HUMAN RIGHTS FOR DEMOCRACIES: A PROVISIONAL ASSESSMENT OF THE AUSTRALIAN HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011

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Australia’s Human Rights Framework, adopted by the Commonwealth Government in 2010, together with the subsequent enactment of the Human Rights (Parliamentary Scrutiny) Act 2011 (HR(PS)A), constitutes a development of considerable significance with respect to the realisation of human rights objectives in Australia.1 It is also something of an outlier in terms of human rights acts against which we can compare and assess the human rights institutions in other jurisdictions. In this article we suggest that the first few years of the HR(PS)A’s operation indicate that there are grounds for optimism concerning its contribution as a human rights mechanism of a type which is suited to articulating and implementing human rights in democratic polities.

I INTRODUCTION

At first sight, the Australian version of what we call here a ‘democratic model’ for human rights institutionalisation is a relatively minor modification of what is commonly referred to as the ‘dialogue model’ as it exists in the UK.2 A plethora of divergent labels are used for the many different mechanisms that exist for articulating and implementing human rights. Thus the recently enacted provisions adopted at the federal level in Australia are sometimes called a ‘parliamentary model’ because they involve human rights based parliamentary scrutiny but no explicit human rights oriented responsibilities for courts (see Janet L. Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69(1) Modern Law Review 7, and George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2012) 34 (1) Statute Law Review 58). However the label ‘parliamentary’ is also given to the UK model, in which, in addition to parliamentary scrutiny, courts are empowered to make ‘declarations of incompatibility’ when they consider legislation to be incompatible with human rights, and are required to interpret legislation so that it is compatible with human rights, where this is possible. The label ‘parliamentary’ may be appropriate here since, on the UK model, Parliament is not required to amend legislation in the light of a court’s declaration of incompatibility, and so, legally, has the ‘final say’. However, to avoid ambiguity, we have chosen to refer here to Australia’s Human Rights Framework as establishing a ‘democratic model’, in contrast to both the strong form judicial review that includes the judicial power to invalidate legislation, as holds in the US, which we call the ‘juridical model’, and the weak form judicial review in which judicial review is confined to making ‘declarations of incompatibility’, that do not affect the legality of the legislation in question, as in the UK and New Zealand. See Mark Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-based Worries’ (2003) 38 Wake Forest Law Review 813; also Nicholas Barry and Tom Campbell, ‘Towards a Democratic Bill of Rights’ (2011) 46(1) Australian Journal of Political Science 71. For alternative labels, see Stephen Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 International Journal of Comparative Law 167.

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model involves what has been called a ‘weak form’ of human right-based judicial review of legislation in which courts draw attention to perceived incompatibilities between proposed or existing legislation and a particular human rights charter or convention, but do not have the power to invalidate legislation on this basis.3 Thereafter a dialogue is said to take place between courts and parliaments, which may, but need not, result in amendments being passed by the parliament in question.

The democratic model, as adopted in Australia, embodies terminology and mechanisms similar to those used in the dialogue model. Thus, both have ‘statements of compatibility’, which accompany draft legislation when it is presented to the Parliament, and both have a joint parliamentary committee to scrutinise legislation from a human rights perspective, and enter into ‘dialogue’ with the minister (or member) sponsoring a bill, as well as issue reports to the Parliament on the outcome of their scrutiny. There are, however, two crucial differences. First, the democratic model does not involve any form of human rights-based judicial review of legislation. Second, the democratic model does not mandate any human rights-related interpretive powers for courts.

The practical significance of these differences is, as yet, largely unclear. Meantime, different views on the merits of the HR(PS)A tend to reflect the prior assumptions of the commentators involved concerning the likely substantive outcomes of the different models, rather than their judgments as to the actual operation of the Act. Thus those who endorse the dialogue model contend that the HR(PS)A is a half-way house towards a ‘real’ human rights act, which involves some form of human rights-based judicial review, the substantive outcomes of which they consider more likely to meet with their approval.4 On the other hand, those opposed to anything approaching any sort of human rights act tend to see the HR(PS)A as inviting ‘judicial activism’ by giving human rights a place in judicial interpretive practice, with less desirable outcomes and blurring the functional divide between courts and parliaments.5 On this latter view, the HR(PS)A, despite the absence of human rights-based judicial review, is a move towards a type of constitutional democracy in which parliaments are to some extent subject to the supervision of courts in human rights matters, thereby setting up a human rights ‘juristocracy’, with illegitimate outcomes and ‘democratic deficits’.6

A third perspective, favoured by David Kinley7 and endorsed here, regards the HR(PS)A as an opportunity to strengthen political mechanisms for protecting and promoting human rights without compromising democratic practice. From this point of view, the HR(PS)A is seen as a distinctively democratic way of furthering the implementation of human rights. While the critics of this perspective contend that the HR(PS)A will turn out to be either a rubber stamp for executive policies, or a covert

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encouragement for judicial activists, its supporters hold that it is not intended to involve, and need not involve, a significant shift of political power from parliament to courts. Rather they see it as a progressive development which provides the right sort of opportunities for the executive and parliamentary branches of government to become better informed about, and more focussed on, the human rights issues which arise in the course of preparation and enactment of new legislation. This democratic perspective does not involve commentators intruding their own judgments as to the quality of the substantive outcomes. What is at stake is the democratic value of the process.

Adopting this third perspective, we explore how far the Parliamentary Joint Committee on Human Rights (PJCHR), established by the HR(PS)A, has taken advantage of this opportunity and how its operation might be further developed as an effective cross-party mechanism for protecting the human rights of vulnerable minorities and promoting the fundamental rights of all those within its domain, all within the parameters of democratic governance. Optimistically, we identify some positive factors that have emerged in the first few years of the HR(PS)A’s operation, and make some suggestion as to how it may be strengthened whilst remaining a democratic instrument for enhancing regard for human rights in Australia.

In developing this perspective we take what may be called a ‘political approach’ to human rights, according to which human rights are best articulated and implemented through the political protection and promotion of certain basic human interests, with the exclusion of court administered limitations on the substance of validly enacted laws.8 This is based on the conviction that human rights require specification and refinement through open and widespread political debate, in the executive drafting of legislation and in parliamentary decision-making processes, so that law and policy-making remains the work of elected governments, responsible to their citizens. On this political approach, courts are limited to the task of settling disputes as to the validity of laws in accordance with their sources, and applying valid laws to specific circumstances. In this way Australia’s Human Rights Framework can be seen as an enlightened and encouraging plan for the development of a human rights regime suited to democratic polities.

The practical difficulties encountered by the HR(PS)A are clear. These include pervasive political party control of the Parliament, divisive conflicts over the specific content of human rights often deriving from conflicting economic interests, and insufficient public information and involvement in the political process, as well as the lack of time and resources to carry out demanding parliamentary investigations, reports and decisions. Yet, if the role of the democratic model is to inform, guide and participate in the political process rather than to obstruct a government’s legislative proposals, then its current achievements become more apparent. These include strengthened decision-making frameworks within which to build a more vigilant and bipartisan approach to human rights, while generating better informed political debate with respect to the specific content and requirements of human rights in particular circumstances, thus bringing human rights considerations to bear in the formation of policy, the drafting of legislation, and parliamentary debate and decision-making.

Our current assessment is that the PJCHR, as constituted by the HR(PS)A, has promoted a measure of cross-party engagement with human rights in a way that manifests a degree of impartiality appropriate to resolving human rights issues, while contributing significantly to informed debate concerning the difficult moral choices

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facing a parliament when determining the meaning and weight to be given to specific and often competing human rights considerations.9

II BACKGROUND

The HR(PS)A was passed on 25 November 2011. It established the PJCHR to scrutinise bills, Acts, and legislative instruments, and report on any matter referred to it by the Attorney-General. The HR(PS)A also requires that bills and legislative instruments be accompanied by 'statements of compatibility' (SoC) detailing their conformity with human rights as defined in seven human rights treaties to which Australia is a party.10 The SoC requirement came into force on 4 January 2012, and the first PJCHR was formed in March 2012. It published its first report in August 2012.

This was the culmination of a process begun in December 2008 with the creation of the National Human Rights Consultation Committee, chaired by Father Frank Brennan. The Brennan Committee recognised and commended existing institutionalised human rights protections in Australia, such as the Australian Human Rights Commission, while noting that these protections are regrettably ad hoc.11 To remedy this, the Committee recommended including improving education in human rights, introducing human rights training for public servants, incorporating international human rights treaties into a human rights statute, and conducting human rights audits of all existing federal legislation. The recommendations involved empowering the federal courts to make ‘declarations of incompatibility’ when there is a perceived incompatibility between the content of legislation and legally defined human rights standards, which would trigger parliamentary reconsideration of the legislation, and requiring courts, if possible, to interpret legislation in such a way as to make it compatible with the prescribed set of human rights. This model, which is largely drawn from the UK Human Rights Act 1998, is similar to the dialogue model already adopted in the Australian Capital Territory, in 2004, and Victoria, in 2006.12

Elements of both the democratic and the dialogue model are present in the Brennan Committee’s report.13 Its two – sometimes tentative – key recommendations were that the Federal Government adopt a UK-style human rights act which would enable the High Court to make declarations of incompatibility with respect to legislation which they deem to be in conflict with Australia’s international human rights obligations or a statement of human rights enacted by the Australian parliament,14 and an interpretative provision ‘that requires federal legislation to be

13 See Edward Santow, ‘The Act that Dares not Speak its Name: the National Human Rights Consultation Report’s Parallel Roads to Human Rights Reform’ (2010) 33(1) UNSW Law Journal 8. The juridical model was deliberately excluded from the Committee’s terms of reference. See National Human Rights Consultation Committee, above n 11, 383. This follows a history of Australian reluctance to endorse a number of proposals to move in this direction. These include two referenda (1944 and 1988) and three legislative attempts (1973, 1981, and 1984).
14 National Human Rights Consultation Committee, above n 11, xxxvii, 373-8.
interpreted in a way that is compatible with the human rights expressed in the Act provided it is consistent with Parliament’s purpose in enacting the legislation’. These provisions appear to place the Brennan Committee’s primary recommendations firmly within the dialogue model.

However, as pointed out by Edward Santow, a careful reading of the National Human Rights Consultation Report reveals that, while consensual in its final recommendations, other more democratic alternatives were also commended for consideration. These elements are more in tune with the democratic model and could be adopted without involving new powers and duties for the courts. In the foreword to that report, Father Brennan himself notes that ‘our elected leaders could adopt many of the recommendations in this report without deciding to grant judges any additional power to scrutinise the actions of public servants or to interpret laws in a manner consistent with human rights.’

The Brennan Committee’s report was widely debated and received broad, but not overwhelming, support in the media. However, subsequently, the (then Labor) Government’s response in Australia’s Human Rights Framework included enhanced scrutiny of bills by the Parliament, but with no additional powers for courts. The Attorney-General, Robert McClelland, argued that the proposal for a UK style ‘Human Rights Act’, including judicial review, was ‘divisive’, and commended an apparently less ambitious package, including SoC, and a parliamentary joint committee to report to Parliament on its scrutiny of bills in the light of Australia’s seven human rights treaties incorporated in the Act’s commitments. All these features accord with the democratic model for human rights implementation.

While adopting this option may be seen as something of a climb down by a government that set up the National Human Rights Consultation Committee, and was certainly a disappointment for those in favour of a more juridical human rights system, there was a significant academic literature in favour of a proposal which fits well into Australia’s deeply rooted history of parliamentary scrutiny committees.

Thus, in 1998, Janet Hiebert suggested supplementing the Canadian model of Charter-based judicial review with Australian style parliamentary scrutiny, which she dubs ‘legislative review’. Hiebert justified her proposal by arguing that:

> If parliament became a place for discussing the justification for policies and their effects on protected rights, this important public record would, through media coverage and observations by interested individuals and groups, stimulate a broader

15 National Human Rights Consultation Committee, above n 11, 187.
17 The National Human Rights Consultation Committee (above, n 11, 302) makes several references to a submission by Tom Campbell and Nicholas Barry who argue for a democratic model on the basis that human rights are ‘best protected and promoted through a healthy democracy, a robust civil society and strong oversight mechanisms, rather than rights-based judicial review’.
18 Ibid vi.
19 See opinion pieces in March 2010, by Ian Lee and by Philip Lynch, both in the The Age on 1st March, Paddy Gourley in The Canberra Times on 2nd March, and Adam McBeth in The Australian, on 5th March.
public debate on the merits of policies that raise rights issues. This would put pressure on governments to explain, justify and, where warranted, revise policy decisions.21

About the same time, a more specifically Australian model for parliamentary human rights protection was formulated by David Kinley, whose proposal was to tie Australian political practice to its obligations under the Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) by making the executive ‘aware of the possible implications for the human rights it is obliged to protect.’22 This centred on what Kinley called ‘reformatory, rather than revolutionary’ changes to the existing parliamentary scrutiny processes, as conducted by the Standing Committee for Scrutiny of Bills and the Standing Committee on Regulations and Ordinances.23 As Kinley explains:

The rationale of the proposal stems not only from the pragmatic recognition of the apparent Bill of Rights impasse [of 1988], but, more importantly, from the philosophical - that is democratic - justification of placing the greatest responsibility for the legal protection of human rights and civil liberties upon the elected legislators rather than the appointed judiciary.24

Kinley favoured the pre-legislative influence on Parliament, rather than the post-facto, remedial nature of judicial determination and saw the potential for influence over parliamentarians ‘by way of electoral pressure in respect of unacceptable legislation, where the electorate is aware of such legislation and cognizant of its impact on human rights.’25

More recently, one of the authors of this paper, Tom Campbell, proposed a ‘democratic model’ which would ‘involve both a shift of power from government to Parliament and an opportunity to provide the basis for much wider public debate than current Parliamentary procedure facilitates.’ This model, he argued, ‘can be seen as part of a wider development to give more effective and less adversarial tasks to members of the parliament who are not government ministers, thus making the Parliamentary system more thoughtful and forward looking.’26

The central elements of this democratic model can be seen in the HR(PS)A which bypassed the Brennan Committee’s somewhat tentative suggestion of a statutory bill of rights involving weak form judicial review, in favour of a joint parliamentary scrutiny committee on human rights, with a membership drawn proportionately from party

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22 Kinley, above n 7, 158-84.
23 Ibid 180-4.
24 Ibid 159.
25 Ibid 160.
26 Tom Campbell, ‘Human Rights Strategies: An Australian Alternative’ in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds), Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia (Ashgate, 2006) 319, 335. Campbell suggests that such a parliamentary committee would have ‘legitimate recourse to a much wider, more ethical, corpus of literature that approaches the articulation of human rights as a moral rather than a legal matter’, including ‘philosophical, political, economic and social writings on human rights’ not to service judicial review of legislation or executive discretion, but ‘to provide the terms of reference for a variety of political mechanisms for agendizing, prioritizing, and developing a polity’s human rights commitments within the mainstream of democratic process’. These proposals are discussed in chapters 13 and 14 of the Brennan Committee’s report.
representation in both houses of Parliament, and charged with the task of scrutinising legislation for compatibility with the seven human rights treaties incorporated in the legislation, taking into account the proposer’s SoC and discussing issues arising with the relevant minister. This major modification of the dialogue model, as adopted in the HR(PS)A to supplement Australia’s existing human rights institutions, such as the advisory Australian Human Rights Commission, established a distinctive human rights regime with the stated intention of promoting and protecting human rights through democratic mechanisms compatible with democratic principles.

III COMPETING EXPECTATIONS AND COMMON CRITICISMS

Australia’s Human Rights Framework evoked considerable public comment. Much of this focused on the Government’s failure to adopt the recommendations of the Brennan Committee. Forceful adverse comments along these lines came from NGOs and university-based supporters of human rights judicial review. Thus, the choice of what we have called a democratic model was seen by the Human Rights Law Centre at the University of New South Wales, as:

deficient in many respects. In particular, and contrary to the recommendation of the Committee and other UN human rights mechanisms, it does not incorporate the ICCPR into domestic law, does not impose any legal obligation on public authorities to promote, protect, respect or fulfil human rights, and does not provide victims of human rights violations with access to any effective and enforceable judicial remedies.

On this view, the HR(PS)A is nothing more than ‘icing without a cake’, offering none of the essential ingredients of what these critics see as a genuine human rights act.

Many commentators gave qualified welcome to the Australia’s Human Rights Framework, tending to see the HR(PS)A as at best a relatively minor improvement, without having high expectations with respect to its impact. Yet, not all those opposed to a statutory bill of rights welcomed the government’s proposals. Thus, Bryan Horrigan suggested that ‘the passage of the [act] might yet be used by courts (or at least urged by parties in litigation) to develop and even recast relevant judge-made norms of statutory interpretation in line with international human rights jurisprudence.’ Others noted the potential for SoC to make ‘important impact on the

27 Membership of the committee is roughly proportionate to the party division in the Parliament. Following the Australian tradition of robust parliamentary committees, the membership is not confined to parliamentarians with specific qualities or expertise.


29 See Williams, above n 2, 92: ‘An entirely self-regulating model may be incapable of ameliorating these systemic weaknesses because it is equally vulnerable to the same dynamics.’ Also Edward Santow, above n 13, 8 at 33: ‘If the Framework represents the end of the road for human rights reform in Australia...the prospect of Australia receiving an effective and comprehensive human rights regime remains remote.’

30 Bryan Horrigan, ‘Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond’ (2012) 27(2) Australasian Parliamentary Review 4. Rosalind Dixon, writing in the early days of the PJCHR, noted that it is not clear on the face of the Act whether decisions of UN bodies will be resorted to in informing the PJCHR’s deliberations, a question which has been answered by the Committee in the affirmative. See Rosalind Dixon, ‘A New (Inter)national Human Rights Experiment for Australia’ (2012) 23 Public Law Review 75, 76.
process of interpretation’, because ‘in cases of ambiguity, a court will look to the historical record for context, and that context might include executive and legislative assessments of compatibility with the human rights.’ 31 They suggest that this will ‘impact on interpretations adopted by tribunals, …and the scope of executive decision-making pursuant to those provisions.’ 32 This, perhaps unintended, threat to Australia’s commitment to the authority of Parliament is to be found in many submissions to the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the bill. 33 Thus, James Allan drew attention to its potential for ‘outsourcing the interpretation of human rights to international bodies.’ 34

A diverse range of commentators expressed concern about the highly ambitious number of human rights involved in the seven human rights treaties identified in the HR(PS)A, if only because of the dubious feasibility of scrutinising legislation for possible violations of such a broad range of over a hundred rights. Following on from these criticisms, many submissions suggested a more carefully delimited range of rights, although others sought an open-ended commitment to human rights. Thus the Law Council of Australia suggested that the list of rights be expanded to include the Declaration on the Rights of Indigenous Peoples, 35 while others suggested that the range of international instruments listed in the Bill may have been curtailed by political considerations, such as limiting the potential for raising human rights issues surrounding migration matters. 36

Another criticism which cropped up repeatedly in the report of the Senate Legal and Constitutional Affairs Committee concerned the threatened bureaucratisation and legalism of the brief given to the PJCHR which could inhibit its political inputs and limit its contribution to public political discussion, with departmental administrators preparing the SoC and legal advisers doing the same for the PJCHR. 37 Further, Senator Brandis suggested that, in addition to forming a basis for legal challenge to administrative decisions, the PJCHR would become a ‘formulaic’ opportunity for the government to validate its legislative agenda. 38 This rubber stamp critique also features in Rosalind Dixon’s contention that there was a danger that ministers would outsource responsibility for preparation of SoC to their departments, thereby ‘[removing] deliberation over questions of human rights protection to a context that is far less public, political and participatory.’ 39

32 Ibid 17-18. See also Dan Meagher, ‘The common law principle of legality in the age of rights’ (2011) 35(2) Melbourne University Law Review 449, 466: This potential is reinforced by the ‘convergence of approach between the principle of legality and presumption of consistency [with international human rights norms], at least insofar as the judicial protection of human rights in concerned.’ However, Meagher notes that the ‘principle of legality’ when conceived of as a presumption that, in the absence of an explicit statement to that effect, legislation is to be understood as compatible with basic common law principles, is far from becoming an established principle of Australian law. However, it is clear there is conceptual space open to the development of this trend.
34 Ibid, 25 November 2010, 2 (Professor James Allan).
36 Ibid, 4 November 2010, 23 (Senator Hanson-Young).
37 Ibid, 25 November 2010, 2910, especially chapter 3 and more so in the Opposition Senators’ Dissenting Report, sec 1.19, 21 and 23.
38 Ibid, 4 November 2010, 13 (Senator Brandis)
39 Dixon, above n 30, 79.
Even supporters of the Bill expressed concerns over the projected efficacy of the scrutiny process without judicial review. These doubts often reflect Janet Hiebert’s view that the parliamentary model has at its heart an inherent conflict in empowering a parliament which is increasingly marginalised by party politics to protect rights by calling the executive government to account, since parliamentary control ‘can only be as effective as parliament is powerful’.

The increasing strength of party discipline is a little-disputed observation of Westminster models of government. This trend in Australia, which has far fewer members of parliament than the UK, is even more pronounced.

As indicated by George Williams and Lisa Burton, party loyalties tend to divide the PJCHR along partisan lines, a point made by many others, including parliamentarians.

The impact of party loyalty, along with the bureaucratisation and juridification of the process, together with the complexity and scope of the scrutiny of bills, are probably the strongest and certainly the most common objections that were expressed in relation to the expected effectiveness of the PJCHR. However, the validity of these criticisms has to be tested in the context of the prior and underlying assumptions of the contributors to the debate. Thus critics of the Human Rights (Parliamentary Scrutiny) Bill 2010 may be divided into those who favoured a more juridical human rights regime to guarantee some external control over elected governments in the interest of minorities and ill-advised majorities, on the one hand, and those who fear that the dialogue model will degenerate into de facto judicial review and therefore support a more exclusively democratic model, at the other extreme. Such viewpoints do not diverge primarily with respect to the content of the predicted outcomes of the various models, but represent prior assumptions about the normative legitimacy of allocating the right to define, balance and apply human rights within a polity. With these points in mind, we turn to an overview of the emerging practice of the PJCHR.

### IV THE EMERGING PRACTICE

The emerging practice of the PJCHR, mainly during its first two years (2012-13), are viewed here in relation to (1) the procedures established by the Committee to deal with its scrutiny of bills, (2) the development of its relationships with government departments in relation to statements of compatibility (SoC), (3) the Committee’s reports to Parliament and the parliamentary responses, and (4) the media coverage of its activities. This analysis focuses, not on the authors’ views regarding the content of the overall outcomes of the practice, but on the quality of its input to the democratic process with respect to human rights.

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41 The percentage of cabinet members as a proportion of all parliamentarians in Australia is roughly nine per cent. In the UK, it is 2.5 per cent. The proportion of high-level positions relative to the number of parliamentarians makes it increasingly difficult for smaller parliaments to effectively utilise the dialogue model of rights protection. See, eg, Scott Prasser, ‘Executive growth and the takeover of Australian parliaments’ (2012) 27(1) *Australian Parliamentary Review* 48.

42 Williams above n 2, 58, 80.

A Procedures

Under the HR(PS)A, the PJCHR is charged with examining the compatibility of bills and acts with the seven international human rights treaties cited in the Act. The Committee has acknowledged that the prospect of scrutinising compatibility with human rights across this range is ‘challenging’. During its first two years the PJCHR considered 289 bills or acts, and 1924 legislative instruments. Of these, the PJCHR took the view that 137 bills or acts and 85 legislative instruments required them to seek further information from departments presenting the bills in order adequately to assess their human rights impact. During this period 18 reports were made to the Parliament.

One complicating factor in tackling this vast body of legislation is the variety and number of international human rights treaties involved: in the first two years, 116 of the rights in question were related to the International Covenant of Civil and Political Rights (ICCPR), 12 to the Covenant on Economic Social and Cultural Rights (ICESCR), 11 to the Convention on the Rights of Persons with Disabilities (CRPD), 4 to the Convention on the Rights of the Child (CRC), 4 to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and 1 to the Convention Against Torture (CAT). There were no references to the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The PJCHR identified seven rights from both the ICCPR and ICESCR which appeared regularly, namely: the rights to privacy; to a fair trial; to social security; to work and in work; to freedom of expression; to health; and to non-discrimination. Based on our analysis of those bills into which the Committee chose to enquire further, 91% related to the ICCPR and the ICESCR. Of those concerns relating to the ICCPR, 56% were regarding the right to privacy (article 17) and the right to equality before the law (article 14).

Further, though the HR(PS)A requires scrutiny only for compatibility of bills with the human rights treaties, the PJCHR is not precluded from looking further afield, and, in the three year period gave attention to other treaties to inform its understanding of the seven core treaties. With respect to the material used in its scrutinies, the then Chair, Harry Jenkins, stated that the General Comments of UN Committees were considered by the PJCHR to be ‘very important’, suggesting that the expectations of Bryan Horrigan and others, that the parliamentary model could serve to internationalise Australia’s human rights interpretation, may prove correct. Further, when considering the meaning of the terms of those human rights treaties, and in keeping with David Kinley’s expectations of a human rights scrutiny committee, in addition to drawing on General Comments, the PJCHR takes into account reports of UN Special Rapporteurs, and judgments of foreign courts, including the European Court of Human Rights.

Moreover, the PJCHR’s powers and responsibilities include the scrutiny not only of bills but also of existing acts, legislative instruments, and matters relating to human

46 In 2014 250 bills and 1717 legislative instruments were reviewed and 17 Reports were submitted to Parliament.
48 Kinley, above n 7, 158, 181.
The first power is by far the most regularly exercised, and, together with the examination of SoC, is arguably its most important function. The last has not yet been exercised. The sheer volume of work involved is illustrated by the delivery of eleven reports totalling 1577 pages in the first six months of 2013, up from seven reports totalling 487 pages in 2012. Understandably, the PJCHR sometimes released its report after the scrutinised legislation has passed through the Parliament.

In these circumstances, the PJCHR had to become selective over the matters on which they seek further information and undertake detailed analysis. Early on the Committee adopted a triage process, to select for further analysis, which involved, first, whether the measures are aimed at achieving a legitimate objective; second, whether there is a rational connection between the measures and that objective; and, third, whether the measures are proportionate to that objective.

This three stage approach carries its own complexities. The PJCHR notes the lack of precision in the standards that are to be applied and the flexibility involved in considering each bill according to its specific features, a difficult and time-consuming process, particularly in relation to proportionality, and where conflicting rights are involved. In practice, given the range of rights which may be infringed, and given that few of these are identified as non-derogable rights, the PJCHR’s analysis tends to focus on the general compatibility of a statutory provision with a protected right, since a narrowly legal test is neither feasible nor desirable, given the essentially moral nature of the issues involved.

As discussed in the next section, the PJCHR has developed extensive dialogue with ministers over selected legislation and delegated legislation it considers problematic. The Committee regularly questions the rational connection between the evidence given and the proportionality of the measures to the objective, and more than once (with the cooperation of the relevant minister) received sensitive information on a confidential basis to allow it to effectively carry out its scrutiny tasks. All this is evident from the detailed correspondence laid out in the PJCHR’s reports to Parliament. And so, while the triage process does provide a basis for selecting and analysing the bills to focus on, the complexity of the issues involved generates further pressures on the volume of scrutiny work that is required.

In the first two years there were relatively few examinations of acts but the PJCHR conducted extensive reviews of three contentious packages of legislative schemes. These were migration legislation relating to regional processing of asylum seekers, the Northern Territory intervention, and ‘Newstart’ allowance schemes. The latter two were conducted at the request of non-government organisations, the former was instigated at the Committee’s own initiative. All the inquiries included public hearings. The PJCHR published detailed findings on all three packages of legislation.

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50 The PJCHR, unlike its UK counterpart, is not expressly granted the power to conduct own-motion thematic inquiries.
after coordinating with other parliamentary committees. Each inquiry was significantly delayed.56

The picture is, therefore, one of considerable activity, with difficult choices having to be taken regarding the competing demands made with limited time and resources, and considerable concern as to the extent and complexity of the tasks it has been set. However, the Committee has been able to draw on the standard practices of Australia’s parliamentary scrutiny committees and the experience of the UK Joint Committee on Human Rights, suitably adapted to the more political orientation of the HR(PS)A.57 Consequently, it has been able to make rapid progress in establishing the basis for effective scrutiny procedures.

B Statements of Compatibility

Crucial to the human rights scrutiny conducted by the PJCHR is the quality of the SoC provided by the minister of the department involved. SoC were introduced under the UK Human Rights Act 1998 to encourage ‘a culture of rights’ by creating an incentive for departments to consider the impact of legislation upon human rights early in the policy formation process,58 and encouraging the Parliament to take collective responsibility for the human rights implications of the legislation it enacts. SoC are expected to be stand-alone documents assessing (rather than merely stating) compatibility with human rights. They are intended to be ‘an expression of opinion by the relevant minister or sponsor of the bill’ and are the initiating document for the dialogue between the executive and the parliament on relevant human rights issues.59 The PJCHR takes SoC as the starting point of its analysis of bills and delegated legislation.

To date, no legislation has been introduced with a SoC stating that the bill is incompatible with human rights. This is not surprising as few treaty-based human rights are absolute and the normal issue, where a human right is thought to be involved, is to determine whether this limitation is morally justified, which will naturally be the opinion of the minister involved.

Initially SoC were seen to be too brief and usually unhelpful. However, the PJCHR, from early on, was consistent in following-up short and formulaic SoC and calling for further elaboration to defend, or temper, the claims made in the original statement. In this connection, the PJCHR developed two Practice Notes detailing its practices and expectations of others involved, to assist the drafting of legislation.60 These are based on the Explanatory Memorandum to the HR(PS)A which requires that ‘a statement of compatibility must include an assessment of whether the bill or legislative instrument is compatible with human rights as defined in the act; and contain a level of analysis that is proportionate to the impact of the proposed legislation on human rights.’61 In addition the Attorney-General’s Department issued

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56 The migration legislation report took ten months, the Newstart inquiry final report took nine months, and the Northern Territory intervention inquiry took twelve months.
58 Hiebert, above n 44, 30; Horrigan, above n 32, 8.
guide-lines to assist in drafting legislation in conjunction with the PJCHR’s practices and expectation, and the Australian Government Solicitor published a briefing note detailing the act’s operation. The complex of drafting tools now available for departmental guidance suggests that the PJCHR’s recommendations have had some impact on the early stages of developing legislation. Similarly, while the responsiveness of ministers to the PCHR’s recommendations have been varied, the Committee has noted that adherence to the requirements enunciated in its first Practice Note improved greatly by mid-2013, largely in response to an increasingly vocal PJCHR. Additionally, the Office of Parliamentary Counsel has adapted its client guide to include reference to the role of Counsel in the justificatory process.

Overall, while adherence to SoC requirements remains inconsistent and ‘pro forma’, there is evidence that departments and ministers were giving increasingly explicit attention to human rights, both in the drafting of bills and the construction of SoC. Especially noteworthy is the frequency and persistence with which the PJCHR follows up its inquiries with a sustained exchange of views which can lead to modifications and undertakings agreed with the minister in question. This is not only vital to the Committee’s own analysis but is one of the main sources of pressure for the development of pre-legislative human rights integration into the practice of departments.

In line with the role of the PJCHR, its objective has not been to reach a definitive opinion as to the compatibility of proposed legislation with human rights but to draw attention to instances where this is a conclusion to which Parliament might come after considering the analysis provided by the PJCHR in the light of their judgment as to the adequacy of the minister’s responses. Thus, in relation to the Migration package, a consensus statement in its 8th Report of 2013, the PJCHR noted ‘a significant risk’ of incompatibility, leaving it to the Parliament to make up its mind on the matter.

C Parliament

In the first two years of its operation the PJCHR (2012 and 2013) made 18 lengthy reports to Parliament relating to bills and delegated legislation. In that time Hansard shows that 15 references to the PJCHR were made in Parliament, only one of which, put forward by Senator Brandis, was sceptical about the value of the reports. The other 14 references drew upon the Committee reports, recommendations, or the member’s experience on the committee, to assert the importance of a human rights consideration in debating bills. In 2014 a further 30 references to the work of the PJCHR are cited in Hansard, showing an exponential increase, albeit from a low base. The Committee’s work has also informed the work of other parliamentary committee inquiries.

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63 Orr, Ebbeck, Briese, and Yuile, above n 59.
Over this period, Hansard searches show considerable engagement with human rights issues from both sides of the chamber. Whether this can be marked down as a direct result of the PJCHR’s work or whether such issues were raised regardless is hard to discern. Certainly there are many references to human rights made in Parliament but most of these relate to abuses in foreign countries, and the particular concerns of Representatives for the families of constituents. Nonetheless, there was a steady flow of Hansard references to the PJCHR, its work, and the members own contributions to the debate. Other members of the Parliament occasionally refer to SoC, while one MP, Janelle Saffin, notes that statements are ‘one of the first things that I think a lot of members now read’. 68

The relative paucity of explicit references to the work and reports of the PJCHR may reflect the shortage of time for the scrutiny process and the publication of its reports.69 The practical effect of this is that very regularly the Committee, after reserving its decision on compatibility of a bill due to a lack of information, receives the clarifying information it requested from the relevant minister after the passage of the bill. Yet, despite these limitations, without extensive discussion in Parliament, the PJCHR has successfully obtained some amendments to bills prior to passage,70 as well as undertakings to amend legislation,71 and amendments to legislative instruments after tabling.72 For instance, the National Disability Insurance Scheme (NDIS) and the Sex Discrimination Act 1984 were amended at the recommendation of the PJCHR, despite the clear parliamentary majority on the former enjoyed by the government.73

Further, a suite of Bills introducing measures to control drug use amongst Customs officers were introduced in 2012 and 2013. On these, the Committee extracted a commitment from the Minister for Home Affairs in 2013 to amend regulations made under the Acts to provide strict limitations on the use of personal information obtained under the regulations.74 Some regulations were amended by the minister after the Committee threatened to move a motion to disallow the regulations. Other noteworthy intra-governmental exchanges and ministerial concessions relating to fair trials and conflict of rights occurred in relation to the Law Enforcement Integrity Legislation Amendment Bill 2012, and the Customs (Drug and Alcohol Testing) Regulations 2013.75

69 PJCHR, Sixth Report of 2013 (2013) 180. The Committee has made special note of the limited time for consideration of Bills, which could amount to the use of Parliament as a rubber-stamp for government legislation, as was suggested by Senator Brandis.
72 PJCHR, Tenth Report of 2013 (2013) 45
73 Ibid 45-51.
76 The extensive dialogue between the PJCHR and the Minister Clare demonstrate that the democratic model can, despite the lack of legal sanction, create pressures on the executive to remain accountable to Parliament on human rights issues, and in consequence effect legislative change. Both of these were achieved in the case of the Law Enforcement legislation. The thoroughness of Clare’s engagement can be seen in the PJCHR’s reports, which show extensive deliberation and careful consideration, while maintaining a principled position with respect to the purpose of the legislation. This illustrates an increasing willingness on the part of government departments and ministers to engage in dialogue with the Committee. The ability to examine the operation of existing legislation and its interaction with the bill under consideration, and the opportunity for the Minister to justify drafting choices, demonstrate the scope provided by the HR(PS)A for significant balancing of human rights and policy issues prior to enactment,
All this may be seen as amounting to minor changes of focus in parliamentary debates with little impact with respect to amending bills. However, this has to be seen in the context of the roles of scrutiny committees in communicating with government departments that are presenting bills, improving the quantity and quality of the information available to Parliament, and ensuring that certain, often not immediately apparent, considerations are available to the government and the public. The crucial factor is whether human rights issues have been explicitly addressed in the preparation and adoption of legislation, and this relates as much to the preparation of bills within departments as to the rather limited recourse to parliamentary amendments.  

D Media

Given that a major objective of Australia’s Human Rights Framework was to better inform and focus public discussion as well as parliamentary debate on human rights, media coverage of the contribution of the HR(PS)A has been disappointing. While the coverage of the Brennan Committee’s report and the launch of Australia’s Human Rights Framework was considerable, there has not been a great deal of sustained media attention given to the work of the PJCHR and relatively lukewarm editorial comment on its initiation and impact. Thus The Australian, in stark contrast to its coverage of the bill of rights debate in 2008-2009, published very few critiques of the democratic model and the only major coverage of the introduction of the HR(PS)A and its passage and implementation was in The Australian on the day after the act came into force. Since then, mainstream media outlets in Australia (and New Zealand) have utilised the PJCHR’s work to frame debate around contentious issues, such as the treatment of asylum seekers, and the NDIS, often without directly reporting the PJCHR’s activities. The PJCHR’s thematic reports into legislative schemes under the section 7(b) power to examine acts for compatibility with human rights did garner strong media attention, particularly the reports relating to the Newstart allowance. The Australian and The Sydney Morning Herald both covered the PJCHR’s consideration of the

Although measurement of the PJCHR’s effect is made difficult without explicit Hansard references to the committee’s work.

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Newstart scheme in detail.80 In general, there was stronger media coverage of thematic, rather than of regular scrutiny functions.

The rather limited occurrence of media attention may be explained in part by the modus operandi of scrutiny committees, which characteristically seek a consensus position that all members of the committees can go along with, and work, often behind the scenes, to elicit and test the rationale for adopting new legislation against criteria that can attract cross-party agreement, like the clear articulation of the efficacy and necessity of proposed laws. Their aim – not always attained – is to be balanced and consensual, utilising no pressures beyond those that can be derived from reasoned discussion and relevant information. In contrast, a court’s declaration of incompatibility (as in the dialogue model) is seen, institutionally, as more combative and therefore more newsworthy than the exchange of view between committees, departments and legislatures. Welcome as bipartisan cooperation may be in contrast to parliamentary dog fights, committee work in general does not attract the same level of media attention as parliamentary debate, and when it does this is often achieved by reporting the PJCHR findings as criticisms when they are in fact questions, and as condemnations when they are only concerns.

However, it should be noted that the PJCHR holds public hearings when thematic legislative packages are considered, and these are covered by many media outlets. And, despite the inconsistent media coverage of the PJCHR’s routine scrutiny work, there is no doubt that the media has been instrumental in highlighting some of the human rights concerns identified by the Committee, and thus contributing to the development of the human rights culture which renders Australian society and politics more sensitive and sympathetic to human rights considerations. Nonetheless, while it may be that the most effective pressures in favour of human rights compliance are often better achieved through measured political debate and more consensual commitment to human rights objects, it should be noted that the opportunities provided by the HR(PS)A have not been well utilised to date.81 This is a challenging factor for Australia’s Human Rights Framework, which is intended to encourage and facilitate human rights education and achieve more extensive and better informed public discussion of human rights issues.

V CURRENT ISSUES AND POSSIBLE IMPROVEMENTS

The observations emerging from this account of the operation of the HR(PS)A, suggest that the PJCHR, in the context of Australia’s Human Rights Framework, has

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made its presence felt and established itself as an appropriate human rights mechanism of considerable potential within a parliamentary democracy. This raises hope that the democratic model can bring human rights into a positive working relationship with other aspects of democratic politics in a way that sustains what may be regarded as a human right to democracy.82 From this perspective we can envisage the emergence of new ways of bringing human rights more into the processes of government and attribute some these improvements to the operation of the PJCHR and its associated institutions. However, before drawing some tentative conclusions along these lines it may be helpful to mention some of the significant impediments to such an outcome and how some of them might be overcome.

One such impediment is that some legislative items escape parliamentary scrutiny due to the inadvertence of drafters or idiosyncrasies of the Australian system. The PJCHR itself identified bills which amend principal acts as a potential loophole which could lead to abuse of human rights. The SoC accompanying these bills are often confined to the impact of the amendment, without considering the impact on human rights of the primary legislation, and the extent to which the amending bill may further the human rights implications of the principal act. Further, the use of delegated legislation in modern government to flesh out detail and give changeable content to the original, sometimes skeletal, legislation obstructs comprehensive human rights assessment of principal acts.83 One response to this is the PJCHR’s willingness to utilise the breadth of its powers of review to include acts in force.84 The PJCHR is empowered under section 7(a) to examine legislative instruments for compatibility with human rights. This extends beyond disallowable legislative instruments (the vast bulk of delegated legislation) to all legislative instruments.85 However only disallowable legislative instruments are required by the HR(PS)A to be introduced with SoC. It is unclear whether this is an oversight or a deliberate design. The volume of legislative instruments tabled in a financial year peaked at 3,004 in 2008-9. About half of the law of the Commonwealth by volume consists of delegated legislation rather than acts of Parliament.86

The PJCHR drew attention to a large number of legislative instruments that represent serious threats to human rights, either individually, or as part of a wider scheme of legislation. Although most delegated legislation does not deal with substantive human rights matters, there are discrete pockets of policy which regularly raise serious human rights concerns, such as extradition regulations, designating classes of people for immigration purposes, or determining carbon pricing schemes. The use of delegated legislation has increased over the past 30 years such that eight times as many legislative instruments were tabled over the 2006-2011 sitting years than were bills.87 Though often not dealing with substantive matters, legislative instruments can constitute real threats to human rights.

These and other obstacles that impede the PJCHR might be met by giving that committee the power to disallow legislative instruments, which would provide a strong incentive to parliamentarians to take action. It has also been suggested that the PJCHR

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84 Commonwealth, Parliamentary Debates, House of Representatives, 13 March 2013, 1849-52 (Harry Jenkins).
86 Odger’s Australian Senate Practice (Department of the Senate, 2012, 13th ed) 415-16.
have the power to delay infringing legislation in order to affect alteration to bills presented to either house, which may be effective in similar situations.\footnote{See, eg, Barry, above n 2, 71, 80.} Importantly, this suggestion falls short of recommending a veto power, as this would run counter to the democratic objection to judicial review that failure to object may give false reassurance as to its human rights compatibility.\footnote{Ibid 78.} However, the power to delay legislation could be legitimised on the basis that it allows for proper deliberation, thus focusing on process, not outcome.

Other impediments are less amenable to such solutions. Thus, David Kinley notes that ‘a substantial proportion of legislative competence in areas where it can be supposed human rights concerns might be raised lies with the States exclusively, or concomitantly with the Commonwealth.’\footnote{Kinley, above n 7, 158, 168.} A range of matters that have the scope to limit human rights lie beyond the Commonwealth’s legislative competence. Then there is the added complexity of uniform schemes of legislation agreed to by the Commonwealth executive with various other State governments which are introduced into the Parliaments with a certain air of fait accompli.\footnote{Odger’s Australian Senate Practice (Department of the Senate, 2012, 13\textsuperscript{th} ed) 437.} Uniform schemes of legislation may not be regarded as desirable in complex federal systems of government,\footnote{Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, Scrutiny of National Schemes of Legislation: Position Paper by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia (1996), available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/natschem/index.htm> 7-8 [2.3-2.7].} but, insofar as they are, this is a significant and perhaps ineradicable impediment, and one which has been raised constructively by the PJCHR both in its reports and in the Chair’s tabling statements.\footnote{PJCHR, Third Report of 2013, 31-4; Commonwealth, Parliamentary Debates, House of Representatives, 13 March 213, 1849-52 (Harry Jenkins).}

Similar problems arise in relation to the implementation of treaties and other international agreements. Matters dealing with foreign affairs and intergovernmental agreements, such as the Trans-Pacific Partnership, often represent a threat to the effective exercise of the Committee’s scrutiny function, as the agreements to which the bills or legislative instruments refer are finalised as a result of executive consultation.\footnote{PJCHR, Seventh Report of 2012 (2012) 11-14. A high profile example of this was reported on the first day of the Act’s operation, when then-Attorney-General Nicola Roxon tabled the ‘Malaysia Solution’ shortly before the HR(PS)A came into effect. Roxon attempted to justify this evasion of scrutiny by referring to the comprehensive bilateral negotiation process culminating in the international agreement.}

Comprehensiveness was a hallmark of the PJCHR’s first twelve months of operation. In a party-dominated Parliament, legislative time-frames can be extremely tight, creating a heavy workload and jeopardising thorough scrutiny of bills. Yet, while institutional pressures, such as the anticipation of PJCHR review, are important in creating incentives for the consideration of human rights by the executive early in the legislative-formation process, it does not necessarily follow that all bills must be scrutinised in order to bring this about. Philip Lynch has recently prescribed features essential to the PJCHR achieving ‘best practice’, one of which is that it should screen all bills, report on all substantive problems, and be swift and timely.\footnote{Philip Lynch, ‘Australia’s Human Rights Framework: Can there be Action without Accountability?’ in Paula Gerber and Melissa Castan (eds), Contemporary Perspectives on Human Rights Law in Australia (Lawbook Co, 2013) 17, 25.} Whatever the merits of comprehensive scrutiny it may use resources beyond what is required to
maintain general compliance with human rights.96 The comprehensive approach does ‘[keep] the government on its toes’,97 but thorough and principled scrutiny which prioritises contentious government bills that are likely to gain media attention, could be more effective, and might free up some of the PJCHR’s resources to focus on more holistic reviews of existing legislation.98

The problem of comprehensiveness has a bearing on the issue of which rights should feature in the HR(PS)A. The PJCHR’s strong focus on civil and political rights is perhaps unexpected.99 However, while there is considerable contestation over the type of rights to be given special protection, the Brennan Committee found that ‘[t]here is strong support for the notion that Australia should protect and promote all the rights contained in the international human rights treaties to which it is a party.’100 Indeed one of the alleged benefits of Australia’s Human Rights Framework is that it is better suited than courts to take on board social and economic issues. This is an important factor in favour of the democratic model.

VI CONCLUSION

The implications of such data as is available concerning the first two or three years of the HR(PS)A can be used to present a seemingly plausible case that human rights would be better protected if there were an external (e.g. judicial) check to keep Parliament in line, especially with respect to those human rights standards which seek to protect those vulnerable minorities who are typically neglected by majoritarian governments. Scrutiny committees, legislative drafters and human rights commissions, it is often argued, do not have the political capacity to control democratic governments, which are fixated on electoral outcomes. Giving courts more of a voice in such matters on the lines of the dialogue model, especially in a jurisdiction that is emerging from a common law tradition for the protection of individual liberties, seems an obvious way to go.

Our response to this line of argument is to point to the difficult moral choices that arise in the interpretation and articulation of human rights, a process which involves reconciling conflicting human rights with each other, and working out how far to prioritise their implementation over other factors. It is suggested that such choices raise political questions, the answers to which are most appropriately determined through the democratic process.

This important constitutional debate is not the direct focus of this article, which concentrates instead on the performance and potential of the democratic model of human rights implementation adopted in Australia. Our assessment of the achievements and drawbacks of the HR(PS)A from a democratic point of view is intended to draw attention to the human rights potential of alternatives to the more

97 Ibid 62 [11.5(ii)].
98 This is in keeping with the suggestions arising from UK report of Murray Hunt, Hayley Hooper and Paul Yowell, ‘Parliament and Human Rights: Redressing the democratic deficit’ (AHRC Public Policy Series No. 5, 2012) 22.
100 Brennan Committee, above n 11, 96.
juridical models for human rights implementation. Here, we do not speculate directly on which model will produce what we personally regard as the best substantive human rights outcomes, in part because it is a matter of reasonable disagreement as to what such best outcomes would be. Instead we have made a provisional evaluation of the HR(PS)A practice in the light of more procedural criteria relating to the PJCHR’s contribution to promoting human rights through the democratic process.

From this viewpoint, the first parliamentary term of the operation of the HR(PS)A, particularly the PJCHR, has been a qualified success. With very limited resources and the pressures arising from the timing and quantity of parliamentary business, a great deal has been done to establish well designed procedures for dealing with a heavy workload in a productive and effective manner. The PJCHR has built up a reasonable degree of cross-party cooperation without greatly inhibiting the expression of its consensual concerns and the persistence of its intra-governmental enquiries. Our account signals some ways in which it could continue to develop its performance, not only keeping within but actually celebrating its democratic boundaries, which requires respecting the opinions as well as the interests of others. That process, we suggest, should be directed towards providing an environment in which the human right to democratic governance is an integral part of policy-making, of legislative drafting and of parliamentary decision-making.

From our analysis of the operation of the first three years of the HR(PS)A we can see that it is capable of generating morally appropriate pressures and bringing them to bear on government in at least two ways. Firstly, if it can do so by making governments more attentive to human rights considerations in policy formation and legislative drafting, and secondly by communicating relevant and compelling human rights related ideas and information to Parliament and the public. This encourages democratically justified pressure on governments to take human rights to heart. In such a scenario the relevant ministers are caught in a pincer movement arising from some pressures arising within departments imbued with a growing culture of rights, and other pressures arising from a PJCHR expressing basic moral convictions in ways which seek to transcend party political divisions, thereby institutionalising benign pressures on ministers from both departmental and parliamentary sources.101

In this context, we have suggested that there are a number of improvements which should be considered. One is that, while there has been a significant move towards a more comprehensive and less ad hoc approach to human rights scrutiny, it is clearly important to combine this with a triage mechanism which enables the PJCHR to give more attention to controversial alleged human rights violations, as well as to anticipated threats to human rights as they arise. For this to be effective, ways must be found to commence pre-legislative scrutiny at the earliest feasible stage to enable the PJCHR to perform its analysis and provide reports on relevant human rights concerns in good time.

Another issue is how to deal with federal legislation and foreign treaty arrangements which are currently outside the PJCHR’s scope. Consideration should also be given to amending the HR(PS)A to enable the PJCHR to require that legislation be delayed to give the Committee time to prepare its reports, and to encourage greater parliamentary scrutiny. Also, there are strong grounds for building on the Committee’s efforts to engage in public consultations, especially in the case of packages of legislation on important themes, such as asylum seekers and security innovations.

101 This notion of a pincer is drawn from some findings made about the operation of the UK JCHR and legislative scrutiny committees from Australian jurisdictions. Murray Hunt credits the SoC requirement with being ‘an effective catalyst for greater parliamentary engagement’ (Murray Hunt, ‘The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?’ (2010) 6 European Human Rights Law Review 601, 608).
Another important task is to moderate the risk of ‘human rights legalism’ arising from outsourcing responsibility for preparation of SoC to departmental advisers, thereby ‘[removing] deliberation over questions of human rights protection to a context that is far less public, less political and less participatory.’\(^{102}\) While avoiding media attention is not always negative for the proper functioning of the HR(PS)A, it should be an aspiration of all parliamentarians to adopt the discussion of human rights as part of their mainstream duties as political representatives.

The worth and effectiveness of such developments in the operation of the HR(PS)A should not be assessed primarily in terms of last minute legislative amendments, or the number of times the work of the PJCHR is referred to in Hansard, or reported in the press. Nor, however, can they be tested simply by whether or not commentators agree with the substance of the eventual outcome. There is no non-partisan viewpoint from which there can be objective determination of the precise content of the human rights that ought to be implemented in a particular place at a particular time. Nor is there an entirely unprejudiced perspective from which we can deduce the ‘correct’ view as to when and how far particular human rights should be limited when they conflict with other human rights or are impractical in certain circumstances.

On this basis, our interim assessment of the operation of the HR(PS)A is that it has improved Australia’s human rights institutional performance and shown that the act provides significant opportunities for political leaders, parliamentary members, political parties and their public supporters to contribute effectively to the enhancement of Australia’s democratic human rights framework.

\(^{102}\) Dixon, above n 30, 79.