Australia, *Dissenting Report of the Australian Greens, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (October 2017) 35; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016* (March 2016) 4; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (June 2015) 10; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Dissenting Report of the Australian Greens, Inquiry into Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (June 2015) 38; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (November 2014) 55; Senate Community Affairs Legislation Committee, Parliament of Australia *Dissenting Report of the Australian Greens Inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017* (September 2017) 55.

¹²⁰ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, 'Declared area' provisions, Police stop, search and seizure powers, the control order regime and the preventative detention order regime, *Committee Hansard*, 1 December 2017, 1 (Sarah Pritchard); Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017, *Committee Hansard*, 20 September 2017, 26 (Charles Morland Bailes); Evidence to Senate Community Affairs Legislation Committee, Inquiry into Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Committee Hansard*, 31 August 2017, 13 (Fiona McLeod); Law Council of Australia, Submission 3 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016* (4 March 2016) 5-7; Australian Human Rights Commission, Submission 16 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (31 October 2014) 37; Law Institute of Victoria, Submission 117 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 14.

¹²¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014 -2015* (5 December 2017) 28.

¹²² Compare, ACT Human Rights Act Research Project ANU, *Creating a Human Rights Culture within the ACT Government: Report on Interview Research Assessing the Impact of the Human Rights Act 2004 on the ACT Public Service* (2008) 21.

¹²³ See, eg. Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources; *Guidance note 1*, above n 77.

However, improvements may also be attributable to the awareness that unless limitations on human rights are justified then legislation may be subject to a PJCHR report raising human rights concerns. There are numerous instances of the PJCHR being able to conclude its assessment of legislation without having to request further information from the legislation proponent because the information provided in the statement of compatibility was adequate.¹²⁴ The statement of compatibility for the Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018 provides one such example. While the bill imposes limitations on a range of rights, including the right to privacy and the right not to incriminate oneself, the statement of compatibility provides a detailed assessment as to why these limitations are permissible against the limitation criteria.¹²⁵ In this instance, the PJCHR listed the bill as not raising human rights concerns and concluded its examination without requesting further information.¹²⁶

There is also evidence that the PJCHR's work may lead to improved explanations of why a measure engages and limits particular human rights. The PJCHR regularly concludes that measures are likely to be compatible with human rights after correspondence with legislation proponents. This indicates that by requesting further information from the legislation proponent the PJCHR is providing a potential safeguard where insufficient information has been provided in the statement of compatibility. As the legislation proponent's response is made publicly available as part of the PJCHR's report this helps to rectify the initial deficiency. Such processes also show that there is scope for further improvement in respect of statements of compatibility if such information had been provided in the first instance.¹²⁷

Even where the PJCHR is unable to conclude that a measure is compatible with human rights following such a response, it is still likely to provide increased transparency and potentially an improved explanation of the measure. For example, this arose in the context of the PJCHR's examination of the human rights compatibility of the powers of the Australian Federal Police (AFP) to share information with agencies overseas. At the PJCHR's request the relevant minister provided the PJCHR with copies of the AFP National Guideline on international police-to-police assistance in death penalty situations and the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (guidelines). These guidelines were published in the PJCHR's report with the minister's response. While the PJCHR ultimately concluded that the powers still raised human rights concerns, there is now a more transparent explanation of the extent of any safeguards provided by such guidelines in the context of the legislation.¹²⁸

¹²⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 24.

¹²⁵ Explanatory Memorandum, Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018, Statement of Compatibility 17, 21.

¹²⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018* (27 March 2018) 137.

¹²⁷ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014 -2015* (5 December 2017) 28; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015 -2016* (5 December 2017) 24.

¹²⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 8 of 2017* (15 August 2017) 83-91.

Impact on international processes

As noted above, the Australian government, in reporting on Australia's compliance with its international human rights obligations to UN treaty monitoring bodies, has pointed to the work of the PJCHR as a mechanism to assist to ensure consistency with its obligations.¹²⁹ The Australian government's reliance on the role of the PJCHR and references made to the PJCHR by the international treaty monitoring bodies and procedures is some evidence that the PJCHR is having an impact on these international processes at least in so far as it is pointed to as a mechanism for compliance.¹³⁰ In this respect, a number of UN treaty monitoring bodies have also requested specific information from the Australian government about the PJCHR's work and its findings.¹³¹ However, while acknowledging the work of the PJCHR, these UN treaty monitoring bodies in their concluding observations have also called on the Australian government to strengthen legislative scrutiny processes.¹³²

¹²⁹ See, See, Australia, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, fifth periodic report of Australia, UN Committee on Economic Social and Cultural Rights, E/C.12/AUS/5 (16 February 2017); Australia, *Consideration of reports submitted by States parties under article 40 of the Covenant*, sixth periodic report of Australia, UN Human Rights Committee, CCPR/C/AUS/6 (2 June 2016) 2; Australia, *Consideration of reports submitted by States parties under article 9 of the Convention Eighteenth to twentieth periodic reports of States parties due in 2014*, UN Committee on the Elimination of Racial Discrimination, CERD/C/AUS/18-20 (2 February 2016) 6-7.

¹³⁰ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (23 June 2017) [5]-[6]. See, also, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia, A/HRC/35/41/Add.2 (9 June 2017) 15 -16.

¹³¹ See, eg. UN Committee on the Elimination of All Forms of Discrimination Against Women, *List of Issues*, UN Doc CEDAW/C/AUS/Q/8 (30 November 2017) [1]; UN Committee Against Torture, *List of Issues Prior to Reporting*, UN Doc CAT/C/AUS/QPR/6 (9 January 2017) [8].

¹³² UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (23 June 2017) [5]-[6].

Not ineffective, but not a human rights panacea

The PJCHR is made up of a small group of parliamentarians who are assisted by expert advisers. It does not exist as part of a more wide-reaching system of domestic human rights protection in contrast to the UK, the ACT and Victoria. This means that it would be ill-conceived to view the PJCHR as a fix-all for human rights considerations in the Australian context or even the parliamentary context. Rather, claims that the PJCHR is ineffective must be understood in the context of parliamentary processes and the potential effectiveness of parliamentary committees more generally. While the PJCHR can raise concerns about the human rights compatibility of legislation, choices as to whether such legislation proceeds depend on the majority in the legislative chambers.

This article has applied criteria of effectiveness which are grounded in the parliamentary context within which the PJCHR exists. Taken on these terms, the PJCHR provides scope for a more systematic consideration of the human rights implications of legislation than was previously the case. Prior to the Parliamentary Scrutiny Act there was no requirement that legislation proponents or a parliamentary committee consider the human rights implications of legislation at all. As outlined in this article, while the PJCHR is not a panacea for all human rights issues in Federal legislation, over its more than five years in operation it has been successful at developing working methods and modes of operation that are capable of addressing the goals of informing members of parliament about the human rights implications of legislation; contributing to dialogue with the executive; and creating scope for engagement around human rights issues. This challenges the claim that the PJCHR is ineffective. There are also some indications that the work of the PJCHR is having an impact in areas including contributing to considerations of human rights issues and international obligations in the parliament and beyond.

At the same time there is scope for additional mechanisms and approaches to support the work of the PJCHR and to strengthen human rights legislative scrutiny in the Australian context. This includes ongoing engagement from the executive, continued engagement by members of parliament as well as consideration being given to procedural mechanisms to improve timeframes for meaningful consideration of human rights issues before the passage of legislation.