THE LEGAL RHETORIC OF SAFETY AND SECURITY: IMPROVING NATIONAL SECURITY LAW PROCESS, ENACTMENT AND CONTENT BY MODERATING ITS EXECUTIVE AND LEGISLATIVE INFLUENCE

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The legal rhetoric of safety and security has become a touchstone in continuous Australian national security legislative enactment and reform. In this article, the political origins of safety and security are identified with Prime Ministerial and other ministerial statements, consistently framing national security legislative measures around a physical security aspect. This rhetoric and resultant legislative practice inadequately connects with or reinforces the practices of Australian democracy. It has produced a distorting effect over national security laws. The article looks at three different, but related, illustrative examples reflecting this narrow safety and security ascendancy. It canvasses contemporary reasons – legislative, technological and organisational-bureaucratic, demonstrating a pressing need for reform of national security legislative enactment and review, particularly with increasing securitisation of the Australian polity. It proposes broadening legislative review foundations and ameliorating methodological deficiencies, by prioritising reforms for the lead reviewer, the PJCIS and its connections with other forms of review.

I INTRODUCTION

The phrase safety and security, or being safe and secure, has become an Australian political touchstone in continuous national security legislative reform and review. Safety and security has prominently emerged in political language, policy and legislative debate. Laws claim to advance safety and security as a first priority of government.[1] Affording safety and security is linked to realising individual and

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[1] This claim is repeated (with some variation of words) in the media releases of successive Coalition Attorney Generals Ruddock, Brandis KC, Porter and Cash, referred to under subsequent Parts II A 'The origins of safety and security themed communications: the Howard government' and II B 'The Prime Ministerial National Security Statements and other ministerial security statements'.

societal aspirations.[2] Its rhetorical applications and consequences within national security legislative agendas deserve critical appraisal, constituting an important contemporary study.[3]

Articulations of safety and security in national security lawmaking have focused consistently, indeed almost exclusively, on legislative and policy measures around a *physical sec*urity aspect. This represents a failure to envision and connect with broader institutional and conceptual dimensions of security underpinning liberal democratic values. The comprehensive character of democratic, participatory features of representative government have been accordingly challenged. This has occurred against stark and substantiated threat assessments comprising terrorism, and more recently, cyber intrusions, foreign interference and espionage.[4]

A narrow, distorted conception of safety and security significantly threatens liberal democratic values, inadequately integrates with international human rights law, potentially producing transformative consequences for Australian democracy. Politicians engaging a crowded national security legislative and review agenda, invoking safety and security rhetoric, provide additional complications. An erosion of confidence is risked in legislative and executive branch motives, identifying retail or transactional politics for political advantage. If such characteristics are perceived in place of sound policy development, confidence in Australian representative government institutions, practices and actors will likely be diminished.

This rhetorical impact of safety and security produces a distorting influence over national security laws. By default, the desirability of, and broader characteristics of better democratic law making processes in enacting national security laws, are

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[2] For example, increasing economic prosperity: see Peter Dutton, 'A safer and more secure Australia' (Minister for Home Affairs Media Release, 2 April 2019), 1.
[3] For contemporary studies of related but different rhetorical phrases in national security legislative agendas, see the II C 'The attractive political utility of safety and security rhetoric'.
[4] See 'Director-General's Annual Threat Assessment' 24 February 2020 (Mike Burgess, Director General of Security Address, Ben Chifley Building, Canberra); Australian Security Intelligence Organisation *ASIO Annual Report 2018-19*, 1-7 'Director General's Review' and Chapter 3, "Australia's Security Environment and Outlook', 17-29.

then highlighted. Such law making processes need closer alignment with and be intended to reinforce the practices and institutions of liberal democratic representative government. In the national security sphere, signature characteristics would more strongly integrate international human rights principles in the drafting of laws with greater calibration of procedural and substantive safeguards.

Enacting such laws should be freed from the default safety and security rhetorical assumption as being necessarily beneficial and effective. It would further mean that the practices associated with that rhetoric, such as the urgency principle and uncritical bipartisanship, are viewed more sceptically and over time, recede. This would create a stronger deliberative, contested focus, with more engaged legislative review processes consistently producing substantive amendments routinely adopted by government. Consistent with processes less dominated by the Executive, legislated linkages would be made to other interlocking national security accountability mechanisms. This would further reduce Executive dominance and legislative discretions in national security matters, simultaneously enhancing the effectiveness of those other accountability mechanisms.

In Part II, the article identifies the origins of safety and security rhetoric with Howard Coalition government Attorney General Ruddock, whose communications became a key driver in shaping national security legislative processes for that government and its successors. It canvasses successive Prime Ministerial national security statements and related ministerial safety and security rhetoric as a captivating device framing context in advancing national security legislative and policy agendas. The article then highlights several features of the attractive political utility of safety and security rhetoric.

The adoption, articulation, configuration and prioritisation of the theme of safety and security by the Australian governance parties provides an important reference point *in assessing the enactment process, as well as the selected content,* for national security laws. This core issue links and expounds important present and

future reform processes and resultant legislation. It helps explain an unnecessarily narrow protective focus insufficiently integrated with the institutions and practices of liberal representative democracy. Safety and security rhetorical theming has routinely formed an overarching political justification for sustained and far-reaching national security legislative reforms, involving the Australian polity's incremental securitisation. The article accordingly charts and analyses *three selected examples* – in Part III, Part IV and Part V - confirming the ascendancy and influence of safety and security, in different ways, in Australian national security legislative discourse.

In Part III, a comparison and contrast is first made of the dissonances between the significantly broader content and meaning of *International Covenant of Civil and Political Rights* (ICCPR) relevant to safety and security, against emergent Australianised rights approaches in national security legislative transactions. Brief analysis of two *ICCPR* rights most directly engaging safety and security issues – Article 6 and Article 9 – supports this discussion.

National security legislation consistently framed and advanced under the theme of safety and security warrants scrutiny in the context of these ICCPR security related articles, as fully articulated by UN processes. This is because of previous Australian government efforts invoking international human rights instruments to justify legislation, based on a politically claimed right to safety and security, or of human security. Examination of ICCPR rights contextual and interpretive materials confirms that safety and security considerations are more broadly conceived than individual or collective physical security. A significant disjuncture exists between the political applications of safety and security in legislative formation, as against conventional multi-factorial considerations in the security obligations of selected ICCPR rights. This positioning of the interpretative application of international human rights obligations is tracked in subsequent Labor and Coalition governments, whilst both acting differently, ultimately

ensures that national security legislative development is persistently framed by safety and security principles.

Secondly, in Part IV, this background informs a succinct outline of recent and relevant operative principles and methodologies by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Parliamentary Joint Committee on Human Rights (PJCHR) in engaging national security legislative review. This discussion demonstrates the disconnected manner in which human rights concepts are utilised in reviews, demonstrated by the passage of 2018 and 2019 pieces of legislation around espionage, foreign interference and then around foreign influence, and de-encryption, assistance and access.

The influence of safety and security rhetoric emerges differentially in these legislative reviews and enactments. Factors in the PJCIS and PJCHR reviews, in committee-selected and regulated methodology, and in Government hierarchically prioritising PJCIS reviews and recommendations, confirm the predominance of a physical conception of safety and security. The thematic umbrella of safety and security for legislative enactment prolonged the review process, producing significant unresolved human rights compliance issues.

Thirdly, in Part V, the article looks at the argument of executive discretion, as a *default form of rights protection,* identifying difficulties with that claim as a moderating influence as being unrealistic and counter-intuitive. Safety and security rhetoric afforded a laxity in different legislative review steps and practices, sometimes producing circumstances falsely favouring the attractiveness of executive discretion, to ameliorate less than optimal legislation.

In Part VI, an examination of a confluence of other contemporary matters reinforces the appraisal of the influence of safety and security and the need for reform. It forecasts future national security developments and implications – legislative, technological and organisational-bureaucratic. Significant, sustained and transformative national security reforms within various policy, organisational

and legislative areas, will likely propel a further securitisation of the Australian polity, with far reaching consequences.

The article concludes in Part VII, by drawing together principles arrived at in the preceding analysis of safety and security rhetoric. Pragmatic reforms to the lynchpin PJCIS review processes influencing legislation and a follow up process for outstanding responses to INSLM reviews are *briefly advocated.*[5] Such measures are intended to broaden review bases and ameliorate present cultural and methodological practices around national security legislative review driven by safety and security rhetoric. They await further study.

II CONTINUITY AND COMMONALITY OF PRIME MINISTERIAL AND OTHER MINISTERIAL ARTICULATIONS OF SAFETY AND SECURITY

The Coalition and Labor share safety and security articulations, reflecting that contestation of this powerful catchphrase is politically problematic.[6] Differences between Coalition and Labor have been more of emphasis and frequency, than of fundamental conceptual disagreement. Prime Ministers and senior Ministers have cultivated community expectations and institutional protections around safety and security rhetoric as a priority of governance.[7]

Prime Ministerial and other ministerial particulars of safety and security articulation provide insight into its evolution as an organising principle for national security legislative initiatives. The rhetoric distils and justifies exceptional measures in simple, easily communicable terms. The strong political

[5] Brief conclusions are made, given the word constraints of this article.
[6] Bipartisanship may operate as a constraining influence in national security matters: see Greg Carne, 'Reviewing the Reviewer: The Role Of the Parliamentary Joint Committee On Intelligence and Security – Constructing or Constricting Terrorism Law Review?' (2017) 43 *Monash University Law Review* 334, 345-346.
[7] It has also migrated rhetorically to other areas of exceptional, paradigm changing legislative and policy responses: for example, legal policy and responses to the Covid 19 pandemic, national bushfire emergencies during 2019-2020, institutional child abuse and LGBTI marriage equality rights, indicating the varied political capture and utility of safety and security rhetoric.

capture and application of the term is therefore unsurprising. Prime Ministerial and ministerial language around safety and security has afforded a context and narrative in many national security matters.[8]

A *The Origins of Safety and Security Themed Rhetoric : the Howard Government*

Safety and security emerged as a consistent driver of government policy commencing in the Howard years, initially around terrorism,[9] later expanding and redefining national security to incorporate priorities such as encryption, espionage and foreign interference. The prominent, repetitive use of the words safety and security is identifiable with Attorney General Ruddock's tenure.[10] This represented a strategic political shift from the previous Attorney General Hon Daryl Williams, strongly leveraging political circumstances aligning with the Coalition's perceived national security strengths. The words, or words approximating safety and security,[11] appear in numerous Attorney General Ruddock media releases and speeches.[12] The strategy involved repeating safety and

[8] In relation to the many tranches of national security legislation introduced by Coalition governments since the September 2001 terrorism incidents. George Brandis, 'National Security Legislation' (Attorney General Media Release 12 October 2015 and George Brandis 'New Counter-Terrorism Legislation' (Attorney General Media Release 12 November 2015)

[9] Chris Wallace, 'Cabinet papers 2001: how 'securitisation' became a mindset to dominate Australian politics for a generation' *The Conversation* 1 January 2022; Chris Wallace, 'The 2001 Cabinet papers in context' (National Archives of Australia January 2022), esp 1 – 2 'The Tampa crisis, September 11 terrorist attacks and troops to Afghanistan,' identifying the phenomenon as 'securitisation': '…a decisive turn towards securitisation in political discourse and public policy occurred. Securitisation in a political context refers to the systematic transformation of regular public policy matters into security issues, with unusual measures justified as necessary to the survival of the state and the safety of its citizens. 2001 is the year when Australia pivoted to this new securitised mindset, partly driven by events but to a significant extent by political choice'.

[10] Hon Philip Ruddock was Commonwealth Attorney General from 7 October 2003 to 3 December 2007.

[11] Variations include safety by itself, and safety and prosperity.

[12] Representative Attorney General media releases include Philip Ruddock, 'British Counter-Terrorism Options Examined' (Attorney General Media Release 26 February 2004); Philip Ruddock, 'Government Continues To Deliver On Measures To Keep Australia and Australians Safe and Secure' (Attorney General Media Release 10 May 2005); Philip Ruddock, 'New National Security Measures' (Attorney General Media Release 10 May 2005); Philip Ruddock, 'Hosting a Safe and Secure APEC 2007' (Attorney General Media Release 9 May 2006); Representative speeches include Philip Ruddock, 'National Security Australia 2007 Conference', Sydney, 26 February 2007, 1; Philip Ruddock, 'Homeland Security Research Centre', Sydney, 2

security catch phrases, alongside increases in the tempo and frequency of introduced terrorism laws.[13] It sought to convert remotely perceived international threats into immediate, concrete domestic threats. Fusing the international with the domestic was the precursor for further conceptual expansions of national security safety and security rhetoric. The persistence and incidence of language locating safety and security within a national security political lexicon and discourse prevails to the present.

A somewhat tokenistic moderation emerged alongside these iterations of safety and security, in the simultaneous need to protect democratic institutions and processes, a consideration which might restrain excessive government responses. Illustrative statements are:

> We must also respond in a way that does not cost us the very freedoms, liberties and lifestyle that we are seeking to protect.[14]

August 2007, 2; Philip Ruddock, 'Opening Address Day Two Security 2007 Conference', Sydney, 11 July 2007, 1; Philip Ruddock,
'A safe and secure Australia: An Update on counter-terrorism' Sydney, 21 January 2006; Philip Ruddock, 'Security in Government Conference, opening and welcome Address,' Canberra, 17 March 2004, 5; Philip Ruddock, 'A New Framework: Counter Terrorism And The Rule of Law' (Address to the Sydney Institute 20 April 2004), 6; Philip Ruddock, '2004 National Security Australia Forum, Opening Address' 23 March 2004; Philip Ruddock, 'The Commonwealth Response to September 11: The Rule of Law and National Security' (National Forum, Gilbert and Tobin Centre of Public Law, 10 November 2003).

[13] This comprises the volume of terrorism laws and exhortations for urgent passage: for volume, see Anthony Reilly 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; George Williams, 'The Legal Legacy Of the 'War On Terror' (2014) 12 *Macquarie Law Journal* 1; George Williams and Kieran Hardy, Two Decades of Australian Counter Terrorism Laws' (2022) *Melbourne University Law Review* (forthcoming); Nicola McGarrity and Jessie Blackbourn, 'Australia has enacted 82 anti-terrorism laws since 2001. But tough laws alone can't eliminate terrorism' *The Conversation* 30 September 2019; 'National Security review recommends complete overhaul of electronic surveillance – but will it work?' *The Conversation* 4 December 2020; for urgency, see Andrew Lynch, 'Legislating With Urgency – The Enactment Of the Anti-Terrorism Act [No 1] 2015' (2006) 30 *Melbourne University Law Review* 747; Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj et al (eds) *Global anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed 2012), 151; Greg Carne 'Hasten Slowly: Urgency, Discretion and Review – A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 *Deakin Law Review* 49.

[14] 'Security in Government Conference' (n 12), 1

> We have been conscious to respond in a way that respects our free and open lifestyle.[15]
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> I spoke about the dangers terrorism poses to our democratic institutions, our economy and our unique and easygoing way of life …in the process of protecting our economic infrastructure we must be careful not to overreact or adopt extreme policies which may be counter-productive [16]

> In a democratic system we strive to make laws that are acceptable to the community. It follows that we have to work hard to ensure those laws are sufficient to deal with an ever-changing terrorist threat.[17]

> Our response to the increased terror threat must not be narrowly focused on better security…we must also work to support and reinforce the other pillars on which our community life is based – tolerance, diversity and prosperity.[18]

> We have been careful not to betray the essence of who we are as Australians and as a nation.[19]
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> We as a government do have a duty to protect our citizens using all means available within a western liberal democracy while at the same time ensuring that we don't ignore the principles which underpin our culture, our civilisation.[20]

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[15] Philip Ruddock, '2004 Homeland Security Conference' (Opening Address, 24 August 2004), 1
[16] Philip Ruddock, '2005 National Security Forum' (Opening Address, 21 February 2005), 1
[17] Philip Ruddock, 'Mercury 05 Terrorist Detention Discussion Exercise' (Opening address 23 September 2005), 3, 10.
[18] 'A safe and secure Australia: An update on counter-terrorism', (n 12), 1
[19] 'National Security Australia 2007 Conference' (n 12), 2
[20] 'Homeland Security Research Centre' (n 12), 2

Providing effective, substantive restraint is inherently problematic in a calculated safety and security narrative, particularly where relevant international human rights law articles are re-interpreted consistent with Executive interests, whilst restraining international law principles of lawfulness, reasonableness, necessity and proportionality are marginalised. The re-interpretive approach of Attorney General Ruddock in relation to international law obligations in the context of safety and security rhetoric,[21] set a distinctive trajectory for and framing how terrorism laws, and more broadly, national security laws, are reviewed.

A *The Prime Ministerial National Security Statements and Other Ministerial Security Statements*

Principles cited in regular Prime Ministerial national security statements have consolidated the influence of safety and security rhetoric in shaping laws, highlighting overarching government emphases in a way not necessarily discernible in individual media releases or ministerial comments. The Prime Ministerial National Security statements clearly frame and signal a larger agenda. Accordingly, they warrant close attention, pointing to larger themes in national security law development.

The introduction of the Prime Ministerial national security statement from 2008 signalled the increased importance since 2001 of national security issues, formalising a safety and security rhetorical platform. These national security statements periodically express how individual governments prioritise different aspects of national security policy and legislation, displaying a bipartisan adoption of safety and security language. Importantly, national security statements provide *an overarching set of principles framing policy and legislative enactment repeatedly expressing safety and security anchor points*. They transcend simple

[21] This aspect will be considered subsequently under III A 'Re-shaping the influence and interpretation of international law human rights obligations around safety and security – Attorney General Ruddock and the Howard Government'.

ministerial media releases and other communications as dealing with instant national security matters. These anchor points repeatedly emphasise, frame and justify how and why a government is responding to an enlarging portfolio of national security issues. For the Coalition, media releases by relevant Attorneys-General (and later jointly with the Home Affairs minister) particularised and focused upon individual examples of the overarching safety and security rhetoric. With different Coalition governments and different ministers, the theme is politically resilient, with the language of safety and security evolving (with relatively minor changes).

Prime Minister Kevin Rudd[22] made the first Australian National Security Statement.[23] It stated that the government's first priority is the nation's security.[24] Within a new approach framework, 'Australia will therefore need to be adept at adjusting our policies and capabilities as appropriate in order to maintain our enduring objective of a secure Australia and a strong Australia.' [25]

Two other principles underpinned the Rudd statement. First was the expanding portfolio of national security subject matters, which subsequently enabled its intrusiveness and policy dominance. 'Classical distinctions between foreign and domestic, national and international, internal and external have become blurred…Australia needs a new concept of national security capable of embracing and responding to the more complex and interconnecting operating environment that we will face for the future'.[26]

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[22] Hon Kevin Rudd was Prime Minister of Australia 3 December 2007 to 24 June 2010 and 27 June 2013 to 18 September 2013.
[23] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549-12568 (Kevin Rudd)
[24] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (Kevin Rudd)
[25] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12561 (Kevin Rudd)
[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12550 (Kevin Rudd). The Rudd Government significantly increased topics considered as of national security relevance: Department of Prime Minister and Cabinet *National Security Information Environment Roadmap: 2020 Vision* (2010), 1, 4 and *First National Security Statement to the Parliament* (2008), 5-6.

The second principle was that an enlarged national security concept needed integration with existing democratic institutions and practices. This different from subsequent national security statements:

> Our national security interests must also be pursued in an accountable way which meets the government's responsibility to protect Australia, its people and its interests while preserving our civil liberties and the rule of law. This balance represents a continuing challenge for all modern democracies seeking to prepare for the complex national security challenges of the future. It is a balance that must remain a conscious part of the national security policy process. We must not allow any incremental erosion of our fundamental freedoms.'[27]

This language of balance, though problematic,[28] did recognise the larger objective of preserving democratic governance as linked to national security measures.

Prime Minister Gillard[29] outlined her government's National Security Strategy on 23 January 2013, in 'Strong and Secure: A Strategy for Australia's National Security'.[30] A government obligation of achieving safety appeared in foundational terms. Life, safety and security is what matters most, and national security 'is and

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[27] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12551-12552 (Kevin Rudd). This more substantively establishes important qualifying principles moderating safety and security rhetoric- see the earlier discussion under the heading II A 'The origins of safety and security themed communications: the Howard Government'.

[28] See Christopher Michaelsen,'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1; Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Matthew (eds) *Fresh Perspectives on the War on Terror* (ANU E-Press 2008); Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) *Public Law Review* 76.

[29] Hon Julia Gillard was Prime Minister of Australia 24 June 2010 to 27 June 2013.

[30] Department of Prime Minister and Cabinet, *Strong and Secure A Strategy for Australia's National Security* 23 January 2013; Julia Gillard, 'Australia's National Security Beyond the 9/11 Decade', launching *Strong and Secure: A Strategy for Australia's National Security*' (Speech delivered at the National Security College, Australian National University, Canberra, 23 January 2013)

will always be the most basic expression of our sovereignty',[31] 'the most fundamental task of government'.[32] Safety and security was conceptualised locally and internationally - 'We will ensure that Australia remains secure at home and strong in the world. We will keep our nation safe.'[33] This language focuses on the primal, existential aspects of Australian government. It does not connect to protecting democratic qualities of that governance in pursuing national security measures, instead focusing on preservative instincts.

Prime Minister Abbott[34] made blunter safety and security statements, reflecting a greater spatial separation from an integrated, complementary approach for democratic governance and national security. The changing external threat situation – newly emergent terrorism methods, the rise of ISIS, the declaration of an Islamic Caliphate in Syria and Iraq and the significant number of Australian foreign fighters known or suspected of departing Australia to join ISIS, provided a dramatic background amenable to hyperventilated government safety and security language, linking external threats to increased domestic risks. [35]

In his first National Security Statement,[36] the first duty of government was the protection of people, with government to do *whatever possible* to keep people safe.[37] This demanded a policy shift. The government's disposition was to grant security agencies more resources and powers, doing whatever possible to keep

[31] Gillard, 'Speech at National Security College', Ibid, 1.
[32] Ibid.
[33] Ibid, 6.
[34] Hon Tony Abbott was Prime Minister of Australia from 18 September 2013 to 15 September 2015.
[35] See Carne, (n 6), 343; Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights* (LawBook Company, 2020), 47; Shawn Rajanayagam, 'Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act' in Debeljak and Grenfell (eds) Ibid, 654-655.
[36] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957-9960 (Tony Abbott).
[37] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957 (Tony Abbott) (emphasis added)

people safe.[38] Secondly, that our security agencies will 'have all the resources and authority that they reasonably need',[39] linked subsequently to the outlining of several national security legislative reforms.[40] This represented a strong security tilt, heightening and generalising the sense of community risk.

The brief interval between the two Prime Minister Abbott National Security Statements highlighted a strong political emphasis for security related issues. In his second National Security Statement,[41] Prime Minister Abbott repeatedly emphasised the keeping the country, individuals and families safe, even sacrificing prosecutorial success.[42] The equation trading individual rights for community safety was repeated, as 'for too long we have given those who might be a threat to our country the benefit of the doubt'.[43] The 2014 and 2015 national security statements evince a strongest security prioritisation, an attenuated conception of safety and security, whilst devaluing and disconnecting the democratic qualitative character of institutions and practices.

More precisely, the linking of new external terrorism related developments to internal threats – most specifically in the travel of Australians to assist ISIS with indoctrination risks and completed terrorism training and combat experience upon return to Australia – provided a Coalition framework of renewal of Howard era practice of urgent law making,[44] to revisit its claimed superior national security credentials.

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[38] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9959 (Tony Abbott)
[39] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9959 (Tony Abbott)
[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9959 (Tony Abbott)
[41] 23 February 2015
[42] National Security Statement 23 February 2015 (Tony Abbott): see 'Prime Minister Tony Abbott's Full National Security Statement', *Sydney Morning Herald* (Sydney) 23 February 2015
[43] National Security Statement, Ibid.
[44] See references to urgent law making (n 13).

Prime Minister Turnbull[45] delivered two National Security statements. Both stressed the theme of safety and security. He first observed '… my highest duty, and that of my government, is to keep Australians safe…Public safety is the highest priority, and a major part of this is to be as open and transparent with Australians as possible about both the threat and what everyone can do to help'.[46] A residual broader perspective appeared in some asserted values: 'We will defeat these terrorists. And the strongest weapons we bring to this battle are ourselves, our values and our way of life. Our unity mocks their attempts to divide us. Our freedom under law mocks their cruel tyranny. Our mutual respect mocks their bitter intolerance'.[47]

A joint Prime Ministerial Media Release titled 'A Strong and Secure Australia'[48] subsequently appeared.[49] In announcing significant national security reforms under the new umbrella Office of National Intelligence (ONI), the 'reforms driven by serious threats to Australia's security and the Government's determination to keep Australians safe and secure.'[50] This Turnbull Government thus signalled a shift to a harder edged, more security orientated perspective.

The Turnbull government's 2017 Foreign Policy White Paper[51] provides an additional example. Chapter Five, titled 'Keeping Australians safe, secure and free', mentions terrorism, cyber threats, people smuggling, border protection and

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[45] Malcolm Turnbull was Prime Minister of Australia from 15 September 2015 to 24 August 2018

[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13485 – First Turnbull Government National Security Statement (Malcolm Turnbull)

[47] Commonwealth *Parliamentary Debates*, House of Representatives, 24 November 2015, 13487 (Malcolm Turnbull). The observations appear in the closing remarks.

[48] Malcolm Turnbull, George Brandis, Peter Dutton and Michael Keenan, ' A Strong and Secure Australia' (Joint Media Release Prime Minister, Attorney General and Leader of the Government in Senate, Minister for Immigration and Border Protection, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism 18 July 2017).

[49] 'A Strong and Secure Australia' Ibid formed the Turnbull Government's Second National Security Statement.

[50] 'A Strong and Secure Australia' Ibid

[51] Australian Government 2017 Foreign Policy White Paper *Opportunity Security Strength* (Canberra, 2017)

attempted interference in in the independence and sovereignty of Australian decision making.[52] It observes:

> Ensuring the safety and security of Australians is our most fundamental responsibility and highest priority. National security is the foundation on which our freedoms have been built and maintained. The Government's reforms to Australia's domestic security and national intelligence arrangements reflect this commitment'.[53]

An expanded threat range re-prioritised national security responses.[54] The Turnbull government shift coincided with the prelude to the 2019 Federal election, and ongoing Liberal Party tensions over climate change and marriage equality. The robust safety and security language was engaged for electoral advantage and unifying Liberal and Coalition factions.

Persistent safety and security language in the Abbott and Turnbull governments with slight individualised ministerial language changes was facilitated by the continuity of tenure of Attorney General Brandis from 2013 to 2017, followed briefly by Attorney General Porter in the Turnbull administration's final eight months.[55] Over 20 Attorney General Brandis media releases during this time

[52] Ibid, 69-76.
[53] Ibid, 69.
[54] Ibid, 69-76.
[55] Following a Liberal Party room vote, Hon Scott Morrison replaced Hon Malcolm Turnbull as Prime Minister on 24 August 2018.

articulated safety and security related language.[56] Attorney General Porter invoked similar media release language,[57] confirming its political utility.

Internal Liberal party stability in the Turnbull administration proved elusive. On 24 August 2018, Scott Morrison replaced Malcolm Turnbull as Prime Minister. In his first National Security Statement,[58] Prime Minister Morrison re-purposed the language of safety and security through nationalistic protection and strength:

> To protect what we already have as Australians, and to do everything we can to ensure that we are stronger as Australians…Keeping Australians safe…protecting Australians from the threat of terrorism, keeping our

[56] Various phrases reflecting safety and security rhetoric emerged in these media releases. Examples include Tony Abbott and George Brandis, 'National terrorism public alert level raised to high' (Prime Minister and Attorney General media release 12 September 2014): 'first priority of Government is to ensure the safety and security of its citizens'; George Brandis, 'National Security Legislation Amendment Bill (No 1) 2014 (Attorney General Media Release 1 October 2014): 'protect Australia and Australians'; George Brandis, 'Parliament passes Foreign Fighters Bill' (Attorney General Media Release 30 October 2014): 'keep Australians safe'; George Brandis, 'Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Attorney General Media Release 30 October 2014): 'tools they need to keep Australians safe', 'do everything it can to keep Australians safe'; George Brandis, 'New laws targeting foreign fighters come into effect' (Attorney General Media release 10 January 2015): 'The Australian Government is doing everything it possibly can to keep Australians safe', 'Its paramount obligation is to keep Australians safe'; George Brandis, 'PJCIS Report into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Attorney General Media Release 27 February 2015): 'support the security and safety of the Australian public'; George Brandis, 'Data Retention Bill passed by Parliament' (Attorney General Media Release 26 March 2015) : 'resources and powers they need to keep our community safe'; George Brandis, 'New National Terrorism Threat Advisory System' (Attorney General Media release 26 November 2015): 'the Government has acted to ensure people have the information they need to protect themselves, their friends and communities'; George Brandis, 'COAG to strengthen national security legislation'(Attorney General Media Release 1 April 2016): 'The highest priority of Government is to keep Australia safe'; George Brandis, 'Meeting of Attorneys-General on post sentence preventative detention' (Attorney General Media Release 5 August 2016): 'highest priority of Commonwealth, State and Territory Governments is to ensure safety of the community'; George Brandis, 'Two bills to bolster the fight against terrorism' (Attorney General Media release 15 September 2016): 'keep our community safe'.

[57] Christian Porter, 'Attorney-General welcomes Committee Report on Espionage and Foreign Interference Bill' (Attorney General Media release 7 June 2018) ; Christian Porter, 'Parliamentary Committee Report on Foreign Influence Transparency Scheme' (Attorney General Media release 25 June 2018); Christian Porter, 'Counter-terrorism powers and offences extended' (Attorney General Media Release 16 August 2018)

[58] Prime Minister Scott Morrison, 'Address to the Sydney Institute' (Sydney Institute, 15 December 2018).

> borders strong…Even stronger, that's what I want Australia to be. And to protect Australia from the things that would make us weaker…weaker borders, weaker protections for our national security…' [59]

This safety and security language reflected the Prime Minister's prior ministerial experience as Minister for Immigration and Border Protection,[60] including the conduct of Operation Sovereign Borders.[61] The 2018 National Security Statement played to a recent history of Coalition national security credentials. Emphasising nationalistic strength transmits safety and security in physically and geographically protective terms, disconnecting that approach from qualitative impacts upon democratic institutions and practices. Its calibrated imaging of Australia and Australians decouples those entities from the legal and political institutional framework and cultures, necessary for factors moderating protection to develop.

This Prime Ministerial language was mirrored in a Minister for Home Affairs,[62] media release 'A safer and more secure Australia'.[63] This document parlayed frighteningly multiple and complex threats,[64] assuring that the 'safety and security of Australians is the Morrison Government's number one priority'.[65] It innovatively linked that objective to attaining prosperity. 'Only through our plan

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[59] Ibid, 1-2.
[60] Hon Scott Morrison was Minister for Immigration and Border Protection in the Abbott government from 18 September 2013 to 23 December 2014.
[61] The safety and security institutional memory of Operation Sovereign Borders was revisited by Hon Scott Morrison as Treasurer: see Commonwealth, *Parliamentary Debates*, House of Representatives 8 May 2018 3338-3348 (Scott Morrison) and Hon Scott Morrison 'Budget Speech 2018-19, 8 May 2018' (Second Reading of the Appropriation Bill (No 1) 2018-2019), 12: 'The Liberal and National Parties can always be trusted to keep Australians safe. Stopping the boats and keeping them stopped. Protecting Australians from the threat of terrorism…Protecting Australia from those who seek to do harm and exert unwelcome influence on our soil'.
[62] The Hon Peter Dutton became Minister for Home Affairs on 20 December 2017; and was Minister for Immigration and Border Protection from 23 December 2014 to 21 August 2018.
[63] 'A safer and more secure Australia', (n 2).
[64] Such as terrorism, border security, gangs and drugs, foreign interference, child sex offenders, local crime and natural disasters: Ibid.
[65] Ibid, 1.

for a stronger economy can we ensure a safer and more secure Australia'.[66] This connection synergised two perceived Coalition strengths – national security to economic management and the economic wellbeing of Australians. Rhetorical safety and security linkages were later made to another Coalition identifier – being a quiet Australian.[67] Attorney General Porter was asked to update 'how the Morrison government is on the side of Australians who quietly chose policies that strengthen our national security essential to our safety'.[68] Prior to outlining recent Morrison government activities 'directed at keeping Australians safe', the Attorney General stated the Government had 'clearly demonstrated that it is on the side of Australians who have made a quiet choice to strengthen our national security and to keep our nation safe'.[69]

A similar, but later, continuity of safety and security language persisted with the two Attorneys General in Morrison government, as it did in the Abbott and Turnbull governments. Attorney General Porter provided several examples in

[66] Ibid, 1.
[67] Identification of a quiet Australian resonates with earlier Liberal party identifications – Prime Minister Menzies 'forgotten people' and Prime Minister Howard's 'battlers'. See Sean Kelly, *The Game A Portrait Of Scott Morrison* (Black Inc 2021), 128-131; Judith Brett *Doing Politics Writings On Public Life* (Text Publishing, 2021), Chapter 2 'Robert Menzies Forgotten People' and Judith Brett, *Robert Menzies Forgotten People* (Melbourne University Publishing, 2007).
[68] Commonwealth, *Parliamentary Debates* House of Representatives 1 August 2019, 1836 (Andrew Hastie)
[69] Commonwealth, *Parliamentary Debates* House of Representatives 1 August 2019, 1837 (Christian Porter)

ministerial media releases.[70] Attorney General Cash[71] conveyed a hardening of language and deleted references to oversight mechanisms.[72]

A *The Attractive Political Utility of Safety and Security Rhetoric*

The historical framing of safety and security in the National Security and related statements by politicians from Prime Minister Rudd to Prime Minister Morrison provides a recurring political touchstone for continually introduced national security laws, their evolution and review. *This prominent framing of safety and security has been absorbed into the politics and procedures of legislative enactment.* Simplistic, slogan-like messaging of safety and security captures political attention. Debate about safety and security measures helps quarantine issues to immediate legislation, diverting attention from other pressing domestic policy issues. Disconnecting each piece of legislation from the extensive suite of security laws means that incremental transformative trends for Australian liberal democratic institutions and practices are distracted and quieted. Creating a desirability and numeracy of laws can undermine review pre-conceptions about

[70] Christian Porter 'Strengthening Counter-Terrorism Laws' (Attorney General media release 20 February 2019) : 'further strengthening counter-terrorism laws to ensure safety of Australians'; Christian Porter, 'Strengthening Australia's counter-terrorism laws' (Attorney General Media release 1 August 2019): 'to ensure dangerous offenders remain behind bars if they pose an ongoing threat to public safety'; Christian Porter and Peter Dutton, 'Strengthening controls on high risk terrorist offenders' 3 September 2020 (Attorney General and Minister for Home Affairs media release 3 September 2020) : 'new scheme would ensure public safety is number one priority for our courts when making decisions about the release of high risk offenders'; 'delivers our commitment to keep Australians safe'; Christian Porter, 'Government Response to the Comprehensive Review into Intelligence Legislation' (Attorney General Media release 4 December 2020): 'to keep Australians safe against new and emerging threats'.

[71] Hon Michaelia Cash became Commonwealth Attorney General on 30 March 2021 and remained until the swearing in of the Albanese Government on 23 May 2022.

[72] Michaelia Cash, 'Counter Terrorism Legislation Amendment (Sunsetting Review And Other Measures) Bill 2021' (Attorney General Media release 24 August 2021): 'The Government's highest priority is to keep Australians safe'; 'the single purpose of keeping Australians safe'; Michaelia Cash 'Keeping Australia safe from high risk terrorist offenders' (Attorney General Media release 22 November 2021): 'a critical step towards ensuring the safety of the Australian community'; 'A Morrison government will back our intelligence, law enforcement and other operational agencies by providing the resources, powers and legislative support they need to tackle this complex and ever evolving threat'.

how such laws impact upon the sustainability – that is the safety and security – of democratic institutions and practices.

Safety and security is now pre-eminent amongst security rhetoric around national security laws. It has escaped critical appraisal and analysis. This contrasts with at least *three other examples of security rhetoric* also politically applied.[73] These are firstly, in the formation of new national security laws, there needs to be a *balance* (often adjectivally described as 'appropriate'[74]) between national security protection and civil liberties- human rights.[75] Secondly, enacting such laws is frequently claimed by the Executive to be 'urgent' – an urgency paradigm transformative of legislative and review processes.[76] Thirdly, as a rejoinder to claims that rights analysis of national security laws is deficient in the absence of a Commonwealth bill of rights, that such legislation is *detailed*. [77]

Such analysis concludes generally that security rhetoric is problematic, often invoked to further concentrate executive power at the expense of calibrated checks and balances, whilst lacking a broadly based perspective for protecting democratic institutions, practices and culture. Safety and security rhetoric remains politically attractive, emphasising the need for similar analysis and scrutiny of this fourth, but distinctively overarching, type of security discourse.

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[73] Each of the following has been examined in critical academic writing.

[74] Appropriateness in a national security adjectival or adverbial context has remarkable versatility as a category of indeterminate, indeed subjective reference. See Daryl Williams, 'ASIO Bill a Win for National Security' (Attorney General Media release 17 June 2003); and Robert McClelland, 'National Security Legislation passes the Parliament' (Attorney General Media release 15 November 2010).

[75] For the issue of 'balance' see Michaelsen (n 28); Bronnitt, (n 28); Simon Bronitt and James Stellios 'Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' (2006) 30 *Melbourne University Law Review* 923 and Greg Carne 'Brigitte and the French Connection : Security Carte Blanche or A La Carte?' (2004) 9 *Deakin Law Review* 573, 613-614.

[76] On legislative urgency, see Lynch, 'Legislating With Urgency – The Enactment Of The Anti-Terrorism Act (No 1) 2005' (n 13); Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' (n 13) Carne, (n 13); Carne, (n 6), 337.

[77] For the claimed safeguard of legislation being 'detailed', see Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes In Enacting The Anti - Terrorism Act (No 2) 2005 (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 61-64.

Safety and security rhetoric is inherently politically conservative. The preceding Prime Ministerial views demonstrate language bridging party lines, establishing conformities and contours of debate. The bipartisan adoption of the theme of safety and security in the above statements unifies, conserves and confines the shaping of processes and content of contemporary enacted national security laws. The Coalition is favoured in advancing safety and security rhetoric to ace approaches more connected to an integrated human rights approach.. Such rhetoric is similarly effective in corralling and closing down debate.[78] The Coalition has been advantaged through a constantly evolving national security environment. Here safety and security advocacy can be a reflex, default response, deployable across topics such as terrorism, espionage and foreign interference, amenable to the sound bite, media talking points, social media communication and policy takeaways.

Major parties of Australian government are responsible for the ascendancy of safety and security's influence upon national security legislation formation. The sharpest relativities in national security legislation appear against the Australian rejection of a national charter of human rights[79] and the advocacy of distinctively Australian alternatives.[80] Such incoherence has included truncated legislative

[78] The agency of safety and security in confining debate is reflected in the scarce academic literature critically analysing the nature, quality, circumstances and impacts when safety and security rhetoric is mobilised to support additional legislation. For one example, see Saul Eslake, 'The Quest for 'Security' – Is it rational, has it actually made us safer, and at what cost?' (Address to the Royal Society of Tasmania, Hobart, 14 November 2017) . The speech is updated as 'Address to the Society of University Lawyers' Annual Conference Hobart' (1 November 2018) : https://www.saul-eslake.com/quest-security-rational-actually-made-us-safer-cost/ Brian Toohey, *Secret: the Making of Australia's Security State* (Melbourne University Publishing, 2019), Chapter 43 'Australia's Own National Security State'.

[79] George Williams, 'The Legal Assault on Australian Democracy' The Annual Blackburn Lecture *Ethos* June 2015, 18, 23 and George Williams, 'The Legal Legacy of the 'War on Terror" (2013) 12 *Macquarie Law Journal* 3.

[80] The Australian exceptionalist model of human rights protection comprises representative and responsible government, an independent judiciary, a free media, the common law, a suite of Commonwealth anti-discrimination laws and the tolerance of the Australian people: Daryl Williams, 'Against constitutional cringe: the protection of human rights in Australia' (2003) 9 *Australian Journal of Human Rights* 1; See also Robert McClelland, 'Australia's Human Rights Framework' (Attorney General Media Release 21 April 2010) and Robert McClelland 'The Protection of Promotion of Human Rights in Australia' (Attachment to Media Release) 8

review processes, reviews inconsistently and patchily connected with human rights, the rise of a liberal democratic rights agenda,[81] subsequent scheduled reviews by the initial reviewing committee,[82] as well as significant executive discretion as a uniquely claimed form of rights protection.[83]

Doctrinally and practically, safety and security rhetoric has encouraged a failure to assess demonstrable physical security needs against a real incidental risk of measures incrementally transitioning to an authoritarianism similar to those ideological states, non state actors and movements associated with the national security risks of terrorism, foreign interference and influence, and espionage. This is not to naively deny significant national security challenges.[84] It is instead to be conscious that prominent revision and repetition of national security issues are susceptible to deleterious (sometimes unintended) institutional and legislative consequences driven by safety and security language and its attendant misalignment with liberal democratic values.

III SAFETY AND SECURITY ASCENDANCY: ILLUSTRATIVE FACTORS INFORMING BOTH COALITION AND LABOR GOVERNMENT APPROACHES

The safety and security statements of Coalition and Labor Prime Ministers and ministers confirm an entrenched security rhetoric in Australian political discourse. A critical need exists to ameliorate the effects of a safety and security rhetoric, focusing on attainable, pragmatic reforms to legislative review institutions and

October 2009. Some additional features mentioned by Attorney General McClelland are the rule of law, separation of powers, universal suffrage and administrative law.

[81] Discussed under Part III C 'Coalition government following the Rudd and Gillard governments - conventional international human rights law principles contained by continued safety and security rhetorical framing.'

[82] See for example see *Intelligence Services Act 2001* (Cth) ss 29(1) (bb), 29(1) (bca), 29 (1)(ca), 29(1) (cb) and 29 (1) (cc).

[83] See discussion under Part V 'The Default of Executive Discretion As A Form of Rights Protection – Moderating Narrow Safety and Security Approaches?'.

[84] (n4)

processes. Significant consequences from the drafting, amendment and implementation of national security laws make improved review processes highly desirable – in re-orientating safety and security language around qualitative aspects of democratic practices, culture and legislative processes themselves. The first aspect involves *how international human rights obligations have been reinterpreted* in domestic law matters.

A *Re-shaping the Influence and Interpretation of International Law Human Rights Obligations Around Safety and Security – Attorney General Ruddock and the Howard Government*

Various *International Covenant of Civil and Political Rights*[85] commonly arise in analysing recent safety and security rationalised legislation. Personal safety and security is affected by Article 7 freedom from torture and Article 10 the right to humane treatment. Of some relevance are Article 17 the right to privacy, Article 18 freedom of thought, Article 19 freedom of opinion and expression, and Article 25, the right to take part in public affairs. These articles are referred to in the legislative, executive and review processes of contemporary national security legislation.[86]

Such *ICCPR* articles confirm that recent national security legislation content *should better align safety and security considerations in a broader, participatory dimension of rights, institutions and practices within a democratic polity, rather than being rigidly confined to individual or collective physical security.* Such

[85] *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171.
[86] See in particular the Parliamentary Joint Committee on Human Rights reports on the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*: Commonwealth Parliament, Parliamentary Joint Committee on Human Rights *PJCHR Human rights scrutiny Report 2 of 2018* and *Report 3 of 2018*; the *Foreign Influence Transparency Scheme Bill 2017* : Commonwealth Parliament, Parliamentary Joint Committee on Human Rights, *Human rights scrutiny Report 1 of 2018, Report 3 of 2018 and Report 2 of 2019*; and the *Telecommunications and other Legislation Amendment (Assistance and Access) Bill 2018* PJCHR, Commonwealth Parliament, Parliamentary Joint Committee On Human Rights, *PJCHR Human Rights scrutiny Report 11 of 2018 and Report 13 of 2018*. The word limits of this article do not permit a similar appraisal of these matters in the manner of Article 6 and Article 9 of the *ICCPR*.

physical security should be a necessary starting point, not an end in itself – and be directed to securing critical liberal democratic participatory rights, institutions and culture. The *ICCPR* articles most prominently invoking safety and security are Article 6 the right to life and Article 9 liberty and security of the person.[87]

Important questions emerge around Article 6 right to life with national security legislation promoted within a safety and security framework. Close attention to the Prime Ministerial and other statements,[88] indicates that their use of safety and security implicitly raises Article 6 right to life issues. This issue emerges in different ways. Prime Ministerial statements of safety and security as a first priority of government, in contrast to a recognised *ICCPR* right, conducted through the UN Human Rights Committee reporting, General Comments and Optional Protocol Processes, help comprehend how review of bills, executive responses, legislative formation and amendments, along with subsequent reviews, come about. Dissonances in *ICCPR* rights interpretation are apparent, including transacting those rights at parliamentary committee review, executive response to review and enactment stages of recent national security laws. Each stage may yield a better understanding of how the legislative process interacts with those rights.

Some preliminary observations are useful. First, political processes articulating a safety and security theme have *distorted a legally based conception of international human rights*, producing a distinctively Australianised security focus regarding rights content and operation. Second, the elasticity of national security legislative topics, framed by safety and security rhetoric, provides ongoing opportunities for consolidating distorted Australianised approaches. Third, articulations of safety and security inconsistent with conventional international human rights law analysis will then influence committee processes. The principles *differentially applied* to test bills between different parliamentary committees (such as human rights concepts of legality, proportionality and

[87] *ICCPR* Article 6 and Article 9 are briefly discussed below.
[88] As discussed under Part II 'Continuity and Commonality of Prime Ministerial and Other Ministerial Articulations of Safety and Security'

necessity), followed by varied Executive responses for bill amendments, display that divergence. Failure to identify these differences and tensions simply weakens review. Overall, a significant disjuncture exists between political applications of safety and security in legislative formation, as against conventionally interpreted multi-factorial considerations in ICCPR rights security obligations. Relevant ICCPR rights reveal such safety and security considerations display a broader conception than individual or collective physical security.

In summary, the most relevant articles of the *ICCPR* conceptualise security in a different and more holistic way than apparent in the Australian safety and security rhetoric. That rhetoric therefore alternatively indulges *a distortion* of the international human rights law when enacting domestic national security laws, or the capacity *to ignore, or pay lip service to*, international human rights law in such enactments, especially for PJCHR reviewed bills.[89] The rhetoric engenders significant negativity to integrating international human rights principles in national security law enactment.

A range of *related observations* regarding *how human rights principles, interpretations and methodologies are positioned* in Australian national security legislative enactment, was made in academic commentary in the years after the September 2001 terrorist attacks. A major orientating factor relevant to security matters was the Howard government's highly critical engagement with the international human rights system,[90] coinciding with rising prominence of national security issues. The Howard government's strongest criticism arose around reporting processes under UN human rights treaties,[91] prompting a systematic

[89] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See Part IV A below, 'Parliament's national security law review committees – the ongoing influence of a narrowed safety and security approach'.
[90] Daryl Williams, 'CERD report unbalanced' (Attorney General Media Release) 26 March 2000; 'Against Constitutional cringe: the protection of human rights in Australia' (n 80).
[91] Sarah Joseph, 'The Howard government's record of engagement with the international human rights system' (2008) 27 *Australian Year Book of International Law* 45, 53-58. Joseph notes that 'the government was rarely influenced by human rights considerations in adopting its various policies' and that it 'continually asserted its sovereignty as the Australian government …that Australia's comparatively good human rights record should somehow exempt it from

domestic response and international reform campaign of the UN human rights treaty committee system.[92]

The Howard government accordingly was not disposed favourably to a coherent integration of human rights principles in national security law formulation.[93] An early distinctive factor in legislative and policy responses to terrorism was a bullish prioritisation of protective security measures challenging conventional human rights protections, underpinned with a rhetorical dimension.[94] This reflected hastened and visceral protective reactions to the September 11 2001 attacks,[95] often without reference to the human rights law frameworks by which rights emergencies should be transacted.[96]

An additional consideration in national security law matters was a claimed but highly contestable compliance of legislation with international human rights law.[97] That approach operates by pre-emptively deflecting, deterring and neutralising criticism of such laws; whilst asserting the legitimacy of such laws by citing international human rights standards when simultaneously diverting forensic assessment of the laws against such standards.

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international scrutiny': Joseph, ibid, 45, 66. Alison Duxbury, 'International Human Rights Law and the Events of 2001: Has the World Changed Forever?' (2011) 28 *Australian Year Book of International Law* 13, 23, 25.

[92] Daryl Williams and Philip Ruddock, 'Australia At Forefront Of UN Human Rights Reform' (Attorney General and Minister for Immigration, Multicultural and Indigenous Media Release) 1 October 2003; Alexander Downer and Philip Ruddock, 'Progress Made to Reform UN Treaty Bodies' (Minister for Foreign Affairs and Attorney General Joint Media Release) 9 March 2006 with attached report *Reform of the United Nations Human Rights Treaty Body System: Australian Initiatives*

[93] Greg Carne, 'Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government' (2008) 25 *Australian Year Book of International Law* 11.

[94] Hilary Charlesworth, 'Human Rights in the wake of Terrorism' (2003) *Law Society Journal* 62 (June).

[95] Sarah Joseph, 'Australian Counter-Terrorism Legislation and The International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428, 451, 452.

[96] Joseph, "The Howard government's record of engagement with the international human rights system' (n 91), 62-63.

[97] Carne, 'Neither Principled nor Pragmatic?' (n 93), 13-19 'II Assertions of Compliance with International Law in Developing Domestic Counter-terrorism Legislation'. This was similar to the often asserted state claim in international law that state actions are consistent with international law.

It was further recognised that limitation upon the infraction of human rights in national security laws is a critical feature.[98] From that principle, contestation in security matters emerged between the competing qualifying concepts of balance and proportionality, with differences in their scope and methodology influencing political justifications for security laws. The balancing paradigm of national security laws drew support from both government proponents of,[99] and academic opposition to such laws.[100] Both identification of difficulties with a balancing paradigm,[101] and advancing proportionality as a better alternative more attuned to human rights,[102] emerged in academic commentary. These are important backgrounding issues capable of inducing, shaping and influencing a legislative and policy culture, where safety and security rhetoric gains traction and is embedded in the discourse of legislative enactment.

Two articles – Article 6, but also article 9 of the *ICCPR*, and their deliberate early Coalition re-interpretation for national security law purposes- *form the genesis of processes supportive of initial and subsequent Australian government safety and security rhetoric, remaining influential to the present.*. It is contrastingly useful to look at how, under the guidance of the UN Human Rights Committee (in its General Comments and relevant communications) these Articles are conventionally interpreted. Insights into processes and gaps in transacting human rights enacting national security enactment will then be better informed.

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[98] This point was acknowledged by both political proponents of such laws as well as academic commentators.

[99] Philip Ruddock, 'Australia's counter-terrorism laws' *Proctor* (November 2007), 26, 27; Philip Ruddock, 'Attorney responds: what about the right to security?' *Bar News* (Winter 2005), 8, 9.

[100] George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43.

[101] Bronitt 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' (n 28); Bronitt and Stellios, (n 74); Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities : Unbalanced Responses to Terrorism?'(n 28); Carne, (n 74), 613-614 G 'Imbalances in the balancing model'; Michaelsen, (n 28), 18-20.

[102] Michaelsen, (n 28); Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 302-303; Christopher Michaelsen 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach' (2010) 29 *University of Tasmania Law Review* 31, 45-46.

1 *Article 6 of the ICCPR*[103]

The disconnection of the rhetoric of safety and security from the interpreted content of *ICCPR* Article 6 is nothing new. It is a reinvention of the Coalition's earlier narrow focus upon physical safety and security in relation to Article 6. This distorted interpretation was communicated by then Attorney General Ruddock under the label of human security,[104] referencing Article 3 of the *Universal Declaration of Human Rights* (UDHR).[105] Exceptionally, this approach suggested that an evolved interpretation of these international instruments meant that an actual international right to safety and security existed.[106]

In contrast, conventional ICCPR interpretations identify Article 6 as having two components.[107] Article 6 continues as a non- derogable right – eliminating the

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[103] Article 6, paragraph 1 of the *ICCPR*: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

[104] Philip Ruddock, 'Statement by the Attorney General Philip Ruddock on National Security – Overseas Developments' (Attorney General Media Release 19 February 2004), Philip Ruddock, 'A New Framework: Counter Terrorism and the Rule of Law' (Attorney General Media Release 20 April 2004); 'Hardline security a UN right' *The Australian* (Sydney) 26 July 2005.

[105] Article 3 of the *UDHR* states that 'Everyone has the right to life, liberty and the security of person'. An analysis and critique of international law anomalies and overreach in this approach see Greg Carne, 'Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2005) 25 *Australian Year Book of International Law* 1, 23, 25.

[106] This was through articles, speeches and media releases by Attorney General Ruddock: 'British Counter Terrorism Options Examined' (n 12); Ruddock, '2004 National Security Australia Forum Opening Address' (n 12) ; Philip Ruddock 'Securing Civil Liberty' (2004) *Lawyer's Weekly*; 'Attorney responds: What about the right to security?' (n 99), 8.

[107] Sarah Joseph and Melissa Castan, *The International Covenant On Civil and Political Rights Cases Material and Commentary*, 3rd edition (Oxford University Press 2014), 167: a negative component as in a right to not be arbitrarily or unlawfully deprived of life by the State or its agents' and a 'positive component…that the State must adopt measures that are conducive to allowing one to live'.

possibility of subtraction from, or qualification of the right.[108] Further, the Article 6 right as formative and integrative is well recognised.[109]

The traditional emphasis, reflected in the now superseded General Comment 6, was upon the protection of the individual from the state and its power threatening life.[110] Its replacement, General Comment 36, adopted in September 2019 (and in the aftermath of many years of terrorism experience following September 2001) reflects greater coverage of *both* components – protection from the state, but also the state's responsibility to protect life. Key statements in General Comment 36 regarding paragraph 1 of Article 6[111] indicate the evolution of both components.[112] Further, Article 6's guarantee of the right to life, including the right to protection of life under article 6(1), may overlap with the right to security of person guaranteed by article 9 (1).

Importantly, however, General Comment 36 on Article 6 *qualifies and balances these obligations with other human rights considerations*. This reflects an integrative human rights approach, a signature feature of the United Nations treaty based system. *This approach embodies safety and security considerations in a more measured, holistic manner than the Australianised conception of a right to security*, where in enacting safety and security legislation, security trumps competing human rights.

The Australianised conception instead is a politically advantageous policy response. It asserts a robust and populist national sovereignty, appealing to an immediate personal physical security, in contradistinction to a protective culture

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[108] See *ICCPR* Article 4 (2). See William A Schabas, *UN International Covenant on Civil and Political Rights Nowak's CCPR Commentary* 3rd revised edition (NP Engel Publisher 2019), 123.
[109] General Comment No 36 (UN Doc CCPR/C/GC/36) paragraph 2 ' a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights'. See also Nowak, Ibid, 12.
[110] General Comment No 6 (Adopted 30 April 1982) – see in particular paragraphs 2, 3 and 4.
[111] 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.
[112] General Comment No 36, (n 109) paragraph 3, paragraph 7, paragraph 18, paragraph 21 and paragraph 23.

for the largely intangible interests of democratic institutions and practices. This approach presses political claims and political momentum, especially upon an electorate denied the educative influence and tempering effect of a statutory or constitutional charter of rights.

2 *Article 9 of the ICCPR*[113]

A similar disconnection of the theme of safety and security from the interpreted content of *ICCPR* article 9 also became apparent. A claimed right to live in safety and security by reference to Article 3 *UDHR*, was conceived,[114] instead of a foundational claim upon ICCPR article 9.[115] In other words, the guarantee of security of the person is independent from, and not dependently coterminous, with situations confining or denying liberty. Reliance upon Article 9 would then mean 'reference to both the General Comment on article 9 and relevant communications to the Human Rights Committee,'[116] rigorously testing whether the Coalition claimed right to safety and security was tenable. The security of the person within an Article 9 ICCPR conventional approach would once more reflect a balanced and integrative human rights methodology.

The new General Comment 35 on Article 9[117] confirms this status. Key statements in General Comment 35 are illustrative of this point, with the extended protection

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[113] *ICCPR* Article 9, paragraph 1: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.
[114] This was through eliding from the right to life aspect in Article 3 of the *UDHR* to a claimed right to live in safety and security: Greg Carne, 'Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2008) 25 *Australian Year Book of International Law* 1, 33-34.
[115] *ICCPR* Article 9 'guards the right to security of the person' applying to 'persons in and out of detention'.
[116] Carne (n 114), 35.The *then relevant* General Comment on Article 9 ICCPR was General Comment 8 (Adopted 30 June 1982).
[117] As adopted on 16 December 2014. General Comment No 35 (UN Doc CCPR/C/GC/35) Article 9 Liberty and Security of person (16 December 2014)

of Article 9 beyond that afforded by Article 3 of the UDHR. Significantly, Articles 6 and 9 of the ICCPR are seen as interrelated.[118]

The re-shaping and re-articulation of conventional interpretations of ICCPR articles relevant to safety and security by Attorney General Ruddock provided the foundation rhetoric for future Coalition governments to minimise the influence of conventional international human rights law interpretation in the development of national security laws. That significant physical safety and security orientation continued with subsequent Coalition governments, framed by a safety and security rhetoric at odds with a democratic culture, practice and institutions shaping such laws.

B *The Rudd and Gillard Labor Governments Rights Frameworks*

A series of distinctive factors framed the Rudd and Gillard governments' national security legislative activity. First, the tempo and volume of legislative enactment contracted.[119] Such contraction reduced the occasions in which safety and security language might be invoked, likely corroborating that Coalition security legislation applying the themed rhetoric was partly politically inspired.

Second, Attorney General Roxon initiated a PJCIS inquiry and report – *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*[120] – providing a foundation for a subsequent Coalition government serial resumption of national security legislative reforms.[121] Third, the balancing comments about civil liberties and the rule of law in the first National Security Statement of Prime

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[118] See General Comment 35, paragraph 3, paragraph 5 and paragraph 9.
[119] Williams, 'A Decade of Australian Anti-Terror Laws' (n 13) 1136, 1144-1145, 1167.
[120] Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (May 2013). In conducting an inquiry and producing this report, the PJCIS was provided with a discussion paper (which includes terms of reference) Commonwealth Parliament, *Equipping Australia Against Emerging and Evolving Threats* (Discussion Paper July 2012), attached as Appendix E to PJCIS Report May 2013.
[121] The initial round of Coalition sponsored reforms included the *Counter-Terrorism (Foreign Fighters) Act 2014* (Cth), the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth), the *National Security Legislation Amendment Act (No 1) 2014* (Cth), and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

Minister Rudd represented a less overtly politicised, more integrative approach to safety and security issues.[122] Fourth, the Rudd Government conducted a National Human Rights Inquiry, which recommended in the *National Human Rights Consultation Committee Report*,[123] that the Commonwealth adopt a statutory charter of rights.[124] That recommendation was rejected by the Rudd Government, [125] forgoing a larger opportunity for a more integrated human rights approach to national security laws, which would likely have reduced the safety and security rhetorical impact.

Instead, limited measures were pursued under a *National Human Rights Framework.* These included a statement of legislative compatibility with human rights[126] and a Parliamentary Joint Committee on Human Rights (PJCHR) reviewing legislation for compatibility with Australia's seven major international human rights covenants.[127] The 2013 Coalition government victory caused the *National Human Rights Framework* to become defunct, with PJCHR review recommendations marginalised in the terrorism laws legislative process,[128] and primacy afforded to PJCIS review.[129]

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[122] See the Prime Minister Rudd quotation in the text in Part II B heading 'Prime Ministerial National Security Statements and other ministerial security statements' .
[123] Commonwealth Attorney-General's Department, *National Human Rights Consultation Committee Report* (2009)
[124] Ibid, xxxiv, Recommendation 18.
[125] It instead introduced Australia's Human Rights Framework, implementing limited, selected aspects of the *National Human Rights Consultation Committee Report*: see Robert McClelland, 'Australia's Human Rights Framework', (Attorney General Media release 21 April 2010), including the establishment of a Joint Parliamentary Committee on Human Rights; Robert McClelland, 'Enhancing parliamentary scrutiny of human rights' (Attorney General Media release 2 June 2010)
[126] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s.8
[127] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s.4
[128] This reality is most obvious in relation to three 2014-2015 bills: the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth), the *National Security Legislation Amendment Bill (No 1) 2014* (Cth) and the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth).
[129] See Carne (n 6) 373-374.

C *Coalition Governments Following the Rudd and Gillard governments – Conventional International Human Rights Law Principles Contained by Continued Safety and Security Rhetorical Framing*

Succeeding Coalition governments reverted to the national security legislative volumetrics and tempo of Howard government.[130] Significant new influence over legislative formation arose through the introduction of a liberal democratic rights analysis.[131] The Attorney General Senator George Brandis[132] and the Australian Human Rights Commissioner, Tim Wilson[133] were its major proponents.

This involved a significant narrowing of what legitimately comprised human rights - to expression, association, property, religion and movement, being the 'real' human rights.[134] That discourse resulted in many rights (of which the five listed rights are included) recognised under the *ICCPR*, derogation or non-derogation processes and the *ICCPR* limitation mechanisms, to lose legitimacy. Broader scepticism towards the United Nations Treaty *ICCPR* based human rights system, including its jurisprudence and General Comments, revived Howard government approaches.

Different inquiries coalesced around this liberal democratic rights agenda. The Australian Human Rights Commission produced a discussion paper, national

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[130] The Howard government held office from 11 March 1996 to 3 December 2007. The Abbott government, upon election, moved quickly to enact three significant pieces of terrorism legislation: the *National Security Legislation Amendment Act (No 1) 2014* (Cth), the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (Cth). See Williams 'A Decade of Australian Anti-Terror Laws' (n 13).

[131] Greg Carne, 'Re-Orientating Human Rights Meanings and Understandings?: Reviving and Revisiting Australian Human Rights Exceptionalism Through A Liberal Democratic Rights Agenda,' (2015) 17 *Flinders Law Journal* 1. Such rights were commonly limited to speech, association, property, religion and movement.

[132] George Brandis, 'In Defence of Freedom of Speech', (2012) 56 *Quadrant* 21 -26.

[133] Timothy Wilson, 'The Forgotten Freedoms' (Speech delivered at the Sydney Institute, Sydney 13 May 2014)

[134] Ibid., 3, 12 and Timothy Wilson 'Rights and Responsibilities 2014' (Discussion Paper, Australian Human Rights Commission, 2014)

consultation and a themed report.[135] Similarly, the Attorney General tasked the Australian Law Reform Commission to review Commonwealth legislation to identify provisions unreasonably encroaching upon traditional rights, freedoms and privileges, which include common law categories of rights, amongst which were speech, religion, property, association and movement.[136] The Australian Law Reform Commission report ultimately identified multiple legislative breaches of such rights.[137]

This context aided the ascendancy of safety and security rhetoric as an operative principle upon national security laws. A narrower compendium of legitimated liberal democratic rights facilitated the confinement in application of *ICCPR* based rights. This enabled a downgrading of international human rights law influence on that legislative process, including marginalising the PJCHR review role in multiple national security legislative enactments.

The Howard government created a template for its Abbott and Turnbull successors around national security laws, legitimated by longevity of practice and its claimed superiority in national security matters. The Morrison government renewed emphasis on safety and security as driving national security legislative reform, through an evolved assertion of Australian sovereignty.[138] This accords with

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[135] 'Rights and Responsibilities 2014' (Discussion Paper) Ibid; Australian Human Rights Commission, 'Rights and Responsibilities Consultation Report 2015' (Australian Human Rights Commission, 2015)

[136] George Brandis, 'New Australian law reform inquiry to focus on freedoms' (Attorney General Media release 11 December 2013); Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws Issues Paper* No 46 (2014), Chapter 1 'Executive Summary – Encroachments on rights, Freedoms and privileges', 14-23.

[137] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Final Report* (ALRC Report 129 (December 2015). Importantly, the report has separate chapters on the identified Liberal democratic rights – Chapter 4 Freedom of Speech, Chapter 5 Freedom of Religion, Chapter 6 Freedom of Association and Assembly, Chapter 7 Freedom of Movement and Chapter 18 Property Rights.

[138] Prime Minister Scott Morrison, 'The 2019 Lowy Lecture, *In Our Interest*', (Speech delivered at the Lowy Institute, Sydney, 4 October 2019). The lecture conveys the view that Australia properly engages with international instruments and international organisations through principles of Australian sovereignty and independent cooperation.

earlier Coalition marginalisation of conventionally interpreted international human rights law in national security legislative processes.[139]

IV NATIONAL SECURITY LEGISLATIVE REVIEW PROCESSES: THE PJCHR, THE PJCIS, EXECUTIVE RESPONSES TO THEIR REVIEWS AND RECENT LEGISLATIVE ENACTMENT EXAMPLES

The different impacts of safety and security rhetoric as outlined in Part III – focusing on safety and security rhetoric informing Coalition and Labor government approaches – *also flows through to influence Parliamentary processes for the review of national security laws.* The Coalition's longevity in government assisted after the September 2001 terrorist attacks,[140] but the ascendancy from the time of the Abbott government of the PJCIS as the premier parliamentary reviewing body of national security laws was critical, supplanting the Senate Legal and Constitutional Committee.[141] The PJCIS is structured to practically provide membership to only the two major parties,[142] to install a

[139] This is reflected in various examples prioritising and giving preference for legislative review recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) as against those of the Parliamentary Joint Committee on Human Rights (PJCHR) when reviewing the same bills. The PJCHR was created by legislation of the Rudd Labor Government – see the discussion under Part III B 'Rudd and Gillard Labor governments rights frameworks', above.

[140] The Coalition held office from 11 March 1996 to 3 December 2007 (the Howard government) and again from 18 September 2013 to 23 May 2022 (the Abbott, Turnbull and Morrison governments)

[141] These extensive inquiries and reports of the Senate Standing Committee on Legal and Constitutional Affairs as the premier reviewing committee for national security law matters during the Howard Government may be accessed at Completed Inquiries and Reports Previous Parliaments at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2019-22

[142] Namely the Liberal National coalition and the Labor party: See *Intelligence Services Act 2001* (Cth) Schedule 1, cl 14. The process of Prime Ministerial and Leader of the Government in the Senate *nomination of members*, following consultation with each recognised political party, and then appointment respectively by resolution of the House of Representatives or the Senate, appears to have trumped a practical realisation of s.14 (5) of the *Intelligence Services Act 2001* (Cth), that the 'Prime Minister and the Leader of the Government in the Senate must have regard to the desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties in the Parliament'.

Government committee majority,[143] and operates on principles of endorsed bipartisanship.[144]

In this second of the three aspects of the impact of safety and security rhetoric, *its influence is manifested in the disconnected manner in which these Committees utilise human rights concepts in reviews, along with the Executive hierarchically prioritising PJCIS reviews in which human rights considerations are not a central operating principle.* The narrowing characteristics of safety and security rhetoric *further impacts upon how human rights principles are configured in the actual review process methodologies and in the Executive responses to them.* The marginalisation or sidelining of human rights in these review processes aligns neatly with safety and security rhetoric.

How safety and security rhetoric has influenced, framed and provided context for the structures and operations of these national security legislative review processes is best considered in two parts – initially, how formal methodologies and processes of parliamentary review committees – the PJCHR and the PJCIS - for national security matters have been impacted; then, by illustrative and differentially shaped consequences for two important national security bills dealing with espionage and foreign interference, and data assistance and access.

A *Parliament's National Security Law Review Committees – the Ongoing Influence of a Narrowed Safety and Security Approach*

The PJCHR itself reviews nationals security bills – the general limits of its review capacities are *compounded by the influence of safety and security rhetoric* and the prioritisation of those rhetorical values, particularly when PJCHR review interacts with, or coexists with, PJCIS review.

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[143] *Intelligence Services Act 2001* (Cth) s.28 (3).
[144] Endorsed by the Labor Party in Opposition. For difficulties and tensions arising in a PJCIS doctrinal bi-partisan approach, see Carne, n 6, 339-349.

A first principle around PJCHR review is its inherent limits as an exclusive parliamentary model, with no judicial interpretive function for identified international human rights obligations, (as impacting bills or legislation), nor a clear parliamentary obligation to deliberatively consider PJCHR review findings.[145] These weaknesses derive from a parliamentary self-regulatory model - a government maintaining confidence and supply in the lower house can determine qualitative or nominal compliance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[146] Other explanations also exist for the compromised effectiveness of PJCHR review.[147]

The second principle involves examining interaction of PJCIS and PJCHR legislative reviews, in which certain practices have been demonstrated: marginalised PJCHR national security legislative review recommendations both as to substantive human rights amendments, as well as in the timed release of PJCIS reports and subsequent legislative action, rendering PJCHR recommendations variously irrelevant in legislative formation.[148] The significant margin for executive influence determining the nature of the relationships between

[145] 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, 476-479; Rosalind Dixon, 'A New (Inter)National Human Rights experiment For Australia' (2012) 23 *Public Law Review* 75, 75-76.

[146] George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 (1) *Statute Law Review* 58, 90-91, 92-93; Williams and Reynolds, Ibid, 506-507; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the Human Rights (Parliamentary Scrutiny) Act?' (2015) 38 (3) *University of New South Wales Law Journal* 1046, 1073, 1076-1077.

[147] Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33 (1) *Australasian Parliamentary Review* 72, including Reporting, Workload and Time Constraints, (90-94), the framing of what comprises effective legislative impact (99-100), deliberative impact on debate (100-103) and impacts of statements of compatibility and a culture of justification (103-105)

[148] For analysis of these practices see Greg Carne, 'Sharpening the Learning Curve: lessons from the Commonwealth Parliamentary Joint Committee of Intelligence and Security Review Experience of Five Important Aspects of Terrorism Laws' (2016) 41 *University of Western Australia Law Review* 1, 36-37, 42, 47 and Carne (n 6) 367-376.

the PJCHR and the PJCIS is both a cause and effect of the consistency and prominence of safety and security rhetoric in government messaging.[149]

Assessment of PJCIS performance has focused, from one perspective, around its capacity to deliver amendment recommendations for national security bills, as subsequently adopted by government.[150] Instead, the critical emergent question is the level of integration of human rights analysis and application by both the PJCHR and the PJCIS, including democratic qualities of that legislative process aspect, translated into demonstrable rights enhancements in enacted national security legislation. That standard would include how a preceding influence of safety and security rhetoric was tempered in legislative formation. Commentary about the PJCIS through methodologies, practices and culture acceptable to the Executive and the NIC,[151] instead highlights *numerical uptake of recommendations*, over qualitative assessment of human rights sourced changes after PJCIS review.[152] In one sense, it mirrors Commonwealth executive based Attorney General accepted modifications as synonymous with achievement.[153]

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[149] See discussion above under the headings Part II Continuity and Commonality of Prime Ministerial and Other Ministerial Articulations of Safety and Security and Part III Safety and Security Ascendancy: Illustrative Factors Informing Both Coalition and Labor Government Approaches

[150] This is the utility measure apparently favoured by one commentator: Sarah Moulds, 'Committees of influence: Parliamentary Committees with the Capacity to Change Australia's Counter-terrorism Laws' (2016) 31 (2) *Australasian Parliamentary Review* 46 and Sarah Moulds 'Forum of Choice? The Legislative Impact Of the Parliamentary Joint Committee Of Intelligence and Security' (2018) 29 *Public Law Review* 287; Contrasting perspectives are advanced by Dominique Della Pozza, 'A Dual Scrutiny Mechanism for Australia's Counter-Terrorism Law Landscape: The INSLM and the PJCIS' in Debeljack and Grenfell (eds), (n 35), 673, 681-686 and by Carne (n 6) and (n 148)

[151] Moulds, Ibid *Public Law Rev*iew, 291-292; Moulds, Ibid, *Australasian Parliamentary Review*, 61-62.

[152] A further issue with this analysis is the equation of numbers of accepted PJCIS recommendations with success may reflect serial drafting problems (including unanticipated and unintended consequences) in national security legislation, or that expedited legislation under the urgency principle needs improvised remediation: see discussion of the latter under Part II C 'The attractive political utility of safety and security rhetoric'.

[153] Michaelia Cash, 'Counter-Terrorism Legislation Amendment (Sun setting Review and Other Measures) Bill 2021 (Attorney General Media release 24 August 2021); Christian Porter, 'Attorney General welcomes Committee Report on Espionage and Foreign Interference Bill', (n 57): 'the Committee's role in considering and making amendments to national security legislation is at the centre of a process that has seen ten tranches of national security laws passed

It further fails to engage significantly with the reductive effects on review of nominated bipartisanship,[154] the self-defined PJCIS methodological approach,[155] and restrictions on PJCIS membership.[156] It similarly appraises PJCIS performance from the same general assumptions applying to other parliamentary review committees – discounting the exceptional and distinctive national security legislative subject matter disproportionately shaping the qualitative characteristics of Australian representative government, in both the PJCIS and legislative processes, as well in enacted legislation. Indeed, the interactions between PJCIS and PJCHR reviews of national security legislation in explicitly transacting human rights reveal an ongoing dominant influence of narrow safety and security perspectives.

It is arguably a misconception to see the dominance of the PJCIS influence over national security legislative outcomes, minimising direct and referenced human rights influence, *as solely or exclusively attributable to formal legislative restraints* in mandates under which the Committees work. That approach would mean, as a matter of legal formalism, that the PJCIS is wholly constrained its narrowly conceived terms of reference:

> The functions of the Committee are
> (b) to review any matter in relation to ASIO, ASIS, AGO, DIO, ASD or ONI referred to the Committee by
> (i) the responsible Minister; or
> (ii) the Attorney-General; or
> (iii) a resolution of either House of the Parliament.[157]

since 2014, with the Government accepting 128 recommendations of the Committee, resulting in 293 Government amendments'.

[154] Carne, (n 6) 339-349.

[155] Discussion of the self-defined PJCIS methodological approach immediately follows.

[156] *Intelligence Services Act 2001* (Cth) s.28 and Schedule 1, Clause 14.

[157] *Intelligence Services Act 2001* (Cth) s. 29.

Moreover, this approach assumes that constraints upon how the PJCIS has reviews referred (and the terms of reference) are *conclusively the factors* determinant of outcomes. This downplays strong executive actions in determining the scope within which the PJCIS can work – the selection of PJCIS members,[158] the use of Senate Committee member majorities to close off hitherto parallel, and precedent Senate inquiries into national security law matters[159] and the executive practice of not waiting for PJCHR reports to inform PJCIS deliberations.[160]

Furthermore, how the PJCIS performs its committee hearing work, within cited constraints, is a *matter of self-regulation in articulating relevant principles*. PJCIS methodological insights are located in the PJCIS's statement[161] of the common principles for analysis of laws directed to meeting a national security threat. A *strong bipartisan based safety and security rhetoric ultimately influences both its content and more particularly how such common principles of analysis will then be conceived and manifested. As such, the methodological approaches of the PJCIS are arguably weighted, through the selection of facially neutral language, towards safety and security principles*.

The PJCIS methodology considers that laws need to be effective at achieving their stated aims, simultaneously minimising human rights limitations:[162]

> To be effective, the laws need to be workable from the perspective of law enforcement and prosecutors – that is, they must be enforceable.[163]

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[158] *Intelligence Services Act* (Cth) s.28 and Schedule 1, Clause 14.
[159] As was the practice in 2014 of ceasing Senate Legal and Constitutional Affairs Committee review into the *Counter-Terrorism (Foreign Fighters) Bill 2014* (Cth) as the PJCIS review was being conducted – see Carne, 'Sharpening the Learning Curve' (n 148), 11-14. The Senate Legal and Constitutional Affairs Committee was previously the senior, and more broadly based, review committee for terrorism laws.
[160] This relates again to the relationship and timing of PJCIS review recommendations to those of the PJCHR- see the references in (n 148).
[161] Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (June 2018), 9.
[162] Ibid.
[163] The PJCIS then cited a submission (as a consideration) from the Australian Human Rights Commission to a previous PJCIS inquiry, regarding limitations on human rights: 'It is

> Taking these considerations together, and having accepted the legitimacy of the aims of the Bill, the Committee has sought to ensure through its review that each of the measures in the Bill is
>
> . clear and unambiguous in its terms
>
> . proportional and appropriately targeted to the threat, and
>
> . enforceable[164]

Elsewhere, the PJCIS has also articulated its operating principles:

> While acknowledging the need for increased transparency, the Committee has sought to identify areas where it considers appropriate amendments are required to improve the integrity and proportionality of the proposed measures, the clarity and effectiveness of their application and operation, and to ensure adequate safeguards are provided.[165]

and

> In the main, the Committee expects that the powers have effective safeguards and oversight, and expects that they are being used appropriately by security agencies and law enforcement. The Committee reiterates the importance of the public assurance that is provided by effective and robust oversight measures.[166]

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permissible for a legislative measure to limit human rights where the measure is expressed in clear and unambiguous terms, is directed to a legitimate aim, is necessary to achieve that aim, and is proportionate' : Ibid, 9-10.

[164] Ibid, 10.

[165] Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017*, (June 2018), 16.

[166] Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (April 2019), 7.

The above three excerpts display *a primary focus upon the operability of legislation*, accounting for human rights considerations *incidentally* through reliance on safeguards and legislative language. The importance of *ex post facto* oversight is subsequently acknowledged. This focus of PJCIS review is *enabling*, albeit one accommodating human rights principles, but subordinated to a broadly conceived operability. That nominally neutral language[167] is by default *an enabler of safety and security values rhetorically promoted.*

In contrast, the PJCHR conducts its *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) reviews *within a consistently articulated human rights framework*:[168]

> The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.[169]
>
> A focus of the PJCHR reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to its stated objective; and be a proportionate way to achieve that objective. These four criteria provide the analytical framework for the committee.[170]

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[167] As identified in the PJCIS methodology and operating principles quoted in the text above.
[168] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s.7: 'The Committee has the following functions: (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue.'
[169] Parliamentary Joint Committee On Human Rights, Commonwealth Parliament, Guidance Note 1: *Drafting statements of compatibility* (December 2014)
[170] *Committee Information* – Parliamentary Joint Committee on Human Rights, Commonwealth Parliament, *Human Rights Scrutiny Report 3 of 2018*, iv.

Obtaining the latter aspect of democratic institutional security arises through whatever supportive human rights influences prevail in PJCIS and the PJCHR interactions, each committee having its own distinctive approaches in analysing and making recommendations for national security bills. These recommendations to government are backgrounded by considerable uncertainty, incompleteness and differentiated interests. Ad hoc and changeable interactions exist between the PJCHR scrutiny reports, the PJCIS inquiry processes and reporting, subsequent executive responses and legislative enactment. Such features thrive in a rhetorical safety and security environment not tempered by the formal parameters, nor the accumulated jurisprudence, of a statutory or constitutional charter of rights.

This prioritisation of the national security interest over a more human rights integrated national security approach is consistent with a *narrowed conception* of legitimate human rights as synonymous with liberal democratic rights – speech, property, religion, movement and association.[171] Again, that narrowness resonates with the narrower approach to national security laws advanced by safety and security rhetoric.

National sovereignty has been more recently emphasised. This development might further induce a lack of receptiveness to international human rights law in legislative formation, enactment and review. Prime Minister Morrison's 2019 Lowy Lecture,[172] with sovereignty informing and shaping how Australia engages internationally, is a later variation of Prime Minister iterations of safety and security:

> On our *safety*, that depends on our national security, afforded by our alliances, our defence, diplomatic and intelligence capabilities, our adherence to the rule of law and our ability to enforce the law. On our *freedom*, that depends on our dedication to national sovereignty, the

[171] Refer to discussion above under the heading Part III C 'Coalition governments following the Rudd and Gillard governments – conventional international human rights law principles contained by continued safety and security rhetorical framing'
[172] Prime Minister Morrison (n 138)

> resilience of our institutions, and our protections from foreign interference…[173]

Prime Minister Morrison then tasked DFAT to audit 'global institutions and rule-making processes where we have the greatest stake'.[174] The then Foreign Minister moderated Australia's response upon completion of that audit.[175]

The longitudinal effect of such developments may provide diverse effects upon the legislative process and the institution of Parliament itself, in legislative priorities, formation, review, distorted bipartisanship, an accentuation of executive power, making deliberative and broadly informed consideration more problematic.

A *Consequences in Parliamentary Committee Review of More Recent Bills*

Further complicating factors have emerged in relation to significant and relatively recent national security legislation. In 2018 and 2019, Parliamentary reviews were conducted in relation to espionage, foreign interference and influence matters, and in relation to assistance and access to telecommunications.[176] These serious and broadly based matters contesting Australian governance especially demand a

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[173] Ibid.
[174] Ibid.
[175] Marise Payne, 'Australia and the world in the time of COVID-19,' (Speech of Foreign Affairs Minister to National Security College, Australian National University, Canberra, 16 June 2020): 'We will target our efforts to preserve three fundamental parts of the multilateral system: the rules that protect sovereignty, preserve peace and curb excessive use of power, and enable international trade and investment; the international standards related to health and pandemics, to transport, telecommunications and other issues that underpin the global economy and thirdly, the norms that underpin universal human rights, gender equality and the rule of law.'
[176] *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (n 161); Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (December 2018); and *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (April 2019) (n 166).

carefully integrated human rights approach if the national security responses are not to undermine democratic institutions and practices.

Substantiated espionage and foreign interference and influence threaten a weakening of Australian representative government, advantaging the interests of a foreign power. Equally, a poorly crafted and calibrated legislative response presents such a threat and its implementation may also weaken Australian democratic governance practices and institutions. These subject matter capacities to 'reduce Australia's long term security and …undermine our democracy and threaten the rights and freedoms of our people'[177] have exposed tensions between legislative responses to a threat and the impact such responses exert on democratic institutions and practices. The two-fold risks highlight the centrality of parliamentary committee review in achieving a human rights integrated approach in recommended legislative amendments – balance, restraint, detail, calibration and broad evidence grounded approaches are critical.

Likewise, privacy and data security and the claimed exponential use by terrorist and criminal groups of secure, encrypted communications to avoid detection is an emergent, challenging issue. If a purely preventative bias underpins legislative drafting and implementation, important democratic operative values and co-operative international data protection standards will be compromised. An integrative human rights approach again becomes paramount.

The committee reviews of bills (*National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) and *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Cth) again show predominance of the physical conception of safety and security, as reflected

[177] *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* Ibid, 9.

in the PJCIS review interaction (as it may exist) with, and Executive responses to, the PJCHR approaches.[178]

In the first example,[179] significant human rights compatibility issues identified by the PJCHR persisted, but the Attorney-General's response ameliorated some of the bill's human rights infringements through amendments already provided to the PJCIS.[180] The PJCIS methodology in this instance indicated reporting on submissions made to it, being neither consistently human rights informed, nor endorsing the human rights informed perspectives included in these submissions. This demonstrates that to be effective, any explicitly framed human rights analysis deriving from PJCHR reviews under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) needs to identify and connect with PJCIS language and methodology to improve the chances of influencing PJCIS recommendations.

In the second example[181] a much sharper disconnection between PJCHR identified human rights issues, ministerial responses and PJCIS review of and reporting of the bill emerged.[182] This was underpinned by the Minister for Home Affairs narrowly conceived safety and security approach in insistence upon an expedited passage of the bill, producing significantly greater human rights concerns around

[178] The word limitations of the present article preclude a detailed analysis of the competing principles and dynamics of different Parliamentary Committee processes in the context of these two national security legislative examples. From the perspective of national security legislative process and review these matters may be examined in a future separate article.
[179] *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth)
[180] Christian Porter, *Response of Commonwealth Attorney General to Chair PJCHR Document MC18-001708* dated 14 March 2018, paragraph 3 with enclosure 'Draft parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017'. The changes were to the definitions of inherently harmful information; distinguishing the application of disclosure offences as applying to non-Commonwealth officers and Commonwealth officers; and broadening the defences for journalists.
[181] *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Cth).
[182] That disconnection is substantial, with the PJCHR reports (PJCHR *Human Rights Scrutiny Report 11 of 2018* (16 October 2018) 24-71 and PJCHR *Human Rights Scrutiny Report 13 of 2018* (4 December 2018), 51-120 identifying many significant ICCPR based human rights issues in the Bill's provisions.

compatibility than the circumstances of the earlier bill.[183] The expedition of the second bill ultimately triggered an extraordinary prolonged and complicated review and legislative process,[184] suggesting that an early, broader human rights amenable approach would have produced more effective and timely conclusions and legislation.

V THE DEFAULT OF EXECUTIVE DISCRETION AS A FORM OF RIGHTS PROTECTION – MODERATING NARROW SAFETY AND SECURITY APPROACHES?

The role of safety and security rhetoric has been argued in Part III and Part IV[185] to adversely affect the scope of human rights integration and influence in national security legislative and policy review and formation. In spite of the powerful, legislative imperatives towards enhancing national security powers engendered by safety and security rhetoric, it is implausible to maintain that there should be few or no safeguards hedging national security legislation. The creation of a partial vacuum raises the issue of *which safeguards actually become relevant to the operation of legislation,* when human rights referenced standards have been variously impacted, or manipulated, in the ways identified.[186] In this sense, a *third consideration*, namely *Executive discretion, may be flexibly invoked as a claimed safeguard of rights protection.*

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[183] See letter of 22 November 2018 from Minister Dutton to Chair of PJCIS, as Submission 89 to the Commonwealth Parliament, Parliamentary Joint Committee Intelligence and Security, *Inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill, 2018*: 'I write to you regarding an urgent matter of national security…the situation has become more urgent…I ask that the Committee accelerate its consideration of this vital piece of legislation'

[184] Subsequent further PJCIS review in 2019 and INSLM review in 2020 resulted from this approach.

[185] That is, Part III Safety and Security Ascendancy: Illustrative Factors Influencing Both Coalition and Labor Government Approaches and Part IV National Security Legislative Review Processes: The PJCHR, the PJCIS, Executive Responses to their Reviews and Recent Legislative Enactment Examples '

[186] Ibid.

The impact of safety and security rhetoric, *in reducing the potency and number of enacted safeguards,* has *therefore facilitated some articulation of Executive discretion as a default form of rights protection around enactment of national security laws*. Various characteristics are identifiable with that discretion, including: personalised reassurance in the integrity and capacity of office bearers making decisions under legislation containing the discretions, simultaneously with good institutional culture;[187] discretionary selectivity in presenting arguments supporting and justifying further counter-terrorism laws;[188] an executive determined discretionary control of the specifics written into counter-terrorism laws when proselytising pragmatism and detail as characteristics of Australian terrorism laws;[189] executive nomination as to what constitutes urgency, thereby prioritising law enactment, producing enlarged discretions which assume 'positive exercise of discretion and a confidence in the bona fides of the government's stated intention to eventually legislate in response to review committee recommendations;'[190] and PJCIS review as a legitimating and reassuring process for national security laws, distracting from the concentrations of executive discretion within them.[191]

Such discretion is in different ways oddly presented and implausibly explained source of rights protection in a national security context.[192] Contradictions and credibility problems arise with ministerial proponents of expansive laws advancing themselves as agents of rights protection[193] in this unusual construction

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[187] Carne (n 77), 74; Carne, 'Hasten Slowly' (n 13), 86.
[188] Carne (n 77), 63
[189] Carne, Ibid, 62-63; Carne, 'Beyond Terrorism: enlarging the National Security Footprint Through the Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011 (Cth)' (2011) 13 *Flinders Law Journal* 177, 226.
[190] Carne, 'Hasten Slowly' (n 13), 86.
[191] Carne, 'Sharpening the Learning Curve' (n 148), 40.
[192] Executive discretion appears to have originated as an offset or compensatory rights assurance for urgency principle enacted national security laws (and hence adequate safeguards then likely not conceded, implemented or fully developed) as mentioned under Part II C 'The attractive political utility of safety and security rhetoric'. See also the references in Ibid.
[193] This is particularly the case given the weak doctrine of Ministerial responsibility as it applies to national security matters in Parliament, illustrated by ministerial practice of refusing to either confirm or deny claims: Commonwealth, *Parliamentary Debates,* Senate, 4 December 2013,

of rights mediated through executive discretion. That executive discretion can be illustrated in some different categories of legislative examples.

The plethora of national security legislative enactment for terrorism laws has meant that *where detention is contemplated*, executive discretion of choice manifests in the overlapping, different forms of detention and other separately enacted ancillary measures. This phenomenon arose directly from the Commonwealth's continuous revisiting and revision of terrorism laws since 2001. That discretion enables executive discretionary choices of selecting applicable detention from across the spectrum of broadly defined terrorism matters, from initial investigation to post expiration of sentence custodial arrangements. Discretion also enables the shifting of relevant terrorism related individuals between different forms of detention.

A first example is found in the removal of ASIO's controversial,[194] but unused, detention and questioning power in 2020,[195] occurring alongside the retention of an enhanced questioning power covering new security aspects.[196] The independent

819, (George Brandis); Commonwealth, *Parliamentary Debates*, Senate, 4 December 2013, 766 (John Faulkner): 'It has been the policy of successive governments that questions seeking information concerning the activities of the ASIO or the Australian Secret Intelligence Service (ASIS) will not be answered' (quoted from *Odgers' Australian Senate Practice*) '…So there is a longstanding precedent which every member of parliament understands: ministers have been and should be constrained on what they say publicly about intelligence and security matters'. Alternatively an 'operational matters' doctrine may be invoked in order to decline to comment. Both measures act pre-emptively to close discussion.

[194] See Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415; Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism? : Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 1

[195] *Australian Security Intelligence Organisation Amendment Act 2020* (Cth). See Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020); Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention powers Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018).

[196] Compulsory ASIO questioning powers were expanded in the *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) beyond terrorism offences to all forms of politically motivated violence; and importantly, to new categories of espionage and acts of foreign interference.

role of an issuing authority was removed,[197] with the questioning power absorbed into the existing Attorney-General only warrant granting authority, previously limited to a range of intrusive, but non-detention, ASIO investigative powers relevant to security.[198] Removing the independent issuing authority results in the loss of a carefully crafted and important safeguard,[199] not subject to discretionary Executive control. It produces a commensurate increase in the scope of the Attorney General's discretion to issue a questioning warrant, in the interpretation and application of the legal criteria underpinning the issuing of that warrant, and creates a false equivalence of the intrusiveness of an exceptional questioning warrant with the various existing ASIO Attorney General warrant based covert surveillance and information gathering mechanisms.[200] These reforms afforded the attractive Executive utility in expanding discretion in national security matters and in relaxed safeguards by which such discretion could be accessed.

A second example arises in the multiple forms of detention available to the Executive in national security matters, indicating the variety of discretions in choice and selectivity around individual, and interlocking, pieces of national security legislation.[201] First, there exists the criminal investigatory arrest and

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[197] See *ASIO Act 1979* (Cth) Division 3 Subdivision B Questioning warrants Sections 34B to 34 BH.

[198] *ASIO Act 1979* (Cth) Division 2 Special Powers – search warrants, computer access warrants, surveillance devices, listening devices and inspection of postal and other articles.

[199] A range of such safeguards were forensically and exhaustively deliberated in 2002 and 2003 involving a protracted legislative review process involving two major reports from Commonwealth Parliamentary Committees: Commonwealth Parliament, Joint Parliamentary Committee on Intelligence Services *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (May 2002) and Commonwealth Parliament, Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

[200] (n 195)

[201] The different and potentially overlapping detention provisions outlined below are premised upon Executive discretions as to both the form of detention selected by Executive authorities against statutory criteria and the ability to transfer the detainee between different forms of Commonwealth detention or related measures: see for example, s.105.25 and s.105.26 (4) of the *Criminal Code* (Cth), identifying ASIO questioning warrants under Division III Part III of the *ASIO Act 1979* (Cth) and the investigation of Commonwealth offences under Part 1C of the *Crimes Act 1914* (Cth), including Subdivision B – Terrorism offences.

detention provisions in the *Crimes Act 1914* (Cth) relating to terrorism offences.[202] The provisions were reformed in the aftermath of the *Haneef* matter,[203] including detailed provisions for calculating the standard investigation time[204] during detention, and for the extension of the investigative period during detention.[205]

Second, there exists detention under the *Migration Act 1958* (Cth) in the form of sections 189[206] and 192.[207] The latter is particularly apposite as it allows the detention of persons whose visas have been cancelled on character grounds.[208] These provisions would have had further reach, through the operation of s.36 B of the *Australian Citizenship Act 2007* (Cth),[209] prior to the High Court decision in *Alexander v Minister for Home Affairs.*[210]

Additionally, different preventative detention orders exist in the *Criminal Code* (Cth).[211] These orders are intended to be pre-emptive and preventative in nature:[212]

> The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to:

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[202] See *Crimes Act 1914* (Cth) s 3WA (arrest for terrorism offences) and Part 1 C, Division 2 Powers of Detention Subdivision B Terrorism Offences ss 23 DB to 23 W.
[203] Hon John Clarke QC *Report of the Inquiry into the case of Dr Mohamed Haneef* Canberra: Attorney General's Department (November 2008)
[204] *Crimes Act 1914* (Cth) s.23 DB. In particular, see s.23 DB (9) (a) to (m), (10) and (11).
[205] *Crimes Act 1914* (Cth) s.23 DE (1) to (7).
[206] *Migration Act* s.189 Detention of unlawful non citizens
[207] *Migration Act* s.192 Detention of visa holders whose visas liable to cancellation.
[208] *Migration Act 1958* (Cth) s.501 (a) the person has a substantial criminal record (includes sentenced to a term of imprisonment of 12 months or more ; s.501 (c) risk of engaging in criminal conduct in Australia; s.501 (d) (v) represent a danger to the Australian community or to a segment of that community…by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment…; s.501 (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*
[209] Section 36B empowered the Minister for Home Affairs to determine that a person ceases to be an Australian citizen if satisfied, among other matters, that the person engaged in certain proscribed conduct, including in engaging in foreign incursions and recruitment, which demonstrated that the person had repudiated his or her allegiance to Australia.
[210] [2022] HCA 19. Section 36 B was found invalid by a majority of the High Court of Australia on the basis that it reposed in the Minister an exclusively judicial function of adjudging and punishing criminal guilt.
[211] See Carne, (n 77), 21-23.
[212] *Criminal Code* (Cth) Division 105 Preventative detention orders s.105.1 'The object of this Division is to allow a person to be taken into custody and detained for a short period of time'

(a) Prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring; or
(b) Preserve evidence of, or relating to, a recent terrorist act

From the perspective of executive discretion, an initial preventative detention order[213] may be applied for by a member of the AFP to a senior AFP member.[214] The duration of the preventative detention order, by way of a continued preventative detention order,[215] confers further Executive flexibility[216] within a relatively short time frame, making challenge before a court difficult.[217] These time limits are entwined in initial doubts of the scope of the powers conferred as being consistent with Chapter III *Commonwealth Constitution* requirements.[218] This led the States and Territories to enact their own, more expansive, fourteen day preventative detention schemes.[219] Further levels of discretionary flexibility in the Commonwealth's preventative detention orders allowing shifting between different forms of detention have been previously identified and remain relevant.[220]

These discretionary choices in relation to detention around terrorism matters are further supplemented by the Commonwealth's enactment of control orders[221] and

[213] Section 105.7 *Criminal Code*
[214] Section 105.7 *Criminal Code* Note 2. A senior AFP member is an AFP officer of or above the rank of Superintendent: see *Criminal Code* s.100.1 definition.
[215] Section 105.12 *Criminal Code* – a judge, AAT member or a retired judge may make a continued preventative detention order
[216] Potentially extending the preventative detention through the combined operation of ss 105.7 and 105.12. to a maximum of 48 hours.
[217] It was thought at the time of enactment, the relative time brevity of the Commonwealth preventative detention scheme was linked to the uncertainty of its constitutional foundation: Carne (n 77), 38.
[218] Ibid
[219] See, for example, *Terrorism (Community Protection) Act 2003* (Vic) Part 2 A Division 2 Preventative Detention Orders; *Terrorism (Police Powers) Act 2002* (NSW) Division 2 Preventative Detention Orders
[220] Carne, (n 77) 67, 69 in the discretionary legislative interrelationship between *Criminal Code* Division 105 Preventative detention orders and the now repealed ASIO detention and questioning warrants. This discretionary interrelationship continues to apply in circumstances involving ASIO questioning warrants: see s.105.25 and s. 105.26 of the *Criminal Code* (Cth).
[221] *Criminal Code* (Cth) Division 104 Control Orders

post sentence supervision orders.[222] Each of these orders provides the Executive with extensive discretionary choices as to the circumstances in which applications may be made for such orders, including interim and continuing orders,[223] and the conditions which may be sought, upon application to and approval of a court, as attaching to those orders.[224] Practically, the level of flexibility, and hence discretion, in the available content for these orders exceeds the blunter mechanism of the various forms of detention discussed above.

Important 2018 national security enactments also provide singular illustrative examples of executive discretion as a claimed form of rights protection, highlighting the bipartisan qualities of the practice. The *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018* (Cth)[225] required extensive, if ultimately insufficient, amendment, following its introduction and subsequent PJCIS report release.[226] A distinctive feature of executive discretion included in the amended bill was a requirement for Attorney General consent to prosecutions for an espionage offence and for a secrecy offence, seen as an additional safeguard. The Shadow Attorney General,[227] alert to criticism of this measure,[228] supported the measure and explained at some detail, the A-G's propriety role for this function.[229]

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[222] *Criminal Code* (Cth) Division 105A Post sentence orders
[223] *Criminal Code* (Cth) Division 104 Subdivision B Interim Control Orders Subdivision D Confirming an interim control order; *Criminal Code* (Cth) Division 105 A Post sentence orders s.105A.7A Making an extended supervision order
[224] *Criminal Code* (Cth) Division 104 s.104.5 (3) (a) to (l) Obligations, prohibitions and restrictions (control orders); *Criminal Code* (Cth) Division 105 A Conditions of extended supervision orders and interim supervision orders – s.105A.7B (2) General rules about conditions, s.105A.7B (3) (a) to (r) General conditions
[225] The bill was originally introduced in 2017: See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145-13149 (Malcolm Turnbull)
[226] *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (June 2018) (n 161).
[227] Hon Mark Dreyfus QC, who was also a member of PJCIS.
[228] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018, 6346 (Andrew Wilkie)
[229] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018 6337, 6338-6339 (Mark Dreyfus). The shadow Attorney General emphasised the improved nature of the Bill in several aspects: Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018, 6337-6339 (Mark Dreyfus).

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Cth),[230] attracted considerable controversy,[231] even after the PJCIS report[232] recommended amendments.[233] The Bill introduced two new powers – technical assistance notices[234] and technical capability notices.[235] Given the Bill's significant potential for privacy intrusions and weakened data protections[236] and the difficulty in obtaining US congressional approval for access to non US citizen data in the initially presented scheme, it would seem logical for judicial warrants to underpin both notices.[237] The fact that judicial warrants were not subsequently provided for, confirms a strong retention of executive discretion in the Ministerial and agency arrangements,[238] even allowing for Coalition and Labor settled amendments as members of the PJCIS,[239] increasing the roles of IGIS and the Commonwealth Ombudsman.[240]

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[230] The Minister for Home Affairs introduced the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 2018, 9671- 9674 (Peter Dutton).

[231] Three major issues emerged in evidence from the data industry, network providers and other submitters to the PJCIS inquiry – the bill (as then drafted) posing 'a significant risk to Australia's national security, jeopardise security co-operation with the United States and create unnecessary risks to Australian businesses and, in particular, local technology exporters': Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2018, 12771 – 12775 (Mark Dreyfus).

[232] *Advisory Report on the Telecommunications and Other Legislation Amendment* (Assistance and Access) Bill 2018 (December 2018) (n 166).

[233] Ibid, ix – xiv, Recommendations 1 to 17.

[234] 'Technical assistance notices will be issued by an agency head or their delegate to compel assistance that a provider is capable of giving': Commonwealth, *Parliamentary* Debates, House of Representatives, 20 September 2018, 9672 (Peter Dutton)

[235] 'Technical capability notices will be issued by the Attorney-General and require a company to take reasonable steps to develop and maintain a capability to respond to agency requests': Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 2018, 9672 (Peter Dutton)

[236] Technical capability notices required sign off by the Attorney General and the Communications Minister; Technical Assistance Notices could be issued by the head of an enforcement agency, or the delegate of the head.

[237] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2018, 12799, (Ged Kearney), noting that the 'government will not agree to judicial oversight'; Commonwealth, *Parliamentary Debates*, Senate, 6 December 2018, 9782 (Rex Patrick).

[238] (n 236) being principally Ministerial and agency control over these warrant equivalent measures.

[239] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2018, 12774-12775 (Mark Dreyfus)

[240] Other measures included further review by the PJCIS in 2019: *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (April 2019 (n 166); as well as INSLM review: Commonwealth Government, Independent

In 2021, the Commonwealth Parliament enacted the first legislation implementing an initial Government's response to the Richardson Review.[241] In the *National Security Legislation Amendment – Comprehensive Review and Other Measures No 1 Act 2021* (Cth), executive discretion is clearly manifested through the loosening and liberalisation of accessing enhanced institutional capacities and co-operative arrangements between different intelligence agencies. A liberalised remit of previously externally orientated intelligence agencies to now engage in domestic orientated security activities is illustrated by three examples, where removing a direct Ministerial accountability measure enhances discretion.

The Act *limited the requirement* for ASIS, ASD and AGO, to obtain a ministerial authorisation to produce intelligence on an Australian person to circumstances where those agencies seek to use covert and intrusive methods (including methods for which ASIO would require a warrant to conduct inside Australia).[242] The Act additionally enlarged ASIS's authority, without ministerial authorisation, to cooperate with ASIO in Australia when undertaking less intrusive activities to collect intelligence on Australian persons relevant to ASIO's functions, outside of Australia.[243] Further, AGO in carrying out its non-intelligence function, was now exempted from a requirement to seek ministerial approval for cooperation with authorities of other countries.[244]

Enlarging these powers situated below a regulatory threshold of formal Ministerial approval means that ASIS, ASD and AGO have increased discretions whether, how, and to what extent, they exercise statutorily enacted powers. Each amendment loosens accountability controls in the form of formal ministerial

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National Security Legislation Monitor *Trust But Verify* A report concerning the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters* 93rd INSLM 2020 9th Report Dr James Renwick SC)

[241] Commonwealth Attorney-General's Department *Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2019) (*Richardson Review*)

[242] See s.8 (1A) and (1B) of the *Intelligence Services Act 2001* (Cth), particularly the reference to 'prescribed activity'.

[243] See s.13B (3) of the *Intelligence Services Act 2001* (Cth).

[244] See s.13 (3A) and (3B) of the *Intelligence Services Act 2001* (Cth).

authorisation, with decision making processes being then informally exercised on an Ministerial executive basis, or simply decided by senior security officials collaborating with one another. These discretions will doubtless generate inter-institutional culture and self-interest norms making it advantageous for intelligence agencies to reciprocally and fully co-operate, with their counterpart intelligence agencies, as the limits of the legislation facilitates.

The difficulties of executive discretion as a claimed safeguard, not exclusive to the above examples, are therefore obvious. Of paramount consideration is that interests and aspirations of the Executive exercising national security powers are frequently and diametrically at odds with an exercise of self-restraint or reflection. Reliance on executive discretion to produce just outcomes signals more an inadequacy of legislated checks and balances, or over-reaching laws with excessive penalties. The exercise of executive discretion as a moderating influence on the laws is fraught with application inconsistencies on irrational or selective grounds, largely dependent upon who is instant discretion holder – the Attorney General, a prescribed authority, a senior police officer or a senior prosecutorial figure. The boundaries of such discretion are often opaque, and articulating it as a rights protecting measure may contrarily mask an executive flexibility to enhance, rather than restrain power. Discretion as a positive aspect may divert attention from its real capacity to further extend, on an ad hoc and diametrically contrary interpretive basis, broadly based laws. Discretions, in a heavily legislated national security environment, are frequently about selecting from the most preferable practical choice from a suite of options.

Further *direct influences of the rhetoric of safety and security to the superficial attractiveness of executive discretion might be discerned*. The fall back upon executive discretion *may arise through a more readily hastened legislative review and enactment process (encouraged by safety and security rhetoric)* with truncated time lines trumping proper process, including calibrated amendments. Executive discretion advanced as a credible alternative may initially foster less

rigorous legislative review of safety and security claims. So rather than ameliorating issues flowing from safety and security rhetoric, reliance on executive discretion actually might enliven those issues.

The claim of executive discretion as a form of rights protection in a national security context invites a suspension of scepticism and disbelief, instinctively at odds with the usual sets of heightened executive interests therein. These weaknesses of executive discretion as a form of rights protection, further point to reform needs for legislative processes and outcomes in national security subject matters, alongside the re-interpretation of international human rights meanings and PJCIS and PJCHR interactions, influenced by the framing safety and security rhetoric.

VI REASONS FOR REFORMING LEGISLATIVE ENACTMENT AND REVIEW - MODERATING NATIONAL SECURITY SAFETY AND SECURITY APPLICATIONS

A *Contemporary Developments – Legislative, Technological and Organisational*

Each of the three major illustrative applications in Part III, Part IV and Part V of the development of national security laws is framed by the overarching thematic rhetorical framework of safety and security – the inadequate bipartisan interpretation and development of international and liberal democratic human rights, the formalised mechanisms, hierarchies and precedential PJCIS reviews, and an misleadingly articulated claim of executive discretion as a human rights safeguard.

These orientations point to a pressing need for practical moderation of the concept's application to ensure greater substantive engagement and attainment of the qualitative and cultural democratic aspects in legislative formation, to protect and advance democratic institutions, practices and culture. The bipartisan Commonwealth commitment to an exclusive parliament based model of human rights, has more readily legitimised safety and security rhetoric. Each party has downplayed, through such rhetoric, the role that conventional human rights analysis should properly play in shaping national security laws.

Other contemporary developments underline the need for urgent reform of the usages of safety and security. Expansive new legislative, organisational and mainstreaming national security developments are likely to demand creative safeguards to contain incremental erosions of representative democratic practices and institutions. The high tempo of Australian legislative change and first resort to legislative reform (rather than other public policy approaches) is an established paradigm that may continue.[245]

The acculturation of safety and security as backgrounding national security law reforms may produce complicating and contradictory results. Two examples are illustrative. The *ASIO Legislation Amendment Act 2020* (Cth) reflects this phenomenon[246] – whilst removing highly contentious ASIO detention and questioning warrants,[247] the legislation extended questioning warrants to all forms of politically motivated violence, (previously restricted to terrorism matters)

[245] Williams and Hardy (n 13). This observation may be tempered, as it was in reduced national security legislative activity 2007-2013, by the 2022 election of a Labor government.
[246] *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (2020) (n 195) – see especially 95-99 'Additional Comments from Labor Members".
[247] There had been several official calls for repeal of the ASIO detention and questioning warrants: Independent National Security Legislation Monitor, *Declassified Annual Report* 20 December 2012 (2012), 106; Independent National Security Legislation Monitor *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), 41; *ASIO's questioning and detention powers Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018) (n 195), 41; *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020) (n 195), 3-5. It is noted that the *Australian Security Intelligence Organisation Amendment Bill 2020* provided that 'Questioning and detention warrants will no longer be available, and detention will not be permitted under a questioning warrant': Ibid, 8.

espionage and foreign interference, simultaneously removing the critical check of an independent warrant issuing authority, installed after protracted review and deliberation in 2002. In a contrasting move, earlier predictions of a central assistance role for the ASD in domestic surveillance were not fully realised.[248] Instead, the *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) amended the *Surveillance Devices Act 2004* (Cth) and the *Crimes Act 1914* (Cth) to give enhanced powers to the AFP and the Australian Criminal Intelligence Commission in relation to serious online crime. These reforms centred on three main powers – data disruption warrants, network activity warrants and account takeover warrants.[249] The primary legislation method of intelligence gathering for the investigation of online crime therefore remained with the two *domestic* agencies – the AFP and ACIC, under warrant processes.[250] On the other hand, the ASD scope for producing intelligence on an Australian person was enhanced.[251] It was linked to an ASD capacity to co-operate with Commonwealth authorities,[252] in the amendments made to the *Intelligence Services Act 2001* (Cth) by the *National Security Legislation Amendment Comprehensive Review and Other Measures No 1) Act 2021* (Cth).[253]

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[248] 'Peter Dutton confirms Australia could spy on its own citizens under cybersecurity plan' *The Guardian* 6 August 2020, discussing ASD assistance to the Australian Federal Police and the Australian Criminal Intelligence Commission. The *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) amended the *Surveillance Devices Act 2004* (Cth) and the *Crimes Act 1914* (Cth)

[249] *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* (Cth) Revised explanatory memorandum, 1-2.

[250] *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) Schedule 1 Division 5 Data Disruption Warrants ; Schedule 2, Division 6 Network Activity Warrants; Schedule 3 Division 2 Account Takeover Warrants.

[251] By clarifying that Ministerial authorisation to produce intelligence on an Australian person was only required when agencies – being the ASD, AGO or ASIS – were to utilise covert and intrusive methods.

[252] *Intelligence Services Act 2001* (Cth) s.13 A (1) (c) (co-operating with a Commonwealth authority prescribed by the regulations for the purpose of this paragraph) (co-operating with intelligence agencies etc in connection with performance of their functions). Commonwealth authorities are broadly defined in s.3 of the *Intelligence Services Act 2001* (Cth).

[253] See Schedule 4 of the *National Security Legislation Amendment* (*Comprehensive Review and other Measures No 1) Act 2021* (Cth).

A further complicating accelerant from the physical conception of safety and security in its relationship with representative democracy has been the added economic component of prosperity. Prosperity, as economic security,[254] has further justified new national security laws, as a securitised subject matter. The aspirant, upwardly mobile consumer and economic actor citizen exercising market choices, is enmeshed in the protective objectives of national security laws. The strength of this development is that materialism and economic advancement are publicly tangible and comprehensible, conferring legitimacy as safety and security subject matters. This economic qualifier is significantly narrower than a full suite of democratic participatory rights. This economic orientation potentially adds to the vocabulary of safety and security rhetoric.

Other legislative developments are also significant. We have seen the recent broadening of national security legislative activity from terrorism, prominent since 2001, to the issues of foreign interference, foreign influence and espionage,[255] principally associated with China and the Russian Federation. However, proposed and implemented national security laws will affect individuals in new, disproportionate and direct ways. These areas include storing, accessing and tracking personal data,[256] harvesting open source information on individuals,[257] as well as contesting the loyalty of certain nationalities in Australia's multicultural community.[258]

Technological developments – previously raised in relation to meta- data retention and access and de-encryption provisions, are in the vanguard. Further expansive

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[254] (n 66)

[255] As reflected in the enactment of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2017* (Cth), the *Foreign Influence Transparency Scheme Act 2017* (Cth) and the *Foreign Influence Transparency Scheme* (Charges Imposition) *Act 2017* (Cth).

[256] *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2019* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

[257] *Office of National Intelligence Act 2018* (Cth) s.7 (1) (g) and *Crimes Act 1914* (Cth) s.15KA (3) (A).

[258] 'Chinese Australians say questions from Senator Eric Abetz are not asked of other communities' *ABC News On Line* 15 October 2020; 'Senator Eric Abetz's controversial question about loyalty rattle Chinese community in Australia' *ABC News On Line* 22 October 2020.

legislation is likely for areas such as facial recognition technology for public area monitoring,[259] and implementing the Richardson Review of the NIC legal framework,[260] are likely to drive database integration and liberalise intelligence collection, collation and exchange. Defensive and offensive cyber protection capacities for the NIC through the ASD will likely be a high contemporary priority.

Governance and bureaucratic re-organisation around national security matters are also of primary importance. Establishing Home Affairs,[261] concentrating various intelligence, intelligence related and law enforcement functions, was a construct prompted by political and departmental issues,[262] matching the leadership ambitions of its former Minister, Mr Dutton.[263] This consolidation of ten security focused or security related agencies under the umbrella of Home Affairs[264] represent a major re-organisation of Australian governance, creating a framework for the Australian polity's active securitisation. The public views of the Home Affairs secretary, Michael Pezzullo, have raised concerns.[265] In contrast, the

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[259] Mike Seccombe, 'Dutton's plan for a surveillance state' *The Saturday Paper* 26 October 2019; 'Coalition-led security and intelligence committee rejects Government surveillance bill', *ABC News On line* 24 October 2021; *Identity-matching Services Bill 2019* (Cth) and *Australian Passports Amendment (Identity matching Services Bill) 2019* (Cth).

[260] Richardson Review (n 241); Commonwealth Government Attorney-General's Department *Commonwealth Government response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2020).

[261] 'A strong and secure Australia '(n 47); Paddy Gourley, 'The folly of the Coalition's Home Affairs super-ministry shake-up' *The Canberra Times* (Canberra) 30 July 2017; Patrick Walters 'Spies China and Megabytes Inside the overhaul of Australia's intelligence agencies' *Australian Foreign Affairs*, October 2018, Issue 4, 27, 45-47.

[262] Malcolm Turnbull, *A Bigger Picture*, (Hardie Grant, 2020), 436-437.

[263] Ibid, 438. The 2017 Independent Intelligence Review did not recommend its establishment: Michael L'Estrange and Stephen Merchant, *2017 Independent Intelligence Review* Department of Prime Minister and Cabinet (June 2017), 13-22 (Summary of Recommendations). See also Chapter Four of the *2017 Independent Intelligence Review* 'New Structural Arrangements For Managing The National Intelligence Enterprise'.

[264] The 2022 Labor Government has since re-assigned ministerial responsibility for the AFP to the Attorney-General's portfolio: 'AFP back in the A-G's hands amid portfolio reshuffle' *Australian Financial Review* (Sydney) 3 June 2022, 32. Austrac and ACIC were also re-assigned to the Attorney-General's portfolio: 'National security fears over AFP shift' *The Australian* (Sydney) 3 June 2022

[265] Turnbull (n 262) 439; James Button, 'The Minister, Pezzullo and the demise of Immigration' *The Monthly* February 2018; Michael Pezzullo, 'Keynote Address – Data Analysis, privacy and National Security Research', (Speech to Women in National Security Conference Power

Director General of Security has sought to explain and proselytise ASIO's contemporary and evolving roles and priorities.[266] The Director General of ASIS[267] and the Director General of ASD have similarly engaged in institutional public relations.[268] The establishment of an Office of National Intelligence[269] to collect, co-ordinate, integrate and share intelligence from a range of sources, additionally provides new national security architecture for future co-ordination of liberalised, lateralised and co-operative NIC activities. That safety and security orientation is likely to be strengthened by adopted recommendations of the Richardson Review. The *Comprehensive Review* terms of reference and methodology signalled an expanded security intelligence footprint, consistent with further future executive power concentrations.[270] The Government Response accepted most recommendations.[271]

Security and Change, Canberra, 25 October 2018); Michael Pezzullo, 'Prosper the Commonwealth: The Public Service and Nationhood,'(Speech to the Institute of Public Administration Australia (ACT Division), Canberra 30 October 2018); Karen Middleton, 'Turning on the monitors' *The Saturday Paper* , November 3-9, 2018, 10-11; Commonwealth Parliament, Senate, *Parliamentary Debates* 6 December 2018 9772, 9773 (Jordan Steel- John)

[266] Director General of Security 'Director General's Annual Threat Assessment' 24 February 2020 (n 4); 'ASIO has never acknowledged its chamber of secrets exists. Here's what's inside' *ABC News On Line* 21 August 2020; 'Editor's note' Jonathan Pearlman (2020) 9 *Australian Foreign Affairs* (July 2020), 3-4.

[267] 'Director- General of ASIS in His First Ever Interview' *Australian Outlook* 25 July 2019; 'Australian Secret Intelligence Service boss Paul Symon gives first public interview' *ABC News On Line* 25 July 2019.

[268] 'Aussies are not all good: top spy' *The Australian* (Sydney) 1 September 2020, 1-2; 'Director-General ASD speech to the National Security College' (Rachel Noble, Director General ASD Speech to National Security College, Australian National University, Canberra 1 September 2020)

[269] *Office of National Intelligence Act 2018* (Cth). Importantly Section 4 of the legislation defines 'intelligence agency' – the agencies being the Australian Signals Directorate (ASD), ASIO, ASIS, the Australian Geospatial Organisation (AGO), DIO (Defence Intelligence Organisation) and the Australian Criminal Intelligence Commission (ACIC). Section 4 also defines 'agency with an intelligence role or function' – the agencies being Austrac, AFP, Department of Home Affairs and the Defence Department (other than AGIO or DIO). Collectively, the ten agencies comprise the 'National Intelligence Community'.

[270] This is most likely to arise through harmonisation of intelligence agency legal frameworks regarding operational matters, resulting in a lowering of legal thresholds.

[271] See Christian Porter, 'Government response to the Comprehensive Review into Intelligence Legislation (Richardson Review)' (Attorney General Media Release 4 December 2020): 'The Government will take forward a number of targeted reforms based on the Richardson Review and has agreed in full, part or principle to 186 of the 190 unclassified recommendations'; *Commonwealth Government response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (n 260). The Morrison Government commenced

These three components – legislative, technological and organisational/bureaucratic - combine with other discussed issues towards a continuing securitisation of the Australian state, public policy and related legislative topics. Safety and security iterations will likely continue to underpin some qualitative relational shifts between the citizen and the government, reflecting these components.

VII CONCLUSION: COMMENCING REFORMS TO OFFSET THE CONSEQUENCES OF SAFETY AND SECURITY RHETORIC

This article has explored the manifestations and influences of safety and security rhetoric in the enactment and review of national security laws. Coalition and Labor governments have used safety and security rhetoric to advance and justify new national security laws. It reflects distinctive characteristics and dispositions towards the positioning of human rights held by parties of Australian governance.

Significant consequences flow from the drafting, amendment and implementation of national security laws framed and animated by safety and security rhetoric. In a loosely bipartisan sense, a narrow conception of safety and security around a physical security aspect has emerged, failing to sufficiently connect national security legislation process and outcomes to reinforce substantive accountability characteristics of liberal democratic representative government. Overarching safety and security rhetoric has shaped and distorted the contours of debate, review and enactment of such laws. There is a *general need* to ameliorate such effects upon democratic institutions, practices and culture. There is a *particular* need to focus upon and prioritise pragmatic reforms to legislative review institutions and processes.

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implementation of the Richardson Review recommendations: *National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Act 2021* (Cth).

Three illustrative issues under this umbrella rhetoric involved the reinterpretation of important ICCPR articles, PJCIS review characteristics and methodology, and the default reliance upon executive discretion as a claimed method of rights protection. Legislative process, including Parliamentary Committee review, needs reform to counter-balance and moderate the culture and effects arising from safety and security rhetoric. The need is compelling through the raft of identified present and proposed legislative, technological and organisational-bureaucratic national security reforms, including implementation of the Richardson Report recommendations. This change is similarly imperative because national security laws remain under constant review, amendment and addition.

Reforms need to pragmatically respond to the legislative formation and review practices and exponential growth of powers facilitated by safety and security rhetoric. Safety and security claims need re-orientation towards embracing protection and enlargement of democratic institutions, culture and practices. Such reforms should therefore broaden review foundations and ameliorate cultural and methodological review deficiencies.

Calibrated reforms are best pragmatically prioritised around the PJCIS, the leading review committee. The PJCIS needs its nascent, modest capacity for changing the conduct and trajectory of national security law review augmented. More recent legislative review arrangements have mandated timelines so that the INSLM is empowered to conduct a review of prescribed legislated subject matters, followed by PJCIS review, enabling PJCIS reference to the earlier INSLM review.[272] This incremental construct of the Australian legislative review processes, serendipitously forms a potentially more liberalised review process.

[272] See, for example, s.6 (1B), (1C) and (1E) of the *Independent National Security Legislation Monitor Act 2010* (Cth); Dalla-Pozza, (n 150), 674, fn 2 where the 'dual scrutiny' method is identified being first implemented in 2014 in two acts, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth).

The Labor legislated INSLM process[273] when linked to the confined and ascendant PJCIS process,[274] is advantaged by the comparative ISLM independence[275] from political seduction of safety and security rhetoric.

Significantly, the INSLM review of such legislation sets different, more liberal, methodological international reference points.[276] These include whether Australia's counter-terrorism and national security legislation is (c) consistent with Australia's international obligations, including (i) human rights obligations; and (ii) counter-terrorism obligations; and (iii) international security obligations ; and (d) contains appropriate safeguards for protecting the rights of individuals.[277] Further, the INSLM must consider whether such legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains proportionate to any threat of terrorism or threat to national security, or both, and (iii) remains necessary.[278] When performing INSLM functions, the INSLM additionally must have regard to (a) Australia's obligations under international agreements (as in force from time to time) including (i) human rights obligations; and (ii) counter-terrorism obligations; and (iii) international security obligations.[279]

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[273] The *Independent National Security Legislation Monitor Act 2010* (Cth) legislation was passed during the Rudd Government: Robert McClelland and Joe Ludwig, 'Australia to Establish Independent National Security Legislation Monitor' (Joint Media Release Attorney General and Special Minister of State) 18 March 2010. The first INSLM, Brett Walker SC, was appointed during the Gillard Government: Wayne Swan 'Appointment of the Independent National Security Legislation Monitor' (Treasurer and Acting Prime Minister Media Release 21 April 2011)

[274] As instituted from the time of the Abbott Government in 2014. The Abbott Government intended to abolish the INSLM, as a red tape reduction measure, but eventually relented: Paddy Gourley, 'Abbott's machinery of government may seem 'smaller' but it's not 'rational' ' *Canberra Times* (Canberra) 1 July 2014; Katherine Murphy, 'Australian MPs to attend surveillance conference in London' *The Guardian* (Sydney) 3 July 2014.

[275] See *Independent National Security Legislation Monitor Act 2010* (Cth) ss 11, 12 and 13. The independence of the role is underscored by the fact of INSLM appointees being senior barrister level – Brett Walker SC and James Renwick SC – or previous judicial office – Roger Gyles QC, and being appointed on a part time basis, with only one term of renewal available under the Act.

[276] See *Independent National Security Legislation Monitor Act 2010* (Cth), s.3 (Objects clause) and s.6 (Functions of the INSLM).

[277] S.3 *Independent National Security Legislation Monitor Act 2010* (Cth).

[278] S.6 (1) (b) *Independent National Security Legislation Monitor Act 2010* (Cth).

[279] S.8 *Independent National Security Legislation Monitor Act 2010* (Cth).

Reform to INSLM reporting provisions[280] requiring clear time lines for Executive government responses to INSLM reports,[281] would further strengthen Executive accountability to Parliament,[282] but additionally broaden the informed background of the PJCIS, and enhance how the PJCIS might use its INSLM reference power.[283]

The possibility to shift PJCIS review approaches are residually in the first use of the reference power to the INSLM,[284] in initial rejection of the introduction of

[280] *Independent National Security Legislation Monitor Act 2010* (Cth) Part 4 Reporting requirements s.29 A (Special Report – INSLM own initiated and PJCIS referenced inquiries), s.29 B (Statutory review report – reporting obligations on specific national security legislation included in the *INSLM Act*) and s.30 (Report on a Reference by the Prime Minister or Attorney General).

[281] Commonwealth Government, Independent National Security Legislation Monitor *Report to the Prime Minister The Prosecution and Sentencing of Children for Terrorism* (Dr James Renwick SC 3rd INSLM 2018 5th Report), the INSLM recommendation 11 stated 'I recommend that within 12 months the Commonwealth Government, through the appropriate Minister, advise the Parliament of its response to these recommendations, and where relevant, any implementation of those recommendations'. The Government noted this recommendation; the INSLM further recommended that 'the INSLM Act be amended to provide formal government response to INSLM reports within 12 Months of delivery of the reports'. The Government did not support this recommendation: Commonwealth Government, Attorney General's Department, *Commonwealth Government response to Independent National Security Legislation Monitor (INSLM) Report to the Prime Minister on the prosecution and sentencing of children for terrorism* INSLM Recommendation 11 – Government Response.

[282] The desirability of this measure is highlighted by insufficient or dilatory government responses to two important INSLM reports: *The Prosecution and Sentencing of Children for Terrorism* Ibid and Commonwealth Government, Independent National Security Legislation Monitor *Trust But Verify A report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters* (Dr James Renwick SC 3rd INSLM 2020 9th Report), and also for responses to the more recent INSLM Annual Reports for 2020-2021 and 2019-2020: See Government Responses to reports of the INSLM: https://www.ag.gov.au/national-security/publications/government-responses-reports-independent-national-security-legislation-monitor-inslm

[283] Under s.7A of the *INSLM Act 2010* (Cth) and paragraph 29 (1)(b)(i) of the *Intelligence Services Act 2001* (Cth) –possibly in this instance to refer matters arising from an initial INSLM report back to the INSLM for further follow up.

[284] On 26 March 2019 the PJCIS itself requested that the INSLM review the operation, effectiveness and implementation of amendments made by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).

facial recognition technology based laws,[285] and Labor PJCIS members insisting upon further review of expedited data decryption laws.[286]

Positive change for PJCIS methodology and perceptions is most likely to arise though incorporating *externally sourced processes or functions* by statutory or administrative means. Several avenues exist for greater human rights influence in national security legislation to offset the paradigm of safety and security dominance, ultimately enhancing representative government confidence measures.

Major administrative improvement is attainable in ministerial terms of reference to the PJCIS for individual bill inquiries.[287] A default clause requiring PJCIS Report consideration of the PJCHR interim and final reports on the same bills, and allowing a two week reporting time line following finalised PJCHR reports, would enhance human rights principles integration in PJCIS recommendations.

That reform would provide an intermediate junction between the stated PJCIS and PJCHR review operating methodologies.[288] An alternative compromise is achievable by amending Parliamentary Standing Orders for the tabling of reports, or amending the PJCIS ministerial reference power in the *Intelligence Services*

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[285] 'Dutton's plan for a surveillance state' (n 259); 'Coalition-led security and intelligence committee rejects Government surveillance bill', (n 259); Sarah Martin, 'Committee led by Coalition rejects facial recognition database in surprise move' *The Guardian* 24 October 2019; Commonwealth Parliament, Parliamentary Joint Committee on Intelligence and Security, PJCIS *Advisory report on the Identity-matching Services Bill 2019 and the Australian Passports Amendment (Identity matching Services) Bill 2019*, iii, Recommendation 1 and Recommendation 2; Parliament of the Commonwealth of Australia, PJCHR *Human Rights Scrutiny Report 3 of 2018*, (n 170),43-51; Commonwealth Parliament, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report Report 5 of 2018*, 109-144.

[286] See 'Additional Comments' *PJCIS Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (December 2018) (n 176), 21-23. The *Acting* Minister for Home Affairs eventually provided undertakings that the PJCIS would continue its inquiry into the Bill into 2019 and that the INSLM would conduct a separate statutory review of the legislation within 18 months of the legislation coming into effect. Labor members accepted these items as improvements: Ibid, 22-23.

[287] Under s.7A of the *INSLM Act* and paragraph 29 (1)(b)(i) of *the Intelligence Services Act 2001* (Cth).

[288] See discussion under Part IV ' National Security Legislative Review Processes : The PJCHR, the PJCIS, Executive Responses To Their Reviews and Recent Legislative Enactment Examples'.

Act.[289] That reform initiative might also be replicated by standardising future national security legislative reviews investigation and report by the INSLM, prior to that of the PJCIS. The INSLM report would inform the PJCIS inquiry and report – drawing on the broader human rights framework in INSLM review.[290]

The marginalised inferior PJCHR role in reviewing national security laws and transitioning recommendations points to a conferred PJCIS pre-eminence, which absents valuable review competition and contestation. A PJCIS de facto monopoly on national security legislative review, with membership confined to the Coalition and Labor as governance parties, induces party careerism and subservience. To shift appraisals of safety and security to better reflect liberalised conceptions of representative government institutions and practices, rigorous review by the Senate Legal and Constitutional Affairs Committee, successfully performed up until 2014, should be resumed. .

Reconfigured Senate review will increase human rights foci, through a broader cross bench and minor party membership, breaking embedded PJCIS bipartisanship constraints. Second, the independent check of Senate review should concentrate on PJCIS reviews accrued to the PJCIS itself *through its own report recommendations establishing prospective review* for proposals in its reports.[291] A former Senator member of the PJCIS's recommendations,[292] suggest facilitating further stronger and beneficial relationships between the PJCIS, the IGIS and the INSLM.

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[289] *Intelligence Services Act 2001* (Cth) s.29 (1) (b) (i)
[290] See *Independent National Security Legislation Monitor Act 2010* (Cth) s.6(b)(i), (ii), (iii).
[291] This would form a useful independent review of the PJCIS methodologies, allowing fresh and different assessment of the subsequent PJCIS review of legislation which the PJCIS *itself recommended* and supported in the initial PJCIS review reports. For these PJCIS review examples, see *Intelligence Services Act 2001* (Cth) ss 29(1) (bb), 29(1) (bca), 29 (1)(ca), 29(1) (cb) and 29 (1) (cc).
[292] Senator John Faulkner was a member of the PJCIS (2005-2008 and 2010-2015). See John Faulkner, 'Surveillance, Intelligence and Accountability: An Australian Story', 46-47 and 'Greater Oversight of Spies Needed, says Faulkner' *The Australian Financial Review* (Sydney) (online) 23 October 2014.

The *Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015* (Cth) allowed the INSLM and IGIS to provide copies of their reports to the PJCIS and for the INSLM and National Security Adviser to consult with the PJCIS.[293] Flattening of informal institutional hierarchies between different security review forums, with contestation of PJCIS review reference points, will create more permeability for human rights analysis to inform review deliberations and recommendations. Formalising PJCIS obligations to seriously engage with alternative viewpoints should provide new avenues for human rights analysis to influence PJCIS recommendations. It might similarly temper Committee susceptibility to Executive influence. A further 2020 private member's bill[294] also provided for important amendments to extend and expand PJCIS capacities, information, advice and expertise.[295]

Other reform initiatives incorporating greater externality would be similarly beneficial. PJCIS membership needs relaxation to include two cross bench or minor party representatives.[296] PJCIS reviews and deliberations would be sharper by engaging individual *witness* submissions from quality submissions extending beyond peak body or legal organisations and University specialist centres. The

[293] See *Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015* (Cth) sch 1, items 1, 3, 10; The Bill lapsed at the dissolution of the 44th Parliament on 9 May 2016, being restored to the Notice Paper on 31 August 2016, the second reading adjourned on 13 October 2016. See also Commonwealth, *Parliamentary Debates*, Senate, 8 November 2016, 2209-2210 (Jenny McAllister)

[294] *Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020* (Cth), introduced into the Senate by Labor Senator McAllister on 26 February 2020.

[295] The Bill would, inter alia, provide powers for PJCIS self-activated review of existing, proposed, repealed, expiring, lapsing or ceasing laws relating to counter-terrorism or national security; allow the PJCIS to request reports on counter terrorism or national security matters referred to the INSLM; and to require regular briefings to the PJCIS by the Inspector General of Intelligence and Security and by the Director General of National Intelligence.

[296] See present membership arrangements in s.28 and Schedule 1 Part 3 of the *Intelligence Services Act 2001* (Cth). Whilst obligations exist for the Prime Minister and the Leader of the Government in the Senate to consult regarding PJCIS membership with the leaders of recognised political parties not forming part of the Government and 'In nominating the members, the Prime Minister and the Leader of the Government in the Senate must have regard to the desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties in the Parliament', (Clause 14 (5) of Part 3 of Schedule 1 of the *Intelligence Services Act 2001* (Cth)), exclusive Government and Opposition party PJCIS membership prevails.

PJCIS needs to develop a broader, more contextualised approach to procedurally applying terms of reference for each review. PJCIS education of the fundamentals of how international human rights addresses national security issues, including United Nations Charter based and Treaty based bodies and processes would enlighten internal debate. Context also demands an understanding of how the instant proposed law under review will interact with the suite of Australian national security laws, anticipating unintended consequences; a clearer appreciation of the law's limits in addressing national security issues; and how such prospective laws must integrate within various non-law responses, such as community engagement, programs and education.