

# COMMITTEES OF INFLUENCE: EVALUATING THE ROLE AND IMPACT OF PARLIAMENTARY COMMITTEES

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# COMMITTEES OF INFLUENCE: EVALUATING THE ROLE AND IMPACT OF PARLIAMENTARY COMMITTEES

## Introduction

Around the world, parliamentary democracies are facing a daunting mix of challenges, including an implosion of trust among citizens in democratic institutions, disruption of traditional political processes and the need to respond to increasingly complex policy questions. As Flew argues, the rise of populism around the world points to ‘more general crisis of trust in social institutions and in the project of globalisation that has prevailed in Western liberal democracies’.<sup>1</sup> Despite great advances in communication technologies, the distance between elected representatives and the electorate seems to be greater than ever before.<sup>2</sup> Party politics, as traditionally understood, also appears to be fragmenting as electorates across the world increasingly look to ‘outsiders’ or independents as alternative to organised political parties when casting their vote.<sup>3</sup> In response to these challenges parliaments have begun to experiment with new ways of engaging with the communities they represent, and new ways of obtaining expert advice on complex policy issues, with varied levels of success. In the Australian context, this has given rise to the use of direct democracy techniques such as citizens juries, online questionnaires, social media and postal surveys to gauge the views of the community, and reliance upon expert advisors or committees to help inform policy or legislative agendas.<sup>4</sup>

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<sup>1</sup> Terry Flew, ‘Digital communication, the crisis of trust, and the post-global’ (2019) 5(1) *Communication Research and Practice*, 4-22, DOI: 10.1080/22041451.2019.1561394. See also Goede, M. (2019), ‘The future of democracy: the end of democracy as we know it’ (2019) 48(10) *Kybernetes*, 2237-2265.

<sup>2</sup> See e.g. Luca Verzichelli ‘Back to a responsible responsiveness? The crisis and challenges facing European political elites: the 2017 Peter Mair Lecture’ (2020) 35(1) *Irish Political Studies*, 1-17, DOI: 10.1080/07907184.2019.1677393

<sup>3</sup> See e.g. L Bardi, S Bartolini, and A Trechsel, ‘Responsive and responsible? The role of parties in twenty-first century politics’, (2014) 37(2) *West European Politics*, 235 at 244.

<sup>4</sup> See e.g. Chris Reidy and Jenny Kent, *Systemic Impacts of Mini-publics*, Report prepared for the NewDemocracy Foundation (University of Technology Sydney, 2019) available at <docs\_researchpapers\_2017\_nDF\_RP\_20170613\_SystemicImpactsOfMiniPublics.pdf> (accessed 2 April 2020); D Stockemer, and B Kchouk, ‘Inclusive parliaments: a trigger for higher electoral integrity?’, (2017) 23(3) *The Journal of Legislative Studies*, 419–438; Torsten Geelan, Hernado González and Peter Walsh, *From Financial Crisis to Social Change Towards Alternative Horizons*, (Springer International, 018); Helen Marshall, Joanne Collins, Rebecca Tooher, Maree O’Keefe, Teresa Burgess, Rachel Skinner, Maureen Watson, Heather Ashmeade and Annette Braunack-Mayer ‘Eliciting youth and adult recommendations through citizens’ juries to improve school based adolescent immunisation programs’ (2014) 32(21) *Vaccine*, 2434-2440; Nicole Moretto, Elizabeth Kendall, Jennifer Whitty, Joshua Byrnes, Andrew P. Hills, Louisa Gordon, Erika Turkstra Paul Scuffham and Tracy Comans ‘Yes, The Government Should Tax Soft Drinks: Findings from a Citizens’

Adding to this turbulent social and political context, in response to the complex and potentially devastating threat posed by COVID-19, parliaments around the world have transferred unprecedented powers to executive governments and their agencies, often with the full support of the communities they represent.<sup>5</sup> This includes imposing travel bans preventing citizens from leaving or returning to the country, empowering health officials to direct and detain people, providing police with unprecedented discretion to implement and enforce fines and authorising Ministers to make significant changes to existing laws and services without requiring parliamentary approval.<sup>6</sup> By any measure, this constitutes an extraordinary transfer of power away from the parliament towards the executive with clear impacts on individual rights and representative democracy. These laws were passed within days, sometimes hours, with limited safeguards and a heavy reliance on sunset provisions some of which are dependent on the pandemic being officially called to an end.<sup>7</sup> From within this rush of emergency law-making and institutional power transfer, parliamentary committees emerged as a focal point for democratic scrutiny of governments' legal responses to COVID-19, particularly in Westminster-inspired parliaments including those in Australia, NZ and the UK.<sup>8</sup> This combination of factors makes looking carefully at the current role parliamentary committees play within the Australian Parliament - and their potential to influence the content of laws and policies, the way laws are made and the way the parliament engages with the public - particularly important.

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Jury in Australia' (2014) 11 *International Journal of Environmental Research and Public Health*, 2456-2471; doi:10.3390/ijerph110302456.

<sup>5</sup> Andrew Edgar, (2020) Law-making in a crisis: Commonwealth and NSW coronavirus regulations', on AUSPUBLAW (30 March 2020) .

<sup>6</sup> Sarah Moulds(2020) 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees' (2020) *Alternative Law Journal Online First* <https://journals.sagepub.com/home/alj>; R Cormacain, (2020), 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', *Theory and Practice of Legislation (Oxford, England)*, pp. 1–21.

<sup>7</sup> R Cormacain, (2020), 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', *Theory and Practice of Legislation (Oxford, England)*, pp. 1–21; Oren Gross (2020) 'Emergency Powers in the Time of Coronavirus ... and Beyond' (Just Security, 8 May 2020) accessed 17 June 2020.

<sup>8</sup> Anne Twomey (2020) 'A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic' *The Conversation* (online) 25 March 2020; Lilly, Alice(2020) 'The UK parliament and coronavirus' Explainers, Institute for Government (London, UK) 3 April 2020< <https://www.instituteforgovernment.org.uk/explainers/uk-parliament-coronavirus>> (accessed 27 August 2020); Charlie Dreaver, (2020) 'Special committee set up as Parliament is adjourned' *Radio New Zealand* (online 24 March 2020) <<https://www.rnz.co.nz/news/political/412520/special-committee-set-up-as-parliament-is-adjourned>> accessed 27 August 2020.

In this paper I aim to highlight the importance of evaluating the impact of parliamentary committees on law making in Australia and offer a pathway forward in the form of a tiered evaluation framework that is designed to guard against some of the short comings identified by other scholars in this field . I will briefly look at three case studies – the COVID-19 response, counter-terrorism lawmaking and marriage equality reform (each covered in detail elsewhere in my research)<sup>9</sup> – to explore the existing role parliamentary committees play in improving the quality of federal law making and community engagement with parliament.<sup>10</sup>

### **Why should we care about parliamentary committees?**

Parliamentary committees both reflect and feed into the key values underpinning our parliamentary culture, including values associated with rule of law, accountability and relationships between the governors and the governed. Parliamentary committees also give practical effect to key aspects of our parliamentary democracy. They provide a forum for all parliamentarians to play a role in the legislative process and generate reports containing information about the purpose, effectiveness and impact of proposed and existing laws and policies.<sup>11</sup> They also provide a forum for experts and members of the community to share their views on a proposed policy or law, investigate gaps or shortcomings in existing laws and policies and raise matters critical to the lives and rights of Australians.

Parliamentary committees can undertake specific functions,<sup>12</sup> ranging from scrutinising government expenditure (such as the Senate Estimates process undertaken within the Australian Parliament), reviewing procedural rules and practices or conducting thematic inquiries or investigations into significant public policy issues referred to them by parliament.

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<sup>9</sup> See e.g. Sarah Moulds, ‘From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law-making’ (2020) 31 *Public Law Review* 264; Sarah Moulds ‘Keeping watch on COVID-19 laws: are parliamentary committees up to the job?’, *AUSPUBLAW Blog*, 1 May 2020 <https://auspublaw.org/2020/05/keeping-watch-on-covid-19-laws-are-parliamentary-committees-up-to-the-job/>.

<sup>10</sup> A number of other scholars have studied the role and impact of parliamentary committees in the context of other roles or functions, such as their role in conducting investigations into matters of public importance or their role in scrutinising government expenditure. See e.g. Gareth Griffith, ‘Parliament and Accountability: The Role of Parliamentary Oversight Committees’ (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, ‘Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level’ (2008) 23(2) *Australasian Parliamentary Review* 135.

<sup>11</sup> See e.g. K Barton, (1999) ‘Community Participation in Parliamentary Committees: Opportunities and Barriers’, *Department of the Parliament Library Research Article* No. 10; Ian Marsh, (2004), Australia’ Representation Gap: A Role for Parliamentary Committees?, 5; P Lobban, Who cares wins: parliamentary committees and the executive, (2012) 27(1) *Australasian Parliamentary Review*, 190

<sup>12</sup> See e.g. Laura Grenfell, (2015). An Australian Spectrum of Political Rights Scrutiny: ‘Continuing to Lead by Example?’ 26/1 *Public Law Review* 19-38 , SSRN: <https://ssrn.com/abstract=3395591>; Laura Grenfell and Sarah Moulds (2018) ‘The role of committees in rights protection in federal and state parliaments in Australia’, (2018) 41(1) *University of New South Wales Law Journal*, 40.

This paper focuses on the *legislative scrutiny* role of parliamentary committees – that is, the task of reviewing an existing or proposed law (sometimes against prescribed criteria) and reporting back to parliament with findings or recommendations. In this legislative scrutiny role, parliamentary committees analyse proposed laws and policies and produce vital, independent information about their purpose and effectiveness and provide a forum for experts and members of the community to share their views on a proposed law. In this way, parliamentary committees have both *deliberative* attributes (such as facilitating forums for the public to engage in the law-making process) and *authoritative* attributes (such as the power to recommend reforms to proposed laws or policies).<sup>13</sup>

Whether specifically assigned a rights-protecting role (such as the Parliamentary Joint Committee on Human Rights),<sup>14</sup> or performing a broader inquiry function (such as the Senate Legal and Constitutional Affairs References Committee),<sup>15</sup> parliamentary committees are also key aspect of Australia’s parliamentary model of rights protection.<sup>16</sup> Within this model, parliamentary committees ‘sound the alarm’ about laws that might impact on individual rights, and provide the forum for interested members of the community to express their views on how Parliament should respond. Many committees also provide a source of concrete recommendations for legislative or policy change that can have the effect of improving the rights-compliance of proposed federal laws.<sup>17</sup>

When engaging in an analysis of this type, it is important not to overstate the role parliamentary committees play in the law making process in Australia. Often the recommendations of inquiry-

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<sup>13</sup> Sarah Moulds *Committees of Influence* (2020, Springer) Chapters 1, and 10.

<sup>14</sup> The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The scrutiny criteria applied by the Human Rights Committee is outlined in s3 of the Act and includes the human rights and freedoms contained in seven core human rights treaties to which Australia is a party.

<sup>15</sup> Senate Legal and Constitutional Affairs References Committee is established by Standing Senate, Parliament of Australia, *Standing Order 25* (2000). The Committee has an Opposition Senator as Chair and a majority of non-government members. The current membership of the Committee can be seen at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/References\\_Committee\\_Membership](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/References_Committee_Membership)>.

<sup>16</sup> Under this model, judicial contribution to the conversation on rights is restricted and, provided it stays within its constitutional limits, Parliament is the branch of government with the ‘final say’ on how to protect and promote individual rights. See e.g. George Williams and Lisa Burton, ‘Australia’s Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection’ in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 258.

<sup>17</sup> For examples of the rights-enhancing effect of parliamentary committees see Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Federal and State Parliaments in Australia’, (2018) 41(1) *University of New South Wales Law Review* 40; Sarah Moulds ‘Committees of Influence: Parliamentary Committees with the capacity to change Australia’s counter-terrorism laws’, (2016) 31(2) *Australasian Parliamentary Review* 46.

based committees are rejected or ignored by the government of the day,<sup>18</sup> and sometimes the scrutiny committee reports are issued too late to be of any direct influence on parliamentary debate on the Bill.<sup>19</sup> However, as the counter-terrorism and marriage equality examples show, when considered over time, the role these committees play in collecting, presenting, and analysing different views on the merits of proposed changes to the law can be significant. This makes studying the impact of parliamentary committees particularly relevant to contemporary debates surrounding the quality of parliamentary law making and public engagement with and trust in political and legal institutions.

### **Why is the work of parliamentary committees hard to evaluate?**

The complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means evaluating their performance is not always straightforward.<sup>20</sup> Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.<sup>21</sup> The evaluation framework applied in this research aims to address these challenges. The four key steps of the evaluation framework employed are summarised below.

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

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<sup>18</sup> See e.g. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009*, (2009).

<sup>19</sup> The issue of delayed reporting (and in particular the problem of tabling reports *after* the second reading debate on the particular Bill has ended) has been a particular concern raised with respect to the Parliamentary Joint Committee on Human Rights, Parliament of Australia. For further discussion of how this issue may impact on the overall effectiveness of the Parliamentary Joint Committee on Human Rights see Adam Fletcher in Chapter # and Williams and Reynolds in Chapter #.

<sup>20</sup> Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009), cited in Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111, 131; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41; Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785; J Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny' (2006) 59 *Parliamentary Affairs* 522. See also George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

<sup>21</sup> See, eg, Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees' (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23(2) *Australasian Parliamentary Review* 135; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41.

- Step 2: Identifying the role, functions and objectives of the scrutiny body
- Step 3: Identifying key participants<sup>22</sup> and determining legitimacy<sup>23</sup>
- Step 4: Measuring the impact of the scrutiny system

Step 4 is the most intensive and detailed step in the evaluation framework. It aims to determine what impact a particular component of the scrutiny system is having on the development and content of the law. It includes consideration of the following three ‘tiers’ of impact<sup>24</sup> (a) legislative impact (whether the scrutiny undertaken has directly changed the content of a law); (b) public impact (whether the work of the scrutiny has influenced or been considered in public or parliamentary debate on a Bill, or in subsequent commentary or review of an Act); and (c) hidden impact (whether those at the coalface of developing and drafting counter-terrorism laws turn their mind to the work of legislative scrutiny bodies when undertaking their tasks).<sup>25</sup>

### **The tiered evaluation process in practice**

It is possible to see the tiered evaluation framework s in practice by investigating the impact of the parliamentary committee system on a selection of counter-terrorism laws introduced

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<sup>22</sup> For example, the key participants in the Australian parliamentary committee system include parliamentarians, elected members of the executive government, submission makers and witnesses to parliamentary committee inquiries, public servants and government officers, independent oversight bodies and the media.

<sup>23</sup> A wealth of literature exists on the topic of political legitimacy and the meaning attributed to this term has been contested and developed over time. See, eg, David Beetham, *The Legitimation of Power* (Palgrave, 2002); Allan Buchanan, ‘Political Legitimacy and Democracy’ (2002) 112(4) *Ethics* 689; Immanuel Kant, *Practical Philosophy* (Mary J Gregor ed, Cambridge University Press, 1999); Jack Knight and James Johnson, ‘Aggregation and Deliberation: On the Possibility of Democratic Legitimacy’ (1994) 22 *Political Theory* 277; Bernard Manin, ‘On Legitimacy and Political Deliberation’ (1987) 15 *Political Theory* 338.

<sup>24</sup> Philippa Webb and Kirsten Roberts, ‘Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness’ (Paper presented at the Dickson Poon School of Law, King’s College London, University of London, June 2014) 3 <<https://www.kcl.ac.uk/sspp/policy-institute/projects/government/assets/Human-Rights-Policy-DocumentV5.pdf>>.

<sup>25</sup> Collecting evidence of the hidden impact of parliamentary committees can be challenging due to the need to look beyond documentary sources and consider more subjective material including interviews but, as Evans and Evans and Benton and Russell have shown in their empirical-based work it is not impossible. In Australia at least, much publicly available material exists that points to the hidden impacts of scrutiny, including training manuals, published guidelines, information in annual reports, and submissions and oral evidence given at parliamentary and other public inquiries and hearings. This material can then be tested against a range of targeted individual interviews conducted with key participants in the scrutiny process. Meg Russell and Meghan Benton, ‘Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches’ (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009); See e.g. Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Legislatures’ (2006) 6 *Human Rights Law Review* 546.

between 2001-2018<sup>26</sup> and amendments to the *Marriage Act 1961* (Cth) between 2004-2017<sup>27</sup> and by looking at the early indications of the work of parliamentary committees in scrutinising Australia's federal response to the COVID-19 pandemic.<sup>28</sup> As discussed further in Part Three, these two case studies provide an opportunity to reflect upon the different roles individual committees play within the broader committee system and how some of these committees seek to engage with Australian community.

### 1. Participation and legitimacy

My research has found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact.<sup>29</sup> This is because a diverse range of participants in inquiries into proposed or existing laws provides 'an opportunity for proponents of divergent views to find common ground'<sup>30</sup> or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to 'strike the right balance' between safeguarding security and preserving individual liberty when enacting counter-terrorism laws.<sup>31</sup> A good example of a scrutiny body with these strengths are the Senate Legal and Constitutional Affairs Legislation Committee (the LCA Legislation Committee) and the Senate

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<sup>26</sup> The 14 case study Acts considered are the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *National Security Legislation Amendment Act 2010* (Cth); *Independent National Security Legislation Monitor Act 2010* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth); *National Security Information (Criminal Proceedings) Act 2004* (Cth); *Anti-terrorism Act 2004* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth); *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (and related Acts) *Criminal Code Amendment (High Risk Offenders) Act 2016* (Cth); *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). One of the case study 'Acts', the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth), is more correctly described as a 'Bill' as it was not enacted into legislation.

<sup>27</sup> For a comprehensive overview of the legislative history of the marriage equality reforms see Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (2018, NewSouth Books); D McKeown, *A chronology of same-sex marriage bills introduced into the federal parliament: a quick guide*, Research paper series, 2016-17, Parliamentary Library, Canberra, updated February 2018.

<sup>28</sup> Sarah Moulds 'Keeping watch on COVID-19 laws: are parliamentary committees up to the job?', AUSPUBLAW Blog, 1 May 2020 <https://auspublaw.org/2020/05/keeping-watch-on-covid-19-laws-are-parliamentary-committees-up-to-the-job/>.

<sup>29</sup> This finding is consistent with the discussion in Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76.

<sup>30</sup> Harry Evans (ed), *Odgers' Australian Senate Procedure* (Commonwealth of Australia, 10<sup>th</sup> ed, 2001) at 366; see also Anthony Marinac, 'The Usual Suspects? "Civil society" and Senate Committees' (Paper submitted for the Senate Baker Prize, 2003) 129 <<http://www.aph.gov.au/binaries/senate/pubs/pops/pop42/marinac.pdf>>; See also Pauline Painter 'New kids on the block or the usual suspects? Is public engagement with committees changing or is participation in committee inquiries still dominated by a handful of organisations and academics?' (2016) 31(2) *Australasian Parliamentary Review*, 67-83

<sup>31</sup> Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?' (2016) 27(4) *Public Law Review* 271, 273.

Legal and Constitutional Affairs Legislation Committee (the LCA References Committee) and House Standing Committee on Social Policy and Legal Affairs (the House Committee).<sup>32</sup> These inquiry-based committees have a high overall participation rate, engaging a broad range of parliamentarians, public servants and submission makers.<sup>33</sup> For example, in two counter-terrorism Bill inquiries, the LCA Committees attracted over 400 submissions and heard from well over 20 witnesses.<sup>34</sup> This relatively high participation rate was dwarfed by the rates of participation experienced by the House Committee<sup>35</sup> in its inquiry into two cross-party Marriage Equality Bills in 2012,<sup>36</sup> which received 276,437 responses to its online survey, including 213,524 general comments and 86,991 comments on the legal and technical aspects of the bills.<sup>37</sup> Never before had the Parliament provided a deliberative forum of this scale or attracted so many responses from interested members of the community.<sup>38</sup> Unlike some other parliamentary committees, both the LCA Committees and the House Committee were able to attract participation from a broader cross section of the community, rather than rely on ‘the

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<sup>32</sup> The House Standing Committee on Social Policy and Legal Affairs is established by House of Representatives, Parliament of Australia, *Standing Order* 215 and 229 (2017). The Committee has a government Chair and a majority of government members. The current membership of the Committee can be seen at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Committee\\_Membership](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Committee_Membership)>

<sup>33</sup> See Senate, Parliament of Australia, *Standing Order* 25 (2000); House of Representatives, Parliament of Australia, *Standing Order* 215 and 229 (2017).

<sup>34</sup> Senate Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002). In this inquiry, the Senate Standing Committee on Legal and Constitutional Affairs References Committee received 431 submissions and heard from 65 witnesses. See also Senate Committee on Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002). In this inquiry the Committee received 435 submissions and heard from 22 organisations.

<sup>35</sup> Like the LCA Legislation Committee, the House Committee has a government Chair and majority of government members. It also has broad powers to conduct public hearings into proposed legislation or other thematic issues referred to it by the House of Representatives, and can include ‘participating members’ who can participate in proceedings without having a formal vote.

<sup>36</sup> The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Adam Bandt MP and Mr Andrew Wilkie MP. The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Stephen Jones MP on 13 February 2012. Both of these Bills sought to amend the Marriage Act to remove reference to ‘man and woman’ and permit same sex couples to marry. The Marriage Amendment Bill 2012 (Cth) also included proposed provisions that would have the effect of ensuring that authorised celebrants and ministers of religion are not required to solemnise a marriage where the parties to the marriage are of the same-sex. Both Bills were referred to the House Standing Committee on Social Policy and Legal Affairs, which delivered its report on 18 June 2012. See House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, (2012).

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

<sup>38</sup> *Ibid*, 34.

usual suspects' (such groups or individuals who are already aware of the bill's existence, or who are contacted by politicians or their staff, or by the committee secretariat).<sup>39</sup>

This suggests that high rates of participation are indicators of effectiveness when it comes to parliamentary committees. However, committees that focus on preserving and strengthening relationships with a smaller, less diverse group of decision makers can also have a strong influence and impact on the content of federal laws, particularly when those relationships were with government agencies or expert advisers. This is illustrated by the influential nature of the recommendations made by the specialist the Parliamentary Joint Committee on Intelligence and Security (the Intelligence Committee),<sup>40</sup> which works closely with staff from law enforcement and intelligence agencies when inquiring into proposed or existing national security laws.<sup>41</sup>

This reveals an important tension in the role and impact of different types of parliamentary committees. On the one hand, the ability to attract and reflect upon a diverse range of perspectives when inquiring into a particular law has positive deliberative implications for the capacity of the committee system to improve the overall quality of the law making process, and to identify rights concerns or other problems with the content and implementation of the law. On the other hand, other attributes, such as specialist skills and trusted relationships with the executive, can also lead to a consistently strong legislative impact, which can also have important, positive results.

## 2. Legislative Impact

One of the most surprising findings arising from these two cases studies is the significant legislative impact different components of the committee system were able to have on the content of federal laws. In the context of the counter-terrorism cases study, many of the recommendations for legislative change made by parliamentary committees were implemented

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<sup>39</sup> Paxman, Kelly, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) at 81.

<sup>40</sup> *Intelligence Services Act 2001* (Cth) pt 4, s 28 (2). The Intelligence Committee has some particular attributes that set it apart from the other Committees considered and relate to its specialist intelligence and national security functions. For example, it has a statutory framework, its government-majority membership is tightly controlled and generally limited to the two major political parties, and it has access to information, expert briefings and powers that are generally broader in scope than other committees established for other purposes. See *Intelligence Services Act 2001* (Cth) pt 4. See also Sarah Moulds 'Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security' (2018) 29(4) *Public Law Review* 41.

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

in full by the Parliament in the form of amendments to the Bill or Act.<sup>42</sup> In addition, the types of changes recommended by these committees were generally rights-*enhancing*. In other words, at least in the counter-terrorism context, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny) - but the legislative changes made as result of scrutiny were significant and positive from a rights perspective. For example, this research suggests that the work of parliamentary committees directly contributed to amendments that:

- narrowed the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of ‘terrorist act’;<sup>43</sup>
- removed absolute liability and reverse onus of proof provisions from the terrorist act related offence;<sup>44</sup>
- inserted defences within the terrorist act offences for the provision of humanitarian aid;<sup>45</sup>
- ensured the power to proscribe terrorist organisations is subject to parliamentary review;<sup>46</sup>
- subjected each new law enforcement and intelligence agency power to a raft of detailed reporting requirements and oversight by independent statutory officers;<sup>47</sup>

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<sup>42</sup> Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, 2018) Chapter 5 and Table 5.1.

<sup>43</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) and Related Bills, Items 5 and 8; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 2.

<sup>44</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth), Items 11, 13, 14; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 3.

<sup>45</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and (Cth), Item 4, in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 1.

<sup>46</sup> See e.g. Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See also Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002).

<sup>47</sup> *Ibid*, see also Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

- ensured persons detained under questioning and detention warrant have access to legal representation, are protected against self-incrimination and have access to judicial review of detention at regular intervals;<sup>48</sup>
- ensured that pre-charge detention of people thought to have information relevant to terrorist investigations is subject to judicial oversight and maximum time limits;<sup>49</sup>
- re-instated the court’s discretion to ensure that a person receives a fair trial when certain national security information is handled in ‘closed court’, and limited the potential to exclude relevant information from the defendant in counter-terrorism trials;<sup>50</sup>
- ensured people subject to control orders and preventative detention orders can understand and challenge the material relied upon to make the order and limited the regime to adults only;<sup>51</sup> and
- narrowed the circumstances in which a dual national can have their citizenship ‘renounced’ by doing something terrorist-related overseas, including by narrowing the range of conduct that can trigger the provisions; and making it clear that the laws cannot be applied to children under 14.<sup>52</sup>

These findings are surprising because they challenge the orthodox view that governments generally resist making changes to legislation that they have already publicly committed to and introduced into Parliament.<sup>53</sup> Interestingly, the strength of this legislative impact varied from

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<sup>48</sup> See Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth) and Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendations at viii-ix. See also ASIO Amendment (Terrorism) Bill 2003 (Cth).

<sup>49</sup> See e.g. Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Items 4, 5, 6, 7 and 8 which implement Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004*, (2004) Recommendations 1-4.

<sup>50</sup> Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), ‘General Outline’ and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004).

<sup>51</sup> See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 Bill and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005).

<sup>52</sup> See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended clause 33AA(1); see also Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

<sup>53</sup> As discussed below, this orthodox view suggests that within Westminster systems, parliamentary committees, and in particular government-dominated committees, will be seriously compromised as a form of rights

committee to committee. For example, the Intelligence Committee was a particularly strong performer when it came to translating recommendations into legislative change (achieving an 100% strike rate during the period from 2013-2018) and improving the rights compliance of the law.<sup>54</sup> The committees with broader mandates and more open membership, such as the LCA Committees, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law making, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes.<sup>55</sup> These observations are also apposite in the context of the marriage equality reforms, where there is also evidence that different parliamentary committees working together over time had a strong legislative impact. When taken together, these findings suggest that when multiple components of the scrutiny system work together to scrutinise and review an existing or proposed law, a more significant legislative impact is felt.<sup>56</sup>

### 3. Public Impact

For the purpose of the evaluation framework used in this research, ‘public impact’ refers to the impact of parliamentary committee work on the way laws are debated in the parliament and the community. Looking for this type of impact is particularly important for understanding how parliamentary committees contribute to the deliberative relationship between lawmakers and the broader Australian community. This is because parliamentary committees can help establish a ‘culture of scrutiny’ by providing a forum for parliamentarians to share their views on a proposed or existing law, including pointing out what they consider to be the negative or unintended consequences of the proposed law. This can help identify any unintended or unjustified implications arising from a proposed law, and generate new, less rights-intrusive,

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protection, especially when scrutinising laws that affect electorally unpopular groups, such as bikies and terrorists. See e.g. Janet Hiebert, ‘Governing Like Judges’ in Tom Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63; Janet Hiebert, ‘Legislative Rights Review: Addressing the Gap Between Ideals and Constraints’ in Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 39 at 52.

<sup>54</sup> Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, Chapter 5 and Table 5.1).

<sup>55</sup> Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, Chapter 5 and Table 5.1).

<sup>56</sup> This is evident in both the early cases of the Control Order Bill and ASIO Bill 2002, which were considered by the Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on ASIO and the Senate Standing Committee on Legal and Constitutional Affairs Committees, and in the post-2013 Bills which were considered by the Parliamentary Joint Committee on Intelligence and Security, Senate Standing Committee for the Scrutiny of Bills, and the Parliamentary Joint Committee on Human Rights. See also Moulds, Sarah, ‘Committees of Influence: Parliamentary Committees with the Capacity to Change Australia’s Counter-Terrorism Laws’ (Paper presented at the Australasian Parliamentary Study Group’s Annual Conference, ‘The Restoration and Enhancement of Parliaments’ Reputation’, Adelaide, October 2016)

legislative or policy options. Parliamentary committees can also help parliamentarians to weigh competing arguments or different policy options,<sup>57</sup> either through the public process conducted by the inquiry-based committees, or through the consideration of written analysis provided by the technical scrutiny committees.

The strong public impact of the parliamentary committee system is particularly evident in the marriage equality case study, which demonstrates the potential capacity for parliamentary committees to provide a meaningful deliberative forum for community debate on contested rights issues that is subsequently reflected in (or reflects) the broader parliamentary and community debate on these matters.<sup>58</sup>

By attracting and engaging with these types of submission-makers, parliamentary committees can provide both a platform for these organisations to express their views and a source of information from which to launch future advocacy campaigns. This in turn can have an influence on how the relevant policy issues are debated in the media, and provide incentives for parliamentarians to improve the deliberative quality of the law-making process. For example, the next year, Senator Hanson-Young introduced a similar Bill (the 2010 Bill), which was again referred to the LCA Legislation Committee for inquiry and report.<sup>59</sup> The Committee received approximately 79,200 submissions: approximately 46,400 submissions in support of the 2010 Bill, and approximately 32,800 submissions opposed.<sup>60</sup> The sheer volume of

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<sup>57</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 25; Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?' (2016) 27(4) *Public Law Review* 271, 274

<sup>58</sup> For example, almost immediately after the enactment of *Marriage Amendment Bill 2004*, legislative efforts began to reverse or modify the changes to the definition of marriage, usually advanced in the form of Private Members' or Private Senators Bills. These Bills attracted the support of many of the sophisticated submission-makers to the 2004 LCA Legislation Committee inquiry. These sophisticated submission-makers include legal groups (such as the Castan Centre for Human Rights Law), human rights groups (such as Liberty Victoria) and religious groups (such as the Australian Christian Lobby), all of which have access to powerful and influential members and allies, as well as experience engaging with the media and implementing advocacy campaigns. See e.g. those submission-makers quoted extensively by the Committee in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009*, (2009) Chapters 3 and 4, which include: Dr Paula Gerber from the Castan Centre for Human Rights Law; Mr Gardiner, Vice President of Liberty Victoria; Law Council of Australia; Australian Coalition for Equality; Catholic Dioceses of Sydney and Melbourne; Australian Christian Lobby and Family Voice Australia.

<sup>59</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012). The Bill was referred to Committee on 8 February 2012. The Committee issued its report on 25 June 2012.

<sup>60</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [1.32]. The committee received approximately 75,100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43,800 supported the bill and 31,300 opposed it. The committee received an additional 4,100 submissions, of which 2,600 supported the bill and 1,500 opposed it. This amounts to 79,200 submissions in total: 46,400, or approximately 59 per cent, supporting Senator Hanson-Young's Bill; and 32,800, or approximately 41 per cent, opposing it.

submissions received (regardless of the existence of ‘form letter’ style submissions) made this inquiry a powerful indicator of a shift in public support in favour of marriage equality.<sup>61</sup>

In addition to providing a forum for citizens to share their views directly with parliamentarians, the numerous public hearings held in Sydney and Melbourne<sup>62</sup> provided an important opportunity for the media to hear directly from individuals with experiences of discrimination on the grounds of sexual orientation,<sup>63</sup> as well as those with strong views on the need to preserve marriage as a heterosexual institution.<sup>64</sup> These personal stories would also play an important role in advancing the case for legislative change in the lead up to the 2017 reforms.<sup>65</sup>

The inquiry process also allowed for legal experts and rights advocates - both proponents and opponents of marriage equality - to articulate their arguments with reference to evidence and the experiences of other jurisdictions.<sup>66</sup> This proved to be particularly significant for the development of concrete legislative proposals designed to address both the growing public demand for marriage equality, with concerns associated with the impact of reform on religious rights and freedoms.<sup>67</sup> These issues became the defining features of the future marriage equality debate, and influenced the shape and content of the legislative amendments passed in 2017.

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<sup>61</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [4.5].

<sup>62</sup> A list of witnesses who appeared at the hearings is at Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) Appendix 3, and copies of the *Hansard* transcripts are available through the committee's website.

<sup>63</sup> For example, Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby, Mr Malcolm McPherson from Australian Marriage Equality and Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, as quoted in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [2.3]-[2.6].

<sup>64</sup> For example, Australian Christian Lobby, Rabbinical Council of Victoria, Episcopal Assembly of Oceania, and Presbyterian Church of Queensland as quoted in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [2.57]-[2.61].

<sup>65</sup> See e.g. 'MP stands with son on same-sex marriage' *AAP Australian National News Wire* (Canberra) 10 October 2016; Sarah Whyte, 'Footballer's 10-minute challenge to change MPs' views on same-sex marriage' *The Sydney Morning Herald*, (Sydney) 22 July 2015; Dan Harrison, 'Parents of gays make TV pitch to Abbott on same-sex marriage vote' *The Sydney Morning Herald*, (Sydney) 30 January 2012; Nina Lord, 'In rainbow families, the kids are all right' *The Age* (Melbourne) 28 September 2017.

<sup>66</sup> At that time, marriage equality was recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the United States and Mexico City. Legalisation to enable marriage equality was also under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay, see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [2.52].

<sup>67</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, (2012) [3.1]

The Senate Select Committee on COVID-19's approach to public engagement has also displayed some of the same characteristics, as well as demonstrating the potential for parliamentary committees to embrace innovative ways of connecting with the Australian community. From its inception in March 2020, the COVID Committee has used its inquiry-related functions to rigorously examine government officials and other experts, and been active in sharing its work with the community, including through social media platforms, which has helped to generate sustained media and public interest in its work.<sup>68</sup>

As of April 2021, the Opposition-chaired, non-government controlled committee has received 544 written submissions, held 42 public hearings (conducted in person and via video link and other related technologies), and handled hundreds of questions taken on notice by government agencies. Even before the Committee issued a written report,<sup>69</sup> it influenced the shape of key legislation (for example the legislation providing the legal framework for the COVIDSafeApp and the JobKeeper and JobSeeker support programs)<sup>70</sup> and played a central role in the public debate on the efficacy of key government response to the pandemic.<sup>71</sup>

Although not tasked with applying a prescribed human rights analysis to this issue, the COVID-19 Committee provided a forum for legal and technical experts and the community more broadly to consider whether the COVIDSafeApp is *necessary* having regard to the nature of the threat posed by COVID-19 and the impact of the App on personal privacy, and whether the App constitutes a *proportionate* way to respond to the COVID-19 virus. These question demanded consideration of the scientific evidence relating to the prevalence of the COVID-19 virus within the Australian community, effectiveness and efficiencies of pre-existing contact tracing mechanisms and the effectiveness and efficiency of the App itself. Consideration was

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<sup>68</sup> Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees' (2020) *Alternative Law Journal* Online First <https://journals.sagepub.com/home/alj>

<sup>69</sup> The COVID-19 Committee released its first Interim Report in December 2020 (Senate Select Committee on COVID-19, First Interim Report, Parliament of Australia, December 2020 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Interim_Report)> and its Second Interim Report in February 2021 (Senate Select Committee on COVID-19, First Interim Report, Parliament of Australia, February 2021 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Second\\_Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Second_Interim_Report)>).

<sup>70</sup> For further discussion see Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees' (2020) *Alternative Law Journal* Online First <https://journals.sagepub.com/home/alj>.

<sup>71</sup> For example, evidence provided to the COVID Committee revealed that the COVIDSafeApp had only detected one case of infection not otherwise detected by human contact tracers and that as of August 2020 no payments had been approved as part of the Australian Government's \$680 million HomeBuilder scheme was intended to spark a "tradie led recovery" of the Australian economy but had been no payments approved as of early August 2020 despite 247 applications (Manning, 2020).

also given to the impact of the App on the rights of vulnerable members of the community, such as women experiencing domestic violence, for whom a breach of privacy could have devastating consequences for themselves and their families.<sup>72</sup>

The work of the COVID-19 Committee, and the Parliamentary Joint Committee on Human Rights and Scrutiny of Bills Committee, provided political foundation for the introduction of legislative provisions addressing the use, sharing and storage of information obtained via the App in the form of the *Privacy Amendment (Public Health Contact Information) Act 2020*, and is an example of the benefits of Australia's 'ad hoc', multi-committee approach to human rights scrutiny. However, this ad hoc approach to rights scrutiny of executive action can also give rise to significant shortcomings when it comes to providing robust rights protection, as can be seen by the Australian Government's heavy use<sup>73</sup> of delegated powers conferred on it by pre-existing public health emergency legislation that have been largely exempted from parliamentary committee scrutiny.<sup>74</sup> These provisions also attracted the attention of the Scrutiny of Bills Committee when it considered the Australian Government's Coronavirus Economic Response Package Omnibus Bill 2020, calling on the proponents to provide advice regarding the 'Henry VIII clauses'.<sup>75</sup> As is often the case when it comes scrutiny of emergency law making, this Scrutiny Digest report came weeks after the Coronavirus Economic Response Package Omnibus Bill 2020 (Cth) had been enacted into law, too late to give rise to any direct legislative amendments. This example highlights the clear limits of the Australian ad hoc approach to scrutinising the rights impacts of proposed laws, that relies heavily on a system of

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<sup>72</sup> These issues formed part of the Senate Select Committee's public inquiry hearings in April and May 2020, which drew from the analysis contained in the following two reports from the Human Rights Committee, Report 5 of 2020: Human rights scrutiny of COVID-19 legislation; Report 6 of 2020 .

<sup>73</sup> For example, on its webpage, the Senate Standing Committee on Delegated Legislation has sought to list all delegated legislation registered on the Federal Register of Legislation on or before 20 May 2020 relating to COVID-19. This list totals some 148 legislative instruments.

<sup>74</sup> For example, legislative instruments made under section 475 of the *Biosecurity Act 2015* (Cth) ('the Act') trigger sweeping powers (some powers are referred to as 'special emergency powers') for the Health Minister to determine any requirements necessary to prevent or control the 'emergence, establishment or spread' of COVID19 within, or in a part of, Australian territory, or to another country. These powers have included: a ban on overseas travel; restrictions on retail trade at airports; the COVIDSafeApp; and restrictions placed on remote communities populated by Aboriginal and Torres Strait Islander communities.

<sup>75</sup> Senate Standing Committee on the Scrutiny of Bills Committee, Parliament of Australia, *Scrutiny Digest* (No 5 of 2020), 13. The Scrutiny of Bills Committee also sought advice as to why 'it is necessary and appropriate to provide the minister with broad discretionary powers to alter or extend the operation of supplement payments in the *Social Security Act 1991*' (at p. 15) and queried 'what criteria ministers will consider before determining whether it is appropriate to defer the sunseting of Acts and legislative instruments' (at p. 16).

committees being empowered to work together to scrutinise key aspects of executive law making.

#### 4. Hidden Impact

In addition to looking for ‘legislative’ and ‘public’ impact, the evaluation framework is designed to gather information from those working ‘behind the scenes’ in the law making process.<sup>76</sup> This type of impact is described as ‘hidden’ as it often occurs prior to a Bill or amendment being introduced into Parliament and concerns the activities of public servants and parliamentary counsel, outside of the public gaze.<sup>77</sup>

Investigations into the hidden impact of legislative scrutiny on Australia's counter-terrorism laws suggest that committees with high participation rates are in the minds of those responsible for developing and implementing legislation, and prudent proponents of Bills will adopt strategies to anticipate or avoid public criticism by such bodies. In this way, the inquiry-based parliamentary committees (like the LCA Committee) can have a strong ‘hidden impact’ on the development of laws. The ‘technical scrutiny’ committees,<sup>78</sup> (such as the Scrutiny of Bills Committee) may also generate a strong hidden impact – not because of their capacity to generate public interest, but rather because the ‘technical scrutiny’ criteria these bodies apply is entrenched in the practices of public servants and parliamentary counsel. For example, written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments contains frequent references to the work of the ‘technical’ scrutiny bodies (such as the Scrutiny of Bills Committee) and some of these documents, in particular the *Legislation Handbook*, *Drafting Directions* and *Guide to*

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<sup>76</sup> As part of this research, I interviewed public servants who were directly responsible for developing or drafting the case study Bills, including those from the AGD, Department of Immigration and Border Protection (DIBP), Australian Federal Police and Office of Parliamentary Counsel. I also conducted interviews with current and past parliamentarians and parliamentary staff. Although not statistically representative, these interviews provide a useful insight into the role parliamentary committees play in the development of proposed laws from the perspective of a broad range of players in the legislative development and drafting process. Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia’s Counter-Terrorism Laws* (PhD Thesis, University of Adelaide) Appendix A.

<sup>77</sup> The political Party Room also plays a central role in this behind-the-scenes lawmaking process but remains ‘off-limits’ to almost all researchers, due to its highly politically charged and confidential nature. This work focuses particularly on the role of public servants, parliamentary counsel and parliamentary committee staff and gathers evidence and insights from interviews with these key players in the process.

<sup>78</sup> These scrutiny-based committees are required to review every single Bill (and in the case of the Human Rights Committee, all legislative instruments) for compliance with a range of scrutiny criteria, including criteria that relates to individual rights and liberties. The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The scrutiny criteria applied by the Human Rights Committee is outlined in s3 of the Act and includes the human rights and freedoms contained in seven core human rights treaties to which Australia is a party. The Senate Standing Committee on Regulations and Ordinances is also a scrutiny-based committee, with a mandate to scrutinise delegated legislation.

Commonwealth Offences, translate the abstract principles underpinning the scrutiny bodies' mandates into practical checklists to be applied during particular stages of the legislation development process. In this way, these documents may help create a 'culture of rights compliance' within the public service. Over time, they also give rise to the shared view that the scrutiny criteria applied by these bodies reflect 'best practice' when it comes to developing laws.

Understanding these different forms of 'hidden impact' helps uncover new opportunities to improve the effectiveness and impact of the scrutiny system, in addition to exposing some of the system's key challenges and weaknesses.

The interview material also reveals that the rights-enhancing hidden impact of parliamentary committees remains vulnerable to a number of dynamic factors, including the degree to which the policy officers are able to present alternative policy and legislative options to the Minister for consideration and the expertise and experience of the policy officers and parliamentary counsel involved in the development and drafting of the Bill. When taken together, these findings suggest that understanding the hidden impact of the parliamentary committee system should be of central interest to anyone interested in understanding the overall impact of the parliamentary committee system on the quality of federal law making in Australia.

### **Key findings and recommendations**

Whilst reiterating the salient warnings discussed above about the challenges associated with evaluating the work of parliamentary committees and attributing specific impacts to dynamic and politically-influenced institutions, this research provides the opportunity to reflect the reforms (or investments in existing practices) that could maximize the potential for parliamentary committees to positively influence lawmaking and parliamentary public engagement in Australia. As documented in greater detail in *Committees of Influence* (Springer, 2020), there are a range of common factors that may be determinative when it comes to the capacity of a parliamentary committee to have an impact on lawmaking. These common factors include:

- The deliberative capacity of the committee<sup>79</sup> – such as the extent to which the committee is able to facilitate accessible remote or online forums and inquires to engage meaningfully with experts, community organisations and individuals, as well as it's

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<sup>79</sup> Dalla-Pozza, D. (2006). The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws. Paper presented at the Australasian Law and Society Conference. Retrieved from <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:8439/SOURCE02>. Accessed 6 Jan 2020.

potential to provide a ‘safe space’ for members to change their mind in the face of compelling evidence.

- The political characteristics of the committee<sup>80</sup> – such as whether the committee has a government or non-government majority, the political seniority of its members and expertise of its Secretariat staff, whether it comprises of members from both Houses, or whether its mandate is considered to be highly politicised or not.
- The relationship between the committee and relevant executive agencies<sup>81</sup> – including the committee’s access to relevant government information or capacity to hold ‘private briefings’ and track record of developing practical recommendations that can be readily implemented by government.
- Whether the committee is tasked with a ‘policy scrutiny’ or technical scrutiny’ function<sup>82</sup> – such as whether the Committee is tasked with undertaking compliance related activity by assessing proposals against a prescribed list of criteria, or whether the Committee is given broad scope to examine the policy merits of the law or to evaluate its effective implementation and hold public inquiries and examine witnesses.
- Whether the committee exists within a sophisticated system of committees or operates on an ad-hoc basis.<sup>83</sup>
- Timing of the issue of committee reports and recommendations<sup>84</sup> – including whether the Committee’s reports, recommendations or findings are able to be tabled or published *prior to* the enactment of the proposed law or before the cessation of any relevant disallowance period or sunset provision.

Building on these overall findings, the research that has informed this Paper contains a list of practical reform suggestions for individual committees within the federal committee system,

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<sup>80</sup> Holland, I. (2009). *Senate Committees and the Legislative Process*. (Parliamentary Studies Paper No 7) Retrieved from [http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07\\_Holland.ashx](http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07_Holland.ashx). Accessed 7 Jan 2020; Horrigan, B. (2012). Reforming Rights-Based Scrutiny and Interpretation of Legislation. *Alternative Law Journal* 37, 228 - 232. <https://doi.org/10.1177/1037969X1203700403>.

<sup>81</sup> Moulds, S. (2019). Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security. (2019) 29(4) *Public Law Review* 29(4), 287-321.

<sup>82</sup> Kinley, D. and Ernst, C. (2012). Exile on Main Street: Australia’s Legislative Agenda for Human Rights *European Human Rights Law Review* 1, 58-70.

<sup>83</sup> Grenfell, L. (2015). An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?. *Public Law Review* 26(1), 19-32.

<sup>84</sup> Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 273.

and at the system as whole.<sup>85</sup> While it is beyond the scope of this paper to repeat each of those recommendations here, it is useful to summarize in general terms the changes that could be made to similar committee systems in Australia. These suggestions share many aspects in common with previous reform recommendations made by those working directly within the Australian parliamentary committee system,<sup>86</sup> and some recommendations have already been implemented by a number of Australian Parliaments.

<b>Improve communication between committees and key participants by</b>	Documenting and reporting on the government response to and legislative implementation of the committees' recommendations, for example through annual reports and more instantaneous platforms including social media and direct email through a subscription alert service.
	Improving communication between committees and those responsible for developing and drafting legislative proposals. This could involve committee secretariat staff liaising with public servants to develop subject-specific Guidance Notes and Drafting Directions.
	Developing and delivering specific training to assist in the facilitation of respectful, deliberative public hearings, that could include strategies to promote a culture of respect and support for a diverse range of witnesses and processes to update and expand 'invited submission maker' lists.
	Requiring government responses to all Legislation Committee reports before the conclusion of second reading debate on the Bill, and to all Reference Committee reports within six months of tabling (for example, by amending the relevant Standing Orders).
<b>Increase committee resources and address high workloads to ensure timely tabling of reports by:</b>	Providing additional funding for the general staffing pool that services parliamentary committees. The amount of additional funding should be determined following a work analysis to determine the nature and level of secretariat support necessary for future demands on the committee system.
	Encouraging the use of responsive staffing practices, such as shared secretariats and flexible staffing pools, which enable parliamentary staff to move between committees in response to changing workloads.
	Encouraging the appointment of high-quality, politically independent, part-time specialist advisors to support parliamentary committees over a fixed period, or for particularly complex or lengthy inquiries.

<sup>85</sup> Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide).

<sup>86</sup> Eg Joshua Forkert 'Parliamentary Committees: Improving public engagement' (APSG Conference 27-30 September 2017 Hobart); Hendriks and Kay 'From 'Opening Up' to Democratic Renewal: Deepening Public Engagement in Legislative Committees' *Government and Opposition* 7 August 2017, 7-8. 20-21; Beverly Duffy and Madeleine Foley 'Social media, community engagement and perceptions of parliament: a case study from the NSW Legislative Council'(2011) 26(1) *Australasian Parliamentary Review*, 198, Baczynski J, 'Opportunities for Greater Consultation? House Committees use of information and communication technologies,' Parliamentary Studies Paper 8, Crawford School of Economics & Government, ANU, Canberra, 2009; House of Representatives Standing Committee on Procedure, Parliament of Australia, *Building a modern committee system: An inquiry into the effectiveness of the House committee system* (2010) Dr P Larkin, *Transcript of evidence*, 22 October 2009, 2010 'Agreement for a Better Parliament' made between the Australian Labor Party and the independent members (Mr Tony Windsor and Mr Rob Oakeshott) on 7 September 2010, in particular para 10.6. See also John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23(2) *Australasian Parliamentary Review* 135, 153.

	Encourage the use of departmental or agency secondee arrangements to support parliamentary committees over a fixed period, or for particularly complex or lengthy inquiries
	Supporting parliamentarians in their involvement in parliamentary committees, including through improving training programs for parliamentarians' staff, and profiling high-quality contributions from individual committee members.
	Promoting parliamentary committees as part of the policy and legislative development process amongst the broader public service, including by pointing out the efficiency gains to be made by anticipating and addressing parliamentary scrutiny issues at the pre-introduction stage.
<b>Document committees' contribution to establishing a common rights-scrutiny culture within the Parliament by</b>	Investing in research to track the rights language used in parliamentary debates and parliamentary committee reports across a wide range of subject areas to evaluate the level of acceptance of the rights and scrutiny principles listed.
	Encouraging individual committees to more clearly and specifically document the impact they have on the development and debate of proposed new laws, particularly those committees with specific rights-scrutiny mandates.
	Facilitating workshops and forums to discuss, document and debate the contribution of parliamentary committees to law making in Australia.

Opportunities for parliamentary committees to improve the relationship between parliament and the people

My research also suggests that parliamentary committees might be particularly well placed to improve the relationship between parliament and the people by providing a meaningful deliberative forum for new sources of information to be evaluated and explored.<sup>87</sup> In particular my research suggests that parliamentary committees can enhance the deliberative quality of the legislative scrutiny process by:

***Enhance the deliberative quality of the inquiry process by***

Reviewing and expanding existing committee databases of potential submission makers and processes for selecting witnesses for public inquiries to guard against unconscious bias or preference for 'usual suspects'.

Investing in online materials and secretariat staff capacity to support submission makers and witnesses, particularly new witnesses, for example by providing regular workshops for regular and new submission makers and witnesses and a modest hardship fund to support non-government witnesses travelling from regional or remote locations to attend public hearings in person.

Encourage and support committee members and secretariat staff to develop practical guidance and strategies for the increased use of online surveys, social media distribution of information and targeted polling on issues relevant to

<sup>87</sup> See also CM Hendriks, S. Regan and A. Kay 'Participatory adaptation in contemporary parliamentary committees', (2019) 72(2) *Parliamentary Affairs* 267-289; CM Hendriks, and J. Lees-Marshment 'Political leaders and public engagement: the hidden world of informal elite-citizen interaction.' (2019) 67 (3) *Political Studies*, 597-617; Walker A, Jurczak N, Bochel C, Leston-Bandeira C. 2019. How Public Engagement Became a Core Part of the House of Commons Select Committees. *Parliamentary Affairs*. 72(4), pp. 965-986

parliamentary committee work as a beneficial supplement to conventional written submission and public hearing processes. These techniques should be supported by qualitative research into the impact of these digital engagement techniques on the effectiveness and impact of the work of parliamentary committees. Consideration could also be given to recruiting specialist parliamentary staff to develop, implement and evaluate public engagement strategies for use by committees – complementing the existing expertise of parliamentary committee secretariat staff and the Parliamentary Education Office.

Investing in reliable video communication technologies in capital cities and regional centres to facilitate remote access public hearings. This could be supported by the interim use of video conferencing facilities provided by ‘host’ organisations, such as local councils or public libraries. These techniques should be supported by qualitative research into the impact of these engagement techniques on the effectiveness and impact of the work of parliamentary committees.

My research suggests that these changes could enhance the parliamentary committee systems’ capacity to engage in *deliberative lawmaking* with flow on benefits of the overall health of our democracy.

#### *What is deliberative lawmaking?*

The idea of ‘deliberative decision making’ requires that decision makers have access to accurate and relevant information, consider of a diversity of voices and different positions, reflect on the information received, and reach conclusions on the basis of evidence.<sup>88</sup> When applied to law making, it requires lawmakers to go beyond the idea of ‘trading off’ values or interests of one group against another, and instead engage in an active search for a common ground between different values or interests.<sup>89</sup> This in turn sees decision-makers engaging in reflection and sometimes, changing their mind.<sup>90</sup>

The parliamentary experience of the marriage equality reforms suggests that the parliamentary committee system has the capacity to facilitate the occurrence of this type of law-making. There are three indications of this. First, the process supported deliberative decision-making by providing a central, independent collection point for a range of views, expert opinions and comparative data about the social and legal implications of reform in this area. It also provided a forum for parties to exchange of views, present arguments and evidence in order to convince

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<sup>88</sup> James Fishkin, *When the People Speak : Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 39.

<sup>89</sup> Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 76-80.

<sup>90</sup> *Ibid*, 80, 197. While Orr and Levy’s work focuses on what they call ‘second order’ issues in deliberative democracy, such as the role the judiciary and lawyers play in the design and operation of the electoral system, their analysis of how deliberative democratic values can improve the quality of public decision making holds lessons for the work of parliamentary committees, see 197-200.

decision makers of the merits of their claims.<sup>91</sup> Secondly, the early committee inquiry processes paved the way for the development of future legislative and policy solutions to the marriage equality issue by documenting and summarising tens of thousands of submissions in an accessible format for the Parliament to reflect upon when considering reform in this area.<sup>92</sup> These committee inquiry processes also provided a practical forum for parliamentarians to evaluate the merits of the different positions presented with reference to supporting evidence, and reflect upon previously held views in light of new information.<sup>93</sup> Thirdly, the deliberative features of committee decision-making allowed the parliamentary committee system to explore rights and policy issues beyond binary positions. The case studies suggest that when parliamentary committees listen to competing views and reflect on the rights and interests of a broad cross-section of the community, they can identify common ground and provide a safe space for key decision makers to change their minds about a policy or law.

This can be contrasted with the experience of the postal survey which framed the policy debate on marriage equality in binary terms, and asked the Australian community to ‘pick a side’ rather than ‘tell their story’ when it comes to marriage equality. By narrowing the policy choices down to essential ‘yes’ or ‘no’ questions, these mechanisms provide far more limited opportunities for decision-makers to state reasons or demonstrate reflection, and if relied upon exclusively to resolve complex issues of social policy, can hamper efforts to develop nuanced responses or to provide meaningful protection for minority rights.<sup>94</sup> Under this approach, advocacy groups and media outlets have incentives to frame the policy issue in clear binary terms, attracting support for their preferred option by sensationalising the risks of the alternative or overstating the benefits of their position

While the adoption of a binary approach to rights issues or contested social policy can also occur within any political environment, including within parliamentary committees, elected

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<sup>91</sup> Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 76-80. For an example of this type of exchange of views see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009*, (2009) [5.11].

<sup>92</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, (2012) 49 [5.1]. However, the Committee offered some minor textual amendments suggested by the evidence taken during the course of the inquiry,” for example by recommending that the Bandt Bill be amended to ‘ensure equal access to marriage for all couples who have a mutual commitment to a shared life’, at 49 [5.3].

<sup>93</sup> This aligns with what Fishkin, Levy and Orr consider to be vital features of deliberative decision making. Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 4, 22-23; James Fishkin, *When the People Speak : Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 39.

<sup>94</sup> Paul Kidrea. 'Constitutional and Regulatory Dimensions of Plebiscites in Australia' (2016) *27 Public Law Review* 290, 292-293.

representatives generally play an important role in mediating the most extreme voices within the community, either through self-reflection on the interests of their electorate, or by commitment to policy positions or values ascribed by their respective political parties. Even when parliamentarians reflect the views of the popular or a powerful majority, they have political incentives to frame their views in inclusive or conciliatory terms in order not to isolate sections of their own electorate or their own political party who may disagree with their position.

These advantages of parliamentary committees over direct democracy mechanisms should not be read as implying that public surveys or online polls have no place in representative democracies.<sup>95</sup> As Baker has observed, the issue is not whether plebiscites, postal surveys or opinion polls are ‘superior to (and should therefore perhaps replace) representative democracy’, but rather ‘whether direct democracy is a beneficial *supplement* to representative lawmaking processes.’<sup>96</sup> This suggests that rather than avoiding direct democracy mechanisms altogether, Australian law-makers should look to incorporate these mechanisms into the existing parliamentary committee system where appropriate. This would have the dual benefit of improving the quality and accuracy of information available to parliamentary committees and ameliorating some of the key concerns levelled at direct democracy mechanisms, particularly when applied to complex policy issues or minority rights.

#### *Parliamentary Public Engagement and the International Parliamentary Engagement Network*

The above findings and recommendations are reflected in the recent outcomes of a sustained international focus on improving the quality of parliamentary public engagement led by the International Parliamentary Engagement Network (IPEN)<sup>97</sup> which held an international Workshop on this topic on 26 March 2021. The Workshop commenced with an ‘Australian

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<sup>95</sup> As Kidrea explores, when handled with care, these types of direct democracy mechanisms can ‘confer legitimacy’ on a government’s plans to ‘overcome a longstanding parliamentary stalemate’. Paul Kidrea. ‘Constitutional and Regulatory Dimensions of Plebiscites in Australia’ (2016) 27 *Public Law Review* 290, 292. See also Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP, 2012)

<sup>96</sup> Lynn A Baker, ‘Preferences, Priorities and Plebiscites’ (2004) 13 *Journal of Contemporary Legal Issues* 317, 318

<sup>97</sup> IPEN (International Parliament Engagement Network) was created in 2020 to bring together academics, parliamentary officials and third sector representatives from all over the world, who work on public engagement and parliament. We currently have 219 members from over 30 countries. IPEN aims to share good practice, identify key challenges and ways to address these, promote the exchange of information between practitioners and academics and lead to the enhancement of practices. For further details see < <https://cde.leeds.ac.uk/other-activity/international-parliament-engagement-network/>> (accessed 21 April 2021).

hub’ which included input from experts around the region.<sup>98</sup> The hub began with an exploration of the ‘big picture’ topics, including the question of why public engagement is important to modern parliamentary democracies, who should be responsible for doing the engagement work and how the needs of different ‘publics’ might be met.

The hub also explored the different commitments and responsibilities of parliamentary staff when it comes to leading and facilitating public engagement. Officials from a range of Australian jurisdictions, including the Australian Senate and the Parliament of New South Wales, gave insights to the challenges faced by parliamentary staff and parliamentarians when developing engagement strategies and navigating relationships. Parliamentary staff emphasised the need to preserve the independence and impartiality of their professional support for parliamentary committees, noting that these characteristics set them apart from the role of committee secretariat staff in other jurisdictions, including the United Kingdom. Actively identifying new audiences for inquiries or experimenting with new social media technologies was considered by some parliamentary staff to challenge their independence or potentially raise questions as to their impartiality. However, many parliamentary staff shared a commitment to supporting or facilitating committee *Chairs or members* to develop and implement innovative engagement strategies and described a willingness to provide additional support to vulnerable members of the community seeking to engage with committee inquiries.

The Australian hub ended with discussions about ‘outside the box thinking’ to help engage those ‘publics’ previously underrepresented or ignored in public engagement strategies, such as young people and First Nations people in Australia.

The key findings from this discussion can be summarised as follows:

1. Improving parliamentary public engagement is not an option but a necessity for modern democracies like Australia. Australian parliamentarians should make this a key priority, particularly when it comes to our young people, our First Nations people and other vulnerable groups.
2. Deliberative theories and ideas should not be misunderstood as ‘asking everyone all the time’ but rather ensuring *quality* encounters, *time* for meaningful dialogues and

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<sup>98</sup> See e.g. Carolyn Hendriks, ANU; Gabrielle Appleby and Megan Davis, UNSW; Mark Evans Democracy 2025 Project Jo Fleer, Parliamentary Officer, House of Assembly, Parliament of South Australia and Dr Emma Banyer, Principal Research Officer, Australian Senate and Andres Lomp, Community Engagement Manager, Parliament of Victoria; Laura Sweeney, Assistant Director, Research, Australian Senate and Lauren Monaghan, Senior Council Officer, Digital Engagement, Parliament of New South Wales.

exchanges and *openness to changing positions*. This is a challenge for some highly politicised environments like parliaments, but there are reasons for hope.<sup>99</sup>

3. There is not one ‘public’ but many ‘publics’ and each public demands careful consideration when considering engagement strategies and methods. For example, First Nations peoples must have the opportunity not just to ‘be heard’ in *response* to parliamentary activity but to have an *active voice* in the way the Australian parliament works, how it engages with First Nations peoples, how it exercises legal and political sovereignty over First Nations peoples.<sup>100</sup>
4. Evaluating engagement strategies and looking for impact beyond the immediate ‘success’ or ‘failure’ of a particular technique or inquiry is critical to ensuring we accurately capture the resources required to do things better in the future, and to make the case for more investment in the right engagement activities.<sup>101</sup>
5. Within parliamentary committees there is often a sense of rigid constraints on processes and procedure (eg conventional ways to do things) and stepping outside of these constraints can attract criticisms and concerns for parliamentary staff about impartiality and independence. However, there is a pressing need to move beyond conventional modes of engagement to reach the public/s that have been ignored or excluded from these processes.<sup>102</sup> Developing separate teams of experts and clear strategies and toolkits can support parliamentary staff to develop appropriate strategies in these areas.

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<sup>99</sup> See e.g. Joint Standing Committee on the Commissioner for Children and Young People Paper *In their Own Voice*, Parliament of Western Australia (2020) available at [https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/DCCC5179771AE5064825862A002A2C78/\\$file/20201116+-+Discussion+Paper+-+In+their+own+voice+-+Final+-+with+signature+FOR+WEB.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/DCCC5179771AE5064825862A002A2C78/$file/20201116+-+Discussion+Paper+-+In+their+own+voice+-+Final+-+with+signature+FOR+WEB.pdf); Parliament of New South Wales, Parliament Unpacked Program, available at <https://www.parliament.nsw.gov.au/news/Pages/Parliament-Unpacked-Across-the-Aisles.aspx>; Emma Banyer, The Franking Credits Controversy: House of Representatives Committees, Public Engagement and the Role of the Parliamentary Service, *Australasian Parliamentary Review*, Winter/Spring 2020 Vol 35 No 1; Nick Vlahos ‘Prioritizing Opportunities to Enhance Civic Engagement’ *Medium*, (9 April 2019).

<sup>100</sup> See e.g. Gabrielle Appleby and E Synot ‘A First Nations Voice: Institutionalising Political Listening’, (2020) 48 *Federal Law Review*. 529 - 542, <http://dx.doi.org/10.1177/0067205X20955068>; Dani Larkin, ‘Membership Models for an Indigenous Voice: What does representation mean for First Nations?’ *Indigenous Constitutional Law Blog* (11 March 2021) available at <https://www.indigconlaw.org/home/membership-models-for-an-indigenous-voice-what-does-representation-mean-for-first-nations>.

<sup>101</sup> See e.g. Sarah Moulds *Committees of Influence* (2020, Springer) Chapter 10.

<sup>102</sup> See e.g. Leston Bandeira C, Bender D. 2013. How Deeply are Parliaments Engaging on Social Media?. *Information Polity*. 18(4), pp. 281-29; Prior A, Leston Bandeira Gilbert C. 2020. Parliamentary storytelling: a new concept in public engagement with parliaments. *The Journal of Legislative Studies*; Sarah Moulds, ‘As the first ‘remote’ sitting starts in Canberra, virtual parliaments should be the new norm, not a COVID bandaid,’ *The Conversation* 24 August 2020 <https://theconversation.com/as-the-first-remote-sitting-starts-in-canberra-virtual-parliaments-should-be-the-new-norm-not-a-covid-bandaid-144737>.

6. ‘Thinking outside the box’ is part of the solution: parliament should go *out to the people* instead of the people having to come into parliament.<sup>103</sup> Empowering different public/s to initiate their own forms of engagement – to set the agenda, define the terms of reference, identify the key players – may also help to overcome existing barriers to effective and diverse public engagement.

The Australian ‘hub’ of the Workshop was followed by a Europe hub, introduced by Cristina Leston-Bandeira (University of Leeds) and Elise Uberoi (UK House of Commons), the co-founders of IPEN. The Europe hub was supported by live scribing from Laura Evans of Nifty Fox Creative, who produced visual summaries of each of the three sessions in the hub, culminating in a graphic-illustrated international “Toolkit” for Parliamentary Public Engagement – summarised by the image below.

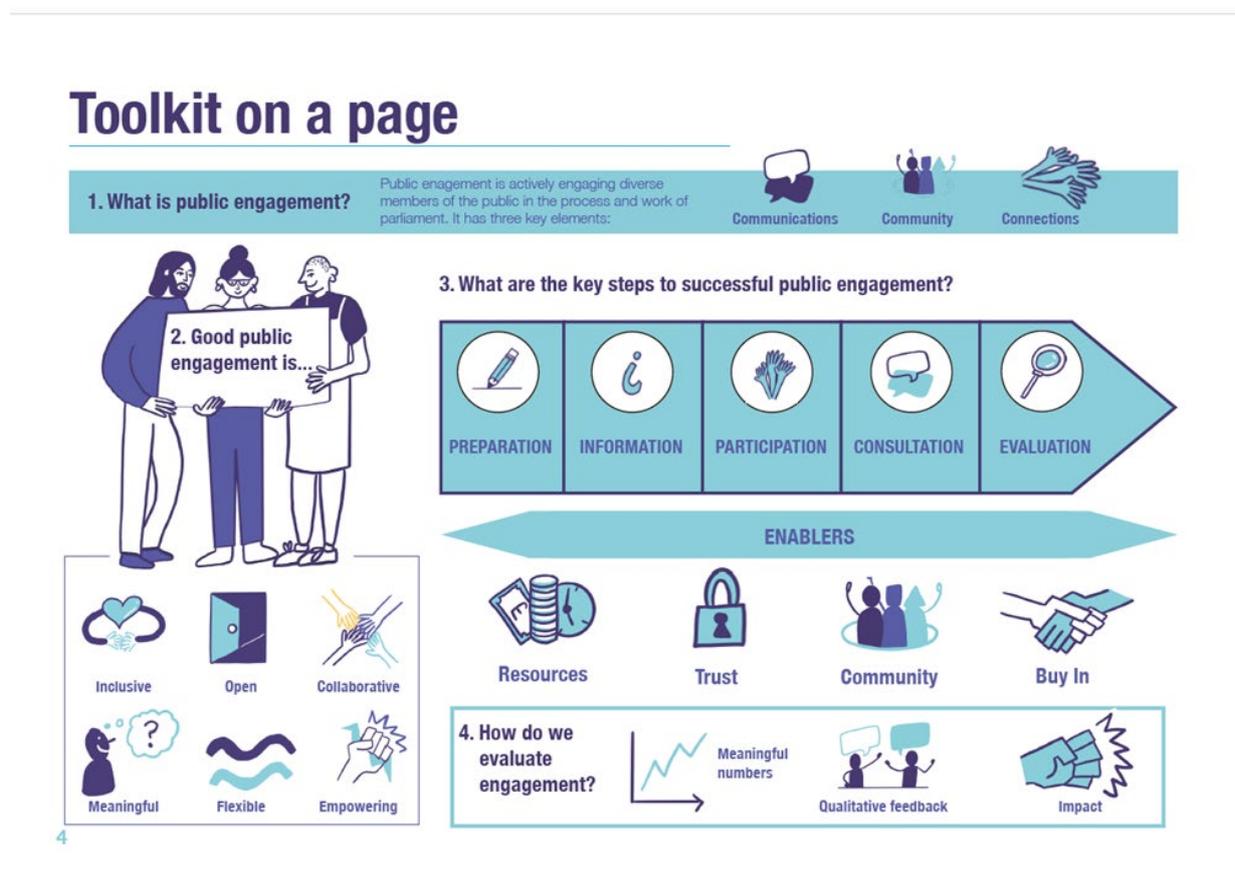


Image: Laura Evans, Nifty Fox Creative, April 2021

It is hoped that this international conversation on the value, role and methods of parliamentary public engagement will continue to inform and inspire practitioners within Australia and

<sup>103</sup> See e.g. CM Hendriks, S Ercan, and J Boswell *Mending Democracy: Democratic Repair in Disconnected Times*. (2020, Oxford University Press); C M Hendriks; *The Politics of Public Deliberation: Citizen engagement and interest advocacy* (2011, London: Palgrave).

support research collaborations across jurisdictions to improve the relationship between parliaments and the publics they represent. As this Paper shows, parliamentary committees do – and will continue- to play a central role in this most fundamental of democratic relationships.

### **Conclusion**

This Paper has described the importance of evaluating the impact of the parliamentary committee system on the quality of parliamentary law making in Australia, as well as highlighting the challenges associated with seeking to evaluate a dynamic institution such as a parliamentary committee. By adopting a tiered approach to identifying and evaluating ‘impact’, this research aims to address the challenges identified during previous studies of parliamentary committees, whilst at the same time providing new, more holistic insights into how different components of the committee system work together, and what is occurring ‘behind the scenes’ when it comes to legislative scrutiny at the federal level.

The case studies explored in my research demonstrate the evaluation framework in action, and uncover the contribution the parliamentary committee system has made to the content and process of counter-terrorism law making, and to the marriage equality reforms. The case studies reveal that it was parliamentary committees working together as a system that played an important role in securing the political commitment and identifying the legal options needed to advance the marriage equality reforms, and made a significant contribution to improving the rights compliance of Australia’s counter-terrorism regime. The case studies also suggest that that parliamentary committees may hold many advantages over other mechanisms for resolving contested issues of social policy and minority rights. This is because – at their best - parliamentary committees have the characteristics of constraint and reflection that are needed to enable deliberative decision-making and a nuanced consideration of competing rights and interests to take place. Parliamentary committees can also temper and moderate the findings of direct democracy mechanisms such as postal surveys and plebiscites by utilising the information gained from such exercises to test, challenge or question other evidence and considerations as part of a broader deliberative process. At their best, parliamentary committees can also provide a ‘safe space’ for parliamentarians to adjust or even shift their public position on a Bill or amendment. Of course, parliamentary committees are not always ‘at their best’ and can be captured by political grandstanding or dominated by personalities or agendas. When this occurs, the broader criticisms of our Australian parliamentary culture<sup>104</sup>

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<sup>104</sup> See e.g Rodney Smith, “Australian solitudes: citizens, parliamentary party politics, corruption agencies and political ethics’ (1999) 14(1) *Legislative Studies* 36-46. Rodney Smith ‘Visible and invisible cultures of

apply equally to parliamentary committees. However, these incidences should not displace the potential for parliamentary committees to provide meaningful, deliberative, innovative and participatory public forums with discernible rights-enhancing impacts on legislation and law-making.

For these reasons, the work of parliamentary committees holds important lessons for those interested in improving Australia's parliamentary model of rights protection, and for those interested in improving the quality of law-making at the federal level. It suggests that there may be some 'unsung heroes' in our current parliamentary landscape that have the potential to provide the foundations for innovative and new ways for rights issues and other contested areas of social policy to be explored and resolved in the future.

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Parliamentary ethics: the 'Sports Rorts' affair revisited', (1999) 34(1) *Australian Journal of Political Science* 47-62; Patrick Weller, 'Parliamentary democracy in Australia' (2004) 56(3) *Parliamentary Affairs* 630-645; Australian Human Rights Commission, *Independent Review into Commonwealth Parliamentary Workplaces* (5 March 2021) accessed at < <https://humanrights.gov.au/CPWReview> > (5 May 2021).