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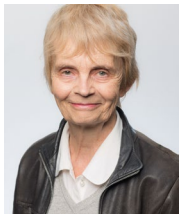

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Australian political opinion: from the 2019 election to COVID-19

Sarah Cameron and Ian McAllister*

In this paper we will cover 3 main topics. First, we examine the results of the 2019 federal election and discuss the 2 major issues that determined the outcome of that election, namely, policies on taxation and factors associated with leadership. Second, we provide an overview of long term trends in electoral behaviour, and how these trends may affect elections in the future. Finally, we look at the political implications of the COVID-19 pandemic.

Before we turn to these topics, some background about the Australian Election Study (AES) survey itself. We have been conducting the AES since 1987, completing 12 surveys after each federal election. We typically ask about 250 questions of each survey respondent; about 90 questions are ones that we ask consistently from election to election. We have therefore accumulated a huge amount of information about why people voted in each election, what they thought was important, and much else besides. This unrivalled database allows us to trace long term trends in electoral behaviour.[1]

The survey we conducted in 2019 went into the field immediately after the election in May and it was in the field until September.[2] We surveyed just over 2,000 respondents nationally, with a response rate of 42%. More information and interactive charts are available at www.australianelectionstudy.org.

The 2019 election

The economy and taxation

Since 1996 the AES has consistently asked voters what they considered to be the most important factor that shaped their vote. From Figure 1 it is apparent that consistently across all that time period, policies are what determined a person's vote. There is a spike in 1998; this was the election in which the goods and services tax that the Liberal Party proposed was

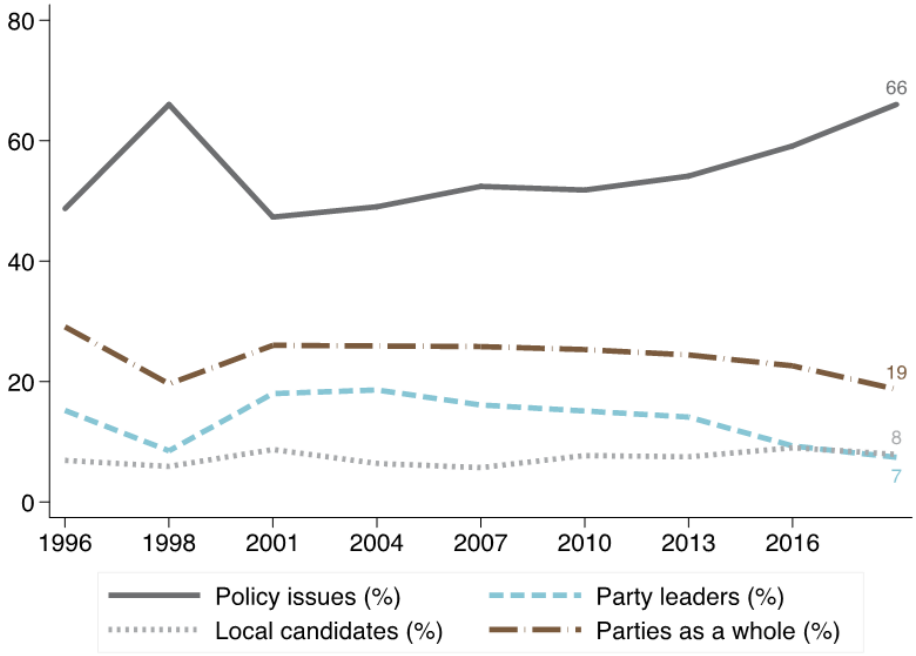
* This paper was presented as part of the Senate Lecture Series on 12 February 2021. For results from the 2022 federal election, see Sarah Cameron, Ian McAllister, Simon Jackson, Jill Sheppard, *The 2022 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2022.

1 Sarah Cameron and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2022*, Australian National University, Canberra, 2022; Ian McAllister, *The Australian Voter: Fifty Years of Change,* University of New South Wales Press, Sydney, 2011.

2 Ian McAllister, Jill Sheppard, Clive Bean, Rachel Gibson, Toni Makkai, Sarah Cameron, *Australian Election Study 2019* [computer file], December 2019.

the major election issue. The importance of policies then declined somewhat in 2001, but it has been consistently increasing ever since. In 2019 a total of 66% of the AES respondents said that policies were the major factor which affected how they voted; this is similar to the proportion in 1998.[3] Aside from policies, about one in 5 people say that it is the political parties that determine how they vote. These considerations relate to whether the political parties are seen as divided or united, as well as to leadership and party loyalties. At the other end of the scale less than one in 10 mention the party leaders or the local party candidates as determining how they vote.

Figure 1: Considerations in the voting decision



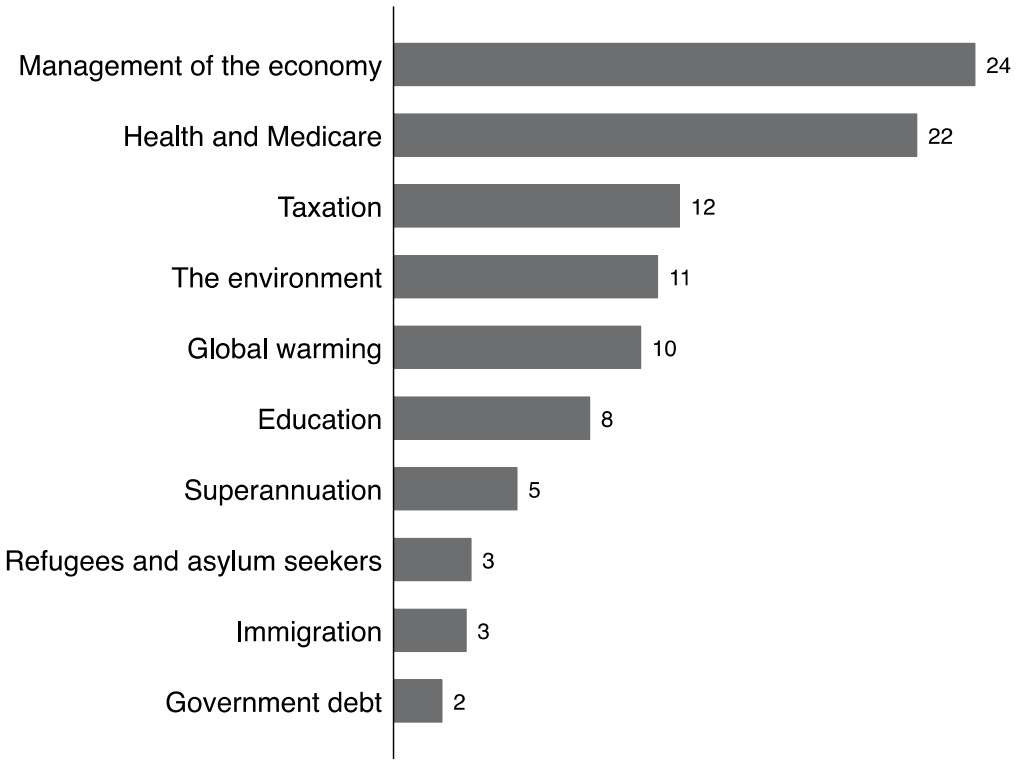
Note: Estimates are percentages. Question asked, 'in deciding how you would vote in the election, which was most important to you'?[4]

The AES also consistently asks people what they considered to be the most important election issues. Figure 2 shows the proportion of respondents who chose one of 10 issues as being their first most important. We find that the major issues that determine how people vote tend to be economic management, health, and education. The 2019 election was very similar to previous elections in that economic management and health were the 2 top issues. Although there were slight differences, the results in Figure 2 show that education declined to the last half of those issues. Similarly, 11% of people mentioned the environment as their most important issue, and another 10% mentioned global warming. If these 2 issues are added together, it means that the environment, broadly defined, was one of the top 3 election issues.

[3] Sarah Cameron and Ian McAllister, 'Policies and performance in the 2019 Australian federal election', *Australian Journal of Political Science*, vol. 55, issue 3, 2020, pp. 239–256.

[4] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 7.

Figure 2: Most important election issues

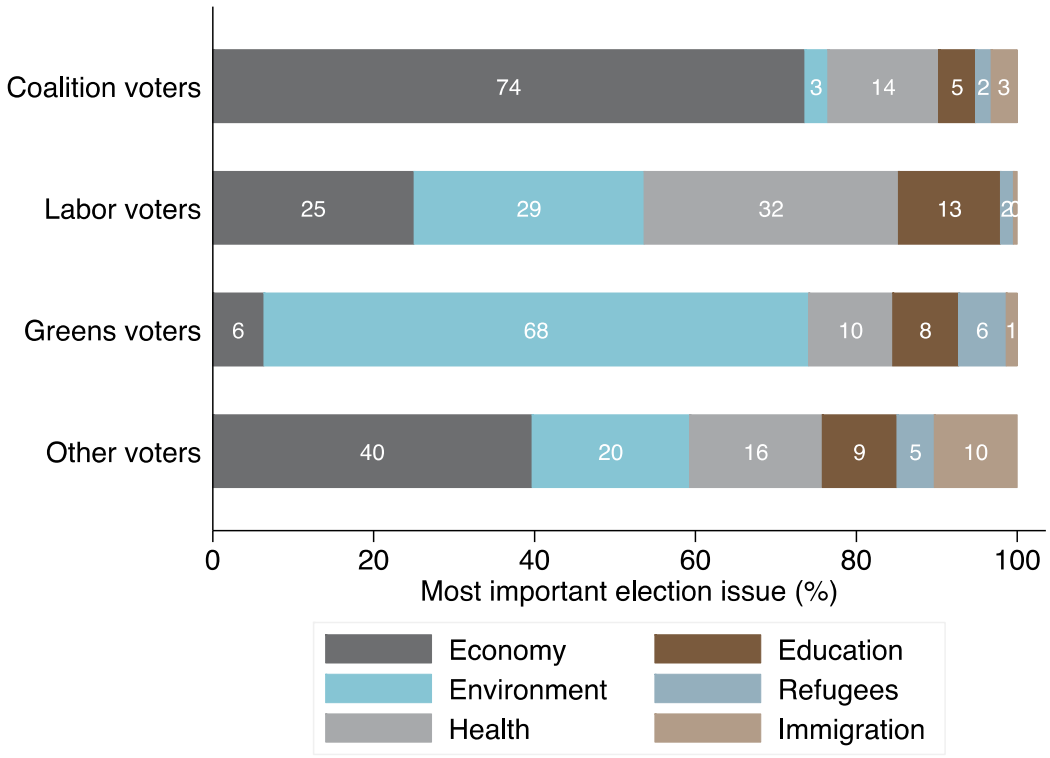


Note: Estimates are percentages. Question asked, '…which of these issues was the most important to you and your family during the election campaign?'[5]

In terms of how the party voters viewed these issues, Figure 3 shows that 3 in 4 Coalition voters thought that economic issues were the most important in the election. Labor voters, by contrast, were more diverse in the issues that they selected, covering health, the environment and the economy. Perhaps not surprisingly, two-thirds of Greens voters identified the environment as being the issue that they considered most important in the election.

[5] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 7.

Figure 3: Most important election issues by vote

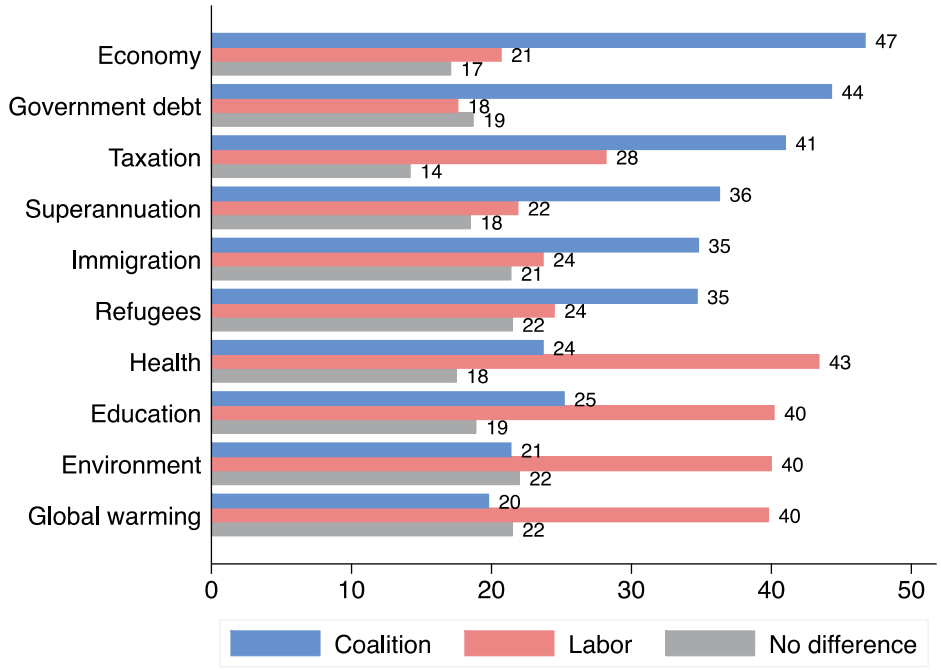


Note: Estimates show the percentage of respondents who indicated each issue was the most important in the 2019 election by first preference vote in the House of Representatives. Environment combines 'the environment' and 'global warming'. Economy combines 'management of the economy', 'taxation', 'superannuation' and 'government debt'.[6]

We also ask voters which of the 2 major parties they prefer to manage these various issues (Figure 4). This shows a consistent pattern where the Coalition has an advantage on economic issues. For example, the Coalition has a substantial advantage over Labor as the preferred party on the economy and government debt, as well as on taxation. At the other end of the scale, Labor has a very strong advantage over the Coalition on issues such as health, education, the environment and global warming. On superannuation, the Coalition has an advantage over Labor of 14 percentage points. However, going back to 2016 the Coalition had put forward a series of policies to restrict superannuation and the amount that people could contribute. When we asked that same question in 2016 voters saw no difference between the 2 major parties. In 2019 the Coalition advantage opened out on the issue significantly.

[6] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 8.

Figure 4: Preferred party policies



Note: Estimates are percentages. Question asked, '...whose policies – the Labor Party's or the Liberal-National Coalition's – would you say come closer to your own views on each of these issues?'[7]

The central economic issue in the election was taxation, and Labor proposed a series of significant policy changes. Labor argued that there should be major tax changes to dividends and tax imputation, as well as changes to the taxation of investment properties through capital gains tax and negative gearing. The AES asked the voters their views on these tax changes, and the respondents were very divided on them.[8] Slightly more thought it was a good policy, slightly less thought it was a bad policy. The net effect, as Figure 5 shows, is that there was a major division between the 2 major parties on the issue of taxation. The Coalition had a significant advantage as the party most able to handle the issue. If we compare that to 2016 there was only a 2 percentage point gap between the 2 major parties; in 2019 that opened out significantly to a 13 percentage point difference. The other interesting part of Figure 5 is the proportion of voters who thought there was no major difference between the parties in 2019; at 14% this was the second lowest figure since 1990, the other one being the 1998 election, which was the election fought on the issue of the introduction of a goods and services tax.

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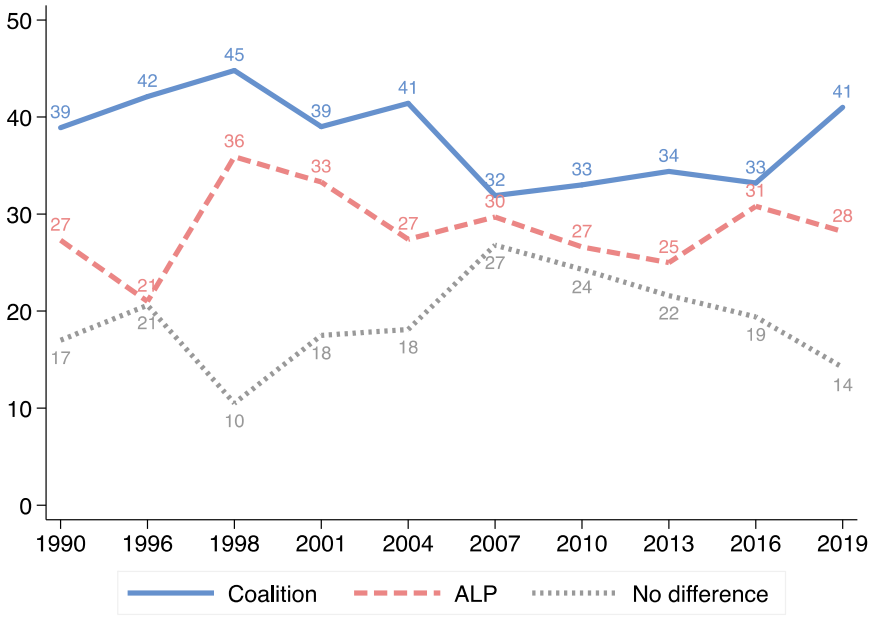
[7] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 8.

[8] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, pp. 8–9.

Figure 5: Preferred party policy on taxation



Note: Estimates are percentages. Question asked, '…whose policies – the Labor Party's or the Liberal-National Coalition's –would you say come closer to your own views on each of these issues? Taxation.'[9]

Labor's economic policies in the election were predicated on the idea that asset ownership was concentrated among relatively small groups of voters who were affluent and able to pay the extra tax that was being proposed. What our research shows, is that this was not necessarily the case. While some voters are affluent and would not have been unduly affected by the tax changes, other asset owners were not particularly well-off. This latter group are using investment properties and share portfolios in order to provide an income in retirement or to build up superannuation.[10]

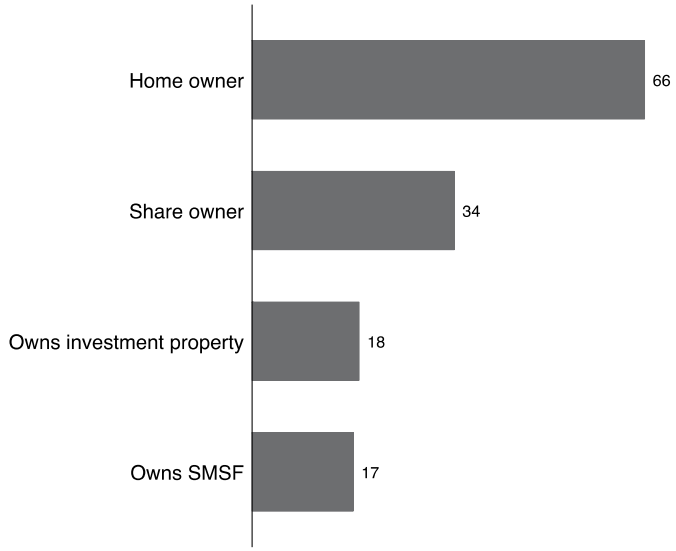
A major change that we have observed in the electorate over the last 20 years is a significant increase in asset ownership across the electorate. Figure 6 shows that two-thirds of people say that they are homeowners, evenly divided between those who own their properties outright and those who are paying them off. This represents a slight decline over the last 20 years or so, largely caused by younger people not being able to enter the housing market because of the cost of property.[11]

[9] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 8.

[10] Timothy Hellwig and Ian McAllister, 'The impact of economic assets on party choice in Australia', *Journal of Elections, Public Opinion and Parties*, vol. 28, issue 4, 2018, pp. 516–534.

[11] Australian Institute of Health and Welfare, *Home ownership and housing tenure*, 5 April 2023 (accessed 8 May 2023).

Figure 6: Asset ownership across the electorate



Note: Estimates are percentages. Questions asked: 'do you own outright, or are you buying or renting the dwelling in which you now live?'; 'do you own shares in any company listed on the Australian Stock Exchange?'; 'do you own any investment properties?'; 'do you have a self-managed superannuation fund?'[12]

The second bar in Figure 6 shows that around one in 3 directly own shares on the Australian Stock Exchange.[13] That is also a decline, because it was around 20 percentage points higher in the early 2000s when there was the privatisation of Qantas, CSL (Commonwealth Serum Laboratories), Commonwealth Bank, and other government-owned entities. There was a significant decline in share ownership after the global financial crisis. But even with 34% of the AES respondents saying they directly own shares, this represents one of the largest proportions of direct share ownership in the world, more than the United States (US), the United Kingdom (UK) and Canada.

The final assets in Figure 6 are ownership of an investment property and a self-managed superannuation fund; in each case about one in 5 people said that they owned such an asset. This estimate is higher than the proportion reported by the Australian Bureau of Statistics (ABS).[14] The reason for this discrepancy is that the ABS uses a strict legal definition of asset ownership, while the AES question identifies people within the household. For example, there could be a household of 4 or 5 people but only one or 2 people might technically own that asset. However, the taxation applied to the asset will affect the income of the total household. We believe that this was one of the key mistakes in Labor's policy towards superannuation and property investment. The proposed changes would have affected a larger proportion of people than Labor assumed. For example, the AES finds that 3 in 4 voters own at least one of these assets. When we compare voting between 2016 and 2019, we find that 19% more Coalition votes in 2019 came from people who owned self-managed superannuation funds compared to the previous election. So, there was a

[12] Ian McAllister, Jill Sheppard, Clive Bean, Rachel Gibson, Toni Makkai, Sarah Cameron, *Australian Election Study 2019* [computer file], December 2019.

[13] Ian, McAllister and Toni Makkai, 'The decline and rise of class voting? From occupation to culture in Australia', *Journal of Sociology*, vol. 55, issue 3, 2018, pp. 426–445.

[14] Australian Bureau of Statistics, *Housing Occupancy and Costs*, 25 May 2022 (accessed 8 May 2023).

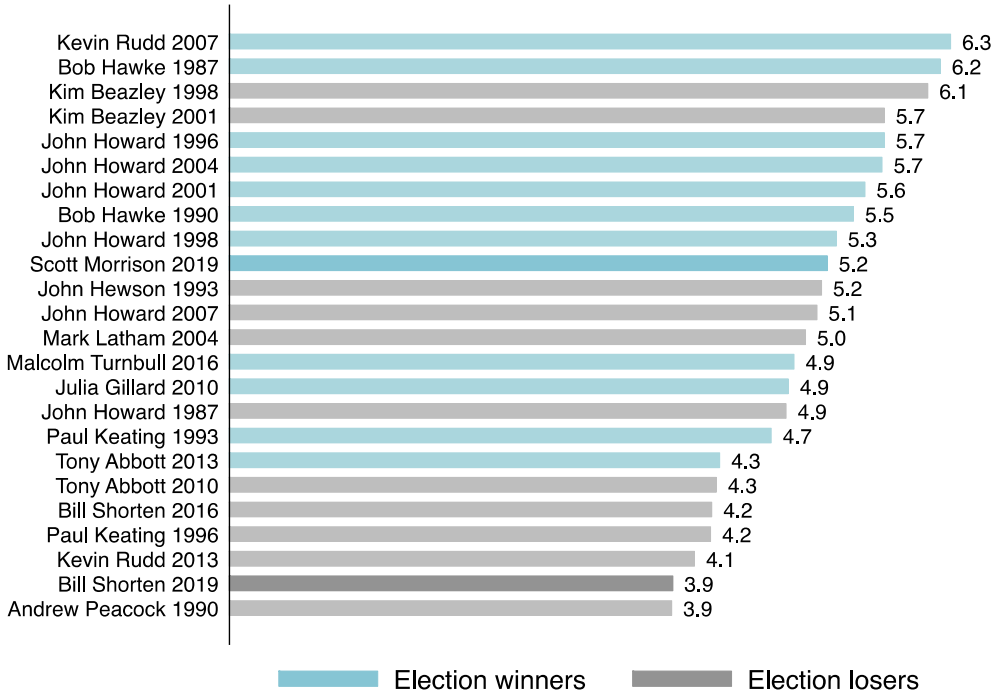
significant movement in votes between those 2 elections, with a shift of about 8% towards the Coalition among investment property owners alone.[15]

Leadership

Apart from taxation and economic policy, the other factor that emerged in the election as important was leadership. Two aspects of leadership were important. One was the relative unpopularity of Bill Shorten as Labor leader, while the second was the fourth change of prime minister outside of an election in the space of 8 years, from Malcolm Turnbull to Scott Morrison. What we find from the data is that Bill Shorten's unpopularity was a factor that harmed Labor, while the change in prime minister was relatively unimportant.

To place leadership popularity in long term perspective, the AES consistently asks the respondents to rate the party leaders on a scale from zero to 10. Figure 7 shows the figures for all of the major party leaders from 1987 through to 2019. The figures at the end of the bars are the mean value of the score from zero to 10. At the top are the most popular leaders over the past 30 or so years; these include Kevin Rudd in 2007 and Bob Hawke in 1987. Bob Hawke was probably even more popular in 1983 but we lack earlier comparable data. At the bottom of Figure 7, Bill Shorten is the least popular leader over the period, with the exception of Andrew Peacock in 1990. Shorten was also relatively unpopular in 2016.

Figure 7: Leader popularity 1987-2019



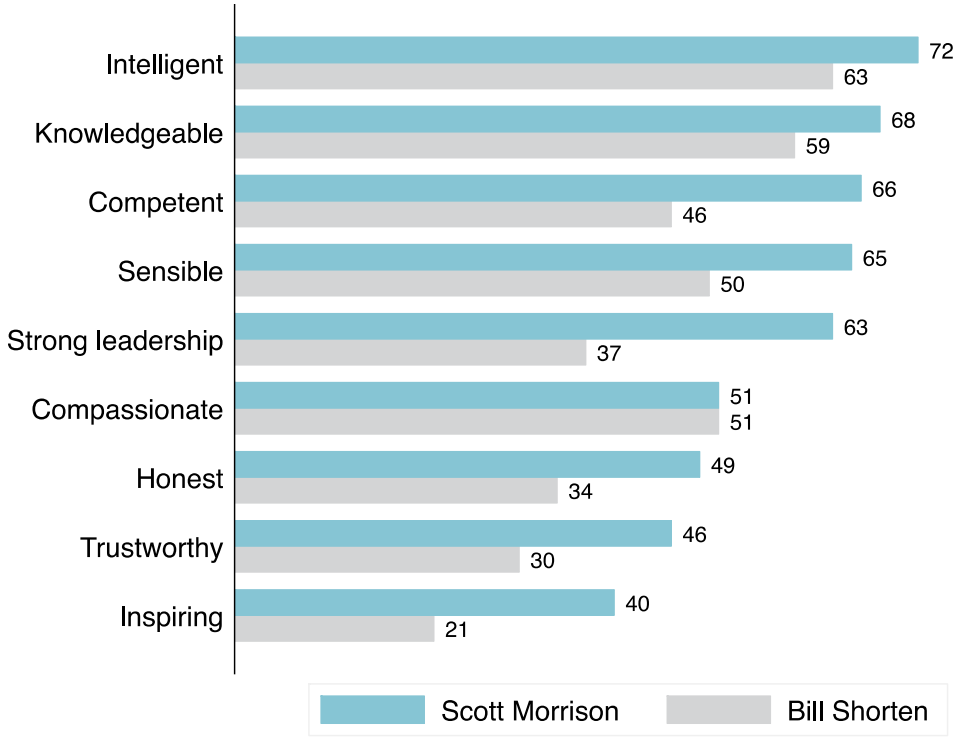
Note: Estimates are means. The scale runs from 0 (strongly dislike politician) to 10 (strongly like politician) with a designated midpoint of 5 (neither like nor dislike).[16]

[15] Timothy Hellwig and Ian McAllister, 'Party Positions, Asset Ownership and Economic Voting', *Political Studies*, vol. 67, issue 4, pp. 912–931.

[16] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 12.

Leadership is electorally significant because there is a large body of research which looks at how voters evaluate leaders based on their qualities.[17] The AES consistently asks a question about how appropriately 9 particular qualities apply to the various leaders. Figure 8 shows that Scott Morrison led Bill Shorten on all of these 9 characteristics, with the exception of compassion, where they are rated equally. The research in Australia and internationally shows that the most important quality that voters look for is integrity; in practice voters are seeking leaders who are honest and trustworthy.[18] Voters also want to see leaders who exhibit leadership, as reflected in strength and inspiration. From the characteristics in Figure 8 it is clear that Bill Shorten fell very far behind Scott Morrison on these qualities.

Figure 8: Leader characteristics



Note: Question asked, '[Thinking first about Scott Morrison/now thinking about Bill Shorten], in your opinion how well does each of these describe him – extremely well, quite well, not too well or not well at all?' Estimates combine the percentage who responded that the characteristic described the leader 'extremely well' or 'quite well'.[19]

Leadership played out in the election in that only about 4% of Labor voters said they were motivated by leadership in the election (Figure 9). If we compare the trend back to 2007, around 20% of Labor voters said they were motivated by leadership, when the highly popular Kevin Rudd led Labor. Even in 2010 and 2013 the results show that leadership figured significantly for Labor voters. Liberal voters were more motivated by leadership in 2016 and

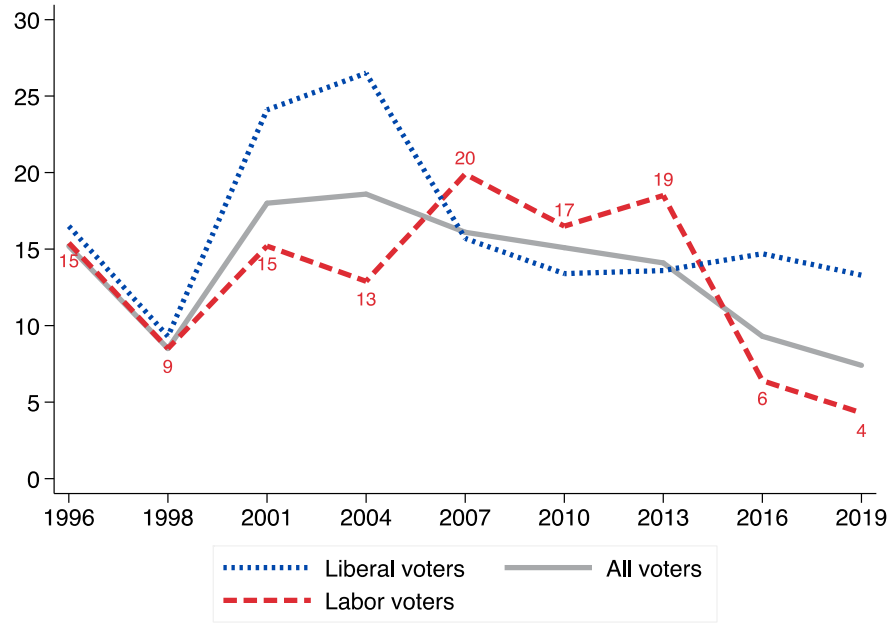
[17] Ian McAllister, 'The Personalization of Politics in Australia', *Party Politics*, vol. 21, issue 3, pp. 337–345; Stephen Quinlan and Ian McAllister, 'Leader or Party? Quantifying and Testing Behavioral Personalization 1996-2017', *Party Politics*, vol. 28, issue 1, 2021.

[18] Dieter Ohr and Henrik Oscarsson, 'Leader Traits, Leader Image, and Vote Choice', in Kees Aarts, André Blais and Hermann Schmitt (eds), *Political Leaders and Democratic Elections*, Oxford University Press, Oxford, 2013.

[19] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 12.

2019 than Labor voters, but again if we look back to 2001 and 2004, the heyday of the Howard Coalition government, it is clear that leadership was much more important at that time.

Figure 9: Voting based on the party leaders

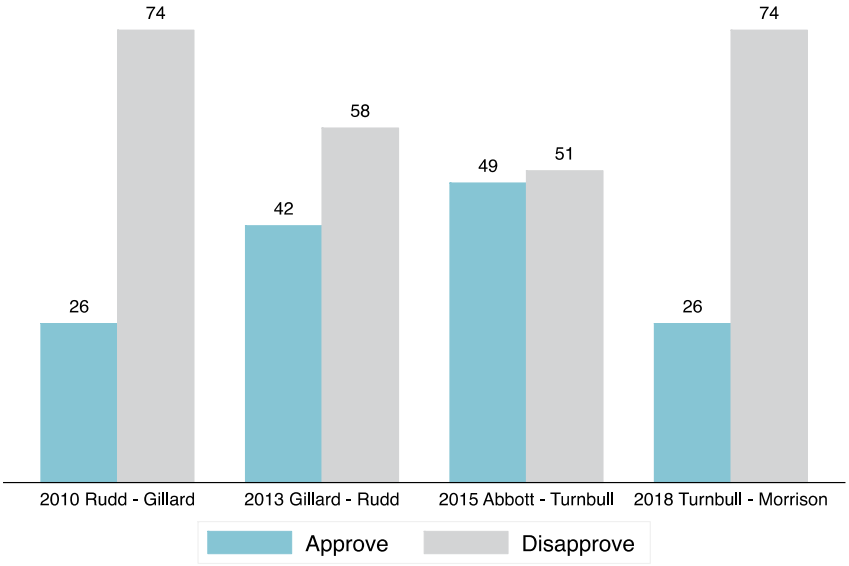


Note: Estimates show the percentage of voters who indicated that party leadership was the most important factor in deciding how they would vote. Question asked, 'in deciding how you would vote in the election, which was most important to you?' [the party leaders / the policy issues / the candidates in your electorate / the parties taken as a whole].[20]

The other aspect of leadership is the consistent changes in prime minister, 4 of them occurring outside of elections since 2010. Each of the AES surveys has asked the respondents what they thought of these leadership changes. It is clear from Figure 10 that for the most part voters were not impressed. They particularly disliked the change from Rudd to Gillard in 2010. They also disapproved of the change from Turnbull to Morrison in 2018. The remaining 2 changes are more ambiguous, but in each case there was a majority who disapproved of it.

[20] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 11.

Figure 10: Attitudes towards the leadership changes



Note: Estimates are percentages. Figure shows approval/disapproval of the way the party (Labor in 2010 and 2013, Liberal in 2015 and 2018) handled the leadership changes in: 2010 when Julia Gillard replaced Kevin Rudd; 2013 when Kevin Rudd replaced Julia Gillard; 2015 when Malcolm Turnbull replaced Tony Abbott; and 2018 when Scott Morrison replaced Malcolm Turnbull.[21]

The 2019 AES survey asked the respondents if they would have changed their vote if Malcolm Turnbull had remained Liberal leader. These results show that while there would have been an exodus of voters from the Liberal Party, it is almost exactly matched by voters who would have been attracted to the Liberals. In effect, the fourth change in prime minister, from Turnbull to Morrison, did not affect the outcome of the election.

A divided electorate?

The 2019 election can be situated in the context of long-term trends in Australian political behaviour and attitudes. Following the 2019 election result, which few expected, there was commentary about the existence of 'two Australias'—an increasingly divided electorate contributing to the unexpected outcome.[22] The AES data allows us to unpack some of the longer-term divisions that have emerged in the electorate, how they fed into the election result, and what this means for the trajectory of democratic politics in Australia.

Gender

Starting with gender differences, in 2019 there was a substantial gender voting gap as shown in Figure 11. Ten per cent more men than women voted for the Coalition, and the Greens attracted a good deal more support among women compared to men. Placing the gender gap seen in 2019 in long-term perspective shows that this was not the usual state of affairs.

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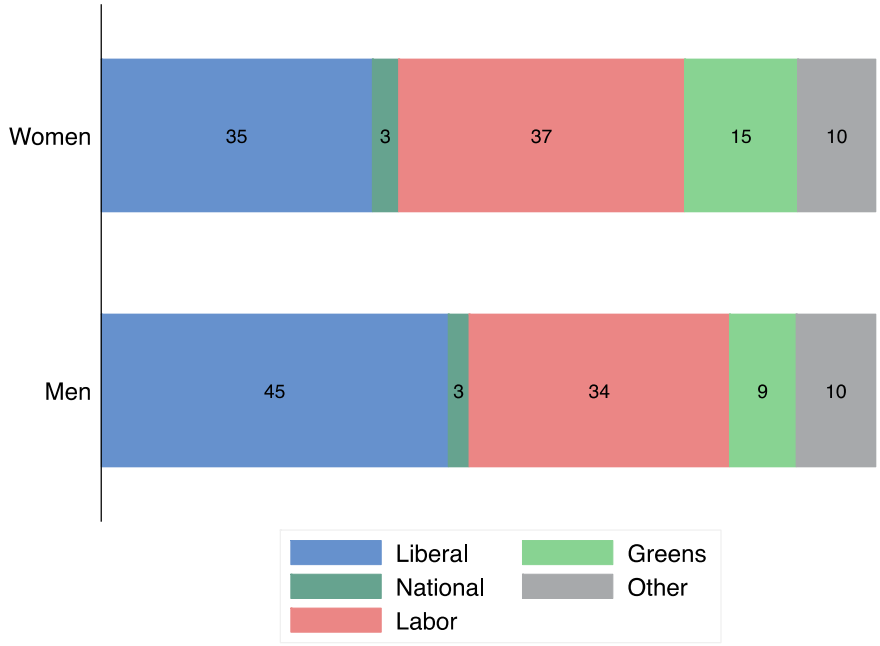
[21] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 13; Ian McAllister, *ANU Poll 2013: Electoral Reform*, ADA Dataverse, V1, 2019.

[22] Matt Wade, 'We have two Australias': Election results show a growing divide within the nation', *Sydney Morning Herald*, 25 May 2019.

Figure 12 shows that the gender gap in voting behaviour has actually reversed over time. In the 1990s women were slightly more likely to vote for the Liberal Party, and men were more likely to vote Labor. Over time this has gradually reversed so that women now prefer Labor and men prefer the Liberals. In 2019 there was the biggest gender gap in voting behaviour on record.

Figure 11: Gender and vote choice



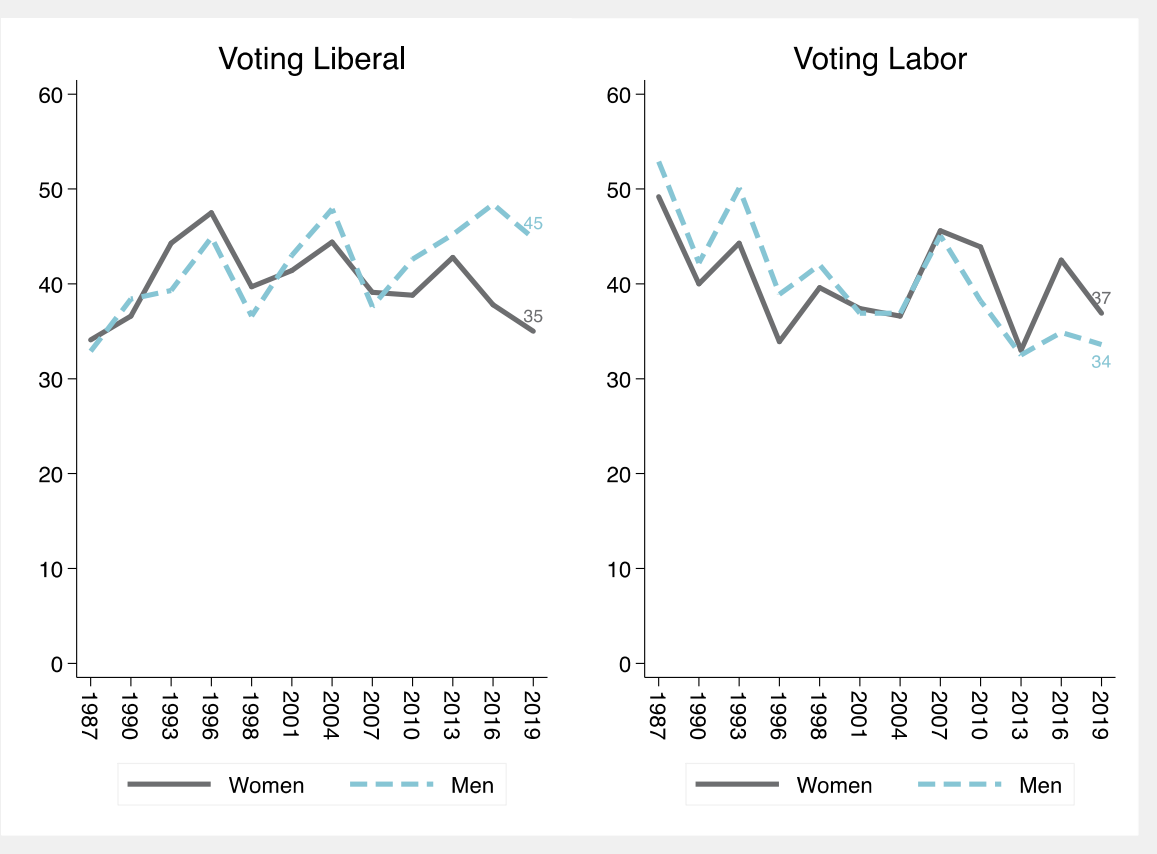
Note: Estimates are the percentage of first preference votes in the House of Representatives.[23]

There are a number of factors underpinning this transformation of gender and voting in Australia. This includes tremendous societal changes that have taken place over this time. An increasing proportion of women undertake higher education, which is associated with greater support for parties on the left. Moreover, women have greater representation in the labour force and as union members.[24]

[23] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 17.

[24] Organisation for Economic Co-Operation and Development (OECD), *LFS by sex and age – indicators*, 2021 (accessed 8 May 2023); Sarah Cameron and Ian McAllister, *Australian Election Study Interactive Data*, edited by Australian Election Study, 2020.

Figure 12: Gender differences in voting for the Liberal and Labor parties



Note: Estimates are the percentage of first preference votes in the House of Representatives.[25]

Changes within Australia's major political parties have also contributed to this shift in gendered voting patterns. Back in the early 1990s women were similarly underrepresented in both the major parties. Just 13% of parliamentarians in 1990 were women.[26] Since then, Labor has dramatically increased their proportion of women in Parliament, to 47%, through introducing voluntary party quotas.[27] The Liberal Party on the other hand has made slower progress, with just 23% of Liberals in federal parliament being women.[28] There has also been a shift in parties' issue priorities over time. In particular, Labor has shifted from a focus on working class issues to incorporate a broader set of priorities including progressive social issues. So, there are factors contributing to the gender gap both within the electorate and within political parties. This reversal of the gender gap is not unique to Australia – it has been observed in other democracies including in Europe and North America.[29]

[25] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 17.

[26] Joy McCann, and Janet Wilson, 'Representation of women in Australian parliaments 2014', *Research Paper*, Parliamentary Library, Canberra, 9 July 201, p. 46.

[27] Katrine Beauregard, 'Partisanship and the gender gap: support for gender quotas in Australia', *Australian Journal of Political Science*, vol. 53, issue 3, 2018, pp. 290–319.

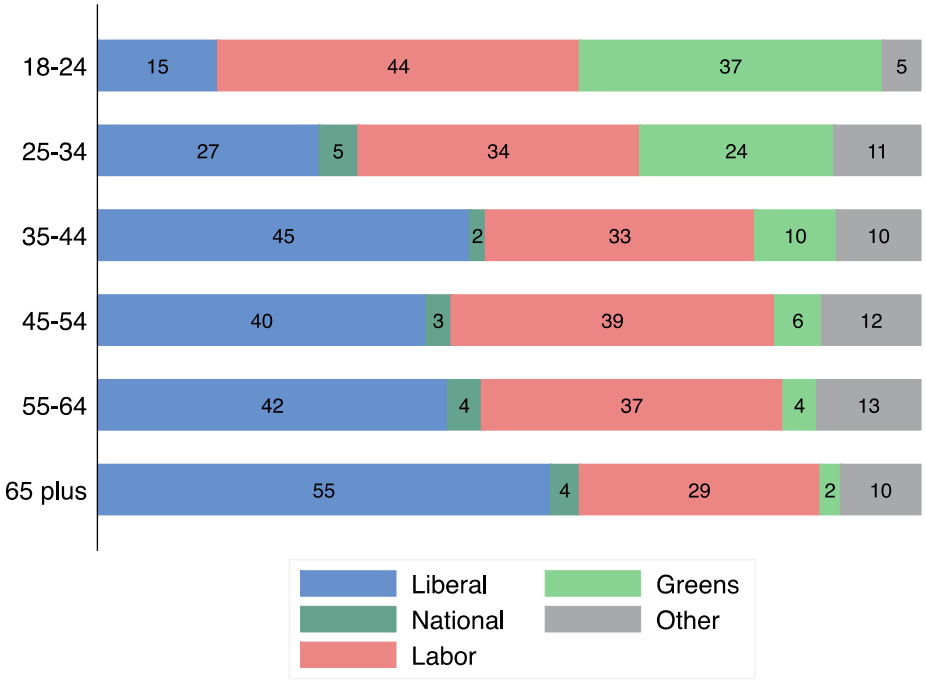
[28] Jane Norman, 'Women still underrepresented in Parliament after 2019 federal election', *ABC News*, 27 May 2019.

[29] Simone Abendschön and Stephanie Steinmetz, 'The Gender Gap in Voting Revisited: Women's Party Preferences in a European Context', *Social Politics: International Studies in Gender, State & Society*, vol. 21, issue 2, 2014, pp. 315-344.

Age and Generation

The AES data also shows generational differences in political attitudes and behaviour. Younger Australians are primarily voting for Labor and the Greens, while a majority of those over 65 are voting for the Coalition as shown in Figure 13. The Greens have a lot of support amongst younger Australians, while older Australians are primarily casting their ballots for the major parties.

Figure 13: Age and vote choice

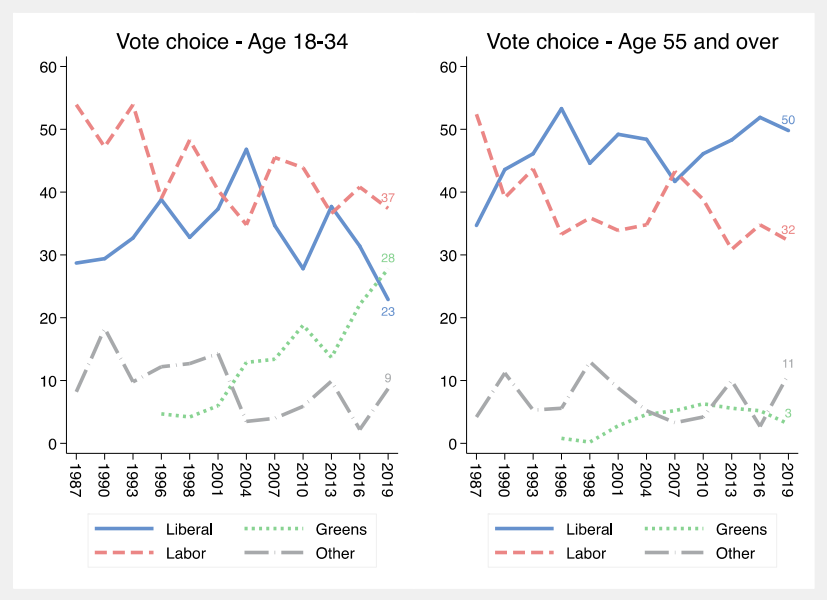


Note: Estimates are the percentage of first preference votes in the House of Representatives.[30]

We can look at the trends over time to see whether this age gap is unique to the 2019 election or a continuation of what has happened in the past. What the results in Figure 14 show is that younger Australians have always been further to the left of older Australians, although the division is growing over time. The current generation of young people are much less likely to vote for the Liberal Party compared to previous generations when they were young. The gap between the voting behaviour of younger and older Australians was greater in 2019 than at any other time on record. The AES surveys have typically shown that as voters get older they shift further to the right in their political preferences. As Millennials and Generation Z are further to the left to begin with, this has potential long-term ramifications for the preferences of Australian voters, as these generations get older.

[30] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 18.

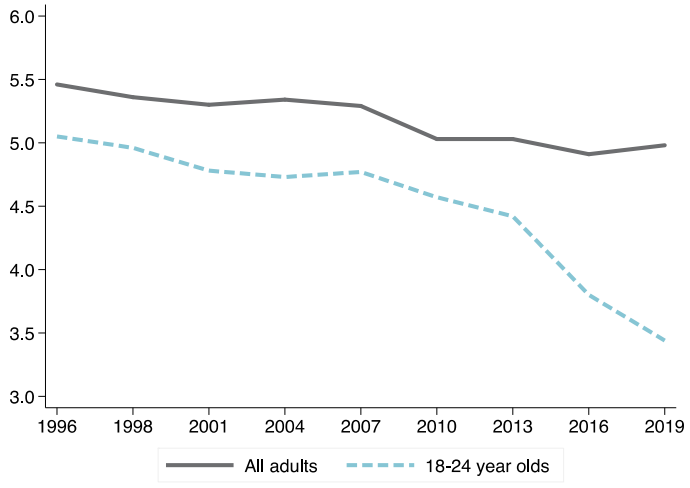
Figure 14: Age differences in voting behaviour



Note: Estimates are the percentage of first preference votes in the House of Representatives.[31]

The generational divide is also evident in where Australians' place themselves ideologically from left to right. Figure 15 shows the average placement of voters on a left-right scale from zero to 10. This shows that the electorate as a whole has been gradually shifting to the left over time. Young people have consistently been further to the left of the electorate as a whole, although there are further indications of generational change in ideology, with the current generation of younger Australians moving a lot further to the political left.

Figure 15: Left-right ideology



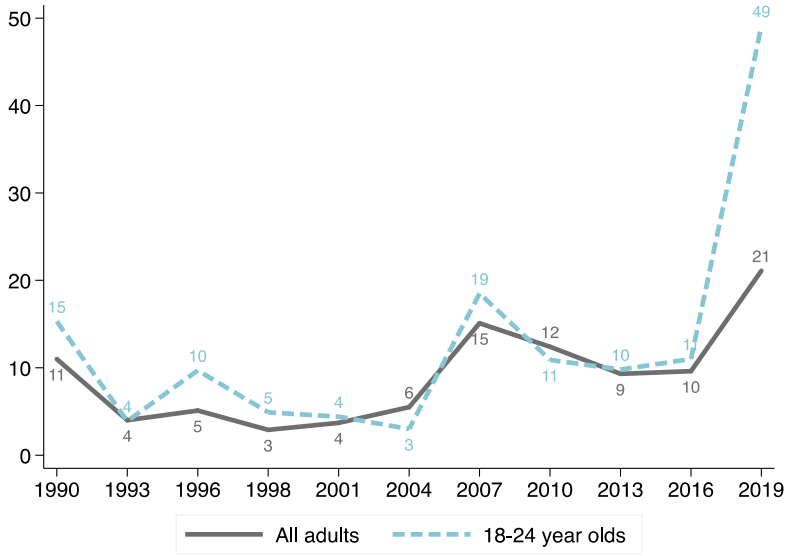
Note: Estimates are means. Question asks, 'in politics, people sometimes talk about the 'left' and the 'right'. Where would you place yourself on a scale from 0 to 10, where 0 means the left and 10 means the right?'[32]

[31] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 18.

[32] Roger Jones, David Gow, Ian McAllister, *Australian Election Study 1996* [computer file], June 1996; Clive Bean, David Gow, Ian McAllister, *Australian Election Study 1998* [computer file], January 1999; Clive Bean, David Gow, Ian McAllister,

In the lead up to the 2019 election there was discussion about it being a 'climate change election'.[33] Examining attitudes on climate change shows further evidence of generational change on this issue. Although Labor, the preferred party on environmental issues, lost the election – there is some support for the idea that 2019 was a climate election. Figure 16 shows that one in 5 voters identified the environment or climate change as their top issue priority in the election. This is a greater proportion than at any other time on record. Young people in particular saw environmental issues as important – around half identified the environment or global warming as the most important election issue. This heightened concern about climate change took place in the context of a wave of global climate change protests in 2019, including in Australia, led by young people.

Figure 16: The environment and global warming as most important election issues



Note: Estimates show the percentage of respondents who indicated the environment or global warming was the most important election issue. Question asked, '…which of these issues was the most important to you and your family during the election campaign?'[34]

Social class

Scott Morrison declared the 2019 election a victory for the so-called 'quiet Australians' a somewhat ill-defined group that has been compared to John Howard's battlers.[35] A question frequently raised in these discussions, is whether the working class, traditionally considered Labor voters, are shifting their votes to the Coalition. The AES data provides a number of

Australian Election Study 2001 [computer file], April 2002; Clive Bean, Ian McAllister, Rachel Gibson, David Gow, *Australian Election Study 2004* [computer file], March 2005; Clive Bean, Ian McAllister, David Gow, *Australian Election Study 2007* [computer file], May 2008; Ian McAllister, Clive Bean, Rachel Gibson, Juliet Pietsch, *Australian Election Study 2010* [computer file], May 2011; Ian McAllister, Juliet Pietsch, Clive Bean, Rachel Gibson, *Australian Election Study 2013* [computer file], January 2014; Ian McAllister, Juliet Pietsch, Clive Bean, Rachel Gibson, Toni Makkai, *Australian Election Study 2016* [computer file], February 2017; Ian McAllister, Jill Sheppard, Clive Bean, Rachel Gibson, Toni Makkai, Sarah Cameron, *Australian Election Study* 2019 [computer file], December 2019 (*Australian Election Study 1996–2019)*.

[33] Adam Morton, 'The climate change election: where do the parties stand on the environment?', *The Guardian*, 12 May 2019.

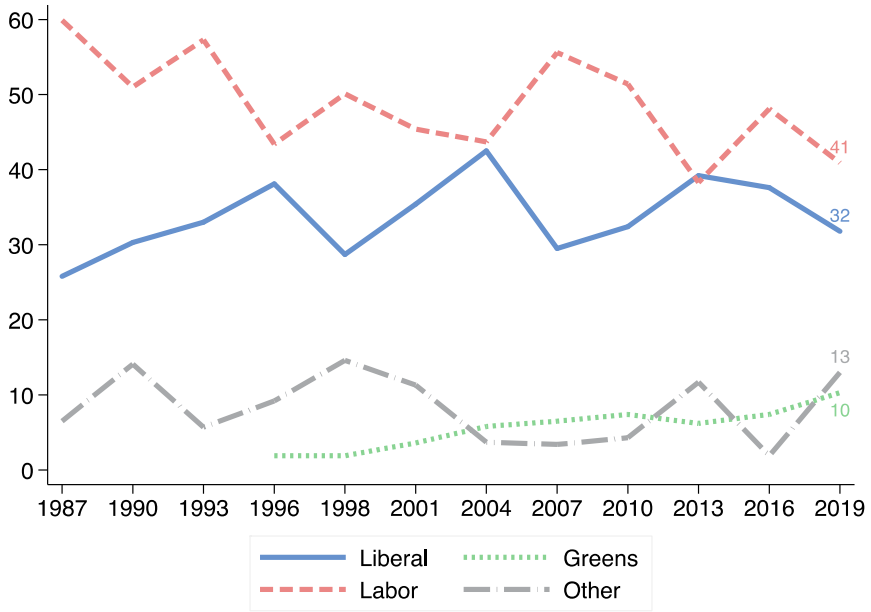
[34] Ian McAllister, Roger Jones, David Gow, *Australian Election Study 1990* [computer file], November 1990; Roger, Jones, Ian McAllister, David Denemark, David, Gow, *Australian Election Study 1993* [computer file], August 1993; and Australian Election Study 1996–2019 *(refer to footnote 33)*.

[35] Laura Tingle and Laura Francis, 'Quiet Australians evaluate Scott Morrison's Government six months after election victory', *ABC News*, 14 November 2019.

ways to look at the voting behaviour of different social classes, although understanding social class is not so straightforward. Previous understandings of class based on occupation no longer reflect the complexities of social class in modern Australia, with the increasing importance of asset ownership.[36]

One way of examining social class is how people identify themselves. The AES asks respondents to identify themselves as either working class, middle class, or upper class. Very few Australians see themselves as a member of the upper classes, and about half and half say they are working or middle class, respectively. Figure 17 shows how the self-identified working class have voted over time. This shows that the working class are still more likely to vote Labor than Liberal, although the trends over time show a gradual erosion of Labor's working-class base. In the late 1980s, 60% of the working class voted Labor, by 2019 this had dropped to 41%. The drop in support for Labor was in favour of minor parties more so than the Liberal Party. Similarly, the data shows that asset owners are much more likely to vote for the Liberal Party.[37] Class therefore remains an important influence on voter behaviour. Although some of the traditional patterns are eroding, while new class divisions, in particular based on assets, are of greater importance.[38]

Figure 17: Working class vote choice



Note: Estimates are the percentage of first preference votes in the House of Representatives among those who identify themselves as working class.[39]

[36] Ian McAllister and Toni Makkai, 'The decline and rise of class voting? From occupation to culture in Australia', *Journal of Sociology*, vol. 55, issue 3, 2018, pp. 426–445; Timothy Hellwig and Ian McAllister, 'The Impact of Economic Assets on Party Choice in Australia', *Journal of Elections, Public Opinion and Parties*, vol. 28, issue 4, 2018, pp. 516–534.

[37] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 20.

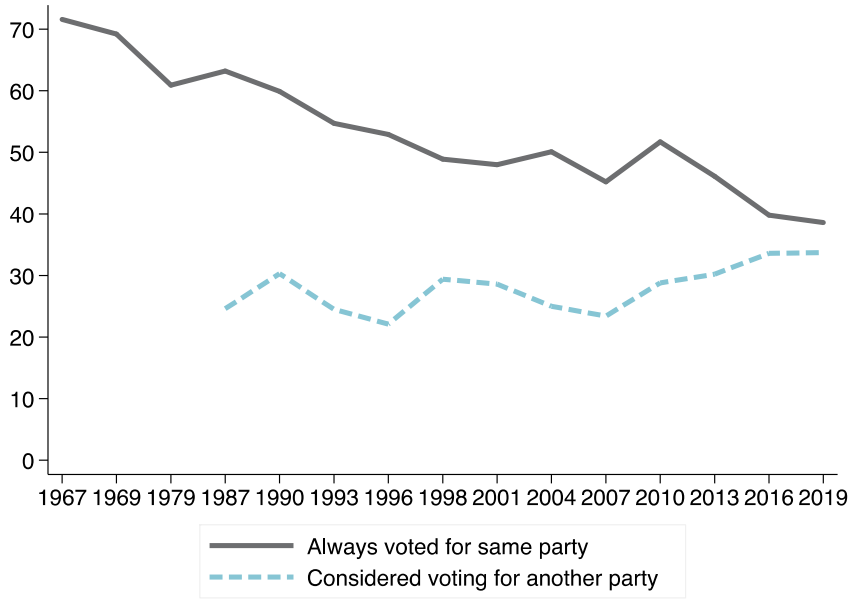
[38] Ian McAllister and Toni Makkai, 'The decline and rise of class voting? From occupation to culture in Australia', *Journal of Sociology*, vol. 55, issue 3, 2018, pp. 426–445; Timothy Hellwig and Ian McAllister, 'The impact of economic assets on party choice in Australia', *Journal of Elections, Public Opinion and Parties*, vol. 28, issue 4, 2018, pp. 516–534.

[39] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 19.

Voting volatility

Another major change that has emerged in the Australian electorate over time is increasing voter volatility. Back in the 1960s around 70% of voters would always vote for the same party, by 2019 less than 40% always voted the same way (Figure 18). There are a number of other indicators that point in a similar direction. More voters are making up their mind about how they are going to vote during the election campaign, rather than far in advance.[40] An ever-growing proportion of voters do not align with any of Australia's political parties. Partisanship has reached record lows – one in 5 voters have no partisan alignment.[41] Combined, these factors are resulting in more unpredictable elections. This presents both opportunities and challenges for political parties, who can no longer rely on particular groups of voters for support, increasing the importance of the election campaign and leadership to shift votes.

Figure 18: Voter volatility



Note: Estimates are percentages.[42]

Citizen disaffection

A final factor where we are seeing major shifts in the electorate is in citizens' attitudes towards democracy. Various indicators show record levels of citizen disaffection with democratic politics in Australia. Satisfaction with democracy in 2019 reached its lowest level since the 1970s Whitlam dismissal; fewer than 60% of Australians were satisfied with the

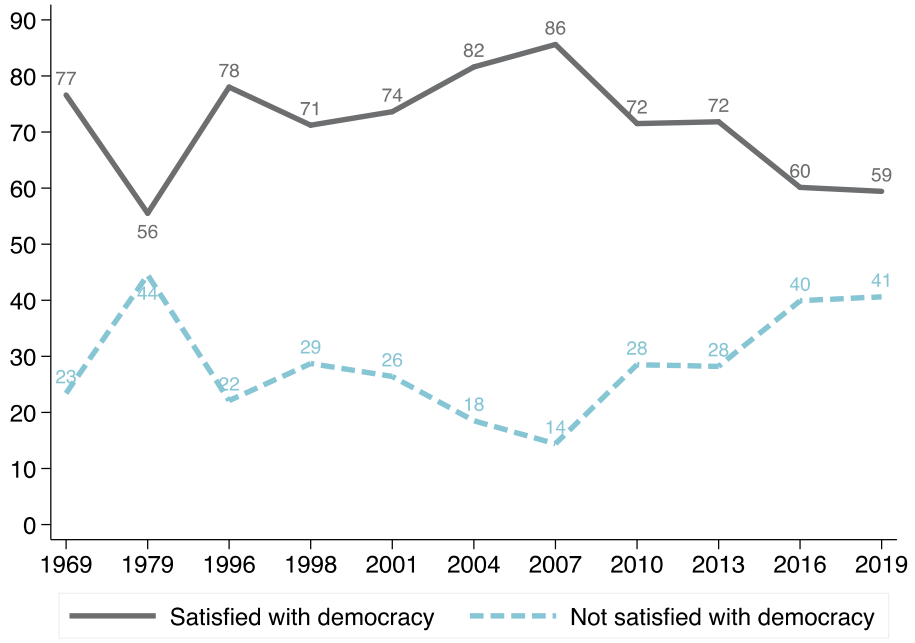
[40] Sarah Cameron, and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019*, Canberra, Australian National University, 2019, p. 18.

[41] Sarah Cameron, and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019*, Canberra, Australian National University, 2019, p. 28.

[42] Sarah Cameron, and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019*, Canberra, Australian National University, 2019, p.21; and Don A. Aitkin, *Stability and Change in Australian Politics*, Canberra, ANU Press, 1967–1979.

performance of democracy (Figure 19). Trust in government reached its lowest level on record, with just one in 4 voters believing people in government could be trusted.[43]

Figure 19: Satisfaction with democracy



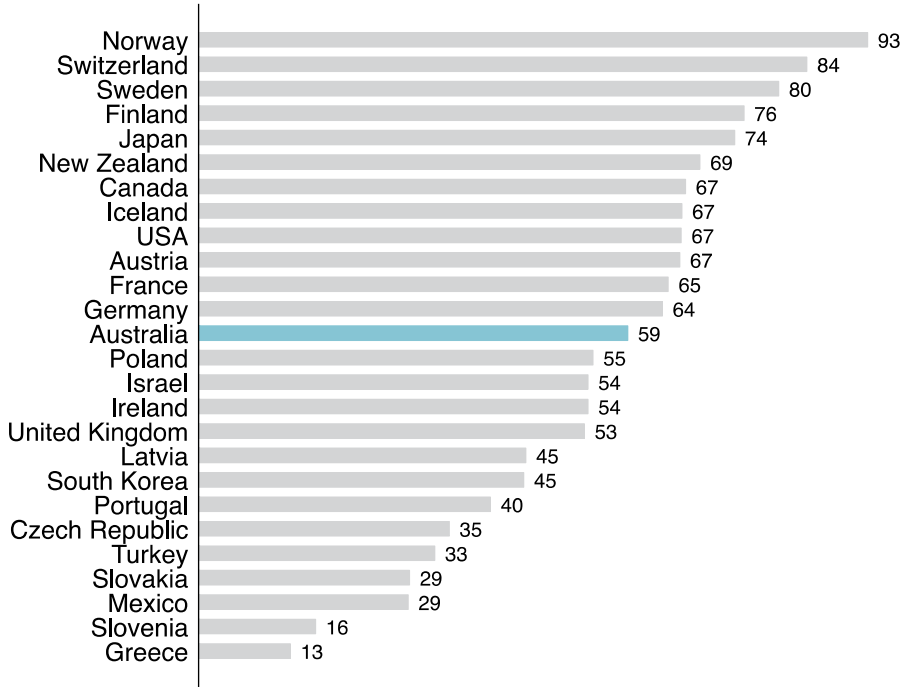
Note: Estimates are percentages. AES question asks, 'on the whole, are you very satisfied, fairly satisfied, not very satisfied or not at all satisfied with the way democracy works in Australia?' Satisfied combines 'very satisfied' and 'fairly satisfied'; not satisfied combines 'not very satisfied' and 'not at all satisfied'.[44]

Placing Australia's level of democratic satisfaction in international comparison in Figure 20 shows that in 2007, when Labor won the election led by Kevin Rudd, Australians would have been among the world's most satisfied democrats alongside Norway and Switzerland. Since then, Australia has dropped down to the middle of the pack among democracies in the Organisation for Economic Co-operation and Development (OECD). Comparing the downward trend in satisfaction with democracy in Australia to other democracies around the world shows that this downward trend is not universal (Figure 21).

[43] Sarah Cameron, and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2019*, Canberra, The Australian National University, 2019, p. 99.

[44] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 15; Don A. Aitkin, *Stability and Change in Australian Politics*, Canberra, ANU Press, 1969–1979.

Figure 20: Satisfaction with democracy in OECD countries



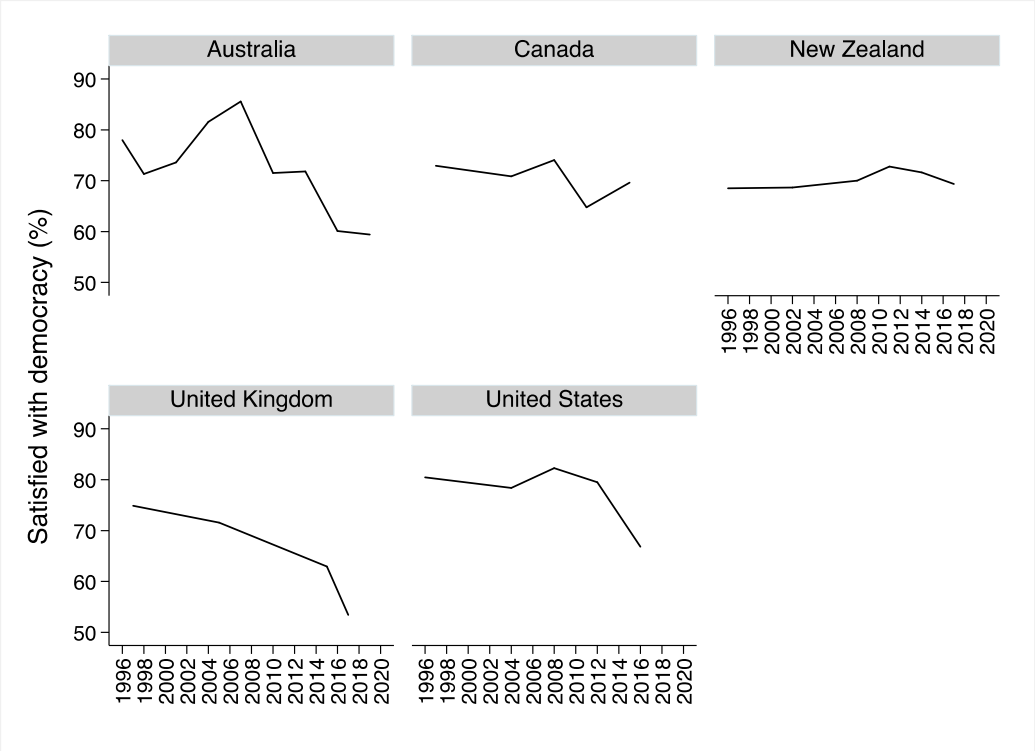
Note: Estimates are percentages combining 'very satisfied' and 'fairly satisfied'.[45]

There has been a decline in satisfaction with democracy in the UK, particularly following the Brexit referendum, and in the US, following Trump's 2016 election win. Canada and New Zealand on the other hand, have not experienced this decline in democratic satisfaction. Some have argued that political disaffection in Australia is simply a reflection of global trends, such as the rise of social media or increasingly disaffected young people. Cross-national trends suggest these factors do not explain the decline in democratic satisfaction, as Canada and New Zealand also have social media and young people however have not experienced a decline. Rather, the evidence suggests that the steep decline in satisfaction with democracy in Australia has been driven primarily by government performance.[46] The merry-go-round of Australian prime ministers during the 2010s undermined democratic satisfaction with democracy, alongside other dimensions of government performance.

[45] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Canberra, Australian National University, 2019, p. 15.

[46] Sarah Cameron, 'Government performance and dissatisfaction with democracy in Australia', *Australian Journal of Political Science*, vol. 55, issue 2, 2020, pp. 170–190.

Figure 21: Satisfaction with democracy in Anglo-American democracies



Note: Estimates are percentages combining 'very satisfied' and 'fairly satisfied'.[47]

The COVID-19 pandemic and political opinion

So far, we have covered the 2019 election, and the long-term trends up to 2019. Of course, a few things have changed since 2019 with the onset of a major global crisis from the COVID-19 pandemic. The pandemic has significant implications for democratic politics around the world including in Australia. The COVID-19 pandemic has brought about a multifaceted crisis, combining a major public health crisis with an economic crisis. Research on previous crises gives us some indications as to how crises can shape democratic politics. Previous studies have found that in times of certain crises—particularly military threats—there is a tendency for voters to rally around the flag, where people give greater support to incumbent leaders and governments at a time of crisis.[48] An example of this effect could be seen in 2001 following 9/11, when George W. Bush's approval ratings skyrocketed after the terrorist attack.[49] On the other hand, there is a lot of research on how economic conditions influence voter behaviour and attitudes – with the central idea being that people punish governments for poor economic performance. Although in the context of a global crisis, benchmarking can become important – how well the crisis is being handled in comparison to

[47] Sarah Cameron, 'Government performance and dissatisfaction with democracy in Australia', *Australian Journal of Political Science*, vol. 55, issue 2, 2020, p. 174.

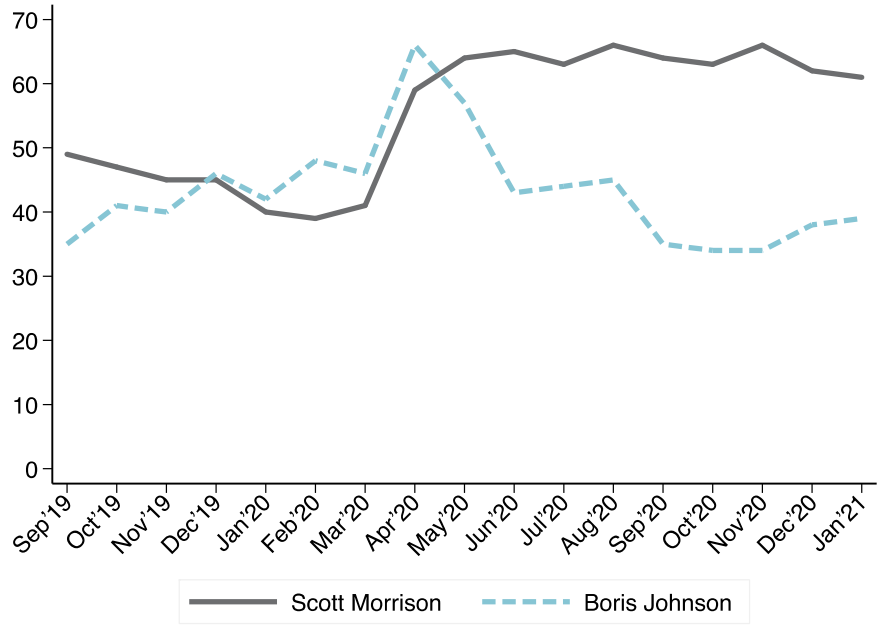
[48] John E. Mueller, *War, Presidents and Public Opinion*, John Wiley & Sons Inc, New York 1973; Matthew A. Baum, 'The Constituent Foundations of the Rally-Round-the-Flag Phenomenon', *International Studies Quarterly*, vol. 46, issue 2, 2002, pp. 263–298.

[49] Marc J. Hetherington and Michael Nelson, 'Anatomy of a Rally Effect: George W. Bush and the War on Terrorism', *PS: Political Science & Politics*, vol. 36, issue 1, 2003, pp. 37–42.

other countries.[50] Given the unique nature and unprecedented scale of the COVID-19 crisis, this raises questions about its effects on citizens' attitudes.

To investigate the rally 'round the flag' effect we can examine approval data for leaders—Scott Morrison in Australia as well as Boris Johnson as a point of international comparison. Polling data shows that there was a 'rally round the flag' effect in both Australia and the UK at the beginning of the pandemic, in March to April 2020 when many countries around the world first went into lockdown. Both Scott Morrison and Boris Johnson received a boost in support of around 20 percentage points (Figure 22). In Morrison's case, before the pandemic his approval ratings were exceptionally low as a result of the bushfire crisis which he was perceived as handling poorly.[51] After the initial jump in support at the beginning of the pandemic, Morrison's support remained exceptionally high throughout the pandemic, whereas for Boris Johnson, the 'rally round the flag' effect was relatively short-lived. We could expect this divergence stems from the 2 countries experiences in handling the pandemic, with Australia doing exceptionally well, whereas the UK was one of the most affected countries in terms of COVID-19 cases and deaths.

Figure 22: Approval ratings of Scott Morrison and Boris Johnson



Note: Scott Morrison question asks, 'do you approve or disapprove of the job Scott Morrison is doing as Prime Minister?'[52] Estimates are the percentage that approve. Boris Johnson question asks, 'do you think that Boris Johnson is doing well or badly as Prime Minister?[53] Estimates are the percentage that respond that he is doing well.

[50] Mark Andreas Kayser and Michael Peress, 'Benchmarking across Borders: Electoral Accountability and the Necessity of Comparison', *American Political Science Review*, vol. 106, issue 3, 2012, pp. 661–684.

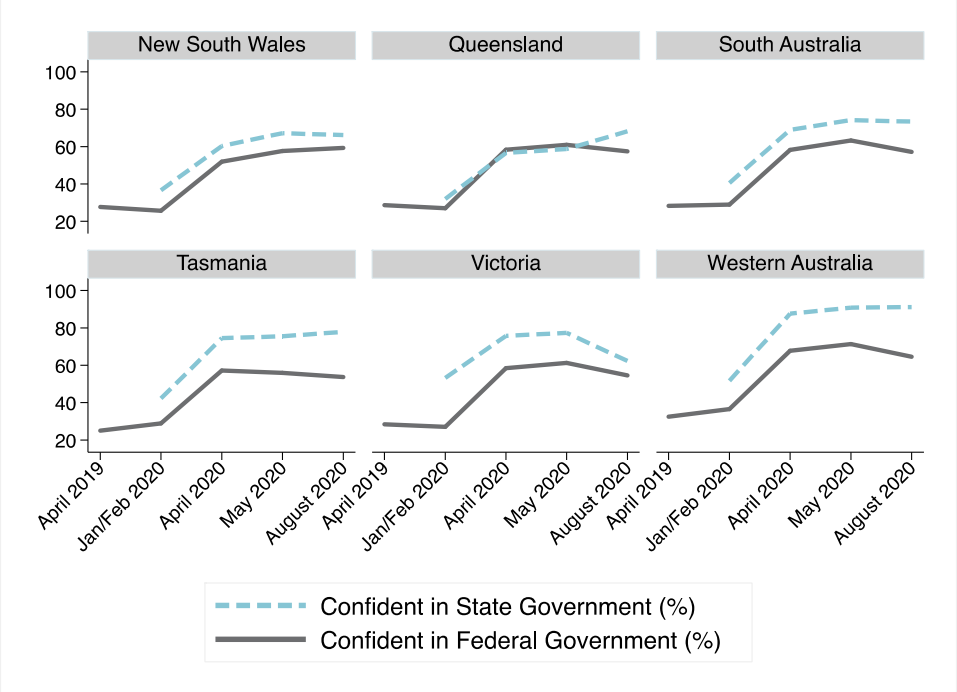
[51] Katharine Murphy, 'Essential poll: Morrison still in the doldrums with voters after bushfires and sports grants', *The Guardian*, 11 February 2020.

[52] Katharine Murphy, 'Essential poll: Morrison still in the doldrums with voters after bushfires and sports grants', *The Guardian*, 11 February 2020.

[53] YouGov, *How well is Boris Johnson doing as Prime Minister?*, Monthly tracker, https://yougov.co.uk/topics/politics/trackers/boris-johnson-approval-rating (accessed 30 March 2023).

ANUPoll data on confidence in state and federal governments in Figure 23 shows further evidence of the 'rally round the flag' effect in Australia. Before the pandemic in 2019 political trust had reached record lows. The closely related measure of confidence in government shows that there has been a huge improvement in citizen attitudes towards government during the pandemic. Differentiating the data by state shows that Victorians lost some confidence in the state but not the federal government, at the time of the second wave of COVID-19 in Victoria. This is consistent with the state government's responsibility for hotel quarantine, which was the source of the outbreak in July 2020. In Queensland, the data shows that confidence in Annastacia Palaszczuk's government increased when she closed the border to New South Wales (NSW) and Victoria in August 2020.

Figure 23: COVID-19 and confidence in government in Australia



Note: Estimates combine the percentage who reported having 'a great deal of confidence' and 'quite a lot of confidence' in the government.[54]

While 2020 started with record low levels of trust, the COVID-19 pandemic increased confidence in government and support for incumbents – as a result of voters rallying round the flag at a time of crisis. This increased support for incumbents provides an electoral advantage. Speculation about the possibility of an early election in Australia stems from the high levels of support the government enjoys in early 2021 and the potential to capitalise on that.

[54] Nicholas Biddle and Karuna Reddy, *ANU Poll 2019: Role of the University*, ADA Dataverse, V1, 2019; Nicholas Biddle, Ben Edwards, Diane Herz, Toni Makkai, and Ian McAllister, *ANU Poll 2020: Bushfires, The Environment, and Optimism For The Future,* ADA Dataverse, V2, 2020; Nicholas Biddle, Ben Edwards, Matthew Gray, and Kate Sollis, *ANU Poll 2020: COVID-19 attitudes and behaviours (longitudinal panel data)*, ADA Dataverse, V1, 2020; Nicholas Biddle, Ben Edwards, Matthew Gray, and Kate Sollis, *ANU Poll 2020: COVID-19 attitudes and behaviours, Wave 2 (May)*, ADA Dataverse, V1, 2020; Nicholas Biddle, Ben Edwards, Matthew Gray, and Kate Sollis, *ANU Poll 2020: COVID-19 attitudes and behaviours, Wave 3 (August)*, ADA Dataverse, V1, 2020.

Conclusion

To sum up, the AES long-term trends show an increasingly volatile electorate. Old divisions such as class and gender are changing over time. The gap between younger and older voters has never been greater, and today's generation of young people are much further to the left than their predecessors. Partisanship has reached record lows. All this contributes to greater unpredictability for electoral politics in Australia.

Following record levels of disaffection in 2019, the COVID-19 crisis, and Australia's relative success in handling the crisis as of February 2021, has ushered in a tremendous boost in support for incumbent governments. The crisis has become the salient issue at the expense of other priority areas. We could expect that continuing support for the current government is conditional on its handling of health and economic dimensions of the COVID-19 crisis.

Reflections on the 10th anniversary of the Parliamentary Joint Committee on Human Rights

Charlotte Fletcher and Anita Coles*

August 2022 marks 10 years since the Parliamentary Joint Committee on Human Rights (PJCHR) tabled its first legislative scrutiny report. In that time, 43 parliamentarians have served on the PJCHR, which has tabled more than 100 scrutiny reports. This paper reflects on the PJCHR's work over that period, including setting out the volume of scrutiny undertaken, and the way in which the PJCHR worked during the COVID-19 pandemic. It also examines the ways in which the PJCHR's processes have evolved in that time. Lastly, this paper considers the PJCHR's impact, highlighting examples of its influence on the development of federal legislation.

Introduction

Following a recommendation of the National Human Rights Consultation Committee in 2009,[1] Australia's Human Rights Framework (the Framework) was launched in 2010. A key element of this Framework was the establishment by Commonwealth legislation[2] of the PJCHR. The PJCHR was established in early 2012 in the 43rd Parliament and tabled its first scrutiny report in August 2012. The PJCHR, made up of 5 members of the House of Representatives and 5 senators,[3] was designed to enhance the understanding of, and respect for, human rights in Australia, and to ensure appropriate recognition of human rights issues in legislative and policy development. It was also intended to establish a dialogue between the executive, the parliament, and the public.[4] The powers and procedures of the PJCHR are determined by

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1 National Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009. Recommendation 7 recommended the establishment of a joint committee on human rights be established to scrutinise legislation.

2 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

3 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 5.

4 See the Hon Robert McClelland MP, *House of Representatives Hansard*, 30 September 2010, p. 271.

resolution of both houses of parliament at the start of each parliament.[5] The PJCHR has now been in operation for a decade, an anniversary providing a timely opportunity to reflect on the PJCHR's work and impact.

This paper is divided into 3 sections, examining:

- the PJCHR's legislative scrutiny and educative work over the past 10 years
- case studies highlighting the type, breadth and extent of the PJCHR's impact
- the PJCHR's scrutiny work during the COVID-19 pandemic.

The work of the PJCHR over 10 years

The PJCHR's core function is to examine all Commonwealth bills and legislative instruments for compatibility with human rights.[6] On average, the PJCHR has considered 225 bills and 1,827 legislative instruments every year. In addition, the PJCHR may examine Acts for compatibility with human rights,[7] and inquire into matters that have been referred by the Attorney-General.[8] The PJCHR reports its findings to parliament regularly, tabling its scrutiny reports in both the House of Representatives and the Senate. The PJCHR also tables an annual report each year, as well as reports for any inquiries undertaken. In total, across 10 years, this has amounted to the tabling of:

- 124 scrutiny reports
- 8 annual reports
- 6 self-initiated inquiry reports (which included calling for submissions and holding public hearings)
- 2 inquiry reports into human rights matters referred to the PJCHR by the Attorney-General.[9]

The PJCHR also publishes an index of all bills and legislative instruments that have been the subject of substantive comment each year.[10] Further, the PJCHR sends a regular 'scrutiny update' email to parliamentarians, their staff and subscribers when a new report has been tabled in the parliament, highlighting key concerns and findings.[11]

The PJCHR is supported by a small secretariat and is advised by an independent external legal adviser.[12] The secretariat is co-located with the secretariats to the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee for the Scrutiny of Delegated Legislation. This means that, in practice, a significant degree of informal collaboration between these 3 legislative scrutiny committee secretariats takes place.

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[5] For example, the most recent resolution of appointment for the PJCHR was determined in the House of Representatives on 26 July 2022 and in the Senate on 27 July 2022, and is available on the PJCHR's website.

[6] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), para 7(a). 'Human rights' is defined in the Act to mean the rights and freedoms recognised by 7 core international instruments. See, s 3.

[7] See, for example, PJCHR, *Ninth Report of 2013* (*Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation), 19 June 2013.

[8] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), para 7(b)–(c).

[9] These reports are all available on the PJCHR's website.

[10] These indexes are available on the PJCHR's website.

[11] In 2022, there were over 400 subscribers to the PJCHR's scrutiny updates.

[12] The secretariat includes a Committee Secretary, 2 Principal Research Officers and a Legislative Research Officer. From 2012 to 2022, the PJCHR's legal advisers have included: Emeritus Professor Andrew Byrnes, Professor Simon Rice OAM, Dr Aruna Sathanapally, and Associate Professor Jacqueline Mowbray.

The PJCHR's educative role

A key aspect of the PJCHR's work is its educative role—enhancing the understanding of, and respect for, human rights in Australia, and facilitating the appropriate recognition of human rights issues in legislative and policy development.

When the PJCHR was first formed, committee members played a direct role in articulating the PJCHR's expectations in terms of the quality of statements of compatibility with human rights, including when making speeches in the parliament,[13] in executive summaries at the beginning of scrutiny reports,[14] and writing to ministers and departments where statements of compatibility with human rights did not meet the PJCHR's expectations.[15] The PJCHR has also progressively published and revised practice notes (now called guidance notes) and other resources to assist its stakeholders, including:

- a practice note on the PJCHR's expectations for statements of compatibility (first published in September 2012, and revised in September 2014 and November 2021)
- a practice note on offence provisions, civil penalties and human rights (first published in early 2014, and revised later that year)
- the Guide to Human Rights, which gives an overview of the 25 key human rights found in the 7 international human rights treaties against which the PJCHR considers questions of human rights compatibility (first published in March 2014 and revised in June 2015).

In addition, committee members, particularly the Chairs and Deputy Chairs, have played an active role in spreading awareness of the PJCHR's role and work, including by presenting speeches to public officials, non-government organisations and lawyers.[16]

Over time the PJCHR continued to reiterate its expectations to ministers and departments in terms of the content of statements of compatibility (including that they should be read as stand-alone documents, provide sufficient information about the purpose and effect of proposed legislation, the operation of individual provisions and how these may impact on human rights; and include an assessment of whether the proposed legislation is compatible with human rights).[17] The responses received from proponents of legislation (usually ministers), in terms of both their tone and substance, while occasionally dismissive in the earlier part of the PJCHR's operation, have largely improved across the decade.[18]

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[13] See, for example, Mr Harry Jenkins MP, *House of Representatives Hansard*, 22 August 2012, p. 9511.

[14] See, for example, PJCHR, *First Report of 2013*, 6 February 2013, pp. xi–xii.

[15] See, for example, PJCHR, *First Report of 2013*, 6 February 2013, pp. xi–xii. In this executive summary, the Chair noted that the PJCHR identified 116 legislative instruments that did not appear to raise human rights concerns but were accompanied by statements of compatibility that did not meet the PJCHR's expectations, and so would write to the relevant ministers in an advisory capacity to provide guidance on the preparation of these statements.

[16] See the PJCHR's website for archive of statements and speeches.

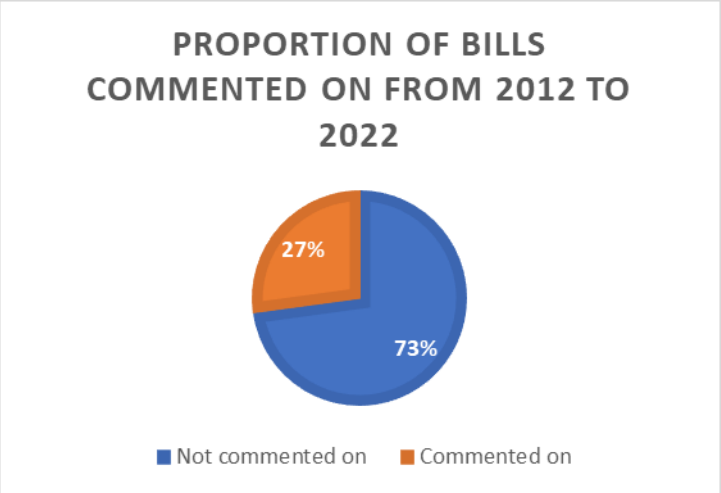
[17] This included by writing directly to minister (see, for example, PJCHR, *First Report of 2013*, 6 February 2013, pp. xi–xii); and by noting these concerns in tabling speeches (see, for example, PJCHR, *Annual Report 2014-15*, p. 24; PJCHR, *Annual Report 2018*, p. 34).

[18] Contrast, for example, the tone and substance of a ministerial response received by the PJCHR from then Minister for Industrial Relations in 2015 (PJCHR, *Twentieth Report of the 44th Parliament*, 18 March 2015, p. 76) with a recent response from the Minister for Home Affairs in 2022 (PJCHR, *Report 2 of 2022*, 25 March 2022, pp. 78–112). For a further consideration of the tone and substance of early responses to the PJCHR, see Simon Rice, 'Allowing for Dissent: Opening up Human Rights Dialogue in the Australian Parliament', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020, pp. 99–134.

The PJCHR's secretariat has often, on the PJCHR's behalf, undertaken an educative role for those preparing statements of compatibility accompanying legislation. The PJCHR has authorised its secretariat to engage directly with departmental officers to ask specific questions about how bills and legislative instruments were intended to operate (and so understand their implications in terms of human rights), and to provide feedback and guidance in the drafting of statements of compatibility with human rights.[19] The secretariat has also on a number of occasions provided training to assist departmental officers in understanding human rights, the PJCHR's expectations, and best practice when drafting statements of compatibility with human rights.

The PJCHR's scrutiny of bills

Over its 10-year span, the PJCHR has examined a total of 2,254 bills and commented on 602 (27%). Overall, the PJCHR has considered that three-quarters of bills do not raise human rights concerns requiring the PJCHR's comment. This is because the bills may not have engaged any human rights, may have promoted rights, may have limited rights but it appeared these were permissible limits, and/or raised only marginal human rights concerns.



The PJCHR generally comments substantively on a bill where it raises human rights concerns or questions, typically by seeking further information from the proponent of the legislation (usually the minister).[20] The threshold for when the PJCHR will formally comment on a bill has evolved over time, gradually shifting towards a higher threshold. To some extent, this shift reflects an increased awareness by departments and proponents of legislation of the PJCHR's expectations when drafting statements of compatibility with human rights (and their knowledge and understanding of relevant human rights and how a proposed measure may engage them). It also appears to reflect a change in the PJCHR's approach to reporting. In its earlier years it focused largely on improving awareness and understanding of the PJCHR's expectations regarding statements of compatibility.[21] As such, while in the first half of its existence the PJCHR often raised more minor human rights issues on the basis that the statement of compatibility was considered inadequate, in more recent years it has focused its

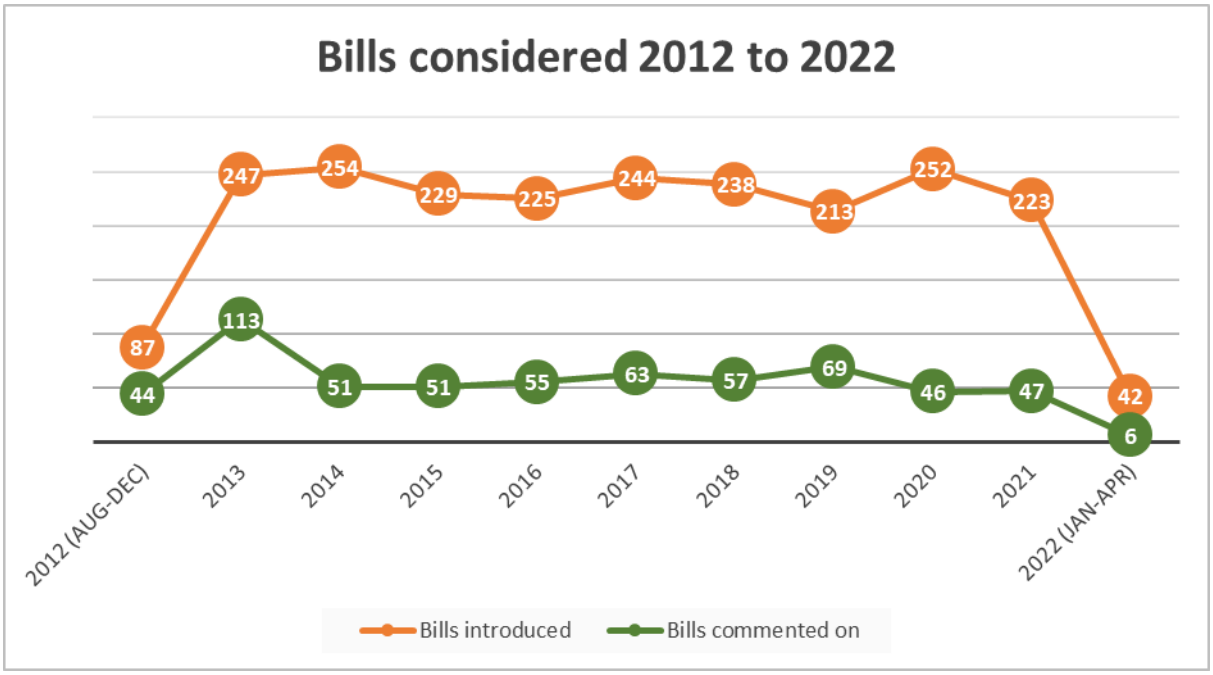
[19] The PJCHR authorised the secretariat to undertake this work from 2012 to 2013, 2018 to 2019 and from 2021 to present. See, for example, PJCHR, *Annual Report 2018*, 12 February 2019 p. 36; PJCHR, *Annual Report 2021*, 28 September 2022.

[20] The PJCHR takes the same approach in respect of delegated legislation, which is discussed further below.

[21] See for example the Chair's (Senator Dean Smith's) tabling speech in February 2014 in relation to the *Second Report of the 44th Parliament*: 'Regrettably, the committee notes that some of the statements of compatibility accompanying bills and instruments considered in this Second Report have fallen short of the committee's expectations … Where further information is required to determine these questions, the committee will write to the sponsor of the legislation, in a spirit of constructive dialogue, to request clarification'.

reports on legislation where there appear to be some significant human rights questions to be addressed.[22]

The following chart shows the numbers of bills introduced into the parliament from the time the PJCHR commenced its work in August 2012 to April 2022 (at the end of the 46th Parliament). It shows that the numbers of bills introduced each year (shown in orange) tends to remain fairly steady, with an average of 236 new bills being introduced each year.[23] The apparent low number of bills in 2012 and 2022 are because these 2 time periods are less than 6 months.



The green line indicates the number of bills that the PJCHR commented on in its scrutiny reports that year. Of note:

- In 2012 and 2013, the PJCHR commented on a significant proportion of new bills.[24] This is because the PJCHR initially wrote up a greater proportion of bills in order to explain what the bills did (even where there were no human rights concerns), to fulfil its educative role and to establish the role of the PJCHR in the parliament.
- From 2014 to 2021 (inclusive), the number of bills the PJCHR commented on remained fairly steady. The spike in the number of bills written up by the PJCHR in 2019 (69) in spite of the drop in the numbers of bills introduced that year (213), is largely attributable to the re-introduction of bills after the 2019 federal election. The PJCHR had previously raised human rights concerns about a number of bills which lapsed because they had not been passed by the end of the parliament. When those bills (whether in identical or substantially similar form) were re-introduced after the

[22] Note, since 2019 the PJCHR's reports have indicated that where the PJCHR has not commented on a bill, this may be 'notwithstanding that the statement of compatibility accompanying the bill may be inadequate', see *Report 3 of 2019* onwards.

[23] Bills are only introduced when parliament is sitting which takes place for 18 to 20 weeks each year on average.

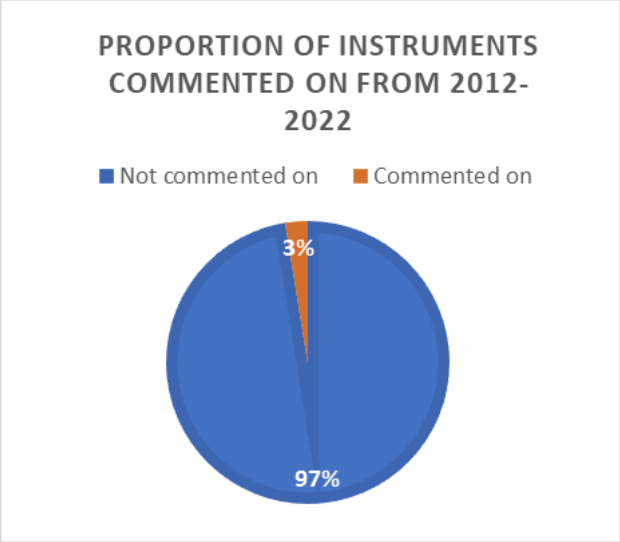
[24] The PJCHR commented on the following percentage of bills each year: in 2012, 50%; in 2013, 46%; in 2014, 20%; in 2015, 22%; in 2016, 24%; in 2017, 26%; in 2018, 24%; in 2019, 32%; in 2020, 18%; in 2021, 21%; and in 2022, 14% (at the end of the 46th Parliament).

election, the PJCHR reiterated its earlier comments.[25] This had the effect that those re-introduced bills were nevertheless considered to have been subject to substantive PJCHR comment, hence the apparent spike in the numbers of bills considered in 2019.

The PJCHR's scrutiny of legislative instruments

In addition to its consideration of bills, the PJCHR examines all legislative instruments (that is, legislation made by the executive under the authority of an existing Act).[26] Legislative instruments usually take effect from the day after registration on the Federal Register of Legislation (FRL).[27] Legislative instruments are made continuously (including outside of parliamentary sitting days and, in some instances, during the caretaker period when elections are called), because the source of authority (an Act) already exists.[28] Delegated legislation may be either disallowable (meaning that either house of parliament can veto it within certain timeframes) or exempt from disallowance. Until July 2021, the PJCHR was the only parliamentary committee empowered to routinely scrutinise exempt delegated legislation.[29]

Over the past 10 years, the PJCHR has examined more than 18,000 legislative instruments, commenting on 466 (an average of 3% overall). The PJCHR does not comment on the vast majority of delegated legislation as it often does not engage, or only marginally engages, human rights. For example, commonly seen legislative instruments routinely provide for a range of matters that raise no human rights concerns, including: new statements of principles specifying whether a particular medical condition may be connected to military service;[30] determining the



[25] See PJCHR, *Report 3 of 2019*, 30 July 2019, pp. 15–16; PJCHR, *Report 4 of 2019*, 10 September 2019, p. 10; PJCHR, *Report 5 of 2019*, 17 September 2019 p. 15. These reports state that '[t]he committee reiterates its views as set out in its previous reports on the following bills. These bills have been reintroduced in relevantly substantially similar terms to those previously commented on'.

[26] Delegated legislation is law made by a person or body other than parliament (such as the Governor-General, a minister or official), under authority granted to that person or body by the parliament. Delegated legislation has the same force of law as an Act of Parliament. Individual pieces of delegated legislation are known by a variety of names, such as regulations, rules, or determinations; however, they are broadly termed 'legislative instruments'. More information about delegated legislation and how it operates is available on the Australian Parliament House website.

[27] See *Legislation Act 2003* (Cth), s 12.

[28] For example, on 11 April 2022, the Governor-General issued a proclamation proroguing the parliament and dissolving the House of Representatives, officially bringing an end to the 46th Parliament. During 2 months of the subsequent election period, between 12 April and 12 July 2022, 142 legislative instruments were registered.

[29] Since 16 June 2021, the Senate Standing Committee on Delegated Legislation has the authority to routinely scrutinise exempt delegated legislation Senate standing order 23(4A). This followed an own-motion inquiry into exempt delegated legislation. Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight, Final Report,*16 March 2021, recommendation 10.

[30] For example, Statement of Principles concerning Graves disease (Reasonable Hypothesis) (No. 7 of 2022) [F2022L0008]. As new conditions are progressively recognised as potentially being related to services rendered, new legislative instruments are continuously made under the authority of the *Veterans' Entitlements Act 1986*. For example, of the 34 legislative instruments registered between 24 December 2021 and 5 January 2022, 20 were Statements of Principles related to various diseases and medical conditions.

characteristics of coins;[31] establishing total allowable catches of certain fish;[32] listing new threatened and endangered species;[33] and establishing and amending accounting standards.[34] Nevertheless, the PJCHR is required to examine each legislative instrument.[35]

Because of this large volume, the PJCHR has always taken an exceptions-based approach to reporting on legislative instruments, and it has experimented with different ways by which to make clear what instruments have been considered in each reporting period. For the first 2 years of operation, the PJCHR published a list of all legislative instruments that had been considered at the end of each report (including those that raised no human rights concerns).[36] This practice ceased in August 2014, with reports thereafter simply referring to legislative instruments 'received' within a particular date range ('received' meaning provided to the secretariat by the Office of Parliamentary Counsel).[37] Some commentators expressed concern that this reduced the transparency around what legislative instruments had been considered.[38] This issue was resolved in February 2018 when references to legislative instruments 'received' between a particular period were replaced by reference to legislative instruments 'registered on the Federal Register of Legislation' between a particular date range.[39] This method allows for the full list of legislative instruments considered by the PJCHR during that period to be generated via the FRL website.[40]

The following chart shows the numbers of legislative instruments registered on the FRL from August 2012 to June 2022. As indicated by the light blue line, the numbers of legislative instruments registered has fluctuated from year-to-year. The dark blue line indicates the number of instruments the PJCHR has commented on in its scrutiny reports each year.

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[31] For example, Currency (Australian Coins) Amendment (2022 Royal Australian Mint No. 2) Determination 2022 [F2022L00309].

[32] For example, Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Amendment Determination (No. 1) 2022 [F2022L00300].

[33] For example, List of Threatened Species Amendment (Tarennoidea wallichii (304)) Instrument 2021, [F2022L00426].

[34] For example, Accounting Standard AASB 2022-1 Amendments to Australian Accounting Standards – Initial Application of AASB 17 and AASB 9 – Comparative Information, [F2022L00398].

[35] As with the scrutiny of bills, in practice, this function is delegated to the PJCHR secretariat, who bring to the PJCHR's attention any legislative instruments that appear to raise human rights concerns.

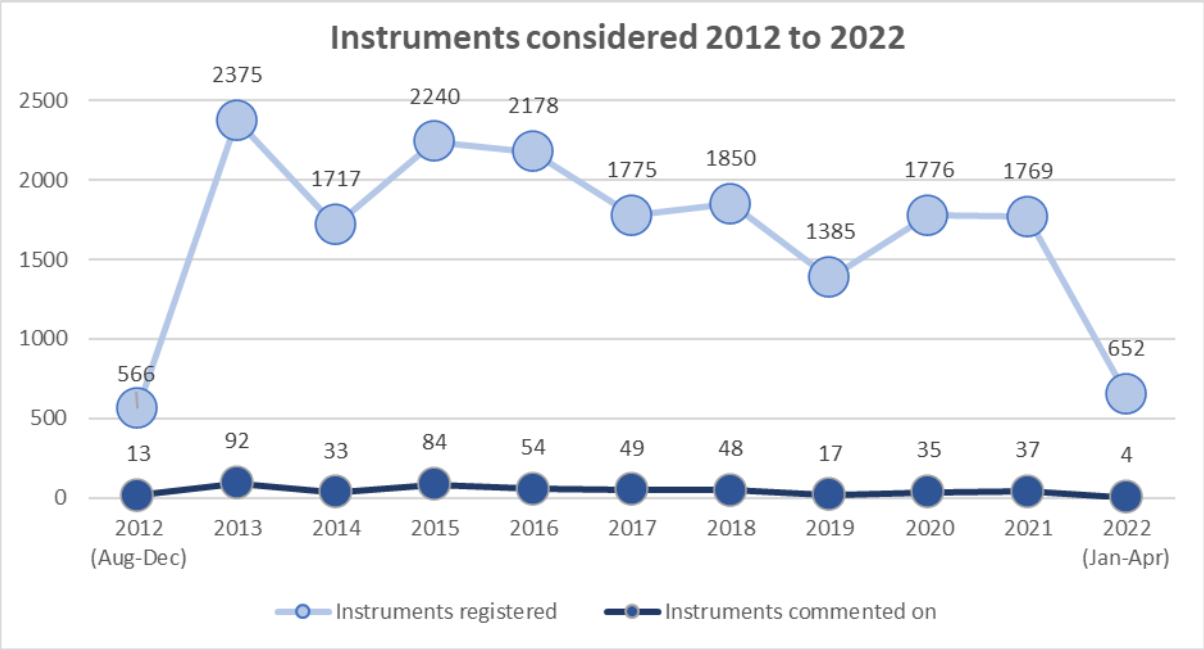
[36] See, for example, PJCHR, *First Report of 2013,* 6 February 2013, pp. 161–177.

[37] PJCHR, *Tenth Report of the 44th Parliament*, 26 August 2014, p. ix (bills introduced 7–17 July 2014; legislative instruments received 21 June–25 July 2014).

[38] See George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review*, vol. 41, no. 2, 2015, pp. 469–507; Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' (pp. 67–98) in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020.

[39] PJCHR, *Report 2 of 2018*, 13 February 2018, Chapter 1, and all reports since that time.

[40] The PJCHR's reports include an explanation of how to find the relevant legislative instruments under consideration—namely, to identify which legislative instruments have been scrutinised by the PJCHR during a specific time period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the FRL's advanced search function.



Of note:

- In 2013, the PJCHR commented on a relatively large proportion of legislative instruments (3.8%).[41] As was the case with bills at the time, this is because the PJCHR initially wrote up a greater proportion of legislative instruments in order to explain what the instruments did (even where there were no human rights concerns), to fulfil its educative role and to establish the role of the PJCHR in the parliament.
- In 2019, the PJCHR commented on a comparatively small percentage of legislative instruments (1.2%).[42] This is likely attributable, in part, to the 2019 federal election period, during which the PJCHR did not exist and so no scrutiny reports were tabled,[43] and the fact that the PJCHR tabled only 6 scrutiny reports overall during 2019.

The timeliness of the PJCHR's reports

The PJCHR seeks to conclude its assessment of bills while they are still before the parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days),[44] where applicable. This ensures that its technical assessment of the compatibility of legislation with international human rights law is available to parliamentarians to inform their consideration of proposed legislation and motions proposing to disallow legislative instruments. However, there is no procedural requirement that provides that bills cannot pass before the PJCHR has reported on a particular bill, and

[41] The PJCHR commented on the following percentage of legislative instruments each year: in 2012, 50%; in 2013, 2.3%; in 2014, 3.9%; in 2015, 1.9%; in 2016, 3.7%; in 2017, 2.8%; in 2018, 2.6%; in 2019, 1.2%; in 2020, 2%; in 2021, 2.1%; and in 2022, 1.1% (at the end of the 46th Parliament).

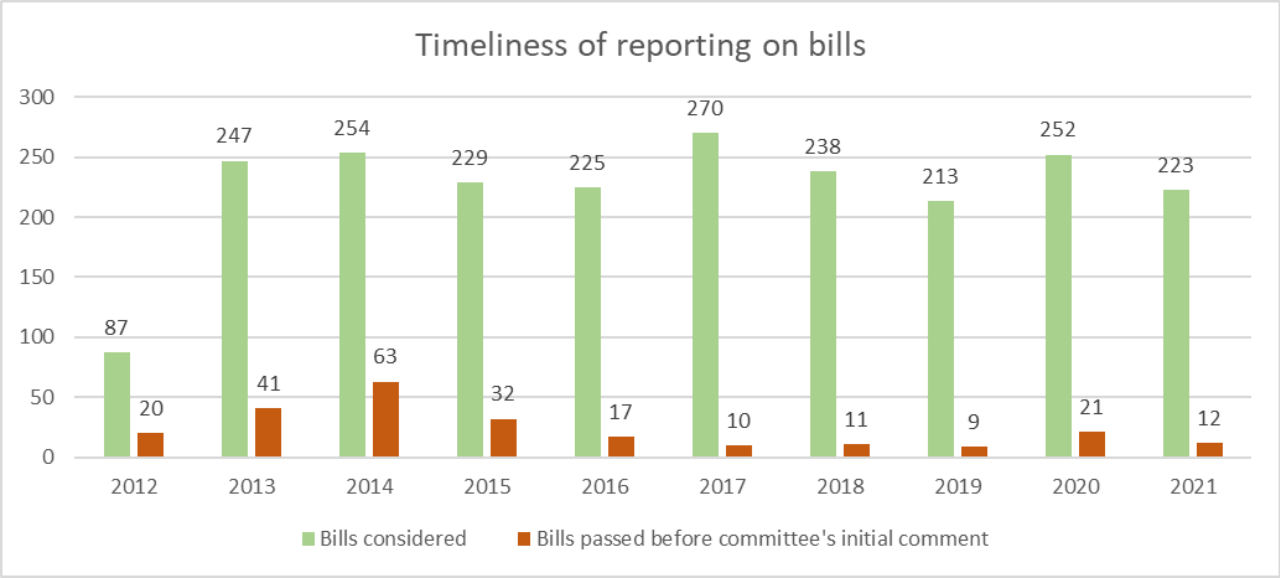
[42] Note, the PJCHR's 6 scrutiny reports that year only examined legislative instruments registered on the FRL between 9 November 2018 and 19 September 2019. See PJCHR, *Report 1 of 2019*, 12 February 2019, p. 1; PJCHR, *Report 6 of 2019*, 5 December 2019, p. 1.

[43] The 45th Parliament was prorogued on 11 April 2019, and the 46th Parliament commenced on 2 July 2019.

[44] Some legislative instruments may have different periods of disallowance if so specified by its enabling legislation. If a notice of motion to disallow a legislative instrument is lodged, this extends the disallowance period usually by a further 15 sitting days, see *Legislation Act 2003* (Cth), s 42.

the varying speeds with which bills proceed through both chambers is beyond the PJCHR's control. Further, while the PJCHR seeks to complete its consideration of legislative instruments within their period of disallowance, legislative instruments can become law immediately, and 20% of legislative instruments are exempt from disallowance.

The following chart illustrates the timeliness of the PJCHR's report on bills.[45] The data in green sets out the number of bills the PJCHR has considered each year, and the data in orange shows the number of bills that had already passed the parliament at the time the PJCHR published its initial comment.



Of note:

- Between 2012 and 2015 (inclusive) there were some delays in the PJCHR's reporting on bills. In 2014 in particular, 24.8% of bills had passed before the PJCHR had published its initial comment.[46]
- From 2016 to 2021 (inclusive) the timeliness of the PJCHR's reporting on bills improved significantly. In 2019 in particular, just 4.2% of bills (9 bills) passed before the PJCHR had published an initial comment.[47]
- The spike in the number of bills that had passed before the PJCHR's initial comment in 2020 (21 bills, or 8.3%) is largely attributable to legislation which was passed in response to the COVID-19 pandemic, much of which passed both houses of parliament the day it was introduced.[48]
- Since 2016, the PJCHR has consistently reported on more than 90% of all bills while they remained before the parliament.

[45] Note, this paper does not graph the timeliness of the PJCHR's reporting on legislative instruments over 10 years owing to the significant volume of instruments considered.

[46] As the chart shows, the percentage of bills that had passed before the PJCHR's initial comment were: in the 6 months of 2012, 23%; in 2013, 16.6%; in 2014, 24.8%; and in 2015, 14%.

[47] The percentage of bills that had passed before the PJCHR's initial comment were: in 2016, 7.5%; in 2017, 3.7%; in 2018, 4.6%; in 2019, 4.2%; in 2020, 8.3%; and in 2021, 5.4%.

[48] Of the 24 bills that passed before the PJCHR's final comment in 2020, 15 passed both houses of parliament on the same day they were introduced, and all passed both houses within 7 calendar days of their introduction.

The PJCHR's capacity to report in a timely way has depended on several factors from time to time. These include the speed of legislative passage, the PJCHR's own work practices, and the timeliness of ministerial responses.

Speed of legislative passage

At times, the volume of legislation introduced, and the speed with which it is passed, has meant that the PJCHR is unable to complete its reports before legislation is passed. On some occasions it has been impossible for the PJCHR to consider bills before they pass the parliament. This was particularly the case in relation to bills responding to the COVID-19 pandemic, which often passed on the day they were introduced, or within a day or 2 of introduction.[49] Of the 24 bills that passed before the PJCHR's final comment in 2020, 15 passed both houses of parliament on the same day they were introduced, and all passed both houses within 7 calendar days of their introduction.

Evolving committee work practices

Some aspects of the PJCHR's work practices have also contributed to its timeliness. In its first 8 years, the PJCHR generally met only in person during joint sitting weeks, and would meet in the second week of back-to-back sittings where these occurred. This meant that bills that had been introduced in the first sitting week were not able to be fully reviewed before the PJCHR's meeting in the second week (especially where they were complex and may have had complicated human rights implications), because this would require their review within one day of their introduction. Consideration of such bills was often deferred, a practice which attracted some criticism.[50] In addition, consideration of private members' bills would often also be deferred because they were not given priority in terms of internal review as such bills rarely pass the parliament.[51] Ultimately, the PJCHR would often resolve not to comment on many deferred bills once they had been appropriately reviewed. With respect to legislative instruments, the PJCHR historically reported on many instruments where the period for disallowance had already passed. Overall, the PJCHR's timeliness in respect of reporting on both bills and legislative instruments has prompted some criticism.[52]

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[49] For example, the Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020, Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020 and Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 were introduced into the House of Representatives on 23 March 2020, passing both houses that day. Similarly, the Privacy Amendment (Public Health Contact Information) Bill 2020 was introduced into the House of Representatives on 12 May 2020 and passed both houses 2 days later, meaning that the PJCHR had no time to consider these bills or comment on them before they passed.

[50] For example, Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020, p. 95.

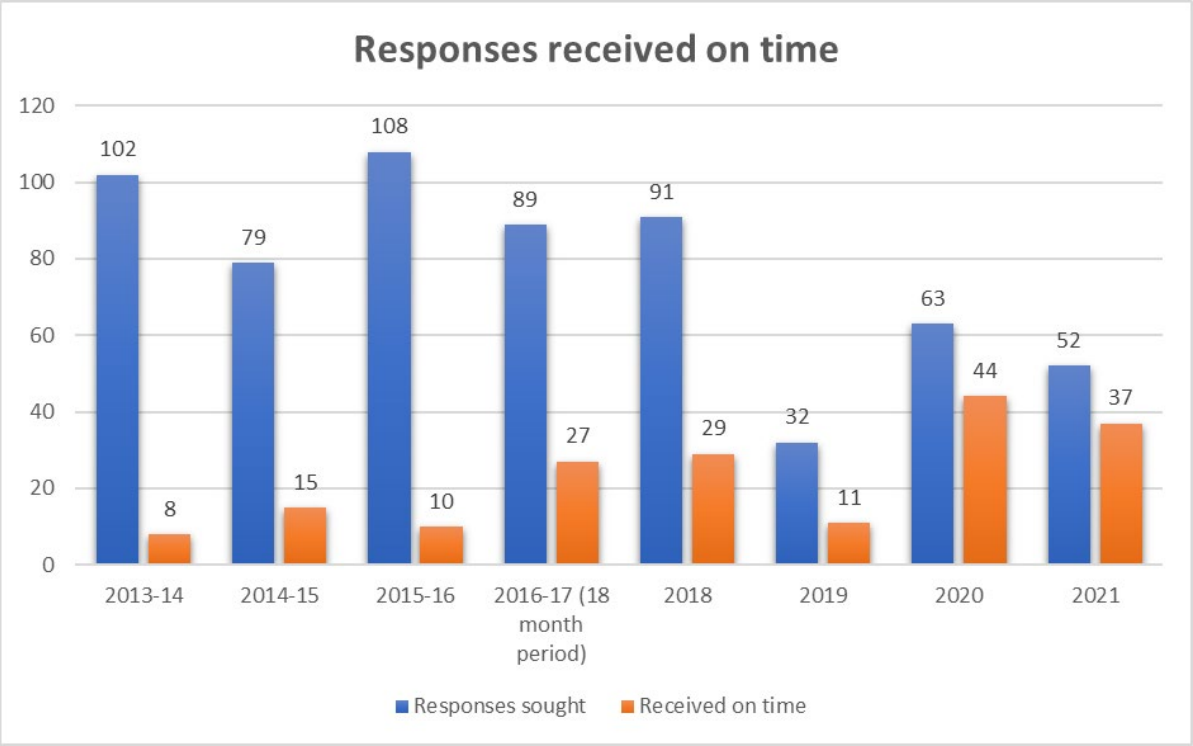
[51] Of the 653 private members' bills and private senators' bills introduced into the Australian Parliament since 1901, only 30 have been passed into law.

[52] See, for example, Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomas Reuters, Pyrmont, 2020, including Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution', pp. 31–63, and Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', pp. 67–98. For example, Professor Williams and Daniel Reynolds have argued (at p. 75) that in the period between August 2017 to December 2020, half of the PJCHR's comments were not available until after the bill or disallowance period had passed. However, this figure does not appear to be correct, and the combination of statistics relating to bills and legislative instruments seems to have considerably skewed the final numbers. Between August 2017 to December 2020, of the 106 instances where the PJCHR concluded there were human rights concerns with a bill or legislative instrument, 27% of instances occurred after the bill or disallowance period had passed. However, the figures differ markedly in relation to bills compared to legislative instruments. For bills, 87% of the PJCHR's comments were available before the bill passed (out of 60 bills, 52 were on time, 8 out of time), whereas in relation to legislative instruments, 54% of comments were made before the

However, in the 46th Parliament, since the onset of the COVID-19 pandemic, the PJCHR resolved to meet and table its scrutiny reports both within and outside of parliamentary sittings. This has meant that it can report in a more timely way, and that the PJCHR only occasionally needs to defer the consideration of bills in cases where there is no time to consider them and they raise potentially significant human rights concerns. In 2021, 203 of the 223 bills introduced (91%) were still before the parliament when the PJCHR published its final comments, meaning that its advice was available to parliamentarians to consider while a bill remained before the parliament. Further, since 2021 the PJCHR has reviewed all legislative instruments, and commented on relevant instruments, within the disallowance period.[53]

Ministerial responses

A further factor influencing the PJCHR's capacity to conclude its consideration of legislation in a timely manner is the receipt of responses from the proponent of legislation in the time provided. Where the PJCHR has written to the relevant minister to seek information before concluding its advice to parliament, it has always stipulated a deadline by which it expects a response to be provided (typically 2 weeks, with discretion for the secretariat to provide extensions of time if feasible). Although there is no legal or procedural requirement that a minister provide the response within this period, the timeliness of responses from ministers has improved dramatically in recent years. The following chart sets out the numbers of requests made by the PJCHR for a response (shown in blue) compared with the number of responses which were received within the time provided (in orange).



disallowance period ended (25 instances within the disallowance period, 21 instances after the disallowance period had ended).

[53] For further information, see PJCHR, *Annual Report 2020*, 13 May 2021, p. 17.

Of note:

- In 2012 and 2013 the PJCHR did not report on the number of responses it had received, and as such this time period is not included in the chart.
- Until 2018, PJCHR reports identified whether a response was on time or late depending on the initial requested date and did not include data on whether responses were received on time where extensions had been granted. Responses received after the initial requested date, even where an extension had been granted, were considered late.[54] Nevertheless, a trend of increased timeliness of responses is apparent, with more than 30% of all responses received on time from 2016–17 to 2019, and more than 70% of responses received on time in 2020 and 2021.[55]
- In 2018, the PJCHR transitioned to reporting on its work according to calendar, rather than financial, year. As such, the 2016 to 2017 time period covers 18 months from July 2016 to December 2017.
- The high number of late responses received in 2018 can be largely attributable to single report entries dealing with numerous legislative instruments.[56]
- In 2019, there is a drop in the number of bills both introduced and attracting PJCHR comment. This is because a federal election was held, which impacted the number of bills introduced that year, and the number of scrutiny reports the PJCHR could table. Further, the PJCHR did not seek a response in relation to many of the bills commented on because they were being re-introduced. The PJCHR merely reiterated its earlier comments.
- From September 2019, the PJCHR resolved to only comment substantively on private members' bills where information suggested that they would proceed to further stages of debate. This contributed to the reduction in the number of requests for responses from that year.

The timeliness (and fulsomeness) of responses to the PJCHR is the responsibility of individual proponents of legislation. However, this trend of significantly increased responsiveness arguably reflects that the legitimacy of the PJCHR's processes—its role, questions, and advice to parliament—appears to have gradually gained acceptance by parliamentarians, as the PJCHR has progressively established itself. Consequently, the necessity for ministers to engage with the PJCHR's processes by responding substantively to its questions in a timely way—while not universal—appears to have progressively become the expected norm.[57] As noted, since 2016, the PJCHR's comments on new bills have been available for parliamentarians to consider while a bill is before the parliament in over 90% of cases, and since 2020, 100% of legislative instruments have been considered within the disallowance period.

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[54] See PJCHR, *Annual Report 2018*, 12 February 2019, p. 33.

[55] 2012 to 2013, 7.8%; 2014 to 2015, 19%; 2015 to 2016, 9.2%; 2016 2017, 30%; 2018, 32%; 2019, 34%; 2020, 70%; and 2021, 71%.

[56] In 2018, a response relating to 9 instruments made under the *Autonomous Sanctions Act 2011* was late. Although it related to only one report entry, it was counted as late 9 times. As it also required a further response which was also late, it was counted again as late an additional 9 times. Similarly, the 5 various park management plans made under the *Environment Protection and Biodiversity Conservation Act 1999* were counted as 5 late responses although they refer to only one report entry. See PJCHR, *Annual Report 2018*, 12 February 2019, para [3.54].

[57] Contrast, for example, the substance of a ministerial response received by the PJCHR from then Minister for Industrial Relations in 2015 (PJCHR, *Twentieth Report of the 44th Parliament*, 18 March 2015, p. 76) with a recent response from the then Minister for Home Affairs in 2022 (PJCHR, *Report 2 of 2022*, 25 March 2022, pp. 78–112).

The PJCHR's impact

Assessing impact

Assessing the PJCHR's impact is important in understanding whether the PJCHR has been effective in achieving its aims. The PJCHR's core legislated function is to examine all Commonwealth bills and legislative instruments for compatibility with human rights.[58] When the Human Rights (Parliamentary Scrutiny) Bill was introduced in 2010, the then Attorney-General the Hon Robert McClelland stated that the new PJCHR was 'designed to improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.[59] The then Shadow Attorney-General, the Hon George Brandis KC, while disagreeing on the definition of 'human rights', noted that expanding parliamentary scrutiny of legislation from a human rights point of view 'has the advantage of locating greater emphasis on human rights at the heart of the political system itself'.[60] Mr Graham Perrett MP, who would go on to become a long-serving committee member, stated that the PJCHR would 'have a very powerful gate-keeping and scrutiny role', helping to ensure that Australian laws reflect human rights obligations, and 'tighten[ing] the parliament's focus on human rights'.[61] When the PJCHR was formally established in 2012, inaugural Chair Mr Harry Jenkins MP, stated that the PJCHR had been established 'as part of a concerted effort to enhance the understanding of, and respect for, human rights issues and to ensure the appropriate recognition of human rights in the legislative process'.[62]

Numerous commentators have considered the extent of the PJCHR's impact when measured against certain factors. For example, Professor George Williams and Daniel Reynolds have twice, in 2015 and 2020, analysed the impact of the PJCHR, gauging it in terms of its deliberative, legislative and media impacts, and its impact on judicial output.[63] Dr Laura Grenfell and Dr Sarah Moulds have analysed the extent of the PJCHR's success by reference to: the adequacy of time to conduct formal parliamentary scrutiny; the attributes of particular committees that lead to greater legislative influence; the power and willingness of committees to facilitate public input; a culture of respect for the value of formal parliamentary scrutiny including rights scrutiny; and the generation of a rights discourse in parliamentary debates.[64]

Several studies have considered that there are many challenges associated with assessing the practical 'effectiveness' of parliamentary committees more broadly.[65] As Meg Russell and

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[58] *Human Rights (Parliamentary Scrutiny) Act 2011*(Cth), para 7(a). 'Human rights' is defined in the Act to mean the rights and freedoms recognised by 7 core international instruments. See s 3.

[59] The Hon Robert McClelland MP, *House of Representatives Hansard,* 30 September 2010, p. 271.

[60] The Hon Senator George Brandis KC, *Senate Hansard*, 25 November 2011, p. 9661.

[61] Mr Graham Perrett MP, *House of Representatives Hansard*, 22 November 2010, p. 3239.

[62] Mr Harry Jenkins MP, *House of Representatives Hansard*, 20 June 2012, p. 7176.

[63] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review*, vol. 41, no. 2, 2015, pp. 469–507, Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020, pp. 67–98.

[64] Laura Grenfell and Sarah Moulds, 'The role of Committees in Rights Protection in Federal and State Parliament in Australia', *UNSW Law Journal,* vol 41, no. 1, 2018, pp. 40–79 (see p. 44).

[65] See Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review,* vol. 33, no. 1, 2018, pp. 72–107 who cites: Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures', *Human Rights Law Review,* vol. 6, 2006, pp. 545,

Megan Benton have observed in the British context, 'much of [p]arliament's influence is subtle, largely invisible and frequently even immeasurable'.[66] In the Australian context, Dr Sarah Moulds has recently considered the capacity for Australian parliamentary committees to have a hidden influence on the development of legislation, not necessarily remedying rights concerns, but in a rights-enhancing manner.[67]

This paper does not traverse the ground already trodden by others in attempting to define the yardstick by which a parliamentary committee may be considered to be effective. Rather, it highlights some specific examples of the PJCHR's impact, some of which is acknowledged, some unacknowledged, and some being examples of the hidden influence on the development of legislation. These examples help to demonstrate that the PJCHR's impact is most readily apparent where:

- its comments have been explicitly acknowledged and addressed in re-drafted legislation and explanatory materials
- its advice has been raised in parliamentary debates and motions, media commentary, or other committee inquiries
- its in-depth public inquiries into legislation (which include engagement with civil society, the public, and academia) have resulted in significant legislative change and media coverage.

Some of these case studies demonstrate that it can often be challenging to identify the PJCHR's impact on face value, without very close monitoring of the progress of legislation over time, or a detailed knowledge of its passage through both chambers of parliament. This can often be because while aspects of the PJCHR's concerns may in fact be addressed by amendments or future legislation or policy, the PJCHR's role and influence in causing those amendments to be made is not always explicitly acknowledged. In such instances, the PJCHR may have an important impact on the re-drafting of legislation, but without any specific acknowledgment given as to the role of the PJCHR.

It is noteworthy that many of these case studies highlight the PJCHR's impact on the development of legislative instruments, despite them being a small part of the PJCHR's work. One reason for legislative instruments constituting such a considerable portion of the 'success stories' arising from the PJCHR's work may be because officials can fairly readily amend or re-make legislative instruments and their explanatory statements, meaning that changes in response to the PJCHR's comments are more likely. On the other hand, once bills are introduced to parliament, changes are often less likely.

551, 545 and 570; Meg Russell and Meghan Benton, 'Assessing the Impact of Parliamentary Oversight Committees: the select committees in the British House of Commons', *Parliamentary Affairs*, vol. 66, 2013, pp. 772 and 766; Aileen Kavanagh, 'The Joint Committee on Human Rights: a Hybrid Breed of Constitutional Watchdog', in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015, p. 115; Malcolm Aldon, 'Rating the Effectiveness of Parliamentary Committee Reports: the Methodology', *Legislative Studies*, vol. 15, no. 1, 2000, p. 22; and Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – from a Lawyer's Perspective', *About the House*, 2005, p. 55.

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

[67] Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia*, Springer Singapore Private. Limited, 2020.

As the following 7 case studies demonstrate, the PJCHR's impact is most readily apparent where its influence has been explicitly acknowledged in terms of: decisions to amend legislative instruments and bills; mentions in debates and motions in the parliamentary chambers; and references in submissions to other parliamentary committees, and the reports and recommendations of other parliamentary committees.

For example, since 2019, the PJCHR has twice resolved to inquire into legislative instruments (by calling for submissions and holding hearings) as part of its normal scrutiny function. Both inquiries have had tangible impacts.

Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019[68]

The legislative instrument

The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (the instrument) made under the authority of the *Aged Care Act 1997* (Cth), regulated the use of physical and chemical restraints in aged care.[69]

The process

The instrument was registered on the FRL on 2 April 2019, taking effect from 1 July. In May and July, the PJCHR received correspondence from Human Rights Watch and the Office of the Public Advocate (Victoria) asking it to consider numerous human rights concerns in relation to the instrument.[70] In July 2019 the PJCHR resolved to inquire into the instrument, holding a public hearing and receiving 17 submissions.

To ensure that the instrument remained open to disallowance during the inquiry (and therefore subject to parliamentary control), on 16 September 2019 on behalf of the PJCHR, Senator Nick McKim lodged a protective notice of motion to disallow the instrument in the Senate. This extended the period by which the instrument was subject to disallowance by a further 15 sitting days. The PJCHR published its inquiry report on 13 November 2019.

The findings

The PJCHR recommended that the use of restraints in residential aged care facilities be better regulated, including by exhausting alternatives to restraint; taking preventative measures and using restraint as a last resort; obtaining or confirming informed consent; improving oversight of the use of restraints; and having mandatory reporting requirements for the use of all types of restraint.[71]

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[68] See inquiry website.

[69] Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511].

[70] See inquiry website.

[71] PJCHR, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*, 13 November 2019, pp. 54–55.

The impact of the inquiry

The PJCHR's inquiry and findings received stakeholder coverage → Numerous stakeholders published articles highlighting the PJCHR's inquiry and findings,[72] and Human Rights Watch highlighted the inquiry in its in civil society submission to the United Nations as part of Australia's third Universal Periodic Review in 2021.[73]

The government responded formally to the PJCHR's inquiry → The government welcomed the PJCHR's inquiry, indicating in-principle support for all of the majority recommendations.[74]

The legislative instrument was amended → In response to the PJCHR's report, the government introduced amendments to the Quality of Care Principles to make it clear that restraint must be used as a last resort, refer to state and territory laws regulating consent and require a review of the first 12 months operation of the new law.[75] This review, finalised in December 2020, made several recommendations, including to clarify consent requirements, strengthen requirements for alternative strategies, require an assessment of the need for restraint in individual cases and for monitoring and reviewing the use of restraint.[76]

The Royal Commission into Aged Care Quality and Safety (the Royal Commission) recommended consideration of the PJCHR's findings → The Royal Commission considered the use of restrictive practices. The final report of the Counsel Assisting the Commission recommended new requirements for regulating the use of restraints and that this should be informed by 3 things, one of which was the PJCHR's 2019 inquiry report.[77]

New legislation was subsequently introduced → Following the Royal Commission's recommendations, legislation was introduced that provides that restraints may only be used in aged care facilities: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; and after informed consent is given. It also provided that the use of a restrictive practice must be monitored and reviewed.[78]

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[72] See, for example, Matt Woodley, 'Restraint in aged care a last resort: RACGP President', *Royal Australian College of General Practitioners,* 20 August 2019; Human Rights Watch, *Australia: Royal Commission Finds Aged Care Horrors*, 4 November 2019.

[73] Human Rights Watch, *Submission to the Universal Periodic Review of Australia*, July 2020.

[74] PJCHR, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 – Government response*, 18 March 2020.

[75] Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019.

[76] Australian Healthcare Associates, *Independent review of legislative provisions governing the use of restraint in residential aged care: Final report*, December 2020.

[77] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, pp. 109–110.

[78] Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (now Act) and related legislation. See also Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021.

ParentsNext: examination of Social Security (Parenting payment participation requirements – class of persons) Instrument 2021[79]

The legislative instrument

The Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 (the instrument), made under the authority of the *Social Security Act 1991* (Cth), specified the class of persons subject to compulsory participation in the ParentsNext program (which may require that a person: attend playgroups; complete further education and training; or address non-vocational barriers to employment such as through counselling or health appointments).[80] A failure to attend these appointments without a reasonable excuse could result in the person's parenting payments being suspended and, if there was a persistent failure, reduced or cancelled.

The process

The PJCHR tabled its initial consideration of this instrument in *Report 2 of 2021* on 24 February 2021, seeking a response from the minister.[81] The minister provided the PJCHR with further information on 11 March, including advising the PJCHR that 18% of participants in the ParentsNext program are Indigenous Australians, one-third of all participants have had their parenting payments suspended for an average of 5 days, and 1,072 participants have had their payments cancelled. Based on this additional information, the PJCHR resolved to undertake a short inquiry into the instrument, seeking evidence from key stakeholders on the human rights implications of the instrument.[82]

To extend the period by which the instrument was subject to parliamentary control, former Senator Pat Dodson, on behalf of the PJCHR, lodged a protective notice of motion to disallow the instrument in the Senate on 11 May 2021.[83] This extended the period by which the instrument was subject to disallowance by a further 15 sitting days (to 11 August). The PJCHR received 39 submissions and held a public hearing in June 2021, taking evidence from a range of community organisations, peak bodies, academics and the Department of Education, Skills and Employment. It tabled its final report on 4 August 2021.[84]

The findings

The PJCHR's report contained an extensive consideration of the key issues raised by witnesses and submitters regarding how the ParentsNext program operated in practice. It also contained an in-depth analysis of the compatibility of the measure with human

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[79] See PJCHR, *Report 2 of 2021*, 24 February 2021; PJCHR, *ParentsNext: examination of Social Security (Parenting payment participation requirements–class of persons) Instrument 2021*, 4 August 2021.

[80] Social Security (Parenting payment participation requirements - class of persons) Instrument 2021 [F2021L00064].

[81] See PJCHR, *Report 2 of 2021*, 24 February 2021.

[82] See inquiry webpage.

[83] Senator Pat Dodson, *Senate Hansard*, 11 May 2021, p. 2363.

[84] See PJCHR, *ParentsNext: examination of Social Security (Parenting payment participation requirements–class of persons) Instrument 2021*, 4 August 2021.

rights, including an analysis of the requirements of the rights to social security and an adequate standard of living. The PJCHR recommended that a class of persons not be prescribed for the purposes of paragraph 500(1)(ca) of the *Social Security Act 1991* (Cth), or alternatively recommended a number of amendments if ParentsNext were to remain compulsory.

The impact

The PJCHR's inquiry received substantial media coverage → The evidence presented to the PJCHR, and its findings, received media and stakeholder coverage.[85]

A motion to disallow 2 sections of the instrument was debated and voted on → On completion of its inquiry, the PJCHR resolved to withdraw its notice of disallowance, leaving the issue of disallowance to the parliament. However, Senator Pat Dodson took the opportunity to take over the disallowance notice in his personal capacity (and not as a committee member). This motion to disallow was moved on 11 August 2021 (the final day to disallow the instrument). Senator Dodson spoke to the motion, stating:

> *The committee's unanimous findings are that there is a considerable risk that the compulsory participation in the ParentsNext program impermissibly limits human rights, including the rights of the child, and that the program's financial sanctions mean that a considerable portion of parents are unable to meet their basic needs and those of their children. They are strong findings that cannot be ignored. The committee's unanimous recommendation was that the ParentsNext program be made voluntary for parents of children under the age of six. In seeking to disallow this instrument, Labor is giving effect to this bipartisan recommendation.*[86]

Former Senator Rachel Siewert also spoke to the motion, arguing that the evidence presented in this inquiry and previous inquiries indicated that the benefits of the program did not outweigh its immediate and long-term harms, and noting that the PJCHR had found that it limited human rights.[87] The motion was subsequently put to a vote. The Senate was equally divided, with 16 ayes and 16 noes.[88] As such, the question was negatived and the 2 sections of the instrument were not disallowed.[89] At the dissolution of the 46th Parliament on 11 April 2022, no government response to the PJCHR's inquiry had been received.

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[85] For example: Luke Henriques-Gomes, 'Punitive and flawed' ParentsNext program should not be expanded, experts warn', *Guardian Australia,* 24 May 2021; Australian Human Rights Commission, 'Commission welcomes ParentsNext Inquiry recommendations', 5 August 2021; Jacqueline Maley, 'Unable to meet basic needs': ParentsNext program suspended a third of parents' payments', *Sydney Morning Herald*, 11 August 2021; Asher Wolf, 'Did the government learn nothing from the robodebt fiasco?', *Canberra Times*, 1 September 2021; Lucy Dean, '"Humiliating': How Centrelink "traps" women in violence relationships', *Yahoo Finance,* 7 September 2021; Deb Tsorbaris, 'Child poverty is a policy choice', *Pro Bono Australia*, 18 October 2021; Terese Edwards, 'A close encounter with justice for the ParentsNext program', *Economic Justice Australia*, 22 February 2022.

[86] Senator Pat Dodson, *Senate Hansard*, 11 August 2021, p. 4733.

[87] Senator Rachel Siewert, *Senate Hansard*, 11 August 2021, p. 4736.

[88] Note, this vote was held during the COVID-19 pandemic, when many senators were attending parliament remotely. Those senators attending remotely were permitted to speak to motions (as Senator Dodson did), but only those physically present in the chamber were permitted to vote.

[89] *Journals of the Senate*, No.112, 11 August 2021, pp. 3908–3909.

Further commentary by parliamentarians → Several parliamentarians circulated media releases about the PJCHR's findings, and the vote seeking to disallow elements of the instrument.[90]

In the following case study, the human rights concerns raised by the PJCHR were addressed by amendments made to a bill following its re-introduction in the new parliament:

Crimes Legislation (Police Powers at Airports) Bills 2018 and 2019[91]

The bill

The Crimes Legislation (Police Powers at Airports) Bill 2019 (now Act) proposed to amend the *Crimes Act 1914*(Cth) to introduce new powers at major airports, including the power for constables and protective service officers (PSOs) to give directions to persons to provide identification documents, move-on (including vacating the airport), or stop (including directing them not to take a flight).

The process

The 2018 bill was introduced into the House of Representatives on 12 September 2018. It was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) the following day for inquiry and report. The PJCHR reported on the bill on 16 October 2018, raising concerns that the proposed powers for constables and PSOs to give directions for persons at major airports to provide identification, move-on, or stop, limited several human rights, particularly the right to assembly.[92] The PJCIS reported on 13 February 2019, raising similar concerns and recommending that the bill be amended to ensure that the move-on powers did not interfere with the right to peaceful assembly, or give police the ability to use the powers to disrupt or quell a protest that is peaceful and does not disrupt the safe operation of an airport. The bill lapsed at the dissolution of Parliament on 11 April 2019.

The bill was re-introduced at the commencement of the next parliament, on 4 July 2019, and the reintroduced bill included a provision making it clear that the powers provided that safeguarding the 'public order and safe operation' of a major airport does not apply, by itself, to persons 'exercising their right to lawfully engage in advocacy, protest, dissent or industrial action'. The PJCHR briefly reported on this new bill and welcomed the changes that addressed its earlier concerns (shared by the PJCIS).

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[90] See Senator Rachel Siewert, Australian Greens, *press release*,12 August 2021; Ms Meryl Swanson MP, Federal Member for Paterson, *press release*, 30 August 2021.

[91] See PJCHR, *Report 11 of 2018*, 17 October 2018; PJCHR, *Report 12 of 2018*, 27 November 2018; PJCHR, *Report 4 of 2019*, 10 September 2019.

[92] See also, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018 p. 15.

The impact

The PJCHR's concerns were addressed in subsequent amendments to the bill → In the second reading speech on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, the Minister for Home Affairs, and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, noted that the bill had been considered by numerous parliamentary committees, and that the amendments incorporated were consistent with the views expressed by the PJCHR.[93]

The PJCHR's comments informed parliamentary debate on the bill → Senator Nick McKim drew extensively on the PJCHR's comments, in voicing opposition to the bill.[94]

There have also been instances in which the PJCHR's comments on a bill have influenced other Senate committees (and their submitters) conducting a concurrent inquiry into the legislation:

Data Availability and Transparency Bill 2020 (2022)[95]

The bill

The Data Availability and Transparency Bill 2020 (2022) (now Act) sought to establish a legislative framework to: facilitate the sharing of public sector data held by Commonwealth bodies with accredited entities; facilitate controlled access to such data; and establish a National Data Commissioner.

The process

The bill was introduced into the House of Representatives on 9 December 2020 (the second last sitting day of the year). In the first parliamentary sitting week of 2021, the bill was referred to the Senate Standing Committee on Finance and Public Administration (the F&PA committee) for inquiry and report by 29 April 2021.

On 24 February 2021, the PJCHR tabled a detailed initial consideration of the bill, seeking further information from the minister in response to 10 specific questions about the compatibility of various provisions with the right to privacy.[96] The PJCHR published its final consideration of the bill on 31 March, taking into consideration the additional information provided by the minister. The PJCHR advised parliament that it retained concerns that the proposed scheme may not constitute a proportionate means by which to achieve its stated objectives, and recommended specific amendments to improve the

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[93] The Hon Peter Dutton MP, *House of Representatives Hansard*, 4 July 2019, p. 294; The Hon David Coleman MP, *House of Representatives Hansard*, 12 September 2019, pp. 2771–2772.

[94] Senator Nick McKim, *Senate Hansard*, 19 September 2019, pp. 2699–2702.

[95] See PJCHR, *Report 2 of 2021*, 24 February 2021; PJCHR, *Report 4 of 2021*, 31 March 2021.

[96] PJCHR, *Report 2 of 2021*, 24 February 2021, pp. 16–17.

bill's compatibility with the right to privacy. The F&PA committee tabled its inquiry report one month later, dedicating an entire chapter of its report to the PJCHR's consideration of the bill.[97] It likewise recommended that consideration be given to whether amendments could be made to the bill, or further clarification added to the explanatory memorandum, to provide additional guidance regarding privacy protections, particularly in relation to the de-identification of personal data.[98]

The impact

The PJCHR's analysis directly informed a concurrent bill inquiry → the PJCHR's technical analysis of the bill featured extensively in the F&PA committee's inquiry, informing the development of one of its recommendations.

The PJCHR's comments were referenced in debate on the bill → The Minister for Employment, Workforce, Skills, Small and Family Business noted that the PJCHR's comments (and those of other committees) had been carefully considered, and amendments had been introduced in response.[99]

Numerous amendments to the bill were introduced in the House of Representatives → As passed by both houses in March 2022, the bill contained 251 government amendments that were partly in response to concerns raised by the PJCHR. The supplementary explanatory memorandum stated that the amendments clarify and strengthen privacy protections, and include several privacy enhancing measures, including data minimisation requirements and a starting position that data shared under the Scheme must not include personal information unless an exception applies.[100] In particular, the 2022 bill introduced a general complaints division, which allows members of the general public to make complaints to the Commissioner about the operation and administration of the Scheme. This amendment reflects the PJCHR's recommendation that a mechanism be established to enable the Commissioner to consider complaints from individuals with respect to the Scheme.

In the following case study, the PJCHR's comments led to a legislative instrument being replaced to seek to address its human rights concerns (and those of another scrutiny committee):

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[97] Senate Finance and Public Administration, *Inquiry into Data Availability and Transparency Bill 2020 [Provisions] and Data Availability and Transparency (Consequential Amendments) Bill 2020 [Provisions]*, April 2021, pp. 35–45.

[98] See Senate Finance and Public Administration, *Inquiry into Data Availability and Transparency Bill 2020 [Provisions] and Data Availability and Transparency (Consequential Amendments) Bill 2020 [Provisions]*, April 2021, p. 78.

[99] The Hon Sturt Robert MP, *House of Representatives Hansard*, 30 March 2022, p. 1264.

[100] Data Availability and Transparency Bill, supplementary explanatory statement.

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021[101]

The legislative instrument

The Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 (the instrument) was registered on the FRL on 27 July 2021.[102] It excluded work for specified employers (who may pose a risk to the health and safety of workers) from counting towards eligibility for a second or third working holiday visa. It also gave the minister the power, by a future legislative instrument, to publicly list such employers in a legislative instrument if the minister is satisfied the employer, or work, poses a risk to safety or welfare.

The process

The PJCHR initially reported on this legislative instrument on 25 August 2021, stating that specifying individual employers on a public list on the basis that they may pose a health and safety risk to prospective employees engaged and limited the right to privacy and reputation. The PJCHR sought the minister's advice in respect of 6 questions, in order to establish whether the measure was sufficiently circumscribed and contained sufficient safeguards to constitute a proportionate limit on rights. The minister's response was received on 30 September, and the PJCHR concluded its consideration in *Report 12 of 2021*, on 20 October 2021.[103]

The findings

While the PJCHR considered that the measure pursued a legitimate objective, concerns remained regarding proportionality. In particular, noting the breadth of the minister's discretion to include employers on the list, the lack of independent merits review, the power to include individual names, and the public accessibility of the list, the PJCHR considered the measure risked being a disproportionate limit on the right to privacy. The PJCHR suggested a number of amendments to the legislative instrument to assist with proportionality, including that the process of making a decision to include an employer on the list be set out in the instrument, including that written reasons be provided to the employer and the employer have a right of reply. The PJCHR also recommended that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

The impact

The regulation was replaced → On 4 March 2022, the minister registered a new legislative instrument to replace this instrument.[104] The explanatory materials to the new instrument noted that 'in response to concerns raised by both the PJCHR and the Senate Standing Committee for the Scrutiny of Delegated Legislation, the Government

[101] See PJCHR, *Report 10 of 2021*, 25 August 2021; PJCHR, *Report 12 of 2021*, 20 October 2021.
[102] Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030].
[103] See PJCHR, *Report 12 of 2021*, 20 October 2021.
[104] Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244].

considers it appropriate to include a procedural fairness mechanism in the Migration Regulations themselves'.[105]

Aspects of the PJCHR's concerns were addressed in the new regulation → The Regulation was amended to include a procedural fairness mechanism, requiring that before specifying a person, partnership or unincorporated association [as an 'excluded' employer], the minister would be required to advise that employer in writing of his/her intention to do so, and the reasons, giving them at least 28 days to make a written submission to the minister about the proposed specification.

There are also instances in which the PJCHR's comments have explicitly been taken into consideration in the progress of bills which have been introduced into the parliament (and the making of related legislative instruments), and the PJCHR's role has been acknowledged:

Sydney Harbour Trust Regulations[106]

Background

In 2010 (2 years before the PJCHR was created), the Sydney Harbour Federal Trust Regulations 2001 (the Regulations) were (re)made under the authority of the *Sydney Harbour Federation Trust Act 2001* (Cth). This instrument regulated conduct on land belonging to the Sydney Harbour Trust (the Trust),[107] including establishing a blanket ban on organising or participating in a 'public assembly' (including a meeting, demonstration, or performance) on Trust land without a licence or permit. This instrument was due to cease effect (or 'sunset') on 1 October 2019. However, in September 2019, the Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 (Certificate) was registered. This short legislative instrument deferred that earlier sunset date by 2 years, meaning that the legislative instrument would continue to have effect until 1 October 2021.

The process

The PJCHR assessed the deferral of sunsetting instrument and noted that the explanatory materials accompanying it failed to acknowledge that the measure engaged

[105] Explanatory Statement, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244].

[106] Sydney Harbour Federal Trust Regulations 2001 [F2010C00261]; Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211]; Sydney Harbour Federal Trust Amendment Bill 2021; and Sydney Harbour Federation Trust Regulations [F2021L01255]. See PJCHR, *Report 1 of 2020*, 5 February 2020; PJCHR, *Report 4 of 2020*, 9 April 2020; PJCHR, *Report 4 of 2021*, 31 March 2021; PJCHR, *Report 5 of 2021*, 29 April 2021; PJCHR, *Report 12 of 2021*, 20 October 2021; PJCHR, *Report 14 of 2021*, 24 November 2021.

[107] The Sydney Harbour Trust manages: Cockatoo Island, North Head Sanctuary in Manly, Headland Park in Mosman, Sub Base Platypus in Neutral Bay, Woolwich Dock and Parklands, the former Marine Biological Station at Watsons Bay, and Macquarie Lightstation in Vaucluse.

any human rights.[108] The PJCHR wrote to the Attorney-General in February 2020 asking for more information about the broad prohibition of public assemblies, and the impact on the rights to freedom of expression and assembly. The Attorney-General responded on 3 March, noting that the Regulations would be subject to a separate independent review process.[109] The PJCHR urged the Attorney-General to give close consideration to the concerns it raised in reviewing the Regulations.[110]

One year later, on 18 March 2021, the Sydney Harbour Federal Trust Amendment Bill 2021 was introduced. The explanatory memorandum accompanying the bill (now an Act) stated that the Regulations that would be made under its authority were anticipated to be 'remade with minor changes to their operation'. The PJCHR therefore wrote to the new responsible minister—the Minister for Agriculture, Water and the Environment—seeking their advice as to whether the blanket prohibition on public assemblies was intended to be retained.[111] The minister advised that the Regulations had originally been drafted to protect the public from the hazards of un-remediated sites in the Trust, and that to address the PJCHR's concerns it was intended for the Regulations to be amended 'to be more explicitly compatible with the right of peaceful assembly'.[112]

A new regulation was subsequently registered on 18 September 2021.[113] It provided that a public assembly is lawful without the need for Trust approval, introducing a requirement that organisers merely advise the Trust of their intention to assemble.[114]

The impact

The PJCHR's comments on the Sydney Harbour Federal Trust Amendment Bill 2021 informed debate → Mr Josh Wilson MP noted the PJCHR's comments in debate on the bill, arguing that the prohibition on public assemblies went against basic principles and was contrary to the 'recent history and tradition of Cockatoo Island'.[115]

The new Regulation altered the blanket prohibition on public assemblies → When assessing the new Regulation the PJCHR noted that the new Regulation provided that a public assembly is lawful, provided that organisers advise the Trust of their intention to assemble.[116] The PJCHR retained some concern about the retention of a potentially broad power to prohibit peaceful public assemblies, but considered that this amendment represented a substantial improvement on the previous Regulation.[117]

The new Regulation explicitly acknowledged the PJCHR's impact on the re-drafting → The statement of compatibility with human rights set out the PJCHR's previous

[108] Focusing only on the effect of the deferral instrument rather than the substantive effect of continuing the original regulation, see PJCHR, *Report 1 of 2020*, 5 February 2021, p. 36.
[109] PJCHR, *Report 4 of 2020*, 9 April 2020, pp. 100–101.
[110] PJCHR, *Report 4 of 2020*, 9 April 2020, p. 102.
[111] PJCHR, *Report 4 of 2021*, 31 March 2021, p. 4.
[112] PJCHR, *Report 5 of 2021*, 29 April 2021, p. 87.
[113] Sydney Harbour Federation Trust Regulations [F2021L01255].
[114] Sydney Harbour Federation Trust Regulations 2021 [F2021L01255] (Cth), s 19.
[115] Mr Josh Wilson MP, *House of Representatives Hansard*, 1 June 2021, p. 5161.
[116] Sydney Harbour Federation Trust Regulations 2021 [F2021L01255] (Cth), s 19.
[117] PJCHR, *Report 14 of 2021*, 24 November 2021, pp. 67–69.

comments regarding the compatibility of the measure with the rights to freedom of expression and assembly, stating that the amendments to the Regulations were made in response to those concerns.[118]

There have been cases in which parliamentarians and submitters to other committee inquires have utilised the PJCHR's comments:

Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015[119]

The bill

The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the bill) sought to amend the *Migration Act 1958* (Cth) to allow an authorised officer to use such reasonable force as they reasonably believed necessary to protect the life, health or safety of any person in an immigration detention facility or to maintain the good order, peace or security of an immigration detention facility.

The process

The bill was introduced into the House of Representatives on 25 February 2015. It was referred to the Senate Legal and Constitutional Affairs Legislation Committee (LCA committee) on 5 March. On 18 March, the PJCHR reported that the use of force powers engaged and limited a number of human rights, including the right to life; the prohibition against torture and cruel, inhuman or degrading treatment; the right to humane treatment in detention; and the right to freedom of assembly, and additionally noted concerns regarding proposed immunities. It set out various concerns about the lack of safeguards in the bill and sought further advice from the Minister for Immigration and Border Protection.

Submissions to the LCA committee inquiry closed on 7 April, and it reported on the bill on 5 June. The PJCHR published its concluding comments on the bill on 23 June. Several amendments were moved to the bill by non-government members and senators regarding the safeguards around the use of force, and the bill lapsed on 17 April 2016 on the prorogation of the parliament and was not re-introduced.

The impact

The PJCHR's human rights concerns were endorsed by numerous submissions to the LCA committee inquiry and reflected in the LCA committee report → the LCA committee report stated that a number of submissions referred to and endorsed the

[118] Sydney Harbour Federation Trust Regulations [F2021L01255], statement of compatibility with human rights, pp. 36–37.

[119] See PJCHR, *Twentieth Report of the 44th Parliament*, 18 March 2015; PJCHR, *Twenty-fourth Report of the 44th Parliament*, 23 June 2015.

concerns raised by the PJCHR.[120] For example, the Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law's submission referred extensively to the PJCHR's report and, when setting out the human rights impact of the bill, referred the LCA committee to the analysis by the PJCHR for a more detailed analysis of the rights implications of the bill.[121] The Law Council of Australia noted and commended the consideration of the bill by the PJCHR and noted that its constituent bodies that considered the bill, the Law Institute of Victoria and the Law Society of NSW, agreed with the PJCHR's conclusions. Its submission quoted extensively from the research presented in the PJCHR's reports, and its recommendations reflected the issues raised by the PJCHR.[122] Further, the Australian Lawyers for Human Rights' submission made extensive reference to the PJCHR's report and agreed with the concerns expressed.[123]

The PJCHR's concerns were referenced in debate on the bill →The PJCHR's report, and the submissions to the LCA committee inquiry, were quoted in parliament during debates on the bill in both the House and the Senate.[124]

The following 5 case studies illustrate that the PJCHR's influence on the development of legislation may not always be readily apparent. In some cases, the PJCHR's concerns have been addressed (in whole or part) by amendments or future legislation or policy without explicit reference to the PJCHR's consideration of the legislation. In such cases, discerning the PJCHR's influence may require very close monitoring of the progress of legislation over time, or an intimate knowledge of its passage through both chambers of parliament.

In the following example, the influence of the PJCHR's recommendations on the drafting and re-drafting of legislation and explanatory materials (including statements of compatibility with human rights) only becomes clear with careful review:

Australian Security Intelligence Organisation Amendment Bill 2020[125]

The bill

On 13 May 2020, the Australian Security Intelligence Organisation Amendment Bill 2020 (the bill) was introduced into the House of Representatives. It sought to repeal and

[120] Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 [Provisions], June 2015, p. 8.

[121] Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW, *Submission 8*, p. 5.

[122] Law Council of Australia, *Submission 30*.

[123] Australian Lawyers for Human Rights, *Submission 15*. See also, for example, the Asylum Seeker Resource Centre, *Submission 26*, p. 6; Refugee Council of Australia, *Submission 27*; Public Law and Policy Research Unit, University of Adelaide, *Submission 37*; Civil Liberties Australia, *Submission 121*, p. 9.

[124] See Mr Graham Perrett MP; Ms Melissa Parke MP, Mr Frank Zappia MP, *House of Representatives Hansard*, 13 May 2015, p. 3838; Senator Sue Lines, *Senate Hansard*, 19 August 2015, p. 5829; Senator Richard Di Natale, *Senate Hansard*, 20 August 2015, p. 5915.

[125] See PJCHR, *Report 7 of 2020*, 17 June 2020; PJCHR, *Report 9 of 2020*, 18 August 2020.

replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants. This framework: provided for the apprehension of subjects; would require a subject to attend questioning and provide information, and/or produce records or things; and provided for the search of a person and entry to premises. The proposed measures engaged a significant number of human rights, including the rights to: liberty; freedom of movement; humane treatment in detention; privacy; fair trial; freedom of expression; as well as the rights of the child and the rights of persons with disability.

The process

The day this bill was introduced into the House of Representatives, the provisions of the bill were referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for report (meaning that the bill would not proceed to debate prior to that report being tabled, which ultimately occurred in December 2020). On 17 June, the PJCHR reported its initial consideration of this bill, noting the many human rights questions that the proposed measures raised, and seeking responses to 51 specific questions. The minister's 38-page response was received on 9 July, in which the minister advised that a number of safeguards would be set out in a statement of procedures to be made by legislative instrument. The PJCHR then reported its extensive concluded findings on the bill on 18 August. In some respects, it considered that the additional information provided by the minister satisfied its human rights concerns. In other instances, it offered specific recommendations to improve the human rights compatibility of the bill (and further recommendations were set out in a dissenting report).

The PJCIS tabled its report on the bill on 3 December 2020.[126] The bill subsequently passed both houses of parliament in a single day, on 10 December 2020 (the final sitting day of the year). Fourteen days later, on 24 December 2020, the Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 (made under s 34AF of the *Australian Security Intelligence Organisation Act 1979* (Cth)) was registered.[127]

The impact

At first glance, the PJCHR's comprehensive consideration of the human rights implications of this bill (and its many recommendations) appeared to have little tangible impact. The PJCIS did not acknowledge the PJCHR's comments in its own report despite raising similar concerns,[128] and the PJCHR's concerns received minimal coverage in the media. Further, when multiple amendments were made to the bill to address the PJCIS's recommendations one week after its report had been tabled,[129] and

[126] Parliamentary joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*, December 2020.

[127] Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714].

[128] PJCIS, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*, December 2020.

[129] A summary of the passage of the bill (including amendments and amended explanatory materials) is available on the bill homepage.

when the bill was then introduced into the Senate, the PJCIS's recommendations were noted but the PJCHR's consideration of the bill was not.[130]

On closer inspection, however, the PJCHR's recommendations would appear to have been considered and, in numerous respects, given effect:

Numerous recommendations made by the PJCIS, which directly addressed some of the PJCHR's concerns, were implemented → These included providing that the best interests of the child would be a primary consideration in decisions involving minors and strengthening oversight by the Inspector-General of Intelligence Services.[131] Then PJCHR Chair, Senator the Hon Sarah Henderson, drew the PJCHR's recommendations and these amendments to the attention of the Senate.[132]

The statement of compatibility with human rights to the bill was expanded as the PJCHR recommended → If the original statement of compatibility to the bill is compared with the revised statement of compatibility[133] following amendments made to the bill on 10 December, it can be seen that the statement has been expanded to include an analysis of specific human rights issues as flagged by the PJCHR, including reflecting that: the best interests of the child are to be a primary consideration; both body searches and forced entry to private premises engage and limit the right to privacy; and limitations on leaving Australia engage and limit the rights to freedom of movement and protection of the family.

The Statement of Procedures to be followed in the exercise of questioning powers (a legislative instrument) incorporated many of the PJCHR's recommendations → The bill empowered the Minister for Home Affairs to make a Statement of Procedures in the form of a legislative instrument. The PJCHR was advised that this was intended to include more detailed guidance as to how questioning could be conducted, and many safeguards to protect human rights. As the document did not exist at the time of the PJCHR's report, the PJCHR could not assess the potential safeguard value of such a document. As such, the PJCHR made numerous recommendations for what additional safeguards should be included in such a document. When the legislative instrument was registered on 24 December 2020,[134] it included many of the safeguards that the PJCHR had recommended, including specific protections where the subject of a warrant has a known vulnerability such as a disability, and requirements for the conditions of the questioning environment itself.

In some cases, the PJCHR's influence on the development of legislation has taken place over a lengthy period. In the following case study, the PJCHR's previous comments had not been

[130] Senator the Hon Richard Colbeck, *Senate Hansard*, 10 December 2020, pp. 7441–7456.

[131] See Australian Security Intelligence Organisation Amendment Bill, supplementary explanatory memorandum.

[132] Senator the Hon Sarah Henderson, *Senate Hansard*, 3 February 2021, p. 290.

[133] Both of these documents can be found on the bill homepage and the amendments to the original document can be observed by using the 'compare document' function in Microsoft Word.

[134] Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714].

explicitly acknowledged in the explanatory materials accompanying the most recent instrument. As such, it would be challenging to have identified the PJCHR's impact on its development over that lengthy period without an understanding of the historical involvement:

Australian Public Service Commissioner's Directions[135]

The legislative instruments

The Australian Public Service Commissioner's Directions 2013 (the 2013 Directions) prescribe the minimum standards with which agency heads and Australian Public Service (APS) employees must comply to meet their obligations under the *Public Service Act 1999* (Cth), and support agency heads to fulfil their responsibilities in respect of their employer powers. The 2013 Directions require agency heads to notify certain employment decisions in the Australian Public Service Gazette. Historically they required the publication of decisions to terminate a public servant's employment and the grounds for termination on a public website.

The process

The PJCHR engaged in an ongoing dialogue with the executive regarding the compatibility of various iterations of these Directions. The PJCHR first sought clarification in 2013 as to why it was necessary to publish employment decisions in the Public Service Gazette, including publication of decisions to terminate a public servant's employment and the grounds for termination on a public website (this could include setting out that employment was terminated on mental health grounds, which the PJCHR noted engaged the right to privacy and to equality and non-discrimination). In response, the APS Commissioner stated that they would review these powers.[136]

Following that review, the 2013 Directions were amended in 2014. The explanatory materials to the amending legislative instrument acknowledged the PJCHR's concerns about the power to publish decisions, stating that in response to the PJCHR's concerns the 2013 Directions were being amended to remove most of the requirements to publish termination decisions.[137] However, the requirement to publicly publish a termination on the grounds of a breach of the Code of Conduct was retained.

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[135] Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 Directions); Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]; Australian Public Service Commissioner's Directions 2016 [F2016L01430]; Australian Public Service Commissioner's Directions 2022 [F2022L00088]. See PJCHR, *Sixth Report of 2013*, May 2013; PJCHR, *Eighteenth Report of the 44th Parliament*, 10 February 2015; PJCHR, *Twenty-first Report of the 44th Parliament*, 24 March 2015; PJCHR, *Report 8 of 2016*, 9 November 2016; *Report 10 of 2016*, 30 November 2016. Note that very similar directives were made in relation to the parliamentary service, with amendments made to those in response to the PJCHR's concerns: see *First Report of 44th Parliament* and *Third Report of the 44th Parliament* regarding the Parliamentary Service Determination 2013; *Report 1 of 2017* and *Report 2 of 2017* regarding the Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016; and *Report 1 of 2018* and *Report 3 of 2018* regarding the Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017.

[136] Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426], statement of compatibility with human rights.

[137] Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426], statement of compatibility with human rights.

The PJCHR further considered this requirement in subsequent reports in 2015, concluding that publishing this information on a publicly accessible website was not a proportionate limit on the right to privacy, as there were other less rights restrictive methods available (such as internal record-keeping).[138] The PJCHR raised similar concerns in 2016, in response to which the APS Commissioner again undertook to review the necessity of publicly notifying termination information.[139] Following that review, the legislative instrument was re-made, ultimately addressing the PJCHR's privacy concerns.[140]

The impact

The Directions were amended several times over 8 years in response to the PJCHR's concerns → They were initially amended in a way that much better protected privacy and rights of persons with disabilities. They were then later improved more broadly.

The most recent Directions addressed the PJCHR's long-held privacy concerns → The APS Commissioner's Directions 2022 included a new exception so that an employee's name may not be included in a notification for an employment termination for breach of the Code of Conduct if including the name is not necessary to ensure public confidence in the integrity of the APS.[141] This amendment addressed the privacy concerns the PJCHR had been raising since 2014 and thus the PJCHR did not comment on these Directions.

In the following case study, the PJCHR's consideration of legislative instruments to provide for the imposition of sanctions on individuals received media coverage and arguably led to improvements to statements of compatibility with human rights:

Autonomous Sanctions and Charter of the United Nations designations or listings[142]

The legislation

Under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* (Cth) the Minister for Foreign Affairs may designate or list a person (in a legislative instrument) as subject to sanctions. Such a listing or designation results in an individual's assets being frozen and the cancellation of any visa, and a ban on travel.

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[138] PJCHR, *Twenty-first report of the 44th Parliament*, 24 March 2015, p. 27.

[139] PJCHR, *Report 10 of 2016*, 30 November 2016, p. 16.

[140] Australian Public Service Commissioner's Directions 2022 [F2022L00088].

[141] This was registered on the FRL on 31 January 2022, meaning that it was considered by the PJCHR in its *Report 2 of 2022* (which considered instruments registered between 20 December 2021 and 15 March 2022).

[142] See PJCHR, *Twenty-eighth report of the 44th Parliament*, 17 September 2015; PJCHR *Thirty-Third Report of the 44th Parliament*, 2 February 2016; PJCHR, *Report 9 of 2016*, 22 November 2016; PJCHR, *Report 3 of 2018*, 27 March 2018; PJCHR, *Report 4 of 2018*, 8 May 2018; PJCHR, *Report 6 of 2018*, 26 June 2018; PJCHR, *Report 8 of 2021*, 23 June 2021.

Since 2013, the PJCHR has drawn attention to the human rights implications of such executive decisions, which can operate variously to both promote and limit rights. If sanctions are placed on persons to whom Australia owes human rights obligations (usually those located in Australia), this could operate to limit human rights, particularly the rights to freedom of movement; private life; family life; and a fair hearing. The statements of compatibility accompanying sanctions legislation initially did not recognise that placing sanctions limited any human rights.

The process

In 2013 the PJCHR sought further information as to the human rights implications of the imposition of sanctions. It asked that the Department of Foreign Affairs (the department) conduct a comprehensive review of the sanctions regime in light of Australia's international human rights obligations and report back. In 2013 the then Minister stated that he had instructed the department to carefully consider the PJCHR's recommendation. However, the Minister for Foreign Affairs (the minister) in 2015 advised the PJCHR she considered there was no need to review the sanctions regime. The PJCHR subsequently undertook its own review,[143] identified the relevant rights that appeared to be impermissibly limited and made a number of recommendations for safeguards to be included in the legislation to better protect rights.[144] The PJCHR continued to raise its concerns and, in 2018, the minister agreed to ask the department to consider whether additional detail regarding the human rights impacts of sanctions could be provided in future statements of compatibility.[145]

In 2021, numerous legislative instruments made between 2001 and 2020 imposing sanctions on almost 300 individuals, were tabled. They were classified as exempt from the disallowance process (by which parliament can veto the instrument), and therefore were not accompanied by statements of compatibility. The PJCHR noted that it appeared this was an incorrect classification, and also questioned the validity of the previous listings.[146]

The impact

The human rights implications of autonomous sanctions are now better acknowledged in statements of compatibility accompanying legislative instruments imposing sanctions
→ Prior to the PJCHR's work, statements of compatibility with human rights did not reflect a consideration as to the human rights implications of the imposition of sanctions on individuals. While the legislation has not yet been amended to contain the safeguards recommended by the PJCHR, the quality of statements of compatibility accompanying

[143] PJCHR, *Twenty-Eighth Report of the 44th Parliament*, 17 September 2015, pp. 15–38; PJCHR, *Thirty-third Report of the 44th Parliament*, 2 February 2016, pp. 17–25.

[144] PJCHR, *Report 9 of 2016*, 22 November 2016, pp. 41–55.

[145] PJCHR, *Report 3 of 2018*, 27 March 2018, pp. 82–96; PJCHR, *Report 4 of 2018*, 8 May 2018; PJCHR, *Report 6 of 2018*, 26 June 2018, pp. 104–131.

[146] PJCHR, *Report 8 of 2021*, 23 June 2021, pp. 27–28.

such legislative instruments have improved, with such statements now regularly acknowledging that rights may be limited.[147]

The PJCHR's concerns received media coverage → In addition, flowing on from the PJCHR's consideration of those instruments which were not registered over a period of 20 years, the PJCHR's concerns were quoted in a media report.[148] On 2 August 2021 the instruments were updated to reflect that they were subject to disallowance, and statements of compatibility were prepared for all instruments. On 11 August 2021, a bill was introduced to validate any actions taken under the earlier listings.[149]

The PJCHR continues to note its concerns about the sanctions regime by listing any such legislative instruments that have been registered within the reporting period, but where it does not appear the individuals subject to designation or listing are in Australia it makes no further comment on individual listings.[150]

In addition to the PJCHR's consideration of bills and legislative instruments through its scrutiny and inquiry reports, the PJCHR has also influenced the development of legislation behind the scenes.

As noted earlier, the PJCHR Chair initially took the lead on liaising with departments and ministers to provide feedback on the drafting of statements of compatibility with human rights. In 2013 and 2014, where inadequacies in statements of compatibility were identified, the Chair sent advisory letters to legislation proponents to provide guidance on the preparation of, and requirements for, statements of compatibility.[151] From June 2018, the PJCHR undertook a project to improve statements of compatibility by further explaining the PJCHR's expectations, underpinned by the legal requirements, as to their content and information as to how they could be improved. This included liaising with legislation proponents and government departments about areas of concern, supplementing and developing further guidance materials and resources to assist in the preparation of statements of compatibility and providing targeted training to departmental officials regarding the PJCHR's expectations. It also involved preliminary discussions to explore options for collaboration with the Attorney-General's Department, in relation to guidance materials, as well as the Australian Human Rights Commission.[152] This process lapsed at the end of the 45th Parliament in mid-2019. In the 46th Parliament, in September 2021, the PJCHR resolved that its secretariat should, where it considered it appropriate, engage directly with relevant departments immediately after the legal adviser and secretariat have identified

[147] Compare, for example the statements of compatibility for legislative instruments from 2013 to 2022: for 2013 example see: Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477]. For 2022 example see: Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 16) Instrument 2022 [F2022L00707].

[148] See Karen Middleton, Rush to fix 'unlawful' list, *The Saturday Paper*, 10 July 2021.

[149] Charter of the United Nations Amendment Bill 2021 (passed both chambers on 2 September 2021).

[150] See, for example, PJCHR, *Report 2 of 2022*, 24 February 2022, p. 68 (footnotes 4 and 5, which list the 5 autonomous sanctions instruments registered in the reporting period—between 22 December 2020 and 27 January 2021—and list the PJCHR's earlier substantive reports which consider the compatibility of autonomous sanctions with human rights).

[151] PJCHR, *Annual Report 2013-2014*, 3 May 2016, p. 18.

[152] PJCHR, *Annual Report 2018*, 12 February 2019, p. 36.

minor, technical human rights concerns with legislative instruments, in an attempt to resolve the matter *before* involving the minister or PJCHR by reporting on the legislation publicly. This was intended to help departmental officials understand the type of information that should be included in a statement of compatibility. Further, where a statement of compatibility was considered to be inadequate (but where it nonetheless did not appear that the legislation raises human rights concerns), the PJCHR authorised the Committee Secretary to write to departmental officials setting out the PJCHR's expectations for future reference. The PJCHR in the 47th Parliament has also endorsed the PJCHR's secretariat undertaking this informal engagement.

Providing feedback in this manner in relation to bills facilitates the PJCHR's educative function, providing departments with information to inform future such drafting. In relation to legislative instruments (and their explanatory materials), this feedback can be incorporated directly by departmental officers, because legislative instruments can often be amended and updated by departmental officers or other delegates directly.

Between September and December 2021, the secretariat liaised directly with departments in relation to a number of bills and legislative instruments. In one case, this resulted in a large department updating its internal guidance for preparing statements of compatibility, and inviting the Committee Secretary to present on the subject at a training session attended by over 70 departmental officers. The approach has also resulted in significant improvements to the explanatory materials accompanying legislative instruments, as well as fostering the PJCHR's positive educative relationship with departments:

Instruments amending the Pharmaceutical Benefits Scheme

Background

Each year, numerous legislative instruments are registered to add, remove or otherwise alter the listing of medications on the Pharmaceutical Benefits Scheme (PBS), which provides for medication subsidies. For some time, the statements of compatibility with human rights accompanying these instruments were largely standard wording noting that the PBS itself promotes the right to health by providing for access to subsidised medication,[153] but not addressing whether the amendments being made by a specific legislative instrument were taking subsidised medications or medical services away from patients (and so potentially limiting the right to health). As such, it could be difficult to determine the effect of the instrument on its face given the complexity of the PBS and the potential availability of other medications or medical procedures.

Liaison with department

Following the PJCHR's resolution that the secretariat may liaise directly with departmental officers to discuss minor technical human rights concerns, the secretariat contacted the Department of Health (the department) seeking advice about the operation of several PBS instruments. The secretariat advised that it was unclear from

[153] See, for example, National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2021 (No. 10) [F2021L01485], statement of compatibility with human rights (registered on the FRL on 31 October 2021).

the statements of compatibility what the effect of deleting relevant drugs from the PBS would be and asked whether there would be any detriment to patients.

Result

The department swiftly responded, explaining the effect of the relevant instruments and advising that they would amend their statements of compatibility in future to explain how most amendments to the PBS do not affect human rights, but where any drug is to be de-listed entirely, to provide more specific information as to the effect of this on patients. This revised approach has since been observed.[154]

Human rights scrutiny of COVID-19 related legislation

The COVID-19 pandemic, and the associated legislative response by the federal Parliament, impacted on the PJCHR's work, both in terms of its influence on committee processes and the types and extent of human rights scrutiny concerns it considered.

Changes to committee processes

In early 2020, as COVID-19 cases continued to emerge in Australia, states and territories progressively introduced lockdown and quarantine measures, which limited the capacity of parliamentarians to physically attend parliament in Canberra. To keep operating effectively while unable to continue its usual practice of meeting in person, the PJCHR resolved to hold its meetings remotely, via teleconference. Further, the PJCHR resolved to:

- publish a special scrutiny report focusing on COVID-19 related bills and legislative instruments, with an overview regarding the laws applicable to the protection of human rights in times of emergencies
- maintain a list of all bills and legislative instruments made in response to the pandemic (not merely those that raised human rights concerns).[155]

To communicate this approach, the PJCHR issued a media release setting out the PJCHR's proposed course of action regarding COVID-19 bills and instruments.[156] It also wrote to civil society stakeholders advising that the PJCHR could accept submissions about a bill or instrument at any time, and drawing their attention to the COVID-19 sub-page on the PJCHR's web pages.[157] Further, the PJCHR wrote to all ministers and heads of departments explaining the PJCHR's scrutiny approach regarding COVID-19 related bills and instruments. The PJCHR also continued to publish its regular scrutiny reports in a timely way, ultimately tabling 15 scrutiny reports in 2020 including one report dedicated to the scrutiny of COVID-19 legislation.[158]

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[154] See, for example, National Health (Pharmaceutical benefits – early supply) Amendment Instrument 2022 (No. 5) [F2022L00725], statement of compatibility with human rights (registered on the FRL on 27 May 2022).

[155] These lists, dating from the beginning of the pandemic to December 2021, are available on the PJCHR website. The Senate Standing Committee for the Scrutiny of Delegated Legislation published a similar list of legislative instruments only.

[156] PJCHR, 'Human rights committee to scrutinise COVID-19 related legislation', *Media Release*, 15 April 2020.

[157] The PJCHR published 6 pieces of correspondence received.

[158] PJCHR, 'Human rights scrutiny report of COVID-19 legislation', *Report 5 of 2020*, 29 April 2020.

Scrutiny of COVID-19 related legislation

The COVID-19 pandemic required governments globally to introduce legislative measures seeking to contain the outbreak and respond to its impacts. In Australia, the *Biosecurity Act 2015* (Cth) (the Biosecurity Act) is the primary legislative basis for the Australian government to manage the risk of diseases entering Australian territory and causing harm to human health. It sets out a number of measures that can be taken to prevent a listed human disease from entering, or establishing itself or spreading in, an Australian territory. On 21 January 2020, the Director of Human Biosecurity first added 'human coronavirus with pandemic potential' to the list of human diseases, to allow measures to be taken under the Biosecurity Act to manage and respond to risks to human health caused by the virus.[159] Since that time, numerous legislative instruments made under the Biosecurity Act and other Acts, and numerous Acts were made to respond to the economic, health, social and other impacts of COVID-19.

The PJCHR considered that legislation taken to control the entry, establishment or spread of COVID-19 in Australia was likely to promote and protect the rights to life and health of Australians; and that legislative responses to help manage the impact of the COVID-19 pandemic on jobs and the economy were likely to engage and promote a number of human rights, including rights to work, an adequate standard of living and social security.[160] Equally, it recognised that such legislation could also limit other human rights (in particular, the rights to freedom of movement and liberty, privacy, equality and non-discrimination, and freedom of assembly). This necessitated careful consideration of whether such limitations were permissible under international human rights law.[161]

One notable aspect of the legislative response to COVID-19 was that many significant responses to the pandemic (including establishing travel bans, entry and exit requirements, and quarantine zones) were dealt with via legislative instruments made under the Biosecurity Act and were exempt from disallowance. This meant that the parliament's primary method of exerting control over delegated legislation was not available. It also meant that the measures were not required to include a statement of compatibility with human rights as part of their explanatory materials.[162] Further, until 16 June 2021, the PJCHR was the *sole* parliamentary committee able to scrutinise this exempt delegated legislation.[163] As such, the PJCHR scrutinised many legislative instruments with significant impacts, which did not include a statement of compatibility (and were not required to include one), and so sought further information (largely from the Minister for Health and Aged Care) to establish whether the measures were compatible with human rights law. The ministerial responses and the PJCHR's assessment of these legislative instruments provided greater information about the rationale for, and impact of, each instrument than was otherwise available. This was

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[159] See Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

[160] PJCHR, 'Human rights scrutiny report of COVID-19 legislation', *Report 5 of 2020*, pp. 1–4.

[161] PJCHR, 'Human rights scrutiny report of COVID-19 legislation', *Report 5 of 2020*, pp. 1–4.

[162] The requirement to prepare a statement of compatibility with human rights in relation only to legislative instruments subject to disallowance is found in subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

[163] As of 16 June 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation can now routinely scrutinise all legislative instruments.

significant noting that many of these legislative instruments appeared to raise significant human rights questions.

For example, the PJCHR examined numerous legislative instruments were made under the authority of the Biosecurity Act to regulate movement into and out of remote communities:

Legislative instruments restricting movement into (and later, out of) remote communities[164]

The legislative instruments

Between 2020 and 2021, 21 legislative instruments were registered, which established or altered emergency requirements for remote communities.[165] These instruments were made under the authority of the Biosecurity Act, designating several geographical areas in Western Australia, Queensland, South Australia and the Northern Territory, and establishing that persons could not enter (and later, could not leave) these areas except in specified circumstances, in an effort to control the entry or spread of COVID-19. Failure to comply with this requirement constituted a criminal offence punishable by 5 years' imprisonment, or a penalty of up to $63,000, or both. Some of the 21 instruments amended those requirements over time, including revoking the requirements in some locations. These legislative instruments were exempt from the disallowance process.[166]

The process

In its first scrutiny report dedicated to the examination of COVID-19 related legislation, the PJCHR noted that these measures were intended to prevent the spread of COVID-19 and so would appear to promote the rights to life and health, but in doing so they may also have limited the right to freedom of movement and the right to equality and non-discrimination (noting that these remote geographical areas appeared to have a high proportion of Indigenous people living there, although this was not specifically addressed in the explanatory materials).[167] The PJCHR therefore asked the Minister for Health and Aged Care (the minister) for further information as to the compatibility of the measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination. The minister responded on 29 May but failed to provide any information with respect to the limitation on these rights.[168]

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[164] See PJCHR, *Report 5 of 2020*, 5 April 2020; PJCHR, *Report 6 of 2020*, 20 May 2020; PJCHR, *Report 7 of 2020*, 17 June 2020.

[165] See COVID-19 bills and instruments indexes, 2020 to 2021.

[166] In 2020 and 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation inquired into the exemption of delegated legislation from parliamentary oversight. This inquiry raised significant concerns about the large volume of legislative instruments which were exempt from parliamentary oversight. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight*, final report, 16 March 2021, recommendation 9. The Senate adopted that recommendation as a resolution of the chamber on 16 June 2021.

[167] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415], explanatory statements.

[168] PJCHR, *Report 7 of 2020*, 17 June 2020, pp. 13–19.

A further such legislative instrument was registered on 23 April 2020,[169] and the PJCHR again wrote to the minister requesting information as to the compatibility of the measure with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.[170] The minister responded on 9 July, explaining that the measure to control the spread of COVID-19 was necessary owing to the greater health risks to Indigenous Australians should these communities be exposed to the infection. The minister noted that the measure was in place for a specific period. While the PJCHR did note that information about any consultation with affected communities would have been useful, it found that the measures did appear to constitute a permissible limitation on the right to freedom of movement and a permissible limit on the right to equality and non-discrimination.

The impact

Human rights scrutiny available to the parliament → The PJCHR's consideration of the human rights implications of these determinations was the only parliamentary consideration of these instruments, and brought this issue to the attention of the parliament. [171]

Influence on civil society → The PJCHR's consideration of this legislation also assisted civil society in their understanding of the human rights implications of these measures when making submissions to the COVID-19 Select Committee.[172]

Conclusion

In the first 10 years of its operation, the PJCHR has conducted a significant volume of legislative scrutiny, publishing a substantial number of scrutiny reports and 8 inquiry reports. The PJCHR's operating practices have continued to evolve as the PJCHR has established itself as a fixture of the parliament. As the case studies in this paper have demonstrated, the PJCHR continues to have an impact on the development of legislation, both directly and indirectly, and in educating parliamentarians, the executive, civil society and the public as to the human rights implications of Commonwealth legislation. The PJCHR's role, questions, and advice to parliament appear to have gradually gained acceptance by parliamentarians and the executive, and engagement with its processes appears to have progressively become an expected norm. Parliamentary committees continually evolve as their

[169] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466].

[170] PJCHR, *Report 6 of 2020*, 20 May 2020, pp. 2–4.

[171] It is noted that in 2021 and 2022, the Senate Standing Committee for the Scrutiny of Bills reviewed the appropriateness of provisions in the Biosecurity Act allowing delegated legislation to be exempt from parliamentary disallowance. The committee identified 30 provisions—including those pursuant to which COVID-19 was first designated a 'listed human disease'—which it considered may inappropriately exempted from disallowance. It recommended that the Biosecurity Act be amended to provide that instruments made under the Act be subject to disallowance. See Senate Standing Committee for the Scrutiny of Bills, *Review of exemption from disallowance provisions in the Biosecurity Act 2015*, May 2021 to February 2022. Were this to take place, it would also have the effect that any such instruments would, in future, require the inclusion of a statement of compatibility with human rights as per *Human Rights (Parliamentary Scrutiny) Act 2011*, subsection 9(1).

[172] See for example, Law Council of Australia submission to the Select Committee on COVID-19, *Submission 422*, June 2020, p. 41.

membership changes and their working practices become more established, and the next decade of the PJCHR will no doubt bring new perspectives, influence and impact.

Committees of influence: evaluating the role and impact of parliamentary committees

Dr Sarah Moulds*

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

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1 Terry Flew, 'Digital communication, the crisis of trust, and the post-global', *Communication Research and Practice*, vol. 5, issue 1, 2019, pp. 4–22. See also Miguel Goede, The future of democracy: the end of democracy as we know it', *Kybernetes*, vol. 48, no. 10, 2019, pp. 2237–2265.

2 See for example, Luca Verzichelli, 'Back to a responsible responsiveness? The crisis and challenges facing European political elites: the 2017 Peter Mair Lecture', *Irish Political Studies*, vol. 35, issue 1, 2020, pp. 1–17.

3 See for example Luciano Bardi, Stefano Bartolini and Alexander Trechsel, 'Responsive and responsible? The role of parties in twenty-first century politics', *West European Politics*, vol. 37, issue 2, 2014, p. 244.

4 See for example Chris Reidy and Jenny Kent, *Systemic Impacts of Mini-publics,* (report prepared for the New Democracy Foundation), University of Technology Sydney, 2017; Daniel Stockemer, and Bilel Kchouk, 'Inclusive parliaments: a trigger for higher electoral integrity?', *The Journal of Legislative Studies*, vol. 23, issue 3, 2017, pp. 419–438; Torsten Geelan, Hernado González and Peter Walsh, *From Financial Crisis to Social Change Towards Alternative Horizons*, Springer International, 2018; Helen Marshall, Claudia Proeve, Joanne Collins, Rebecca Tooher, Maree O'Keefe, Teresa Burgess, S Rachel Skinner, Maureen Watson, Heather Ashmeade and Annette Braunack-Mayer, 'Eliciting youth and adult recommendations through citizens' juries to improve school based adolescent immunisation programs', *Vaccine,* vol. 32, issue 21, 2014, pp. 2434–2440; Nicole Moretto, Elizabeth Kendall, Jennifer Whitty, Joshua Byrnes, Andrew P. Hills, Louisa Gordon, Erika Turkstra Paul Scuffham and Tracy Comans, 'Yes, The Government Should Tax Soft Drinks: Findings from a Citizens' Jury in Australia' *International Journal of Environmental Research and Public Health*, vol. 11, issue 3, 2014, pp. 2456–2471.

Adding to this turbulent social and political context, in response to the complex and potentially devastating threat posed by COVID-19, parliaments around the world have transferred unprecedented powers to executive governments and their agencies, often with the full support of the communities they represent.[5] This includes imposing travel bans preventing citizens from leaving the country, empowering health officials to direct and detain people, providing police with unprecedented discretion to implement and enforce fines and authorising ministers to make significant changes to existing laws and services without requiring parliamentary approval.[6] By any measure, this constitutes an extraordinary transfer of power away from the parliament towards the executive with clear impacts on individual rights and representative democracy. These laws were passed within days, sometimes hours, with limited safeguards and a heavy reliance on sunsetting provisions, some of which are dependent on the pandemic being officially called to an end.[7] From within this rush of emergency law-making and institutional power transfer, parliamentary committees emerged as a focal point for democratic scrutiny of governments' legal responses to COVID-19, particularly in Westminster-inspired parliaments including those in Australia, New Zealand and the United Kingdom.[8]

This combination of factors makes looking carefully at the current role parliamentary committees play within the Australian Parliament – and their potential to influence the content of laws and policies, the way laws are made and the way the parliament engages with the public – particularly important.

In this paper I aim to highlight the importance of evaluating the impact of parliamentary committees on law-making in Australia and offer a pathway forward in the form of a tiered evaluation framework that is designed to guard against some of the short comings identified by other scholars in this field. I will briefly look at 3 case studies – the COVID-19 response, counter-terrorism law-making and marriage equality reform (each covered in detail elsewhere in my research)[9] – to explore the existing role parliamentary committees play in improving the quality of federal law-making and community engagement with parliament.

Why should we care about parliamentary committees?

Parliamentary committees both reflect and feed into the key values underpinning our parliamentary culture, including values associated with rule of law, accountability and relationships between the governors and the governed. Parliamentary committees also give

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5 Andrew Edgar, 'Law-making in a crisis: Commonwealth and NSW coronavirus regulations', *Australian Public Law*, 30 March 2020.

6 Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', *Alternative Law Journal*, vol. 45, issue 3, 2020, pp. 180–187; Ronan Cormacain, 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', *Theory and Practice of Legislation*, vol. 8, issue 3, 2020, pp. 1–21.

7 Ronan Cormacain, 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', *Theory and Practice of Legislation*, vol. 8, issue 3, 2020, pp. 1–21; Oren Gross, 'Emergency Powers in the Time of Coronavirus … and Beyond', *Just Security*, 8 May 2020, (accessed 1 June 2023).

8 Anne Twomey, 'A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic', *The Conversation,* 25 March 2020; Alice Lilly, 'The UK parliament and coronavirus', *Institute for Government*, 3 April 2020; Charlie Dreaver, 'Special committee set-up as Parliament is adjourned', *Radio New Zealand,* 24 March 2020.

9 See for example Sarah Moulds, 'From disruption to deliberation: improving the quality and impact of community engagement with parliamentary law-making', *Public Law Review*, vol. 31, no. 3, 2020, p. 264; Sarah Moulds, 'Keeping watch on COVID-19 laws: are parliamentary committees up to the job?', *Australian Public Law*,1 May 2020.

practical effect to key aspects of our parliamentary democracy. They provide a forum for all parliamentarians to play a role in the legislative process and generate reports containing information about the purpose, effectiveness and impact of proposed and existing laws and policies.[10] They also provide a forum for experts and members of the community to share their views on a proposed policy or law and raise matters critical to the lives and rights of Australians.

Parliamentary committees can undertake a number of specific functions,[11] ranging from scrutinising government expenditure (such as the Senate Estimates process undertaken within the Australian Parliament), reviewing procedural rules and practices or conducting thematic inquiries into significant public policy issues referred to them by parliament. This paper focuses on the *legislative scrutiny* role of parliamentary committees—that is, the task of reviewing an existing or proposed law (sometimes against prescribed criteria) and reporting back to parliament with findings or recommendations. In this legislative scrutiny role, parliamentary committees analyse proposed laws and policies and produce vital, independent information about their purpose and effectiveness and provide a forum for experts and members of the community to share their views on a proposed law. In this way, parliamentary committees have both *deliberative* attributes (such as facilitating forums for the public to engage in the law-making process) and *authoritative* attributes (such as the power to recommend reforms to proposed laws or policies).[12]

Whether specifically assigned a rights-protecting role (such as the Parliamentary Joint Committee on Human Rights (PJCHR)),[13] or performing a broader inquiry function (such as the Senate Legal and Constitutional Affairs References Committee),[14] parliamentary committees are also a key aspect of Australia's parliamentary model of rights protection.[15] Within this model, parliamentary committees 'sound the alarm' about laws that might impact on individual rights and provide the forum for interested members of the community to express their views on how parliament should respond. Many committees also provide a

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[10] See for example Kate Barton, *Community Participation in Parliamentary Committees: Opportunities and Barriers*, Parliamentary Library, 1999; Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?', *Papers on Parliament*, No. 44, Department of the Senate, 2006, p. 5; Paul Lobban, 'Who cares wins: Parliamentary committees and the executive', *Australasian Parliamentary Review*, vol. 27, issue 1, 2012, p. 190.

[11] See for example Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"', *Public Law Review,* vol. 26, no. 1, 2015, pp. 19–38; Laura Grenfell and Sarah Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia', *University of New South Wales Law Journal,* vol. 41, no. 1, 2018, p. 40.

[12] Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia,* Springer Verlag, Singapore, 2020, chapters 1 and 10.

[13] The Parliamentary Joint Committee on Human Rights (PJCHR) is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The functions of the PJCHR are set out in s 7 of the Act which includes examining legislation for compatibility with human rights. Human rights are defined in s 3 of the Act to mean the human rights and freedoms contained in 7 core human rights treaties to which Australia is a party.

[14] The Senate Legal and Constitutional Affairs References Committee is established by Senate standing order 25. The committee has an opposition senator as Chair and a majority of non-government members. The current membership of the Committee can be seen here.

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

source of concrete recommendations for legislative or policy change that can have the effect of improving the rights-compliance of proposed federal laws.[16]

When engaging in an analysis of this type, it is important not to overstate the role parliamentary committees play in the law-making process in Australia. Often the recommendations of inquiry-based committees are rejected or ignored by the government of the day,[17] and sometimes the scrutiny committee reports are issued too late to be of any direct influence on parliamentary debate on the bill.[18] However, as the counter-terrorism and marriage equality examples show, when considered over time, the role these committees play in collecting, presenting, and analysing different views on the merits of proposed changes to the law can be significant. This makes studying the impact of parliamentary committees particularly relevant to contemporary debates surrounding the quality of parliamentary law-making and public engagement with and trust in political and legal institutions.

Why is the work of parliamentary committees hard to evaluate?

The complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means evaluating their performance is not always straightforward.[19] Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.[20] The evaluation framework applied in this research aims to address these challenges.

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[16] For examples of the rights-enhancing effect of parliamentary committees see Laura Grenfell and Sarah Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia', *University of New South Wales Law Journal,* vol. 41, no. 1, 2018, p. 40; Sarah Moulds 'Committees of Influence: Parliamentary Committees with the capacity to change Australia's counter-terrorism laws', *Australasian Parliamentary Review,* vol. 31, 2016.

[17] See for example Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009.

[18] The issue of delayed reporting (and in particularly the problem of tabling reports *after* the second reading debate on the particular bill has ended) has been a particular concern raised with respect to the PJCHR. For further discussion of how this issue may impact on the overall effectiveness of the PJCHR see Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' and David Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Laura Grenfell and Julie Debeljak (eds), *Law Making and Human Rights*, Thompson Reuters, Pyrmont, 2020.

[19] Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches', (paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009), cited in Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart Publishing, 2015, p. 111 and 131; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights', *Australian Journal of Political Science,* vol. 44, issue 2, 2009, p. 41; Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights', *Public Law,* 2006, p. 785; Jennifer Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny', *Parliamentary Affairs,* vol. 59, issue 3, 2006, p. 522. See also George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review,* vol. 41, issue 2, 2015, p. 469.

[20] See for example Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart Publishing, 2015, p. 111; in Gareth Griffith, Parliament and Accountability: The Role of Parliamentary Oversight Committees, *Briefing Paper No. 12/05*, NSW Parliamentary Library Research Service, 2005; John Halligan, 'Parliamentary committee roles in facilitating public policy at the Commonwealth level', *Australasian Parliamentary Review,* vol. 23, issue 2, 2008, p. 135; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights', *Australian Journal of Political Science,* vol. 44, issue 2, 2009, p. 41.

The 4 key steps of the evaluation framework employed are summarised below:

- Step 1: setting out the institutional context in which the scrutiny takes place
- Step 2: identifying the role, functions and objectives of the scrutiny body
- Step 3: identifying key participants[21] and determining legitimacy[22]
- Step 4: measuring the impact of the scrutiny system.

Step 4 is the most intensive and detailed step in the evaluation framework. It aims to determine what impact a particular component of the scrutiny system is having on the development and content of the law. It includes consideration of the following 3 'tiers' of impact:[23] (a) legislative impact (whether the scrutiny undertaken has directly changed the content of a law); (b) public impact (whether the work of the scrutiny has influenced or been considered in public or parliamentary debate on a bill, or in subsequent commentary or review of an Act); and (c) hidden impact (whether those at the coalface of developing and drafting counter-terrorism laws turn their mind to the work of legislative scrutiny bodies when undertaking their tasks).[24]

The tiered evaluation process in practice

It is possible to see the tiered evaluation framework in practice by investigating the impact of the parliamentary committee system on a selection of counter-terrorism laws introduced between 2001 to 2018[25] and amendments to the *Marriage Act 1961* (Cth) between 2004 to

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

[22] A wealth of literature exists on the topic of political legitimacy and the meaning attributed to this term has been contested and developed over time. See for example David Beetham, *The Legitimation of Power*, Palgrave, 2002; Allan Buchanan, 'Political Legitimacy and Democracy', *Ethics,* vol. 112, No. 4, 2022, p. 689; Immanuel Kant, *Practical Philosophy*, ed Mary J Gregor, Cambridge University Press, 1999; Jack Knight and James Johnson, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy', *Political Theory,* vol. 22, no. 2, 1994, p. 277; Bernard Manin, 'On Legitimacy and Political Deliberation', *Political Theory*, vol. 15, no.3, 1987, p. 338.

[23] Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness', *King's College London*, July 2014.

[24] Collecting evidence of the hidden impact of parliamentary committees can be challenging due to the need to look beyond documentary sources and consider more subjective material including interviews but, as Evans and Evans and Benton and Russell have shown in their empirical-based work it is not impossible. In Australia at least, much publicly available material exists that points to the hidden impacts of scrutiny, including training manuals, published guidelines, information in annual reports, and submissions and oral evidence given at parliamentary and other public inquiries and hearings. This material can then be tested against a range of targeted individual interviews conducted with key participants in the scrutiny process. Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009); See for example Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures', *Human Rights Law Review,* vol. 6, issue 3, 2006, p. 546.

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

2017[26] and, by looking at the early indications of the work of parliamentary committees in scrutinising Australia's federal response to the COVID-19 pandemic.[27] As discussed further in part 3, these 2 case studies provide an opportunity to reflect upon the different roles individual committees play within the broader committee system and how some of these committees[28] seek to engage with the Australian community.

1. Participation and legitimacy

My research has found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact.[29] This is because a diverse range of participants in inquiries into proposed or existing laws provides 'an opportunity for proponents of divergent views to find common ground'[30] or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to 'strike the right balance' between safeguarding security and preserving individual liberty when enacting counter-terrorism laws.[31] Good examples of scrutiny bodies with these strengths are the Senate Legal and Constitutional Affairs Legislation Committee (the LCA Legislation committee), the Senate Legal and Constitutional Affairs References Committee (the LCA References committee) and the House Standing Committee on Social Policy and Legal Affairs (the House committee).[32] These inquiry-based committees have a high overall participation rate, engaging a broad range of parliamentarians, public servants and submission-makers.[33] For example, in 2 counter-terrorism bill inquiries, the LCA committees attracted over 400 submissions and heard from well over 20 witnesses.[34] This relatively high participation rate was dwarfed by the

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

[27] Sarah Moulds, 'Keeping watch on COVID-19 laws: are parliamentary committees up to the job?', *Australian Public Law*, 1 May 2020.

[28] This article focuses on the work of a pair of committees, the Senate Legal and Constitutional Affairs Legislation Committee (the LCA Legislation committee) and the Senate Legal and Constitutional Affairs References Committee (the LCA References committee), as well as the Parliamentary Joint Committee on Intelligence and Security (the Intelligence committee) and House Standing Committee on Social Policy and Legal Affairs (the House committee). These inquiry-based committees work closely with the scrutiny-based committees in the federal system, which include the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) and the PJCHR. The work of these scrutiny committees is also relevant to the findings in this article, and to the more detailed research. See Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018.

[29] This finding is consistent with the discussion in Kelly Paxman, 'Referral of Bills to Senate Committees: An Evaluation', *Papers on Parliament*, No. 31, Department of the Senate, June 1998, p. 76.

[30] Harry Evans (ed), *Odgers' Australian Senate Procedure*, 10th edition, Department of the Senate, 2001, p. 366; see also Anthony Marinac, 'The Usual Suspects? "Civil society" and Senate Committees', *Papers on Parliament*, No. 42, Department of the Senate, December 2004; See also Pauline Painter 'New kids on the block or the usual suspects? Is public engagement with committees changing or is participation in committee inquiries still dominated by a handful of organisations and academics?', *Australasian Parliamentary Review*, vol. 31, issue 2, 2016, pp. 67–83.

[31] Dominique Dalla-Pozza, 'Refining the Australian counter-terrorism framework: how deliberative has Parliament been?', *Public Law Review*, vol. 27, issue 4, 2016, p. 271 and 273.

[32] The House Standing Committee on Social Policy and Legal Affairs is established by House of Representatives standing order 215 and 229. The committee has a government Chair and a majority of government members. The current membership of the committee can be seen here.

[33] See Senate standing order 25; House of Representatives, standing order 215 and 229.

[34] Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills*, May 2002. In this inquiry, the committee received 431 submissions and heard from 65 witnesses. See also Senate Legal and Constitutional Affairs References Committee, *Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters*, December 2002. In this inquiry the committee received 435 submissions and heard from 22 organisations.

rates of participation experienced by the House committee[35] in its inquiry into 2 cross-party marriage equality bills in 2012,[36] which received 276,437 responses to its online survey, including 213,524 general comments and 86,991 comments on the legal and technical aspects of the bills.[37] Never before had the parliament provided a deliberative forum of this scale or attracted so many responses from interested members of the community.[38] Unlike some other parliamentary committees, both the LCA committees and the House committee were able to attract participation from a broader cross section of the community, rather than rely on 'the usual suspects' (such groups or individuals who are already aware of the bill's existence, or who are contacted by politicians or their staff, or by the committee secretariat).[39]

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

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

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

[36] The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Adam Bandt MP and Mr Andrew Wilkie MP. The Marriage Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Stephen Jones MP on 13 February 2012. Both of these bills sought to amend the *Marriage Act 1961* (Cth) to remove reference to 'man and woman' and permit same sex couples to marry. The Marriage Amendment Bill 2012 (Cth) also included proposed provisions that would have the effect of ensuring that authorised celebrants and ministers of religion are not required to solemnise a marriage where the parties to the marriage are of the same sex). Both bills were referred to the House Standing Committee on Social Policy and Legal Affairs, which delivered its report on 18 June 2012. See House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, June 2012.

[37] See House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, June 2012, p. 1 and pp. 33–37.

[38] House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, June 2012, p. 34.

[39] Kelly Paxman, 'Referral of Bills to Senate Committees: An Evaluation', *Papers on Parliament*, No. 31, Department of the Senate, June 1998, p. 81.

[40] *Intelligence Services Act 2001* (Cth) pt 4, s 28(2). The Intelligence committee has some particular attributes that set it apart from the other committees considered and relate to its specialist intelligence and national security functions. For example, it has a statutory framework, it's government-majority membership is tightly controlled and generally limited to the 2 major political parties, and it has access to information, expert briefings and powers that are generally broader in scope than other committees established for other purposes. See *Intelligence Services Act 2001* (Cth) pt 4. See also Sarah Moulds 'Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security', *Public Law Review*, vol. 29, no. 4, 2018, p. 41.

[41] For further discussion of the role and impact of the Parliamentary Joint Committee of Intelligence and Security see Sarah Moulds 'Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security', *Public Law Review*, vol. 29, no. 4, 2018, p. 41.

with the executive, can also lead to a consistently strong legislative impact, which can also have important, positive results.

2. Legislative impact

One of the most surprising findings arising from these 2 case studies is the significant legislative impact different components of the committee system were able to have on the content of federal laws. In the context of the counter-terrorism case study, many of the recommendations for legislative change made by parliamentary committees were implemented in full by the parliament in the form of amendments to the bill or Act.[42] In addition, the types of changes recommended by these committees were generally rights-*enhancing*. In other words, at least in the counter-terrorism context, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny) — but the legislative changes made as a result of scrutiny were significant and positive from a rights perspective. For example, this research suggests that the work of parliamentary committees directly contributed to amendments that:

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

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[42] Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018, chapter 5 and Table 5.1.

[43] Supplementary Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth), items 5 and 8; in response to Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, May 2002, p. vii.

[44] Supplementary Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth), items 11, 13, 14; in response to Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, May 2002, p. vii.

[45] Supplementary Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth), item 4, in response to Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, May 2002, p. vii.

[46] See for example Supplementary Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth). See also Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, May 2002.

[47] Supplementary Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth). See also Senate Legal and Constitutional Affairs Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, May 2002. See also Supplementary Explanatory Memorandum, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth).

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

These findings are surprising because they challenge the orthodox view that governments generally resist making changes to legislation that they have already publicly committed to and introduced into parliament.[53] Interestingly, the strength of this legislative impact varied from committee to committee. For example, the Intelligence committee was a particularly strong performer when it came to translating recommendations into legislative change (achieving a 100% strike rate during the period from 2013-2018) and improving the rights compliance of the law.[54] The committees with broader mandates and more open membership, such as the LCA committees, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law-making, generating popular and

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[48] See Supplementary Explanatory Memorandum, *Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (Cth) and Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002*, June 2002, pp. viii–ix. See also Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (Cth).

[49] See for example Supplementary Explanatory Memorandum, *Anti-Terrorism Bill 2004* (Cth) items 4, 5, 6, 7 and 8 which implement Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Anti-Terrorism Bill 2004*, May 2004, p. ix.

[50] Supplementary Explanatory Memorandum, *National Security Information (Criminal Proceedings) Bill 2004* (Cth), p. 1; Senate Legal and Constitutional Affairs Legislation Committee, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*, August 2004.

[51] See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 and Senate Legal and Constitutional Affairs Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, November 2005.

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

[53] As discussed below, this orthodox view suggests that within Westminster systems, parliamentary committees, and in particular government-dominated committees, will be seriously compromised as a form of rights protection, especially when scrutinising laws that affect electorally unpopular groups, such as bikies and terrorists. See e.g. Janet Hiebert, 'Governing Like Judges' in Tom Campbell, K.D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, p. 40 and 63; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Cooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart Publishing, 2015, p. 39 and 52.

[54] Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018, chapter 5 and Table 5.1.

influential public inquiries that had important, rights-enhancing legislative outcomes.[55] These observations are also apposite in the context of the marriage equality reforms, where there is also evidence that different parliamentary committees working together over time had a strong legislative impact. When taken together, these findings suggest that when multiple components of the scrutiny system work together to scrutinise and review an existing or proposed law, a more significant legislative impact is felt.[56]

3. Public impact

For the purpose of the evaluation framework used in this research, 'public impact' refers to the impact of parliamentary committee work on the way laws are debated in the parliament and the community. Looking for this type of impact is particularly important for understanding how parliamentary committees contribute to the deliberative relationship between law-makers and the broader Australian community. This is because parliamentary committees can help establish a 'culture of scrutiny' by providing a forum for parliamentarians to share their views on a proposed or existing law, including pointing out what they consider to be the negative or unintended consequences of the proposed law. This can help identify any unintended or unjustified implications arising from a proposed law, and generate new, less rights-intrusive, legislative or policy options. Parliamentary committees can also help parliamentarians to weigh competing arguments or different policy options,[57] either through the public process conducted by the inquiry-based committees, or through the consideration of written analysis provided by the technical scrutiny committees.

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

By attracting and engaging with these types of submission-makers, parliamentary committees can provide both a platform for these organisations to express their views and a

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[55] Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018, chapter 5 and Table 5.1.

[56] This is evident in both the early cases of the Anti-Terrorism Bill (No 2) 2005 (Cth) (Control Order Bill) and Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) (ASIO Bill), which were considered by the Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on ASIO and the Senate Legal and Constitutional Affairs committees, and in the post-2013 bills which were considered by the Parliamentary Joint Committee on Intelligence and Security, Senate Standing Committee for the Scrutiny of Bills, and the PJCHR. See also Sarah Moulds 'Committees of Influence: Parliamentary Committees with the capacity to change Australia's counter-terrorism laws', *Australasian Parliamentary Review,* vol. 31, 2016.

[57] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge University Press, 1998, p. 25; Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?', *Public Law Review*, vol. 27, issue. 4, 2016, p. 271 and 274.

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

source of information from which to launch future advocacy campaigns. This in turn can have an influence on how the relevant policy issues are debated in the media and provide incentives for parliamentarians to improve the deliberative quality of the law-making process. For example, the next year, Senator Hanson-Young introduced a similar bill (the 2010 bill), which was again referred to the LCA Legislation committee for inquiry and report.[59] The Committee received approximately 79,200 submissions: approximately 46,400 submissions in support of the 2010 bill, and approximately 32,800 submissions opposed.[60] The sheer volume of submissions received (regardless of the existence of 'form letter' style submissions) made this inquiry a powerful indicator of a shift in public support in favour of marriage equality.[61]

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

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

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[59] Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012. The bill was referred to committee on 8 February 2012. The committee issued its report on 25 June 2012.

[60] Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, p. 7. The committee received approximately 75,100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43,800 supported the bill and 31,300 opposed it. The committee received an additional 4,100 submissions, of which 2,600 supported the bill and 1,500 opposed it. This amounts to 79,200 submissions in total: 46,400, or approximately 59%, supporting Senator Hanson-Young's bill; and 32,800, or approximately 41%, opposing it.

[61] Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, p. 51.

[62] A list of witnesses who appeared at the hearings is at Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, appendix 3, and copies of the *Hansard* transcripts are available through the committee's website.

[63] For example, Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby, Mr Malcolm McPherson from Australian Marriage Equality and Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, as quoted in Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, pp. 11–12.

[64] For example, Australian Christian Lobby, Rabbinical Council of Victoria, Episcopal Assembly of Oceania, and Presbyterian Church of Queensland as quoted in Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, pp. 27–28.

[65] See for example Australian Associated Press, 'MP stands with son on same-sex marriage', *9News*, 10 October 2016; Sarah Whyte, 'Footballer's 10-minute challenge to change MPs' views on same-sex marriage', *The Sydney Morning Herald*, 22 July 2015; Dan Harrison, 'Parents of gays make TV pitch to Abbott on same-sex marriage vote', *The Sydney Morning Herald*, 30 January 2012; Nina Lord, 'In rainbow families, the kids are all right', *The Age,* 28 September 2017.

[66] At that time, marriage equality was recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the United States and Mexico City. Legalisation to enable marriage equality was also under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay. See Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, p. 26

[67] Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, p. 37.

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

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

Although not tasked with applying a prescribed human rights analysis to this issue, the COVID-19 committee provided a forum for legal and technical experts and the community more broadly to consider whether the COVIDSafeApp is *necessary* having regard to the nature of the threat posed by COVID-19 and the impact of the App on personal privacy, and whether the App constitutes a *proportionate* way to respond to the COVID-19 virus. These questions demanded consideration of the scientific evidence relating to the prevalence of the COVID-19 virus within the Australian community, effectiveness and efficiencies of pre-existing contract tracing mechanisms and the effectiveness and efficiency of the App itself. Consideration was also given to the impact of the App on the rights of vulnerable members of the community, such as women experiencing domestic violence, for whom a breach of privacy could have devastating consequences for themselves and their families.[72]

The work of the COVID-19 committee, the PJCHR and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), provided political foundation for the introduction of legislative provisions addressing the use, sharing and storage of information obtained via the App in the form of the *Privacy Amendment (Public Health Contact Information) Act 2020*, and is an example of the benefits of Australia's 'ad hoc', multi-committee approach to human rights scrutiny. However, this ad hoc approach to rights scrutiny of executive action can also give rise to significant shortcomings when it comes to providing robust rights protection, as can be seen by the Australian Government's heavy use[73] of delegated powers conferred on it by pre-existing public health emergency legislation

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[68] Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', *Alternative Law Journal*, vol. 45, issue 3, 2020, pp. 180–187.

[69] The Senate Select Committee on COVID-19 released its first interim report in December 2020 and its second interim report in February 2021.

[70] For further discussion see Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', *Alternative Law Journal*, vol. 45, issue 3, 2020, pp. 180–187.

[71] Senate Select Committee on COVID-19, *Final Report,* April 2022.

[72] These issues formed part of the Senate Select Committee's public inquiry hearings in April and May 2020, which drew from the analysis contained in the following 2 reports from the PJCHR (*Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*; *Report 6 of 2020 (see Chapter 1)*).

[73] For example, on its webpage, the Senate Standing Committee on Delegated Legislation has sought to list all delegated legislation registered on the Federal Register of Legislation on or before 20 May 2020 relating to COVID-19. In April 2021, this list had some 148 legislative instruments.

that have been largely exempted from parliamentary committee scrutiny.[74] These provisions also attracted the attention of the Scrutiny of Bills committee when it considered the Australian Government's Coronavirus Economic Response Package Omnibus Bill 2020, calling on the proponents to provide advice regarding the use of 'Henry VIII clauses'.[75] As is often the case when it comes to scrutiny of emergency law-making, this Scrutiny Digest report came weeks after the Coronavirus Economic Response Package Omnibus Bill 2020 (Cth) had been enacted into law, too late to give rise to any direct legislative amendments. This example highlights the clear limits of the Australian ad hoc approach to scrutinising the rights impacts of proposed laws, that relies heavily on a system of committees being empowered to work together to scrutinise key aspects of executive law-making.

4. Hidden impact

In addition to looking for 'legislative' and 'public' impact, the evaluation framework is designed to gather information from those working 'behind the scenes' in the law-making process.[76] This type of impact is described as 'hidden' as it often occurs prior to a bill or amendment being introduced into parliament and concerns the activities of public servants and parliamentary counsel, outside of the public gaze.[77]

Investigations into the hidden impact of legislative scrutiny on Australia's counter-terrorism laws suggest that committees with high participation rates are in the minds of those responsible for developing and implementing legislation, and prudent proponents of bills will adopt strategies to anticipate or avoid public criticism by such bodies. In this way, the inquiry-based parliamentary committees (like the LCA committee) can have a strong 'hidden impact' on the development of laws. The 'technical scrutiny' committees,[78] (such as the Scrutiny of Bills committee) may also generate a strong hidden impact, not because of their capacity to generate public interest, but rather because the 'technical scrutiny' criteria these

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[74] For example, legislative instruments made under s 475 of the *Biosecurity Act 2015* (Cth) ('the Act') trigger sweeping powers (some powers are referred to as 'special emergency powers') for the Health Minister to determine any requirements necessary to prevent or control the 'emergence, establishment or spread' of COVID-19 within, or in a part of, Australian territory, or to another country. These powers have included: a ban on overseas travel; restrictions on retail trade at airports; the COVIDSafeApp; and restrictions placed on remote communities populated by Aboriginal and Torres Strait Islander communities.

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

[76] As part of this research, I interviewed public servants who were directly responsible for developing or drafting the case study bills, including those from the Attorney-General's Department, the then Department of Immigration and Border Protection (DIBP), Australian Federal Police and Office of Parliamentary Counsel. I also conducted interviews with current and past parliamentarians and parliamentary staff. Although not statistically representative, these interviews provide a useful insight into the role parliamentary committees play in the development of proposed laws from the perspective of a broad range of players in the legislative development and drafting process. Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018, Appendix A.

[77] The political party room also plays a central role in this behind-the-scenes law-making process but remains 'off-limits' to almost all researchers, due to its highly politically charged and confidential nature. This work focuses particularly on the role of public servants, parliamentary counsel and parliamentary committee staff and gathers evidence and insights from interviews with these key players in the process.

[78] These scrutiny-based committees are required to review every single bill (and in the case of the PJCHR, all legislative instruments) for compliance with a range of scrutiny criteria, including criteria that relates to individual rights and liberties. The PJCHR is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) The scrutiny criteria applied by the PJCHR is outlined in s 3 of the Act and includes the human rights and freedoms contained in 7 core human rights treaties to which Australia is a party. The Senate Standing Committee for the Scrutiny of Delegated Legislation is also a scrutiny-based committee, with a mandate to scrutinise delegated legislation.

bodies apply is entrenched in the practices of public servants and parliamentary counsel. For example, written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments contain frequent references to the work of the 'technical' scrutiny bodies (such as the Scrutiny of Bills committee) and some of these documents, in particular the *Legislation Handbook*, *Drafting Directions*, and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* translate the abstract principles underpinning the scrutiny bodies' mandates into practical checklists to be applied during particular stages of the legislation development process. In this way, these documents may help create a 'culture of rights compliance' within the public service. Over time, they also give rise to the shared view that the scrutiny criteria applied by these bodies reflect 'best practice' when it comes to developing laws.

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

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

Key findings and recommendations

While reiterating the salient warnings discussed above about the challenges associated with evaluating the work of parliamentary committees and attributing specific impacts to dynamic and politically influenced institutions, this research provides the opportunity to reflect the reforms (or investments in existing practices) that could maximize the potential for parliamentary committees to positively influence law-making and parliamentary public engagement in Australia. As documented in greater detail in *Committees of Influence*,[79] there are a range of common factors that may be determinative when it comes to the capacity of a parliamentary committee to have an impact on law-making. These common factors include:

- The deliberative capacity of the committee[80]—such as the extent to which the committee is able to facilitate accessible remote or online forums and inquires to engage meaningfully with experts, community organisations and individuals, as well as its potential to provide a 'safe space' for members to change their mind in the face of compelling evidence.

[79] Sarah Moulds, Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia, Springer Verlag, Singapore, 2020.

[80] Dominique Dalla-Pozza, 'The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws' (paper presented at the Australasian Law and Society Conference, 2006).

- The political characteristics of the committee[81]—such as whether the committee has a government or non-government majority, the political seniority of its members and expertise of its secretariat staff, whether it comprises of members from both Houses, or whether its mandate is considered to be highly politicised or not.
- The relationship between the committee and relevant executive agencies[82]—including the committee's access to relevant government information or capacity to hold 'private briefings' and track record of developing practical recommendations that can be readily implemented by government.
- Whether the committee is tasked with a 'policy scrutiny' or 'technical scrutiny' function[83]—such as whether the committee is tasked with undertaking compliance related activity by assessing proposals against a prescribed list of criteria, or whether the committee is given broad scope to examine the policy merits of the law or to evaluate its effective implementation and hold public inquiries and examine witnesses.
- Whether the committee exists within a sophisticated system of committees or operates on an ad-hoc basis.[84]
- Timing of the issue of committee reports and recommendations[85]—including whether the committee's reports, recommendations or findings are able to be tabled or published *prior to* the enactment of the proposed law or before the cessation of any relevant disallowance period or sunsetting provision.

Building on these overall findings, the research that has informed this paper contains a list of practical reform suggestions for individual committees within the federal committee system, and for the system as whole.[86] While it is beyond the scope of this paper to repeat each of those recommendations here, it is useful to summarise in general terms the changes that could be made to similar committee systems in Australia. These suggestions share many aspects in common with previous reform recommendations made by those working directly within the Australian parliamentary committee system.[87]

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[81] Ian Holland, 'Senate Committees and the Legislative Process', *Parliamentary Studies Paper 7*, Crawford School of Economics and Government, Australian National University, Canberra, 2009; Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation', *Alternative Law Journal,* vol. 37*,* issue 4, 2012, pp. 228–232.

[82] Sarah Moulds, 'Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security', *Public Law Review,* vol. 29, issue 4*,* 2018, pp. 287–321.

[83] David Kinley, Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights', *European Human Rights Law Review,* issue 1, 2012, pp. 58–70.

[84] Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?', *Public Law Review,* vol. 26, issue 1, 2015, pp. 19–32.

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

[86] Sarah Moulds, 'The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws', PhD Thesis, University of Adelaide, 2018.

[87] For example Joshua Forkert, 'Parliamentary Committees: Improving public engagement' (paper presented at the Australasian Study of Parliament Group, 27–30 September 2017, Hobart); Carolyn Hendriks and Adrian Kay, 'From 'Opening Up' to Democratic Renewal: Deepening Public Engagement in Legislative Committees', *Government and Opposition,* vol. 54, issue 1, 2019, pp. 7–8 and 20–21; Beverly Duffy and Madeleine Foley, 'Social media, community engagement and perceptions of parliament: a case study from the NSW Legislative Council', *Australasian Parliamentary Review*, vol. 26, issue 1, 2011, p. 198, John Baczynski, 'Opportunities for Greater Consultation? House Committees use of information and communication technologies', *Parliamentary Studies Paper 8*, Crawford School of Economics and Government, ANU, Canberra, 2009; House of Representatives Standing Committee on Procedure, *Building a modern committee system: An inquiry into the effectiveness of the House committee system*, June 2010; Dr Phil Larkin, Lecturer, Public Policy, University of Canberra, *Standing Committee on Procedure Hansard*, 22 October 2009; Mr Christopher Pyne MP, Shadow Minister for Education,

Improve communication between committees and key participants by:	Documenting and reporting on the government response to and legislative implementation of the committees' recommendations, for example through annual reports and more instantaneous platforms including social media and direct email through a subscription alert service.
	Improving communication between committees and those responsible for developing and drafting legislative proposals. This could involve committee secretariat staff liaising with public servants to develop subject-specific guidance notes and drafting directions.
	Developing and delivering specific training to assist in the facilitation of respectful, deliberative public hearings, that could include strategies to promote a culture of respect and support for a diverse range of witnesses and processes to update and expand 'invited submission-maker' lists.
	Requiring government responses to all Legislation committee reports before the conclusion of second reading debate on the bill, and to all Reference committee reports within 6 months of tabling (for example, by amending the relevant standing orders).
Increase committee resources and address high workloads to ensure timely tabling of reports by:	Providing additional funding for the general staffing pool that services parliamentary committees. The amount of additional funding should be determined following a work analysis to determine the nature and level of secretariat support necessary for future demands on the committee system.
	Encouraging the use of responsive staffing practices, such as shared secretariats and flexible staffing pools, which enable parliamentary staff to move between committees in response to changing workloads.
	Encouraging the appointment of high-quality, politically independent, part-time specialist advisors to support parliamentary committees over a fixed period, or for particularly complex or lengthy inquiries.
	Encouraging the use of departmental or agency secondee arrangements to support parliamentary committees over a fixed period, or for particularly complex or lengthy inquiries.
	Supporting parliamentarians in their involvement in parliamentary committees, including through improving training programs for

Apprenticeships and Training, 'Agreement for a Better Parliament', 7 September 2010, p. 6. See also John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level', *Australasian Parliamentary Review,* vol. 23, issue 2, 2008, pp. 135 and 153.

	parliamentarians' staff, and profiling high-quality contributions from individual committee members.
	Promoting parliamentary committees as part of the policy and legislative development process amongst the broader public service, including by pointing out the efficiency gains to be made by anticipating and addressing parliamentary scrutiny issues at the pre-introduction stage.
Document committees' contribution to establishing a common rights-scrutiny culture within the parliament by:	Investing in research to track the rights language used in parliamentary debates and parliamentary committee reports across a wide range of subject areas to evaluate the level of acceptance of the rights and scrutiny principles listed.
	Encouraging individual committees to more clearly and specifically document the impact they have on the development and debate of proposed new laws, particularly those committees with specific rights-scrutiny mandates.
	Facilitating workshops and forums to discuss, document and debate the contribution of parliamentary committees to law-making in Australia.

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

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

Enhance the deliberative quality of the inquiry process by:	Formalising and actively building upon existing databases of potential submission-makers and processes for selecting witnesses for public inquiries to guard against unconscious bias or preference for 'usual suspects'.
	Investing in online materials and secretariat staff capacity to support submission-makers and witnesses, particularly new witnesses, for example by providing regular workshops for regular and new submission-makers and witnesses and a modest hardship fund to support non-government witnesses travelling from regional or remote locations to attend public hearings in person.
	Embracing the use of online surveys, social media distribution of information and targeted polling on issues relevant to parliamentary committee work as a beneficial supplement to conventional written submission and public hearing processes. These techniques should be

	supported by qualitative research into their impact on decision-making by parliamentary committee members.
	Investing in reliable video communication technologies in capital cities and regional centres to facilitate remote access public hearings. This could be supported by the interim use of video conferencing facilities provided by 'host' organisations, such as local councils or public libraries.

These changes would enhance the parliamentary committee systems' capacity to engage in deliberative law-making with flow on benefits of the overall health of our democracy.

What is deliberative law-making?

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

The parliamentary experience of the marriage equality reforms suggests that the parliamentary committee system has the capacity to facilitate the occurrence of this type of law-making. There are 3 indications of this. First, the process supported deliberative decision-making by providing a central, independent collection point for a range of views, expert opinions and comparative data about the social and legal implications of reform in this area. It also provided a forum for parties to exchange views, present arguments and evidence in order to convince decision-makers of the merits of their claims.[91] Secondly, the early committee inquiry processes paved the way for the development of future legislative and policy solutions to the marriage equality issue by documenting and summarising tens of thousands of submissions in an accessible format for the parliament to reflect upon when considering reform in this area.[92] These committee inquiry processes also provided a practical forum for parliamentarians to evaluate the merits of the different positions presented with reference to supporting evidence, and reflect upon previously held views in light of new

[88] James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation,* Oxford University Press, 2009, p. 39.

[89] Ron Levy and Grahame Orr, *The Law of Deliberative Democracy*, Routledge, 2016, pp. 76–80.

[90] Ron Levy and Grahame Orr, *The Law of Deliberative Democracy*, Routledge, 2016, p. 80 and 197. While Orr and Levy's work focuses on what they call 'second order' issues in deliberative democracy, such as the role the judiciary and lawyers play in the design and operation of the electoral system, their analysis of how deliberative democratic values can improve the quality of public decision-making holds lessons for the work of parliamentary committees (see pp. 197–200).

[91] Ron Levy and Grahame Orr, *The Law of Deliberative Democracy*, Routledge, 2016, pp. 76–80. For an example of this type of exchange of views, see Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, p. 41.

[92] House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012,* June 2012, p. 49. However, the committee offered some minor textual amendments suggested by the evidence taken during the course of the inquiry, for example by recommending that the Bandt bill be amended to 'ensure equal access to marriage for all couples who have a mutual commitment to a shared life' (see p. 49).

information.[93] Thirdly, the deliberative features of committee decision-making allowed the parliamentary committee system to explore rights and policy issues beyond binary positions. The case studies suggest that when parliamentary committees listen to competing views and reflect on the rights and interests of a broad cross-section of the community, they can identify common ground and provide a safe space for key decision-makers to change their minds about a policy or law.

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

While the adoption of a binary approach to rights issues or contested social policy can also occur within any political environment, including within parliamentary committees, elected representatives generally play an important role in mediating the most extreme voices within the community, either through self-reflection on the interests of their electorate, or by commitment to policy positions or values ascribed by their respective political parties. Even when parliamentarians reflect the views of the popular or a powerful majority, they have political incentives to frame their views in inclusive or conciliatory terms in order not to isolate sections of their own electorate or their own political party who may disagree with their position.

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

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[93] This aligns with what Fishkin, Levy and Orr consider to be vital features of deliberative decision making. Ron Levy and Grahame Orr, *The Law of Deliberative Democracy*, Routledge, 2016, p. 4 and pp. 22–23; James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, 2009, p. 39.

[94] Paul Kidrea, 'Constitutional and Regulatory Dimensions of Plebiscites in Australia', 27 *Public Law Review* 290, pp. 292–293.

[95] As Kidrea explores, when handled with care, these types of direct democracy mechanisms can 'confer legitimacy' on a government's plans to 'overcome a longstanding parliamentary stalemate'. Paul Kidrea. 'Constitutional and Regulatory Dimensions of Plebiscites in Australia', *Public Law Review,* vol. 27, 2017, p. 290 and 292. See also Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation,* Oxford University Press, 2012.

[96] Lynn A Baker, 'Preferences, Priorities and Plebiscites', *13 Journal of Contemporary Legal Issues,* vol. 317, 2004, p. 318.

democracy mechanisms, particularly when applied to complex policy issues or minority rights.

Parliamentary public engagement and the International Parliamentary Engagement Network

The above findings and recommendations are reflected in the recent outcomes of a sustained international focus on improving the quality of parliamentary public engagement led by the International Parliamentary Engagement Network (IPEN)[97] which held an international workshop on this topic on 26 March 2021. The workshop commenced with an 'Australian hub' which included input from experts around the region.[98] The hub began with an exploration of the 'big picture' topics, including the question of why public engagement is important to modern parliamentary democracies, who should be responsible for doing the engagement work and how the needs of different 'publics' might be met. The hub also explored the different commitments and responsibilities of parliamentary staff when it comes to engaging with the public.

Officials from a range of Australian jurisdictions, including the Australian Senate and the Parliament of New South Wales, gave insights to the challenges faced by parliamentarians when developing engagement strategies and navigating relationships. The Australian hub ended with discussions about 'outside the box thinking' to help engage those 'publics' previously underrepresented or ignored in public engagement strategies, such as young people and First Nations people in Australia. The key findings from this discussion can be summarised as follows:

1. Improving parliamentary public engagement is not an option but a necessity for modern democracies like Australia. Australian parliamentarians should make this a key priority, particularly when it comes to our young people, our First Nations people and other vulnerable groups.
2. Deliberative theories and ideas should not be misunderstood as 'asking everyone all the time' but rather ensuring *quality* encounters, *time* for meaningful dialogues and exchanges and *openness to changing positions*. This is a challenge for some highly politicised environments like parliaments, but there are reasons for hope (for example, citizens assemblies, mini-publics, work of Millennium Kids). There is also need for deep national reflection on whose voices are missing in our parliamentary landscapes, particularly when it comes to First Nations peoples.
3. There is not one 'public' but many 'publics' and each public demands careful consideration when considering engagement strategies and methods. For example, First Nations peoples must have the opportunity not just to 'be heard' in *response* to

[97] IPEN (International Parliament Engagement Network) was created in 2020 to bring together academics, parliamentary officials and third sector representatives from all over the world, who work on public engagement and parliament. We currently have 219 members from over 30 countries. IPEN aims to share good practice, identify key challenges and ways to address these, promote the exchange of information between practitioners and academics and lead to the enhancement of practices.

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

parliamentary activity but to have an *active voice* in the way the Australian Parliament works, how it engages with First Nations peoples, how it exercises legal and political sovereignty over First Nations peoples.

4. Evaluating engagement strategies and looking for impact beyond the immediate 'success' or 'failure' of a particular technique or inquiry is critical to ensuring we accurately capture the resources required to do things better in the future, and to make the case for more investment in the right engagement activities.
5. Within parliamentary committees there is often a sense of rigid constraints on processes and procedure (for example, conventional ways to do things) and stepping outside of these constraints can attract criticisms and concerns for parliamentary staff about impartiality and independence. However, there is a pressing need to move beyond conventional modes of engagement to reach the public/s that have been ignored or excluded from these processes. Developing separate teams of experts and clear strategies and toolkits can support parliamentary staff to develop appropriate strategies in these areas.
6. 'Thinking outside the box' is part of the solution: parliament should go *out to the people* instead of the people having to come into parliament. Empowering different public/s to initiate their own forms of engagement – to set the agenda, define the terms of reference, identify the key players – may also help to overcome existing barriers to effective and diverse public engagement.

The Australian 'hub' of the workshop was followed by a European hub, introduced by Cristina Leston-Bandeira (University of Leeds) and Elise Uberoi (UK House of Commons), the co-founders of IPEN. The Europe hub was supported by live scribing from Laura Evans of Nifty Fox Creative, who produced visual summaries of each of the 3 sessions in the hub, culminating in a graphic-illustrated international 'Toolkit' for parliamentary public engagement, summarised by the image below.

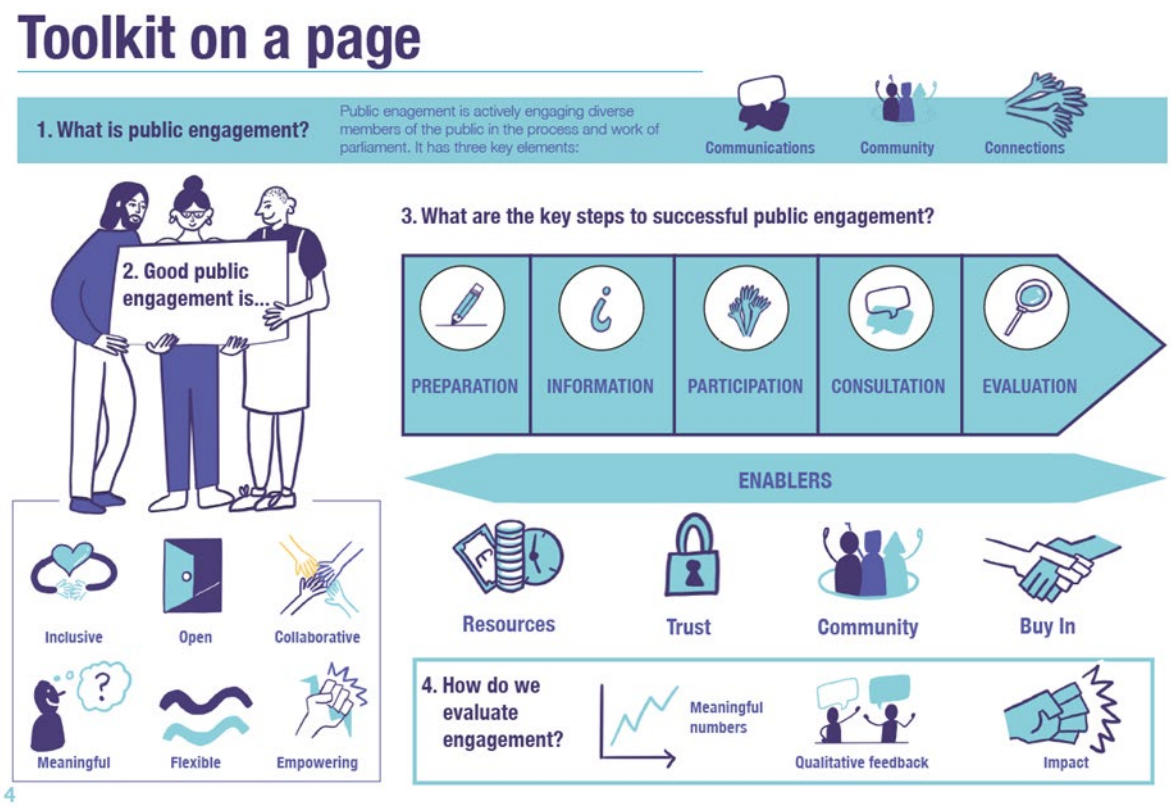

Image: Laura Evans, Nifty Fox Creative, April 2021

It is hoped that this international conversation on the value, role and methods of parliamentary public engagement will continue to inform and inspire practitioners within Australia and support research collaborations across jurisdictions to improve the relationship between parliaments and the publics they represent. As this paper shows, parliamentary committees do – and will continue – to play a central role in this most fundamental of democratic relationships.

Conclusion

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

The case studies explored in my research demonstrate the evaluation framework in action and uncover the contribution the parliamentary committee system has made to the content and process of counter-terrorism law-making, and to the marriage equality reforms. The case studies reveal that it was parliamentary committees working together as a system that played

an important role in securing the political commitment and identifying the legal options needed to advance the marriage equality reforms and made a significant contribution to improving the rights compliance of Australia's counter-terrorism regime. The case studies also suggest that that parliamentary committees may hold many advantages over other mechanisms for resolving contested issues of social policy and minority rights. This is because parliamentary committees have the characteristics of constraint that are needed to enable deliberative decision-making and a nuanced consideration of competing rights and interests to take place. Parliamentary committees can also temper and moderate the findings of direct democracy mechanisms such as postal surveys and plebiscites by utilising the information gained from such exercises to test, challenge or question other evidence and considerations as part of a broader deliberative process. They also provide a 'safe space' for parliamentarians to adjust or even shift their public position on a bill or amendment.

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

The Senate's new role in protecting our democracy

Ben Oquist and Bill Browne*

The Senate – with its unique powers and proportional voting system – could be key to restoring the electorate's apparently diminishing faith in our democracy. In the face of reported long-term loss of trust in government and fears of an increasing appetite for secrecy and executive power, the Senate remains the best hope for a saviour of our democracy.

Summary

At first blush, Australians are confused over even basic questions about the Senate. The Australia Institute research reveals they see distinctions between the Senate and the House of Representatives that are not there, wrongly answering that ministers must come from the House, that senators and members of parliament (MPs) are paid differently and that question time is not held in the Senate. Only 3 in 10 identified that the House is green and the Senate red.

The public's shaky understanding of the Senate is in spite of its importance to democracy. Unlike some upper houses in other Westminster-style democracies, the Australian Senate is active, powerful and representative of the public.

As well as a legislature in its own right, the Senate is a house of review—of bills, regulations, government administration and policy. It also exercises accountability functions, like ordering the production of documents by the government and conducting the estimates process where ministers and senior public servants are questioned.

The founders wrote into the Australian Constitution a Senate, not a states' house, with almost co-equal powers to the lower house. Unlike conservative upper houses in other jurisdictions, the Senate has always been elected, and with the same franchise as the House of Representatives. Since proportional representation in 1949, the Senate has been more willing to exercise the powers bestowed upon it by the Constitution.

Proportional representation makes the Senate a diverse and representative body. The first 2 Indigenous Australians elected to the Australian Parliament – Neville Bonner and Aden Ridgeway – were senators. Senator Bonner was appointed in 1971 and won election in his own right in 1972, 38 years before an Indigenous Australian – former minister Ken Wyatt – would be elected to the House of Representatives.

* This paper was presented as part of the Senate Lecture Series on 25 February 2022.

In the Australian Parliament, the first Indian-Australian, the Asian-Australian and the youngest woman were all senators.

Senator Bob Brown was the first openly gay man elected to the Australian Parliament, and the first openly gay party leader, and Senator Penny Wong was the first openly gay woman and the first Asian-Australian woman elected to the Australian Parliament and the first openly gay member of cabinet. The election of Senator Fatima Payman in 2022 has contributed another milestone, the first woman to wear Muslim headwear.

While women were simultaneously elected to the Senate and the House of Representatives in 1943, the first female party leader, the first woman to administer a federal department and the first woman in cabinet with portfolio responsibilities were all senators. To this day, the Senate much better reflects Australia's gender balance than the House does. As of July 2022, women held 57% of Senate seats, but only 38% of seats in the House of Representatives.

The Senate is also more prepared to stand up to the executive arm of government than the House of Representatives. The most visible example is the crossbench, which has held the balance of power for most of the period since 1955. But party lines are also more fluid in the Senate. As a senator, Barnaby Joyce crossed the floor 28 times. Liberal senators Reg Wright and Ian Wood have him beat, having crossed the floor 280 times between them.

The Senate also serves as an important 'ideas bank', developing and advocating policies that will, in time, be taken up by governments. The legislation for same-sex marriage began in the Senate, as has much progressive climate legislation. The Hawke Government saved the Franklin River from being dammed, but only after the Democrats introduced and passed legislation in the Senate. Hawke would later adopt the legislation as his own. Looking further back, Australia owes its compulsory voting to a private senators' bill in 1924.

With trust in government declining, the Senate is more important than ever. However, it needs to find its feet to fight back against efforts to stymie its powers. Answers to the legitimate questions of senators in estimates have become more evasive and derisory. Recent governments' interpretations of public interest immunity bare little resemblance to the Senate's. Orders for the production of documents were disregarded. Bills originating in the Senate were ignored in the House of Representatives, even though they would have passed if brought on for debate.

The Senate has the tools it needs to remedy the situation. Foremost among them is one that is fundamental to its status as a co-equal legislature – the Senate can block the government's legislative agenda until the government accounts for itself.

The Senate has used this power with success. For example, when the government wanted to implement an ethanol subsidy scheme in 2003, the Senate did not pass the relevant bills until the government provided documents relevant to the scheme. However, it is rare that executive intransigence is challenged. Every remedy at the Senate's disposal depends on its strength of will, and the Senate has often baulked.

One comfort for the Senate is the evidence, in the Australia Institute polling released for the lecture in February 2022 that preceded this paper, that the Australian people back the Senate. Six in 10 Australians agreed that when the Senate and the government disagree on

whether the government has to hand over information, the Senate should insist on its interpretation.[1]

Australians may be confused about the details of how the Senate operates, but they expect it to be a vigorous, powerful chamber that holds the government to account. Seeing the Senate hold the government to account would give the community renewed confidence in the body. Indeed a stronger Senate could help renew confidence in democracy itself.

Public understanding and opinions on the Senate

In July 2020, the Australia Institute polled a nationally representative sample of 1,600 Australians on their knowledge of and attitudes towards the Senate. The results show that understanding of the Senate is relatively poor, underscoring the importance of lifelong civics education on the role of the Senate in our democracy.[2]

Australians assumed that the 2 chambers were more distinct than they actually were.

When asked if government ministers must come from the House of Representatives, 39% of Australians incorrectly said that was true, with only 24% correctly saying that was false. Thirty-seven per cent chose 'don't know/not sure'.

Australians are also unclear on whether senators or members of the House of Representatives are paid more, or if they are paid equally. Forty-five per cent did not know, 23% said senators are paid more and 17% said members were. Only 16% gave the correct answer, that they are paid equally.

Only 25% of Australians correctly identified that question time is held in both chambers, with 34% thinking it was held in the House of Representatives only, 11% the Senate only and 1% saying question time is held in neither chamber.

There was also general confusion about how long the terms of senators for the states run. For this question respondents could not choose a 'don't know/not sure' option, but instead were told to give their best guess. Only 15% gave the correct answer, of 6 years. Five per cent selected 'none of the above'. Twenty-seven per cent chose 'until the next election', and 53% chose a year length that was wrong.

Only 30% correctly answered that the Senate is coloured red. Half of respondents knew that they did not know, and about 20% confidently chose a wrong answer.

Finally, the Australia Institute tested people's knowledge of the balance of power in the Senate by asking 'does the coalition government currently have a majority in the Senate?'

Respondents have been asked this question 3 times between 2018 and 2022.

In 2018, 50% correctly answered that it does not, which fell to 36% in 2020 and to 34% when asked again in January 2022. The shrinking size of the Senate crossbench might contribute to confusion here.

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1 The Australia Institute, *Polling: majority want greater Senate scrutiny of secret contracts*, 5 March 2022.

2 For full details and results, see Bill Browne and Ben Oquist, *Representative, still: the role of the Senate in our democracy*, 9 March 2021.

Overall, the results paint a concerning picture of the limits of the public's knowledge of the Senate. The Australia Institute heard from many people that their political education was limited to primary and high school. Civics education targeted at adults is clearly needed, not just as a refresher but also because it is when someone gets the right to vote that information on how our democracy works is most salient.

There were 2 silver linings in the polling research.

The first is that despite the confusion about how long senators serve, there is little sense that the Senate's electoral system is unfair. In 2020, the Australia Institute asked respondents which system they thought was fairer – the one used elect to the House of Representatives or the one used to elect the Senate. The most popular response was that the systems are equally fair, selected by 37%. A further 35% chose 'don't know', leaving 19% who thought the House system was fairer and 10% who thought the Senate system was fairer.

In January 2022, the Australia Institute conducted a new poll asking Australians a related but more provocative question – whether the House of Representatives should adopt proportional representation.[3]

One in 3 (34%) preferred the proposition that in the House of Representatives a party should win seats proportional to the overall number of votes that it receives. More Australians (44%) prefer the status quo – that a party should win a seat for each electorate where it receives a majority of the vote.

In the absence of a concerted push for proportional representation in the lower house, these numbers are striking. On the face of it, one in 3 Australians prefer proportional representation to the status quo. Of course, how that support would translate to enduring policy reform remains to be seen.

The second silver lining is that while Australians are confused about the Senate, they recognise its power and importance. The Australia Institute presented Australians with 8 powers that the Senate may or may not have, and asked them whether each was a power that the Senate actually had.[4]

A majority (56% to 59%) correctly identified that the Senate can pass, reject or delay legislation from the lower house, whether it is a private members' bill or a government bill. More answered correctly than incorrectly that the Senate can propose new legislation and set up its own inquiries.

Where Australians went astray was with 3 powers that the Senate does not have – to confirm or reject treaties, to confirm or reject government appointments and to introduce tax and spending legislation. More Australians thought the Senate had these powers, than that it did not have these powers.

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[3] The Australia Institute, *Polling: majority want greater Senate scrutiny of secret contracts*, 5 March 2022.

[4] Bill Browne and Ben Oquist, *Representative, still: the role of the Senate in our democracy*, 9 March 2021.

Importance of the Senate

Australians' confusion about the Senate would be less concerning if the Senate were not an important part of democracy. But the Senate is important, in 2 key ways – it is a co-equal legislature, with substantial if too-rarely used powers, and its election via proportional representation means it represents people that the House of Representatives fails to represent.

Power

The Senate's powers have remained mostly unchanged since federation and the Australian Constitution.

Unlike many upper houses, the Senate has almost as extensive legislative powers as the House of Representatives. It is a good thing too, since the Senate is close to being 'effectively the sole legislature' in the words of David Hamer.[5]

References to 'reserve powers' usually mean those of the Governor-General. But the House of Representatives and the Senate have unwritten powers as well, thanks to section 49 of the Constitution. It provides:

> *The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.*[6]

It is from these reserve powers that the 2 chambers can trace parliamentary privilege, orders for the production of documents and the tremendous, though rarely used, power to fine and imprison those in contempt of parliament. What would it take for the Senate to use these powers more often, or more penetratingly?

And while government is formed on the floor of the House of Representatives, the Senate – through its power to block supply – proved in 1974 and 1975 that it has a kind of veto over the government, the power to force a premature election.[7] The fallout from the Dismissal demonstrates that this power should rarely, if ever, be exercised, and it is unlikely to be used again. However, this ultimate sanction protects and preserves the Senate's status and power.

That the Senate has this robust role in our Commonwealth was the intention of the founders, who at the time of drafting had the United Kingdom (UK) House of Lords, the United States (US) Senate and the Canadian Senate to draw on for their models. Alfred Deakin, a future prime minister, called the 2 chambers the irresistible force and the immovable object.[8]

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5 David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, p. 301.

6 *Australian Constitution* s 49.

7 David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, p. 368.

8 Stanley Bach, *Platypus and parliament: the Australian Senate in theory and practice*, Department of the Senate, Canberra, 2003, p. i.

Nor was the Senate ever intended to limit its scrutiny to state issues. The name 'states' house' was considered in the Constitutional Conventions but the more general Senate preferred,[9] and the founders would have known from the US that senators have never limited themselves to protecting states' rights.

The case for upper houses

That upper houses have a continued, important role to play in Australian politics is demonstrated by the renewed calls for upper houses to be introduced in parliaments that do not have them.

There are 3 unicameral legislatures in Australia – the parliaments of the Australian Capital Territory (ACT), Northern Territory (NT) and Queensland. The territories have never had upper houses, on the grounds that their populations are too small to justify the expense of a second chamber.

The Queensland Legislative Council operated between 1860 and 1922, until it was abolished by a vote of parliament. It did not cover itself in glory, with political scientist Justin Harding writing 'Queensland's Council invited destruction through sheer bloody-mindedness and brinksmanship'.[10] The Legislative Council was formed of members appointed for life by the Governor on the advice of the governments of the day, which allowed for its abolition after the Theodore Labor Government advised the Governor to appoint new members who had pledged to vote for its abolition.[11]

Queensland's lack of a second chamber has been identified as a recurring problem for good government. Independents, the Greens, Family First and One Nation have called for the upper house to be restored in one form or another (independent Peter Wellington arguing for it to include mayors, Greens senator Larissa Waters saying it should be elected proportionally).[12] In 2014, the community action group Lock the Gate made restoring Queensland's upper house a key plank of their Queensland People's Bill.[13]

The *Canberra Times* argued that an upper house may have checked the power of the Bjelke-Petersen Government and moderated the Newman Government.[14] A 2021 petition calling for a referendum on re-establishing the Legislative Council was rejected by Premier Annastacia Palaszczuk.[15]

In 2020, the Institute of Public Affairs (IPA) published a report that argued for a reinstated upper house for Queensland on the grounds 'it will lead to more accountability, better

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[9] See, for example, Official Record of the Debates of the Australasian Federal Convention (Andrew Inglis Clark), 11 March 1891, Acting Government Printer, 1891.

[10] Justin Harding, 'Ideology or expediency? The abolition of the Queensland Legislative Council 1915-22', *Labour History*, no. 79, November 2000, pp. 162–178.

[11] Queensland Parliament, *Abolition of the Legislative Council*, March 2022 (accessed 19 May 2023).

[12] Apn Newsdesk, 'Campbell Newman dismisses Wellington's call for upper house', *The Courier Mail*, 25 November 2013; Cameron Atfield, 'Minor parties unite in calls for Queensland upper house', *Brisbane Times*, 13 December 2015; Amy Remeikis, 'Queensland needs an upper house: independent MPs', *Brisbane Times*, 23 November 2013.

[13] 'CSG group banned from Qld parliament', *SBS News*, 8 October 2014.

[14] 'Queensland election 2015: northern politics prove the value of upper houses', *The Canberra Times*, 23 April 2018.

[15] Melanie Whiting, 'Qld Premier Annastacia Palaszczuk rejects call for referendum on Qld upper house', *Daily Mercury*, 13 June 2021.

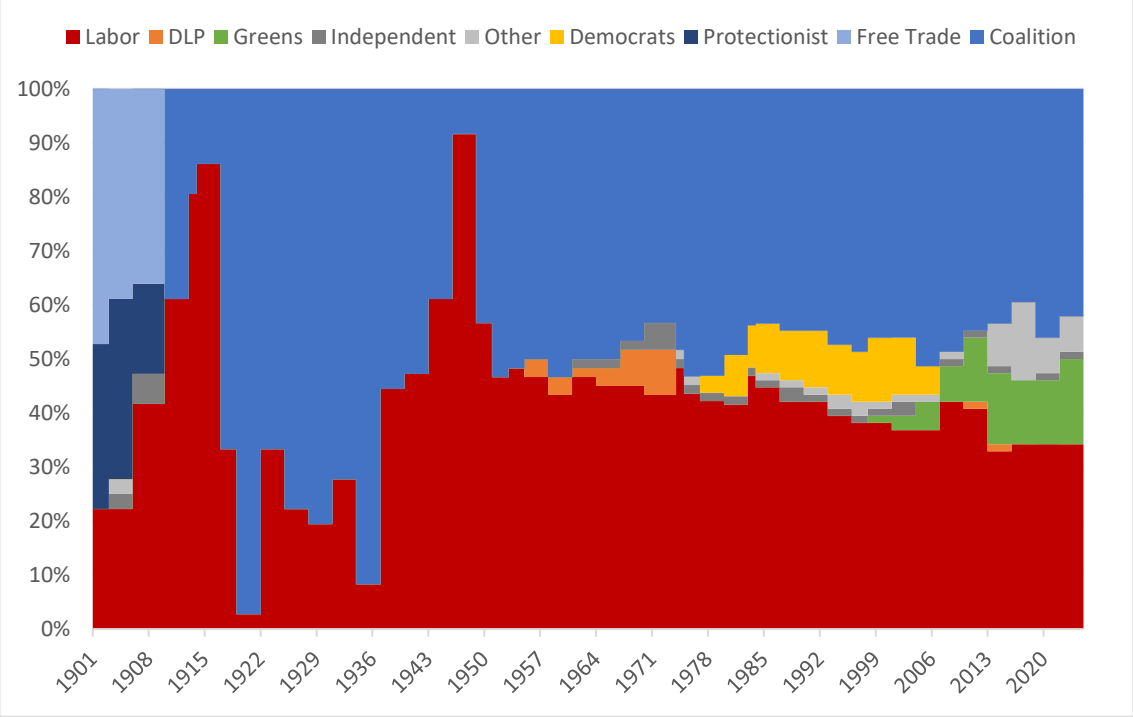
democratic representation, and a greater say for regional Queenslanders'. The IPA identifies 3 potential models, 2 of which would provide proportional representation.[16]

The absence of an upper house in the ACT has been used as an argument for limiting its legislative discretion. Then Liberal Senator Zed Seselja argued that the 'unchecked power' of the ACT Legislative Assembly in the absence of an upper house meant it could not be trusted with the power to legislate for voluntary assisted dying.[17] Queensland MP Terry Young made a similar argument when debating the Restoring Territory Rights Bill 2022, saying 'I just don't believe the territories have the levers and the systems; they're not set up. In other words, they don't have a Senate to debate this properly and handle issues like this'.[18] Then ACT Deputy Liberal Leader Giulia Jones raised the idea of an upper house for the ACT at an Australia Institute event in 2021.[19]

Proportionality

Though the Senate's powers are pretty much the same as they were in 1901, its use of those powers has waxed and waned over the decades. As shown in Figure 1, the winner-takes-all electoral systems in the Senate before proportional representation led to dramatic swings, with the government or the opposition in control of the Senate in most instances.[20]

Figure 1: Senators by party, 1901 to 2022



[16] Morgan Begg and Daniel Wild, *New research proposes models for a Queensland upper house*, 23 October 2020.

[17] Lucy Bladen and Dan Jervis-Bardy, 'ACT would pass "most extreme" euthanasia laws if given chance: Zed Seselja', *The Canberra Times*, 21 July 2021.

[18] Mr Terry Young MP, *House of Representatives Hansard*, 1 August 2022, p. 312.

[19] The Australia Institute, 'The battle for Territory rights', YouTube, 14 August 2021, sec. 54:30.

[20] John Uhr, 'Why we chose proportional representation', *Papers on Parliament*, No. 34, Department of the Senate, December 1999, pp. 13–56.

Knowing that a loss in the upcoming election was likely, the Chifley Government legislated proportional representation ahead of the 1949 election. While preserving its numbers in the Senate was a motivation for the Chifley Government, this manoeuvre also fulfilled the promise of the Constitutional Conventions and the expectations of the founders, and was a reform that both Labor and non-Labor politicians had argued for over the decades.[21]

Within 6 years of proportional representation a consistent minor party presence emerged in the Senate thanks to the Democratic Labor Party, followed by the Australian Democrats and now the Australian Greens.

The Senate has as much of a claim on the title 'people's house' as the House of Representatives

People still persist with the claim that the House of Representatives is the 'people's house' and the Senate the 'states' house. Until the Senate is elected on the principle of one vote, one value, the House of Representatives will have a powerful claim to that title.

However, the mechanism of proportional representation means that in many ways the Senate is more representative of the popular will than the House of Representatives. John Howard observed as much in 1987, when there were Democrats on the crossbench amenable to opposition proposals. He said:

> *… the Australian Senate [is] one of the most democratically elected chambers in the world – a body which at present more faithfully represents the popular will of the total Australian people at the last election than does the House of Representatives; that is a fact in terms of the proportional representation system …*[22]

It remains true today, with then Senate President Scott Ryan observing in 2019 that:

> *… the current Senate is actually very reflective of the national vote despite the differences in state populations.*[23]

This popular representation gives the Senate a vigour and authority lacking from appointed or – even worse – hereditary upper houses. In 1873, well ahead of the Constitutional Conventions, Walter Bagehot observed of the UK House of Lords that '[b]eing only a section of the nation, it is afraid of the nation'.[24]

While mathematically it is possible for senators from the smaller states to control the legislature, in practice it is impossible. Senators are tied to their parties and to broader policy interests, not their states.

The moral authority that comes from proportional representation is unlikely to abate in this term of government. In the House of Representatives, almost as many Australians cast a

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[21] John Uhr, 'Why we chose proportional representation', *Papers on Parliament*, No. 34, Department of the Senate, December 1999, pp. 13–56.

[22] The Hon John Howard MP, *House of Representatives Hansard*, 8 October 1987, p. 1023.

[23] The Hon Senator Scott Ryan, 'The Senate in an age of disruption' (Speech, Institute for Government, London, 4 October 2019).

[24] Walter Bagehot, *The English Constitution*, Fontana Press, London, 1993, p. 146.

primary vote for a minor party or independent (31.7%) as for a Labor candidate (32.6%).[25] Despite this, Labor has a majority in the House of Representatives. As described below, the Senate better reflects this split with minor parties and an independent in the balance of power – giving it a real claim to being more representative than the House of Representatives.

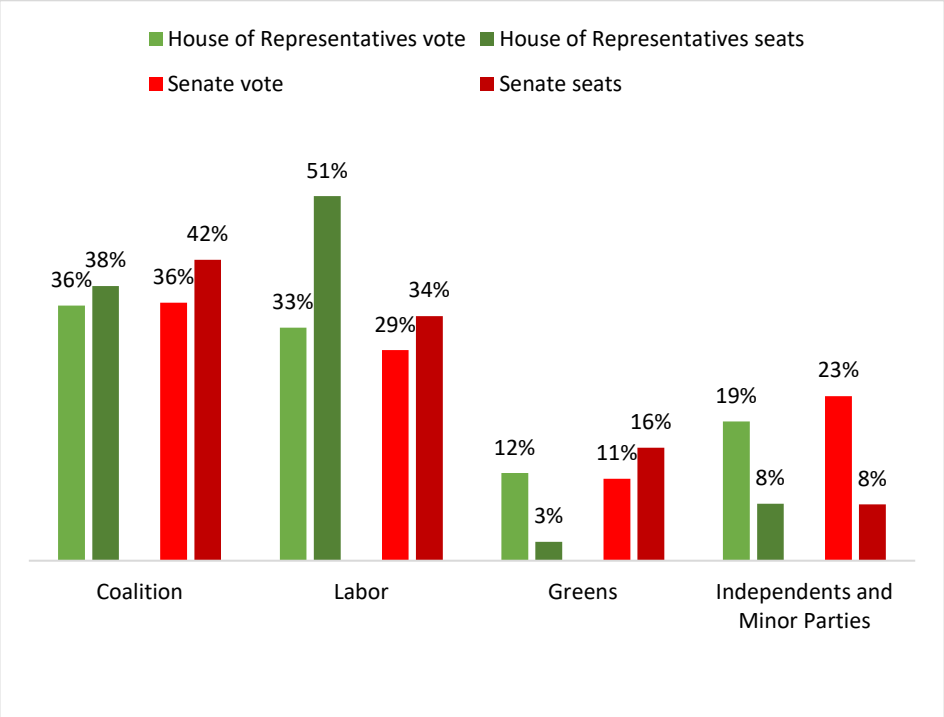
Measuring proportionality

The 'winner-takes-all' approach used in House of Representatives elections means that larger parties tend to win a greater share of seats than their share of the vote. Figure 2 compares the primary vote share that parties received in the House of Representatives (2022 election) and the Senate (2019 and 2022 elections) with the number of seats that they won.

In the most recent House of Representatives election, the Coalition and Labor together received 68% of the primary vote but 89% of the seats. The Greens received 12% of the primary vote but 3% of the seats, and independents and minor parties received 19% of the primary vote and 8% of the seats.

By contrast, the Coalition and Labor received 68% of the vote across the last 2 Senate elections, but hold 76% of the seats in the Senate. The Greens received 11% of the vote but hold 16% of the seats, and other minor parties and independents received 23% of the vote but hold 8% of the seats. These results are not as proportional as they could be – for example if the Senate were larger – but are still more representative of minor parties (including the Greens) and independents than the House of Representatives is.

Figure 2: House of Representatives (2022 election) and Senate (2019 and 2022 elections) disproportionality



Source: Author's calculations

[25] Antony Green, 'Party totals', *ABC News*, 2022.

Another way of looking at proportionality is to identify typical Senate vote compositions, and what portion of the population gave their first preference vote to parties participating in that vote.

For example, at the start of the 47th Parliament, Labor and Greens senators and David Pocock together accounted for 39 votes, enough to pass legislation. These parties received 41% of the popular vote. The Coalition, One Nation, United Australia Party, Jacqui Lambie Network senators, and independent David Pocock, together accounted for 38 votes, enough to block legislation. Together, these parties received 44% of the vote over the 2019 and 2022 elections.

If it seems unreasonable that senators receiving 44% of the vote can block legislation, keep in mind that Labor MPs received 33% of the primary vote in the House of Representatives; from this they won a majority of the seats and formed government.

Table 1: Example Senate voting blocks

Vote composition	Votes (2019 and 2022)	Seats	Vote share	Seat share
Labor + Greens + Pocock	12,182,147	39	41%	51%
Labor + Greens + JLN	12,184,327	40	41%	53%
Coalition + ON + UAP + JLN + Pocock	13,117,828	38	44%	50%
Labor + Coalition	19,426,081	58	66%	76%

Note: ON stands for Pauline Hanson's One Nation, UAP for United Australia Party and JLN for Jacqui Lambie Network. This table is based on the approach used by the University of New South Wales Council for Civil Liberties in a 2003 submission.[26]

Academic Michael Gallagher developed the Gallagher Index, or 'least squares measure', as a measure of the disproportionality of an election.[27] The advantage of the Gallagher Index is that it can be used to compare election proportionality over time or between countries. However, it gives different results depending on how parties are grouped together, meaning that decisions must be made about whether to treat different coalition parties as one party or several, and whether to group the Greens with minor parties and independents.

Applying the Gallagher Index to the 2022 House of Representatives and 2019 and 2022 Senate results shows that the Senate is at least as proportional as the House of Representatives. Results vary depending on how parties are counted (for example, whether the different coalition parties are counted together or separately), but overall the Senate has a Gallagher Index of 11 to15 (with 0 being a perfect score) and the House of Representatives has a Gallagher Index of 17 using either approach.[28]

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[26] University of New South Wales Council for Civil Liberties, 'Submission in response to the Prime Minister's discussion paper – resolving deadlocks: A discussion paper on Section 57 of the Australian Constitution', 31 December 2003, p. 12.

[27] Michael Gallagher, *Electoral systems*, 18 January 2023, (accessed 3 May 2023); Michael Gallagher, 'Proportionality, disproportionality and electoral systems', *Electoral Studies*, vol. 10, issue. 1, March 1999, pp. 33–51.

[28] For a detailed discussion of the limitations of the Gallagher Index, please see Bill Browne and Ben Oquist, *Representative, still: the role of the Senate in our democracy*, 9 March 2021.

Diversity

The Senate's proportionality means it is more representative of class, cultural and gender interests. Women were simultaneously elected to the House of Representatives and the Senate in 1943, but as of 1 July 2022 women make up 57% of the Senate but just 38% of the House of Representatives.[29]

And while the party system means that for the most part a major party senator's vote does not vary no matter what state they come from, independent and micro-party senators are often more explicitly representative of their state's interests – for example, Brian Harradine and Jacqui Lambie from Tasmania and Nick Xenophon and affiliates from South Australia.[30]

The Senate has been a source of diversity, even though there are half as many senators as there are members. An explanation for this might be given by a profile of Penny Wong in the *Sydney Morning Herald*, which said:

> *When [Penny] Wong won preselection for the Senate before the 2001 election … the joke went around that she would never have been able to contest a lower house seat, being not only a woman, but Asian and gay to boot.*[31]

Hopefully, if that were ever the case, it is no longer true – and indeed there have been people of diverse backgrounds elected to the House of Representatives. But it is true that proportionality means that a significant minority that is distributed across the country can be appealed to in the Senate in a way that wouldn't necessarily work in the House.

Diversity milestones set in the Senate include the:

- first Chinese speaker and child of a Chinese person elected to the Australian Parliament: Thomas Bakhap – elected in 1913 for the Liberal Party. Bakhap was the adopted child of a Chinese immigrant and an advocate for the Chinese community in the face of the White Australia Policy
- first 2 Indigenous Australians elected to the Australian Parliament: Neville Bonner and Aden Ridgeway
- youngest woman elected to the Australian Parliament: Sarah Hanson-Young (although the youngest person was Wyatt Roy, in the House of Representatives)
- first Asian-Australians elected to the Australian Parliament: Bill O'Chee and Tsebin Tchen
- first openly gay man elected to the Australian Parliament, and the first openly gay party leader: Bob Brown
- first openly gay woman and the first Asian-Australian woman elected to the Australian Parliament and the first openly gay member of cabinet: Penny Wong
- first member of the Australian Parliament with a partner who is transgender: Louise Pratt
- first female party leader: Janine Haines
- first woman to administer a federal department: Annabelle Rankin

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[29] Lisa Visentin and Katina Curtis, 'Record number of women in the 47th Parliament, as female voters shun Liberals', *The Sydney Morning Herald*, 31 May 2022.

[30] The observation comes from Sharman, although his paper predates Lambie and Xenophon's elections. See Campbell Sharman, 'The representation of small parties and independents', *Papers on Parliament*, No. 34, Department of the Senate, December 1999.

[31] 'Freakish powers of a formidable operator', *The Sydney Morning Herald*, 8 December 2007.

- first woman in cabinet with portfolio responsibilities: Margaret Guilfoyle
- first person of black African descent: Lucy Gichuhi
- first person of Indian heritage: Lisa Singh
- first woman to wear Muslim headwear: Fatima Payman.[32]

The Senate's use of its powers

Orders for the production of documents and estimates

A powerful demonstration of the reinvigorated Senate is in orders for the production of documents.

This broad power comes from the ancient privileges of the House of Commons, and it extends to the creation of documents that do not yet exist, not just the publishing of documents already created. In this way, as well as scope and timeliness, it distinguishes itself from freedom of information (FOI) requests.

Orders for the production of documents are also a quantitative measure of the Senate's activity as a house of accountability. The first Senate was a prolific user of this power, but after the non-Labor parties combined into the Liberal Party in 1909, its use dropped off until the 1970s. It wasn't until the 1990s that the rate of orders for the production of documents returned to that of 1901 to1906.[33] By contrast, the number of bills considered each year had increased 10 times over during the same period.[34]

A 1999 report by the Department of the Senate provides a window on some of the documents that the first Senate, 1901 to 1906, was particularly interested in:

- statistics on the death rates of white people compared to Pacific Island workers in Queensland
- the Governor-General's expenses
- any papers relating to the statement from the General Officer (that is, Chief of Army) that Japan and China were 'casting longing eyes upon the northern portions of Australia'.[35]

Times may change, but the Governor-General's expenses remain of interest. In Senate estimates a few years ago they were going over a tender for the Government House kitchens. Labor Senator for Queensland Joe Ludwig admitted he did not know what a

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[32] Australian Electoral Commission, Electoral milestones for Indigenous Australians, 12 November 2020; Scott Brenton, 'Minority government: is the House of Representatives finally catching up with the Senate?', *Papers on Parliament*, No. 55, Department of the Senate, February 2011, p. 121; Hamish Hastie, 'The story of Australia's first hijab-wearing Muslim senator – and why she's looking forward to meeting Pauline Hanson', *Western Australia Today*, 23 June 2022; Patricia Karvelas, 'Labor's new gay senator Louise Pratt calls for same-sex marriage', *The Australian*, 29 August 2008; Department of the Senate, Senate Brief No. 3: Women in the Senate, 2023; Marian Sawer, 'Overview: institutional design and the role of the Senate', *Papers on Parliament*, No. 34, Department of the Senate, December 1999.

[33] Australian Senate, *Orders for the production of documents*, May 2023; Department of the Senate, 'Business of the Senate 1901–1906', 1999.

[34] Department of the Senate, *'Business of the Senate 1901–1906'*, 1999, p. v.

[35] Department of the Senate, *'Business of the Senate 1901–1906'*,1999, pp. 18–19, 40–41, 62–63, 79–80, 103–104, 125–127.

'Thermomix' was. Committee Chair Cory Bernardi asked him where he had been. Ludwig replied, 'Queensland'.[36]

There are now almost 20 orders for documents with continuing effect, among them:

- the Harradine motion requiring departments and agencies table a list of files, making FOI requests easier
- the Murray motion requiring departments and agencies to disclose high-value contracts they have entered into
- the motion requiring Australia's National Greenhouse Gas Inventory to be published quarterly, in a timely manner
- monthly reporting of vaccination statistics.[37]

There has been innovation in the form of orders for the production of documents, which may in part be a response to growing government recalcitrance in complying with orders. Since 2000, Senate orders have sometimes included a requirement that if a minister fails to produce documents they must front the chamber and explain why they did not meet the deadline.[38]

This requirement has been increasingly commonplace since 2017, and in the *Democracy Agenda for the 47th Parliament* (*Democracy Agenda*) the Australia Institute recommended consistently adding this requirement to orders for the production of documents.[39]

In 2020, the Senate contemplated, but ultimately decided against, a further penalty for non-compliance – for the Leader of the Government in the Senate to be barred from representing the Prime Minister during question time and in committees, and be prevented from sitting at the central table in the chamber.[40] The *Democracy Agenda* also recommended that if the government continues to refuse reasonable orders for the production of documents, this remedy should be revisited.[41]

The Australia Institute is proposing a new standing order for the production of documents, following our research into the growing use of private consultants to do government work. The proposed order would, firstly, require tenders and contracts with consultancies to include information about the purpose and scope of the work and, secondly, require the government to table the final reports and written advice received from a consultancy. With such an order, the public would be able to see what research, advice and recommendations consultants are giving government, and check consultants' reports for themselves to see if they make a convincing case for any actions the government ends up taking.[42]

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[36] Australian Associated Press, '"What is a Thermomix?" MP Joe Ludwig blends oversight with food faux pas', *The Guardian*, 24 February 2015.

[37] Australian Senate, *Orders for the production of documents*, May 2023.

[38] Harry Evans, *Odgers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, p. 588.

[39] Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022, p. 15.

[40] *Journals of the Senate*, No. 41, 12 February 2020, p. 1344.

[41] Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022, p. 15.

[42] Bill Browne, *Talk isn't cheap – making consultants' reports publicly available via Senate order*, 4 October 2021.

Senate-driven reform

The Senate has also been the parliament's 'ideas bank'; introducing good ideas, sensible policies and effective reforms years or decades before they are picked up by the government and the House of Representatives.

To give just a few examples:

- Same-sex marriage legislation and progressive climate legislation had their origins in the Senate.[43]
- The legislation introduced by the Australian Democrats to stop the Franklin River from being dammed – which passed the Senate. The incoming Hawke Government would end up adopting the legislation as its own.[44]
- An end to mandatory jail sentences for petty theft in the Northern Territory.[45]

Examples of the Senate's forward thinking can be found earlier than this.

The original Australian electoral legislation was initiated in the Senate—most notably giving women the right not only to vote but also to stand for election. The Senate's bill extended suffrage to Aboriginal and Torres Strait Islander Australians – but the House of Representatives struck that part out. It was not until 1962 that that grievous wrong was righted.[46]

Likewise, Australia owes compulsory voting to a private senators' bill from a Nationalist senator, Herbert Payne, in 1924. Payne also advocated, with less or delayed success, for proportional representation in the Senate, printing party name under the candidate's name on ballots and the use of circular ballots to mitigate for the donkey vote.[47]

Of course, in politics the credit goes to those who get reforms done, regardless of who started them. But Australians can still treasure the Senate for its role as an ideas bank, proposing reforms that are treated as heresy until they become cornerstones of our system.

Further Senate reforms

The Australia Institute's *Democracy Agenda* proposes other reforms that could strengthen the Senate:

- A Senate Committee for the Scrutiny of Grants, and provisions allowing either house of parliament to disallow a grant.
- Robson Rotation, as the ACT and Tasmania use in their Hare–Clarke elections. This would disrupt the order of candidates as dictated by parties thereby encouraging voters to choose their preferred candidates within parties as well as their preferred

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[43] Mary Anne Neilsen, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, *Bills Digest No. 54*, 2017–2018, Parliamentary Library, Canberra, 24 November 2017.

[44] Lyn Allison, 'Democrats' role in saving the wilderness has been sold down the river', *The Sydney Morning Herald*, 31 December 2002.

[45] Australian Law Reform Commission, *Incarceration rates of Aboriginal and Torres Strait Islander Peoples: discussion paper 84*, July 2017, pp. 76–77.

[46] John Uhr, 'The power of one', *Papers on Parliament*, No. 41, Department of the Senate, June 2004.

[47] Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting*, Text Publishing, Melbourne, 2019; Michael Roe, Payne, Herbert James Mockford (1866–1944), *The Biographical Dictionary of the Australian Senate* (Online Edition), Department of the Senate, Canberra, 2004.

party. Senators could be emboldened to defy the party line once the position the party gives them on the ballot paper ceases to be definitive.[48]

- Making it standard practice to use the fairer 'recount' method for assigning Senate seats after a double dissolution election over the 'order of election' approach. As observed by Malcolm Mackerras, the defeat of Kristina Keneally in Fowler can ultimately be traced to the Coalition–Labor agreement in 2016 which assigned 3 of 4 Labor senators 6-year terms, which meant one would be placed in an unwinnable position in 2 elections time.[49]
- The House of Representatives to commit to debating and voting on private members' bills.

The *Democracy Agenda* identifies areas the House of Representatives could learn from the Senate – how the upper house handles the suspension of standing orders, pairing arrangements, the 'cut-off' period for votes on legislation, and supplementary questions in question time.[50]

The *Democracy Agenda* also argues for fixed 3-year terms, which would make blocking supply a 'much less attractive option', in the analysis of David Hamer of the fixed-term provisions in Victoria and South Australia:

> *It must be assumed that any future government would adopt the Whitlam 'toughing it out' tactics, but it could not be assumed that a governor would act like Sir John Kerr. As the state drifted towards administrative chaos, the opposition would have to bear the political odium, which would be compounded if the only way there could be an election was for the government to pass a vote of no confidence in itself.*[51]

The Senate is its own worst enemy

Popular authority, thanks to being democratically elected through proportional representation, gives the Senate the confidence to act even in defiance of the government. However, there are many times when the Senate's will falters, on matters of whether to censure ministers, question the government's claims of privilege, hold senior public servants in contempt for defying orders for the production of documents, or disrupt the government legislative agenda.

In a 2018 speech, then Senator Rex Patrick contrasted the Senate to the House of Commons. When a software company refused to hand over documents relating to Facebook at the request of a House of Commons parliamentary committee, the Serjeant at Arms was dispatched to bring the owner of the company before the UK Parliament, where it was

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[48] The rare exception to the rule that senators are elected in the order they appear on the party list is Lisa Singh, albeit at a double dissolution where the threshold for election is much lower. See Ben Raue, 'How Lisa Singh and Richard Colbeck used personal appeal against party rankings', *The Guardian*, 9 July 2016.

[49] Mackerras was writing before the election, but he describes the arrangement in 2016 that led to Keneally contesting Fowler. See Malcolm Mackerras, *Kristina Keneally's candidacy for Fowler represents broader issue in Australian elections*, 8 October 2021.

[50] Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022.

[51] David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, p. 109.

explained that he faced fines and imprisonment. When Thales was similarly in risk of being in contempt of the Senate, no such measures were deployed.[52]

Earlier this year, senior public servants were identified by Senator Katy Gallagher as having 'misled' a Senate committee.[53]

The Australia Institute has some reassuring evidence for the Senate. In preparation for the authors' February 2022 lecture to the Senate, the Australia Institute polled a representative sample of Australians on what they think of propositions about the Senate's power and independence.[54]

- Seven in 10 Australians (71%) agree that the Senate should use its powers to make reports written for the government by private consultants public. Only 12% disagree.
- Six in 10 Australians (63%) agree that when the Senate and the government disagree on whether the government has to hand over information, the Senate should insist on its interpretation, compared to 14% who disagree.
- Forty-six per cent of Australians agree that the Senate should refuse to hold a vote on bills that the House of Representatives passes if the House of Representatives is refusing to hold a vote on a bill that the Senate passed, while 27% disagree.

The final proposition has the most potential. Senate enthusiasts talk willingly about the chamber's power to fine and imprison those in contempt, but these measures would be polarising and fraught if actually exercised – although as reserve powers they remain important. The Senate's power to hold up government business, on the other hand, not only has strong precedent, but also is clearly proportionate.

The Senate used its legislative powers to impose procedural penalties on the government in 2003 to 2004, when the government wanted to implement an ethanol subsidy scheme. The Senate had ordered the production of documents related to the scheme – which the government had advised multiple times that it would do. The Senate refused to pass the bills until the documents were tabled. In a subsequent sitting, the government tabled some, though not all, of the documents – and the legislation passed.[55]

Odgers' Australian Senate Practice tells us that something similar happened in 2009, when the Senate ordered information about the National Broadband Network. The legislation only passed after the government produced a summary business plan.[56]

Similarly, the former member and Senator David Hamer proposed in *Can responsible government survive in Australia?*, finalised in 2001 and published posthumously in 2004, that responsible ministers should front Senate legislative committees, even if they were from the House of Representatives. If the minister did not comply, in Senator Hamer's words 'the

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[52] Senator Rex Patrick, *Senate Hansard*, 28 November 2018, pp. 8940–8941.

[53] Jackson Graham, 'Senator claims public servants 'misled' committee over contract's purpose', *The Mandarin*, 17 February 2022.

[54] The Australia Institute, Polling: majority want greater Senate scrutiny of secret contracts, 5 March 2022.

[55] Senator Lyn Allison, *Senate Hansard*, 1 April 2004, p. 22572; Harry Evans, *Odgers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, pp. 393–394; Senator Kerry O'Brien, *Senate Hansard*, 1 April 2004, pp. 22569–22570.

[56] Harry Evans, *Odgers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, p. 672.

answer of the Senate would be simple. The bill will not be proceeded with until the responsible minister has given evidence'.[57]

In the first months of the 47th Parliament, senators contemplated this 'simple answer' in regards to a different dispute – the decision by Prime Minister Anthony Albanese to cut crossbencher advisers from 4 per parliamentarian to one. Senators Jacqui Lambie and David Pocock warned that without staff to help senators go through legislation, they would struggle to pass the government's legislative agenda, and a One Nation spokesperson said:

> *If you're not adequately staffed that means this government expects legislation to be rammed through without proper consideration.*
>
> *If we don't have time [to properly consider bills], the default position that should be taken by every independent and minor party should be to reject government legislation.*[58]

As well as support for the Senate acting as an institution, there is public support for direct action by individual senators.

In 2021, Senator Rex Patrick named and criticised a senior public servant who made an FOI decision in defiance of the findings of the Administrative Appeals Tribunal.

Andrew Podger, a retired senior public servant and former Public Service Commissioner, has said that Senator Patrick's language went too far, but that the senator was justified in naming the public servant, the public servant's decision was almost certainly not justified, and the decision demonstrates the loss of expertise in and increased political pressure on the public service.[59]

The *Canberra Times'* weekly survey asked its readers whether they thought Senator Patrick's naming and shaming was fair and reasonable. As the municipal paper of a public service town, one might suspect their sympathies would be with the public servant. As it turns out, almost half of readers (47%) thought Senator Patrick was fair and reasonable. Only 36% thought he was not.[60]

Conclusion

The Australia Institute's polling finding Australians have a limited understanding of the Senate may not surprise, but it should make us concerned. It is a powerful argument for civics education, not just for school students, but in the form of lifelong education for adults as well. Australia's tradition of compulsory voting makes it even more important that every citizen knows what they are voting for, and why.

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[57] David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, pp. 298-302.

[58] Katina Curtis, 'Crossbench fury as government cuts staffers from four to one', *The Sydney Morning Herald*, 24 June 2022; James Massola, 'Furious crossbench senators threaten to vote against Labor legislation after staff cuts', *The Sydney Morning Herald*, 26 June 2022.

[59] Andrew Podger, 'PM&C is damaging the integrity and reputation of the public service', *John Menadue*, 22 December 2022.

[60] John-Paul Moloney, 'Editorial poll', *The Canberra Times*, 8 December 2021.

The Senate is a neglected, but vitally important accountability institution. Its constitutionally guaranteed co-equal legislative status is the source of much of its power, but it is the Senate's election by proportional representation that gives it legitimacy and authority. The Senate has been the source of many of parliamentary diversity milestones, not to mention the diverse movements, interests and constituencies that have been represented in the Senate thanks to its proportionality.

The Senate has been an ideas-bank, the birthplace of much legislation and policy that has – eventually – been taken up by the government.

Unfortunately, the Senate is often its own worst enemy – when it fails to use the powers it has been given to hold the government to account. The Australia Institute polling research shows Australians are more likely to back the Senate than to oppose it when the Senate faces off against the government. That should strengthen its will.

Research context

The Australia Institute is one of the country's most influential public policy think tanks, with an interest in democracy and accountability since it was founded in Canberra in 1994. In recent years, the Australia Institute collaborated with anti-corruption campaigner Tony Fitzgerald to put his 4 'Fitzgerald principles' to politicians in the 2015 Queensland election, made the case for truth in political advertising laws nationally and saw them legislated in the ACT in 2020, and founded the Democracy and Accountability Program in 2021 to research the solutions to Australia's democratic deficit and develop the political strategies to put them into practice.

The program's first major paper was *Representative, still,* a collaboration between Ben Oquist and Bill Browne.[61] The paper finds that the Senate is a unique, powerful legislative body, but Australians are confused about key details of its powers and operation. The paper was launched by Scott Ryan, then President of the Senate and Senator for Victoria and a champion of the role and power of that chamber, on the institute's webinar series.[62]

Based on the *Representative, still* paper, Oquist and Browne delivered the Senate occasional lecture 'The Senate's new role in protecting our democracy' in February 2022.[63]

[61] Bill Browne and Ben Oquist, *Representative, still: the role of the Senate in our democracy*, 9 March 2021.
[62] The Hon Scott Ryan and Ben Oquist, 'The Role of the Senate in Our Democracy', YouTube, 8 March 2021.
[63] Department of the Senate, Senate Lecture Series (accessed 13 June 2023).

Accountability for cross-jurisdictional bodies

Cheryl Saunders*

Introduction

When I was first invited to deliver a Senate lecture on accountability for cross-jurisdictional bodies I accepted readily. I have a long-standing interest in accountability for intergovernmental arrangements generally, in Australia and elsewhere.[1] Accountability for cross-jurisdictional bodies is, of course, only a subset of the wider subject of intergovernmental relations, but it is important in its own right and complex enough to deserve discrete attention. A renewed focus on these issues also is timely. The responses to the pandemic have given us new insights into the different contributions that different jurisdictions usefully bring to intergovernmental decision-making, which is a consideration that bears on accountability for cross-jurisdictional bodies.[2]

The lecture begins by briefly sketching the arrangements for accountability of intra-jurisdictional bodies. These represent the norm, notwithstanding the federal structure of government, which in Australia divides executive power thematically and assumes that each level of government administers its own legislation.[3] For present purposes, intra-jurisdictional bodies also offer a useful contrast to bodies with cross-jurisdictional elements. The focus in this part of the lecture is on the Commonwealth level of government and on political, rather than legal accountability, in particular to parliament. The principles and practices of political accountability are broadly similar in other Australian jurisdictions, however, all of which have parliamentary systems influenced by Westminster, and most of which are bicameral.[4]

The second part of the lecture canvasses the range of bodies that might be described as cross-jurisdictional for present purposes. They are grouped loosely into 3 categories—regulatory, advisory, and political. I use case studies to illustrate each, examining their constitutions, their functions, and the accountability arrangements presently in place. I do not claim that these categories are either exhaustive or watertight, so complex is the intergovernmental terrain, but they cover a sufficiently broad range of cross-jurisdictional structures to demonstrate the issues and options for accountability that arise.

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* This paper was presented as part of the Senate Lecture Series on 20 May 2022.

1 For a relatively recent comparative account of intergovernmental relations across 12 federations, including Australia, see Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems*, McGill-Queen's University Press, 2015.

2 Cheryl Saunders, 'Grappling with the Pandemic: Rich Insights into Intergovernmental Relations', in Nico Steytler (ed), *Comparative Federalism and Covid-19',* Routledge, London, 2021.

3 For the comparative significance of this arrangement, see Francisco Palermo and Karl Kossler, *Comparative Federalism: Constitutional Arrangements and Case Law,* Hart Publishing, 2017, p. 156.

4 Queensland, the Northern Territory, and the Australian Capital Territory are the exceptions.

The final part of the lecture builds on the second, by considering how the cross-jurisdictional character of any of these types of bodies affects, and should affect, the forms and objects of political accountability.

Accountability for intra-jurisdictional bodies

Accountability arrangements in Australia and elsewhere typically are designed to operate within single jurisdictions as, in effect, unitary systems of government. Arrangements for political accountability to parliament are no exception.

All bodies that exercise public power or spend public moneys are or should be accountable to the institution of parliament in some way. While the mechanisms for accountability are diverse, in Australia they revolve around the principles and practices of parliamentary responsible government. At their core, these are relatively straightforward. The executive government for the time being derives its legitimacy from the support of the parliament. The government is responsible to the parliament, collectively and individually. Responsibility includes accountability, at least in the sense of answerability, for the exercise of public power and the expenditure of public moneys. The ultimate, but by no means the only, sanction is loss of public office.

The actual picture inevitably is more nuanced in at least 3 ways that deserve mention. The first is that upper houses including, in the Commonwealth sphere, the Senate, affect the roles that parliaments play. Upper houses do not contribute to making (or, usually, unmaking) governments. Nevertheless, where they exist, they are an integral part of the system of responsible government, through which they contribute to the possibilities for accountability.[5] A by-product of the Australian penchant for bicameralism is that parliaments have a variety of mechanisms through which to pursue forms of accountability and, at least sometimes, the will to use them.[6] Such mechanisms reach well beyond the activities of the plenary in holding ministers to account, directly or indirectly or enacting substantive and financial legislation. They include the roles of committees in scrutinising public expenditure aided by the Auditor-General, examining estimates, reporting on delegated legislation, scrutinising bills, reviewing reports that are now required by law to be prepared annually, and overseeing integrity institutions.[7]

Second, and less positively, there has been some erosion of ministerial accountability. In part this appears to be attributable to a decline in voluntary compliance with standards, without which parliamentary government cannot operate as it should. It is facilitated, however, by a raft of other developments. These range from reliance on ministerial advisers rather than public service officers, to the contracting out of myriad public services, to increasing reliance

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5 *Egan v Willis* (1998) 195 CLR 424.

6 The result has been characterised as a new system of 'semi-parliamentary government'; an interesting insight, whether the characterisation is accepted or not: Steffen Ganghof, 'A new political system model: Semi-parliamentary government', *European Journal of Political Research,* vol. 57, issue 2, 2018, p. 261.

7 There is a useful account of these in Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees, Briefing Paper No. 12/05*, NSW Parliamentary Library Research Service, 2005.

on artificial intelligence. All of these 'hollow out' the public sector and offer bases on which ministers can evade accountability to parliament, if they are minded to do so.[8]

A third set of developments concerns public bodies themselves. There has been a shift in expectations about the performance of public bodies, from a focus on compliance to a focus on, at least formally, results, to which traditional accountability procedures have had to adapt.[9] More relevantly still for present purposes, the types of public bodies also have diversified in ways that have had a bearing on accountability to parliament, on the part of both the bodies themselves and the relevant portfolio ministers.

The current range of public bodies is usefully captured in various formats, one of the most useful of which is the Australian Government Organisations Register (the Register) prepared by the Department of Finance.[10] Exclusions from the Register include the Commonwealth Cabinet, without explanation, and the High Court of Australia, 'due to its status under its enabling legislation'.[11] The wide variety of bodies covered by the Register are organised across 12 categories. Two deal explicitly with cross-jurisdictional bodies and can be set aside for the moment.[12] Several others include a smattering of cross-jurisdictional bodies, either in the category description,[13] or as examples of the genre.[14] I hold these over for the time being also. I note in passing, however, that this treatment of cross-jurisdictional bodies suggests that there is no clear conceptualisation of them as a distinct category that might raise distinct considerations.

The remaining bodies in the Register are intra-governmental. They are divided between principal, secondary and 'other' Australian government entities. A series of intersecting criteria guide the allocation, both between these broad categories and within them. All the bodies in the first category are covered in one way or another by the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), and subject to the political accountability regimes that the Act prescribes.[15] The typology also draws distinctions by reference to legal form, between non-statutory and statutory entities, registered corporations, joint ventures, and bodies linked through contract. A third criterion for allocation is function and purpose justifying, for example, a discrete sub-category for some advisory bodies. Proximity to the Australian government is another basis for distinction drawing on, for example, considerations of 'separate branding'. Even for intra-jurisdictional bodies, the typology in the Register is by no means neat, further underscoring the complexity of the field.

Four observations might be made about these bodies, on which the next parts of the lecture can build.

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[8] Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees, Briefing Paper No. 12/05*, NSW Parliamentary Library Research Service, 2005.

[9] The shift is traced in Andrew Podger, 'How independent should administration be from politics', in Andrew Podger, Tsai-tsu Su and John Wanna (eds), *Designing Governance Structures for Performance and Accountability,* ANU Press, Canberra, 2000.

[10] Department of Finance, *Australian Government Organisations Register*, 10 May 2023, (accessed 11 May 2023).

[11] Apart from the Constitution itself, the enabling legislation for the High Court is the *High Court of Australia Act 1979* (Cth). It is not entirely clear to what aspect of 'status' the Register refers.

[12] These are Ministerial Councils and related bodies, which is one of 5 sub-categories described as 'Secondary Australian Government Entities and National Law Bodies', which is a sub-category under an 'Other Entities' listing.

[13] Interjurisdictional and international bodies, another listing under Secondary Australian Government Entities.

[14] For example the Gene Technology Regulator, in the sub-category Statutory Office Holders, Offices and Committees, one of the Secondary Australian Government Entities.

[15] *Public Governance, Performance and Accountability Act 2013* (Cth) sub-s 10(1), paras 11(a)–(b), s 89.

The first and most obvious is that, because all these entities are public bodies, exercising Commonwealth executive power within the Commonwealth constitutional framework, accountability for them must lie to the Australian Government and, through the government, to the parliament in some way.

The second point is that the manner of accountability to parliament clearly differs. Primary non-corporate entities, comprising the departments of state, are accountable through the traditional mechanisms of ministerial responsibility, whatever they may be, embellished by more recent practice and elaborated by the PGPA Act. Statutory bodies or entities incorporated by registration are accountable through whatever mechanisms their legal form provides in addition, in the case of primary entities, to the requirements of the PGPA Act. The accountability of other bodies including, for example, secondary non-statutory entities, is more attenuated and may lie through other entities or directly through a minister.

Third, the public purposes that each body is intended to serve drives the features that shape the manner of its accountability to parliament. Purposes identified include the need for a degree of independence from government policy and ministerial direction, purposes that require a less bureaucratic and more entrepreneurial orientation, and policy advising on matters that requires a particular range of expertise.

Fourth, the accountability of the body itself to parliament is only one part of the equation. In every case, ministers also are accountable, at least in principle, for whatever role that they play and whatever functions they exercise in relation to the body, whether these functions are statutory or not. Ministerial functions in relation to intra-jurisdictional bodies may range from appointments, to participation, to receipt of advice, to funding, and to the overall responsibility of ministers for matters within their portfolios.

Cross-jurisdictional bodies

Cross-jurisdictional bodies present additional considerations from the standpoint of accountability. To begin to consider these, some definitions are in order, to identify at least loose parameters for the types of bodies with which the lecture is concerned.

For the purposes of the lecture, I define cross-jurisdictional bodies by reference to 3 considerations, which can apply independently or be cumulative—whether a body draws on the constitutional powers of multiple jurisdictions, whether it involves membership from multiple jurisdictions, and whether it relies on multiple jurisdictions to accept its decisions before they are given effect.

I exclude from the definition bodies that play a significant role in making the federation work but rely entirely on the Commonwealth for constitutional power, membership, and implementation. The Commonwealth Grants Commission is one such body.[16] It is formally an intra-jurisdictional body, notwithstanding some intergovernmental characteristics in practice.

I also exclude, although with greater hesitation, arrangements under which an official of one jurisdiction, who may be a minister or public service officer, exercises functions conferred by the legislation of another, with the agreement of both. These are not strictly 'bodies' in the

[16] *Commonwealth Grants Commission Act 1973* (Cth).

sense in which the term is used in the lecture. More importantly, perhaps, the person on whom the power is conferred already has an established place within the accountability framework of the recipient jurisdiction, as an elected or appointed official. All sorts of difficulties may arise from this 'bifurcation' unless sufficient allowance for it is made, some of which were explored by the Special Commission of Inquiry into the Ruby Princess.[17] It seems obvious, nevertheless, that the usual lines of accountability for the official exercising the power should be preserved, but within a suitably transparent co-operative framework of principle and practice.

In the next section of the lecture, I divide cross-jurisdictional bodies into 3 categories, regulatory, advisory, and political, to assist analysis of the issues and options for accountability. I explore each of these with case studies that are characteristic, but not necessarily paradigmatic.

a) Regulatory bodies

The first category of cross-jurisdictional bodies comprises entities with a regulatory function that rely on the constitutional power of 2 or more jurisdictions. Participation always is voluntary and constitutional support could be withdrawn by any jurisdiction, at least in principle. In many, and perhaps most or even all cases, there is also an underlying intergovernmental agreement and a supporting intergovernmental ministerial council with authority of some kind in relation to the body under the agreement, the constituting statute or both. All of these features have implications for the ways in which the body exercises its powers and carries out its functions.

Bodies of this kind typically result from arrangements that are designed to achieve uniformity of administration, as well as law, on matters for which constitutional responsibility is divided between Australian jurisdictions. This may be a device that is unique to the Australian federation as, for that matter, may be the insistence on uniform administration itself. In any event, the creation of such bodies has evolved as an art form in Australia over time.

A single regulatory body exercising public power conferred by multiple jurisdictions may be achieved in different ways. In some cases the body is established by one jurisdiction, often the Commonwealth, and invested with power by others. The Gene Technology Regulator[18] and the Australian Crime Commission (ACC)[19] are examples. In other cases, one 'host' jurisdiction enacts a 'national law' that includes provision for a regulatory authority and that law then is 'adopted' by legislation of other participating jurisdictions so as to create a 'single national entity'. The National Heavy Vehicle Regulator[20] and the Australian Children's Education and Care Quality Authority (ACECQA)[21] are examples. Occasionally, also, participating states may refer power to the Commonwealth, as envisaged by section 51(xxxvii) of the Australian Constitution, to enable it to establish a body with a broader power

[17] Special Commission of Inquiry into the Ruby Princess, *Report*, August 2020, p. 34, pp. 205–222. The conferral of authority on New South Wales officers occurred under the *Biosecurity Act 2015* (Cth) ss 562, 564.

[18] *Gene Technology Act 2000* (Cth).

[19] *Australian Crime Commission Act 2002* (Cth).

[20] *Heavy Vehicle National Law Act 2012* (Queensland).

[21] *Education and Care Services National Law Act 2010* (Vic).

base, diminishing the need for additional conferrals of power. The Australian Securities and Investment Commission (ASIC) is one body of this kind.[22]

Cross-jurisdictional bodies in this category are diverse in form, institutional structure, and intergovernmental characteristics. Reasons for difference include the extent of the respective powers of the Commonwealth and the states. There may also be an element of evolving intergovernmental fashion.

At one end of the spectrum of the examples given earlier is ASIC, based on the broad but incomplete corporations power of the Commonwealth (under section 51(xx) of the Constitution) augmented by references from the states. ASIC is established by Commonwealth legislation on the face of which it appears almost, if not quite, an intra-jurisdictional body. It nevertheless is the latest iteration in a series of intergovernmental projects that have progressively deepened the harmonisation of the law and practice of the regulation of corporations in Australia—signs of which remain in the Act itself[23] and in the underlying agreement.[24] Amongst other things, the latter restricts the use to which referred powers may be put, requires consultation with the states on appointments to the Commission and requires the establishment of regional offices around the country.

At the other end of the spectrum are national law bodies created by legislation enacted by a host state and given authority elsewhere through adoption by participating jurisdictions. Of the 2 examples given earlier, Queensland is the host for the National Heavy Vehicle Regulator and Victoria for ACECQA. Both deal with the regulation of areas in which there is limited secure Commonwealth constitutional power and significant state power, intertwined with other areas of state regulatory responsibility. Both schemes are underpinned by an intergovernmental agreement[25] and the cross-jurisdictional character of each scheme infuses its design. Relevantly, in each case, a ministerial council has statutory power to direct the regulator in stipulated ways, is involved in appointments to the board and approves draft regulations before promulgation.

Both of these schemes are relatively inventive in the ways in which they go about establishing an 'independent' regulator as a 'single entity' surrounded by all the usual trappings of a public body. Thus, for example, regulations made under both national laws are published on the New South Wales (NSW) legislation website. The Commonwealth's privacy and freedom of information legislation and the NSW State Records legislation are applied to ACECQA by the laws of the participating jurisdictions.[26]

In between these 2 poles are cross-jurisdictional regulatory bodies in which the power balance between the Commonwealth and the states is, at least arguably, more equal. To illustrate the point, both the Gene Technology Regulator and the ACC rely on a range of Commonwealth powers but their functions are extended by legislation of participating states. The *Australian Crime Commission Act 2002* (Cth) establishes an 'Inter-Governmental Committee' with power to monitor and oversee the strategic direction of the body and its

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[22] *Australian Securities and Investment Commission Act* 2001 (Cth).

[23] As in, for example, section 4, dealing with the application of the Act.

[24] Department of Prime Minister and Cabinet, *Corporations Agreement 2002*, 6 December 2002.

[25] Department of Prime Minister and Cabinet, *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform 2011*, 19 August 2011; Federal Financial Relations, *National Partnership Agreement on Early Childhood Education 2009–2012*, 2009.

[26] *Education and Care Services National Law Act 2010* (Vic), ss 263–265.

board.[27] Under the *Gene Technology Act 2000* (Cth) a Ministerial Council, recognised by the Gene Technology Agreement, is required to be consulted on specified appointments, including that of the regulator, and can trigger a review of the Act.[28]

Provision for political accountability was a factor in designing the statutory and policy framework for each of these cross-jurisdictional bodies. The forms of accountability vary with the nature of the body and, specifically, with the extent of its intergovernmental character.

Bodies that are deemed to be supported by significant Commonwealth power, including ASIC, the Gene Technology Regulator, and the ACC, are covered by the accountability requirements of the PGPA Act, albeit on various bases. Even in these cases, however, there are intergovernmental elements of the accountability regime that applies. To take only one example, the Gene Technology Regulator is required, by legislation, to give copies of the body's annual and other reports to the ministers of participating states.[29]

By contrast, other cross-jurisdictional regulatory bodies that are more dependent on state and territory authority have relatively comprehensive accountability regimes of their own, adapted to suit the context. These necessarily deal with, for example, reporting to parliament and the scrutiny of delegated legislation. In both the examples, considered earlier, the Heavy Vehicle Regulator and the ACECQA, the respective bodies are required to report to the ministers of all participating jurisdictions and the Commonwealth, individually or collectively. The reports are required to be tabled in all the parliaments, and a scheme is devised to enable each parliament to scrutinise the delegated legislation, without unduly disrupting the smooth operation of the regulatory arrangements.

b) Advisory bodies

A second category of cross-jurisdictional bodies is advisory, in the sense that these bodies have no significant regulatory functions but rely on the acceptance of multiple jurisdictions to give their decisions effect. As with regulatory bodies, advisory bodies may have other cross-jurisdictional features as well. In particular, they may have multi-jurisdictional representation, or a relationship with an intergovernmental ministerial body. The defining feature of this category, however, is function.

Cross-jurisdictional advisory bodies typically are established to assist with the co-ordination or other form of streamlining of a particular government activity across Australia, while leaving each participating jurisdiction with its own decision-making authority. Two quite different examples illustrate what is a diverse genre—Infrastructure Australia[30] and the Australian Curriculum and Reporting Authority (ACARA).[31] The former audits and develops plans for 'nationally significant' infrastructure across Australia. The latter plays a co-ordinating role in relation to curriculum and assessment in the course of which, amongst other things, it develops a 'national curriculum'.

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[27] *Australian Crime Commission Act 2002* (Cth) ss 8–9.
[28] *Gene Technology Act 2000* (Cth) ss 21, 23, 24, 100, 108, 118.
[29] *Gene Technology Act 2000* (Cth) ss 136, 137.
[30] *Infrastructure Australia Act 2008* (Cth).
[31] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth).

Both bodies are constituted by Commonwealth legislation without any cross-jurisdictional contribution. Presumably this reflects an assumption that Commonwealth power is adequate to support essentially advisory functions of these kinds, which also are emphasised to have 'national' significance.[32] The effectiveness of both bodies in practice, nevertheless, depends significantly on take-up of their advice by others with operative authority. In each case the Commonwealth has some substantive role to play, either financially through the grants power (section 96 of the Constitution) and, in the case of Infrastructure Australia, direct responsibility for some national infrastructure. In each case, also, there is some involvement of non-state parties—owners of and investors in relevant infrastructure in the case of one, and private education providers in the case of the other. Nevertheless, in each case, the preponderance of operative authority is held by the states and territories, including local government. This is a rational allocation of power in the Australian federal context, which accords with the principle of subsidiarity in both principle and practice. The need for states and territories to act on decisions of bodies of this kind, if they choose to do so, give bodies in this category their cross-jurisdictional character.

This character is reflected in the legal framework for the bodies, albeit in different degrees, again reflecting considerations of the balance of intergovernmental power. ACARA has a board with members nominated by the states and territories (amongst others), complies with a Charter approved by an intergovernmental Ministerial Council, is subject to directions from the Council, and reports to the Council.[33] The intergovernmental constitution of Infrastructure Australia is less pronounced but nonetheless evident. The states and territories nominate 3 of the 12 members of the board, the body advises all governments, the Commonwealth Minister must have regard to Council of Australian Governments (COAG) decisions in giving directions, and the body is obliged to consult all relevant governments, amongst others, in reaching its conclusions.

Consistently with the assumptions on which both bodies are based, the accountability framework for each of them lies almost entirely within the Commonwealth sphere, both under the PGPA Act to which each is subject, and generally. Accountability mechanisms are modified in several respects, perhaps reflecting the intergovernmental roles of the bodies. For example, neither the directions to Infrastructure Australia by the Commonwealth Minister nor the directions to ACARA by the Ministerial Council are legislative instruments for the purposes of the *Legislation Act 2003* (Cth).[34] There also are some minor elements of explicit cross-jurisdictional accountability; for example, the annual report of ACARA is required by legislation to also be given to the Ministerial Council.[35]

c) Political bodies

A third category of cross-jurisdictional bodies comprises those that are political in character. These bodies are constituted by the responsible ministers of participating jurisdictions supported, in many cases, by ancillary bodies of public service officers who prepare the

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[32] In the case of ACARA, the Act is explicitly based on a familiar smorgasbord of powers, in addition to a claim for support on the basis of nationhood: *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s 4.

[33] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) ss 7, 13, 43.

[34] *Infrastructure Australia Act 2008* (Cth) s 6; *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s. 7.

[35] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s 43.

ground for the ministerial meeting. Their activities may range from discussions of policy co-ordination, to information exchange, to more formal roles under intergovernmental schemes, of the kind to which reference has been made already.

As the earlier discussion showed, legislation enacted for the purpose of intergovernmental schemes may sometimes create or at least recognise cross-jurisdictional political bodies and confer decision-making power on them. These are the exceptions rather than the rule, however. Typically, cross-jurisdictional political bodies are created by agreement between the participants, in the exercise of their collective executive power with little, if anything, by way of a formal, documented framework. Typically also, their decisions are not legally binding but depend on implementation by the participating jurisdictions, in the exercise of their own powers and responsibilities.

The most high-profile example of such a body in Australia is the forum in which the heads of government of the Commonwealth, states and territories meet. Once called the Premiers' Conference, then COAG, the current iteration of this body is the National Cabinet.[36] The significance of its roles in co-ordination of key aspects of public policy and information exchange was evident throughout the course of the pandemic.

The heads of government forum always is just the tip of a much larger cross-jurisdictional iceberg, the remainder of which comprises meetings of line ministers of various kinds, supported by officials. This intergovernmental 'architecture' was redesigned when the National Cabinet was formed.[37] It then assumed a highly complex structure, with a series of (in effect) ministerial councils operating under the aegis of National Cabinet itself, as 'Reform Committees', one of which was the workhouse meeting of treasurers as the Council on Federal Financial Relations (CFFR). All were comprehended within a loosely overarching National Federation Reform Council (NFRC), with membership that also included a representative of local government. Yet another group of Councils was presented as lying outside both the National Cabinet structure, and the NFRC. There have been some changes to the detail of this structure, following the change of government at the Commonwealth level in May 2022, but the complexity and fragmentation remains.

There have never been formal and specific accountability arrangements for cross-jurisdictional political bodies in Australia. Instead, it is implicitly assumed that the members of such a body are accountable for the stance taken and any follow-up action within their own jurisdictions. This logic has been somewhat muddled by the characterisation of the current forum as a 'cabinet' in which conventions of confidentiality and solidarity apply. The critiques of this characterisation are legion and should, sooner rather than later, bear fruit.

In the meantime, even without this complication, it is fair to say that accountability for cross-jurisdictional political bodies is weak in practice, whatever the theory of federal dualism suggests. Much more could be done within each jurisdiction to make the chain of accountability to parliament and people more effective, without undermining the relationship of trust between members on which such bodies depend. The initiative of the Chief Minister

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[36] Department of Prime Minister and Cabinet, *National Cabinet*, (accessed 11 May 2023).

[37] The structure is portrayed here: Department of Prime Minister and Cabinet, *Australia's Federal Relations Architecture*, (accessed 11 May 2023).

of the Australian Capital Territory (ACT) in making a public statement about National Cabinet, from the perspective of his jurisdiction, after each meeting is a welcome step forward in this regard.[38] More could be done also to enhance the collective responsibility of such bodies, through public release of their charters and decision-making rules and the provision of information about activities and outcomes that has substantive content.

Reflections on accountability

The paper so far has sketched a range of cross-jurisdictional bodies in Australia. To assist analysis, it has grouped them in 3 categories, regulatory, advisory, and political, giving examples of each. In relation to all of these bodies, it has shown that some arrangements for political accountability are in place. These vary with the composition and functions of the body and with what might loosely be described as the depth of its intergovernmental character.

In some respects, the challenge of designing mechanisms for political accountability for cross-jurisdictional bodies are similar to those for intra-jurisdictional bodies. The tools potentially are much the same—ministerial responsibility, including answerability to parliament, regular reports and other forms of transparency, scrutiny by parliamentary committees and by parliamentary chambers as a whole. There can be no one-size-fit-all approach. On the contrary, accountability systems necessarily are tailored to key characteristics of public bodies including, for example, considerations of independence, expertise, and confidentiality. Effective accountability also depends on more than design. Critically, it also is shaped by implementation in practice. This, in turn, relies on the willingness of parliaments to transcend political self-interest and on the willingness of governments to comply. Both of these key aspects of the political accountability chain have been under stress in Australia for some time.

Cross-jurisdictional bodies also differ from their intra-jurisdictional counterparts in at least 2 important ways.

The first is that the lines of political accountability inevitably run to more than one democratically elected parliament, government, and electorate. To ignore this is to undermine democracy at the sub-national level of government, to the detriment of both federalism and democracy, individually and in the compound form of federal democracy.

Secondly, any cross-jurisdictional element affects the goals, responsibilities, and modus operandi of a public body. This is not necessarily a negative; indeed, not a negative at all. As with federalism itself, at least when in co-operative mode, a body with cross-jurisdictional characteristics has the opportunity to draw on insights into conditions and preferences around the country, to respond to difference, and to ensure buy-in, in a way that an intra-jurisdictional body may not.

Intergovernmental relations theory and practice in Australia has not grappled adequately with the implications of cross-jurisdictional characteristics for the operations of public bodies and the accountability regimes that apply to them. There is a tendency to assume that, to be

[38] Andrew Barr MLA, 'Statement on National Cabinet', *Media Release*, 15 March 2022.

effective, accountability regimes must be confined within a single jurisdiction; usually the Commonwealth.[39] A converse assumption typically is explicitly in play—that accountability regimes that operate within a single jurisdiction are, and can be, effective.

There is no doubt that organising an accountability regime within a single jurisdiction is more straightforward, at one level. But to do so reflects the habits of mind developed in and for unitary states. To the extent that such regimes underestimate the significance of the defining, cross-jurisdictional characteristics of these bodies and the need for accountability of and to other participating jurisdiction, they are unsatisfactory. There is a need for greater creativity in thinking about arrangements for the accountability of cross-jurisdictional bodies that fit the conditions of federal democracy in Australia.

Three steps might be useful towards this end. The first is to ensure that the arrangements already in place are actually followed through, in spirit as well as in form, at both levels of government. The second is to develop and publicise practices and procedures for ministerial accountability for intergovernmental action, again at both levels of government, which balance the need for confidentiality and the importance of public accountability and transparency. A third is to acknowledge the cross-jurisdictional character of a body as an element as important as independence and specialisation in designing accountability arrangements for it and putting them into effect. This would mean, for example, that even where a body is primarily accountable to Commonwealth institutions, its cross-jurisdictional character should be understood, protected, and respected in the manner in which accountability occurs.

These 3 steps might sound mundane but they would be challenging in practice, requiring significant cultural, as well as some institutional change. It would be appropriate for some leadership to come from the Senate, in this regard. The historical reality that the Senate has evolved as a house of review rather than as a specifically federal chamber should not be allowed to obscure either the significance of its composition or its potential to play some federal role. One such role, which speaks to the Senate's interests and strengths, is accountability for intergovernmental arrangements, in a form that serves the needs of both democracy and federalism.

[39] The statement is explicit in the Department of Finance explanation of its category of 'inter-jurisdictional bodies':

> Some significant governance challenges can arise when bodies are formed that are accountable to more than one government. Clarity of arrangements and responsibilities are normally contained within the framework of a single jurisdiction, and it is crucial to consider this when establishing any inter-jurisdictional body. Different types or levels of accountability to different jurisdictions may ultimately lead to a lack of accountability.

Department of Finance, *Types of Australian Government Bodies*, 11 February 2021 (accessed 11 May 2023).

Law and border—who has the power to control movement across state borders?

Anne Twomey*

When the COVID-19 pandemic struck, some states closed their borders in an attempt to prevent the disease from spreading within their state. This led to a political and constitutional dispute. Section 92 of the Australian Constitution states that 'trade, commerce, and intercourse among the states … shall be absolutely free'.[1] In this context, intercourse means the movement of people, animals and goods across borders. It is effectively, therefore, a guarantee of free movement across the country. Was the Constitution breached when the states closed their borders during the COVID-19 pandemic, and could the Commonwealth do anything to override these actions?

What does section 92 mean?

The first question that must be confronted is what is meant by the words 'absolutely free'? Can any restrictions be placed on freedom of movement amongst the states? In considering that question, it is helpful to look at the intent of the framers of the Constitution and to read the text of the Constitution as a whole to see how section 92 fits with other provisions.

It is plain from the text of the Constitution that some restrictions are permitted. The Commonwealth Parliament was given power to regulate interstate trade and commerce in section 51(i) and make laws about quarantine in section 51(ix). Section 112 recognises that states may levy charges for the inspection of goods and animals crossing the border to ensure they are not diseased (although the Commonwealth can enact laws to annul these charges). These provisions show that the words 'absolutely free' must therefore permit some level of regulation and the ability to exclude diseased goods, animals and, possibly, people.

This is consistent with the original intent behind section 92, as shown by the framers of the Constitution in the Constitutional Convention debates of the 1890s and in legal opinions they gave in the first decade after federation. Samuel Griffith, for example, considered that section 92 was directed at freedom from taxes, charges and imposts at state borders.[2] When John Cockburn and Henry Higgins raised the fear that the proposed section 92 might prevent their

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1 *Australian Constitution* s 92.

2 Sir Samuel Griffith, 'Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897' in John Williams (ed), *The Australian Constitution – A Documentary History,* Melbourne University Press, 2005, pp. 614 and 630.

states from excluding diseased animals or plants,[3] their concern was dismissed. Richard O'Connor, observed that the states would retain a right of self-protection, so that they could prohibit diseased persons and animals from entering the state without breaching the freedom of trade, commerce and human intercourse.[4] O'Connor later became one of the first Justices of the High Court.

Alfred Deakin, writing as Attorney-General in December 1902, accepted that 'interstate freedom of trade is not infringed by a law prohibiting the introduction of diseased animals' and that state legislative powers extend to 'quarantine and reasonable inspection laws'.[5]

Patrick Glynn, another framer, writing as Attorney-General in 1909, advised that a state inspection law would 'be unconstitutional if it imposed an unnecessary or unreasonable burden upon interstate commerce'.[6] He considered that a state law that imposed a complete prohibition on certain kinds of plants being brought into a state, healthy and diseased alike, imposes 'an unnecessary burden on interstate commerce, and cannot be justified on the ground that it is a precautionary measure against the introduction of disease'. If the law were conditional, rather than absolute, and the conditions were neither unreasonable nor greater than reasonably necessary to meet the ostensible purpose, then the law would be valid.[7]

High Court authority

It is unsurprising, therefore, that the High Court took the same approach. In the case of *Ex parte Nelson,* in 1928, Knox CJ, Gavan Duffy and Starke JJ observed:

> *The establishment of freedom of trade between the States is perhaps the most notable achievement of the Constitution: yet it would be a strange result, if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise.*[8]

Their Honours concluded that a New South Wales (NSW) law that prohibited diseased cattle from crossing the border into NSW and which required in some cases for the cattle to be destroyed if they entered the state, did not breach section 92 of the Constitution.

In 1935, the Court took a similar view in relation to diseased potatoes. A law that banned diseased potatoes from entering a state was valid, but a law that banned *all* potatoes without checking them, just to exclude the risk of disease, was considered invalid because it was disproportionate.[9] Here, we see the notion of proportionality entering the jurisprudence, which will become important.

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[3] *Official Record of Debates of the Australasian Federal Convention, Second Session, Sydney, 2nd to 24th September 1897*, William Applegate Gullick, Government Printer, 22 September 1897, p. 1063 (Cockburn) and p. 1064 (Higgins).

[4] *Official Record of Debates of the Australasian Federal Convention, Second Session, Sydney, 2nd to 24th September 1897*, William Applegate Gullick, Government Printer, 22 September 1897, p. 1062.

[5] Alfred Deakin, 'Freedom of interstate trade – whether state has power to prohibit imports absolutely to prevent entry of disease', 12 December 1902, Opinion 118 in Patrick Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* Vol 1, Australia Government Publishing Service, Canberra, 1981, pp. 144–148.

[6] Patrick McMahon Glynn, 'Freedom of interstate trade – whether state police power extends to exclusion of goods in preventing introduction of disease', 27 October 1909, Opinion 358 in Patrick Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* Vol 1, Australian Government Publishing Service, Canberra, 1981, pp. 464 and 466.

[7] Ibid.

[8] *Ex parte Nelson [No 1]* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ).

[9] *Tasmania v Victoria* (1935) 52 CLR 157, 170 (Gavan Duffy CJ, Evatt and McTiernan JJ).

The Spanish flu

But what about people? Could a state shut its borders to prevent people from crossing so that an infectious and deadly disease did not enter the state? This dilemma was first faced in the wake of World War I as troops began to return to Australia.

When the Spanish flu began to spread in late 1918, Australia had 2 layers of protection—the external border of Australia, and borders between states. Soldiers returning from war were quarantined on their ships in Sydney Harbour or at North Head Quarantine Station. There was insufficient accommodation at North Head, so the troops were made to pitch tents in the bush area in the grounds. On one occasion, soldiers housed in tents at North Head found it was infested with poisonous snakes.[10] Having killed 67 on their first night, they mutinied. Fully masked and in military formation they marched to the gates of the Quarantine Station, defying the guards on duty to shoot them. Unsurprisingly, the guards were not prepared to shoot at hardened Australian troops who had risked their lives to defend Australia. The troops marched onto a ferry, steamed into Circular Quay and, after some negotiations, proceeded to the Sydney Cricket Ground where they served out their quarantine without snakes.

The second line of protection was state borders. In November 1918 an inter-governmental agreement was reached that if a state identified an infection, it would notify the Commonwealth immediately. The Commonwealth would then take control of the state's borders, closing them to neighbouring states and re-opening them when the neighbouring state was also infected. Victoria became infected but didn't admit it, until a doctor blew the whistle. By then Spanish flu had spread to NSW. A furious NSW Government slammed shut its border with Victoria, and declared the inter-governmental agreement at an end.[11]

From then, it was every state for itself. The Commonwealth tried to reassert control, but its threats were ignored. The states closed or opened their borders in their own interests.

Western Australia (WA) seized and impounded the transcontinental train as it entered WA, placing all travellers in quarantine.[12] The Commonwealth objected that this breached the inter-governmental agreement of November 1918, and possibly the Constitution.

WA did not care. The Perth *Daily News* explained:

> *Had we admitted the transcontinental travellers we might have suffered infection. There was a chance. We preferred to flout authority, break the agreement of November, and even perhaps fracture some constitutional statute rather than court the disaster of the entrance within our borders of the black plague.*[13]

The WA Premier, Henry Lefroy, however, found himself on the wrong side of the closed border. He was stuck in Melbourne where he had been attending a premier's conference. The Acting WA Premier, Hal Colebatch, who had shut the border, resisted the pleas of his

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[10] '1000 troops break quarantine – men from the Argyllshire dissatisfied – snakes and discomforts at North Head', *The Border Morning Mail and Riverina Times*, 12 February 1919, p. 2.

[11] Humphrey McQueen, '"Spanish Flu"–1919: political, medical and social aspects', *Medical Journal of Australia,* vol. 1, no. 18, 1975, p. 566.

[12] Ibid.

[13] 'Holding up the Transcontinental', *The Daily News*, 31 January 1919, p. 4.

own Premier and the Prime Minister to reopen it.[14] His actions in closing the border were wildly popular. So popular, indeed, that Colebatch was soon after made Premier, despite being a member of the upper house. While Spanish flu did eventually penetrate the state, its delayed entry saved many lives.

Queensland also shut its borders, including to those in border communities. It charged people a considerable amount to enter quarantine camps and required them to receive 2 compulsory vaccinations before they could enter the state. There were all too familiar stories of lockdowns, the closure of schools, disagreements about mask-wearing, vaccine mandates and quack cures. But despite all the controversy, no one initiated a constitutional challenge to the border closures.

War

War was the next reason to stop people from crossing state borders. During World War II, the Commonwealth issued an order under a national security law that prohibited civilians from travelling by train across state borders unless they had a permit.

According to the published version of events, Dulcie Johnson was a young woman, engaged to be married. Her fiancé was in the navy and about to be shipped off to war, from his training base in Perth. She might never see him again. In October 1944, Dulcie applied for a permit to travel from Sydney to Perth, but it was denied. She went anyway, in a last dash to see her beloved. She bought tickets for the train, on successive legs, as far as Port Augusta, but then stayed on the train and admitted to the conductor in South Australia (SA) that she had no ticket or permit to cross the border into WA. He said she would have to leave the train at Cook, the last stop before the WA border, but the Station Master refused to allow her to leave the train, because it was not a suitable place for a young lady.[15] She made it to Perth, where she was prosecuted. Her counsel argued that the law breached section 92 of the Constitution. The magistrate agreed and the charge was dismissed.[16]

The media portrayed this as a great love story. Dulcie was described as blonde and remarkably beautiful. 'Love laughed at rail permits', cried one newspaper.[17] The Commonwealth appealed the case to the High Court, where Dulcie was represented by 2 of the most illustrious Kings Counsel of the time, including Garfield Barwick. They were being paid by the airlines who took up Dulcie's appeal, using her as a pretty and sympathetic stalking horse for their own subsequent section 92 challenge.[18] Or was Dulcie using them?

Here, the tale might have ended, except for the research of one of my students, Clare Davidson. In looking into Dulcie's story, she discovered that there was a remarkably beautiful blonde woman who used the alias Dulcie Johnson, among many others. She was also known by the press as the 'Angel of Death' and the 'Black Widow'.[19] This Dulcie Johnson, was a

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[14] Carolyn Holbrook, 'Managing the federation during a pandemic: Spanish Influenza and COVID-19', *Australian Policy and History*, 16 November 2020.

[15] Record of interview with Dulcie Johnson, witnessed by E A P Gratwick, 6 November 1944: National Archives of Australia (NAA): A10078, 1945/2.

[16] *Gratwick v Johnson* (Charge No 242/45), Reserved Decision of W J Wallwork SM, 15 February 1945, NAA: A10078, 1945/2.

[17] 'Love laughed at rail permits', *The Sun*, 26 April 1945, p. 3.

[18] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

[19] Leigh Straw, *Angel of Death,* Australian Broadcasting Corporation Books, 2019.

notorious Sydney underworld figure. According to the press at least 8 of her husbands or lovers had been gunned down or stabbed to death, and she had more than 100 convictions. We know she did travel to Perth from her east-coast dens of crime, because she was convicted of running a brothel in Perth in 1946.[20]

But was she the same Dulcie Johnson who had no permit to travel to Perth in October 1944? Having now scoured the archival files on *Gratwick v Johnson*, there are 2 red flags. First, the records state that proof of Dulcie's identity was waived.[21] The authorities relied upon the name she gave and no one ever checked. One does wonder why her lack of confirmed identity was noted a number of times in the file. Second, in her interview Dulcie named her fiancé in the navy[22]—but according to the war records in the National Archives, no such person existed. So the great love story appears to have been a ruse.

Was this instead the story of a gangland figure, fleeing her crimes to run a brothel in Perth, and getting the most eminent Kings' Counsel in the land to represent her for free in the High Court? Perhaps. We don't know for sure.

But what of the law, you ask? The High Court accepted that transport is intimately connected with defence and that the defence power would support a law restricting transport. But this was still subject to section 92. If the law had been one that regulated train travel for defence purposes, affecting both intra-state and interstate travel, it could have been valid. But here, no defence justification was given for restricting interstate train travel, but not intra-state train travel. The order was held invalid.[23]

The Commonwealth Government, in submissions in a later case, criticised this decision. It argued that priority needed to be given to military personnel and freight in long-haul train transport during the war. It contended that the law was not directed at stopping people crossing the borders, as they could do so by other means. But when it came to limiting long-haul civilian travel, the natural place to police it was at the state borders. It contended that the real purpose was defence – not impeding interstate movement of people. But it was too late, as the case had already been lost.[24]

The leper line

What if a state law marked a line *within* a state that could not be crossed, with the added effect of preventing interstate movement by stopping people from getting to the border? In WA, leprosy had begun to spread rapidly in Aboriginal communities in the north of the state during World War II, due to the lack of health patrols and nursing services. In 1941 a law was enacted to prohibit Aboriginal people, who didn't have a permit, from crossing from north to south across the 20th Parallel, which was near Port Hedland.[25] It was known colloquially as the 'leper line'. The line had the effect of separating Aboriginal communities and preventing

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[20] 'Curly blonde "had" Perth', *Mirror*, 22 June 1946, p. 7; 'Notorious woman pays us a visit', *The Daily* News, 26 June 1946, p. 14. On this occasion Dulcie was using the different alias of Dian Lee Bowen.

[21] W J Wallwork SM, Notes of Evidence. NAA: A10078, 1945/2.

[22] Record of interview with Dulcie Johnson, witnessed by E A P Gratwick, 6 November 1944, NAA: A10078, 1945/2.

[23] *Gratwick v Johnson* (1945) 70 CLR 1.

[24] NAA: M1506, 2/1.

[25] *Native Administration Act Amendment Act 1941* (WA).

those in the north, who had poor working conditions, leaving for better paid work south of the line.

In 1957, an Aboriginal man, Dooley Bin Bin, transported 17 Aboriginal people from stations north of the line to places south of the line. One of them had leprosy. Dooley, who was described in court documents as a 'native law giver', was prosecuted, convicted and fined £1 by the magistrate, along with costs of £32.[26]

Dooley was represented by a former WA politician, Thomas Hughes, who argued that the law was invalid because it breached section 92 of the Constitution as it prevented Aboriginal people in the north from travelling south in WA in order to get to SA. The magistrate rejected the argument and it went to the Full Court of the WA Supreme Court.

There, Hughes again argued his constitutional case. He told the court that Dooley, as a tribal law carrier, held an equivalent status to the judges and was a 'brother-in-law of the Bench'.[27] It is not clear what effect this provocative assertion had, but the court did not appear sympathetic to the constitutional arguments made.

Chief Justice Dwyer, with whom the rest of the court agreed, found that the law was a reasonable measure to prevent the spread of disease.[28] It prevented movement of people within a state so that those south of the line would not be exposed to leprosy. He noted that it had not been suggested that Mr Dooley or anyone else had been seeking to travel interstate and was prevented from doing so. The law had 'no real effect on intercourse amongst the States at all'. He characterised the law as an exercise of health powers that could not be seen to be an attempt to evade the operation of section 92 of the Constitution.

The then federal Leader of the Opposition, Arthur Calwell, raised this matter in the Commonwealth Parliament. He observed that '[a]pparently in WA there is a line across which certain aborigines [*sic*] cannot pass. Such a state of affairs should cease forthwith'. He argued that 'in this country an aborigine is supposed to have as much freedom as anybody else'. He noted that they were enlisted in the armed forces and 'I do not think that there should be any line over which any aborigine [*sic*] cannot pass'.[29] The Minister, Paul Hasluck, queried whether Calwell knew for a fact that such a line existed. Calwell responded that he had been told it did. He argued that the Commonwealth needed to obtain power over Aboriginal matters to ensure it could override or prevent such state laws.[30] The Commonwealth did not obtain such power until the 1967 referendum was passed.

In the meantime, even though Dooley had lost his appeal, he still won the war. He arranged for Aboriginal people to cross north and south across the line in such large numbers on so many occasions that it was impossible to arrest and hold them all. The Native Welfare Department concluded that the law was not really for welfare and that it was a waste of time trying to enforce it. It tried to get the Health Department to agree to its removal, but the

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[26] NAA: A432, 1958/106.

[27] 'Aboriginal "judge" invokes section 92', *Sydney Morning Herald,* 20 March 1958, p. 4.

[28] *Dooley v Haselby,* unreported, Appeal No 73 of 1957, 19 March 1958, Supreme Court of Western Australia.

[29] Mr Arthur Calwell, Leader of the Opposition, *House of Representatives Hansard*, 3 December 1957, p. 2796.

[30] Ibid.

Health Department insisted it was still needed for public health. In the end, the problem was avoided by making permits easily available so there was no necessity to take any action.[31]

COVID-19

This history gives us good context for what happened when a pandemic hit Australia in 2020. Just as in 1919, states were prepared to close their borders to prevent the spread of a deadly disease, at least before there were vaccinations available to limit its serious effects and prevent hospitals from becoming overwhelmed.

Tasmania's *Mercury* newspaper gave as a headline in March 2020—'We've got a moat, and we're not afraid to use it'.[32] WA, just as it did in 1919, shut its border to keep COVID-19 out, and was again largely successful in doing so. The border closure protected the mining industry, which was essential to Australia's exports and its economic well-being, and also protected vulnerable Aboriginal communities.

The *Palmer* case

The WA border closure, which was again wildly popular, was criticized by the Commonwealth and challenged in the High Court by Clive Palmer, who was refused entry to the state. Palmer claimed that his physical presence was needed in WA to run his businesses there. WA said that he could use Zoom like everyone else.

As the parties could not reach an agreement on the facts in relation to risk, this aspect of the case was sent to the Federal Court to determine. Justice Rangiah heard evidence from epidemiologists about the level of risk involved in the spread of COVID-19 and in relation to different measures to prevent its entry into the state. He determined that a precautionary approach should be taken to protect the community.[33] The state's capacity to provide safe quarantine facilities was limited and the risk of COVID-19 spreading was high with potentially catastrophic results.

On the basis of Justice Rangiah's findings, it could be concluded that the border closure was reasonably necessary and proportionate to achieving the legitimate end of protecting public health. Unlike the case about the diseased potatoes, there was no ability to know with certainty whether a person entering a state was carrying COVID-19.

The High Court then reconsidered the test that should be applied to see whether a law breaches section 92. First it looked to whether the law discriminated against interstate trade or movement. In this case the law did, by preventing the movement of people across the border. Second, it looked to whether there was a legitimate purpose for the law, and whether it was proportionate to achieving that purpose.[34]

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[31] See further: Anne Scrimgeour, '"Battlin' for their rights": Aboriginal activism and the Leper Line', *Aboriginal History,* vol. 36, 2012, pp. 43–65.

[32] 'We've got a moat and we're not afraid to use it', *Mercury,* 20 March 2020.

[33] *Palmer v Western Australia (No 4)* [2020] FCA 1221, [73]-[81], [245] and [302].

[34] *Palmer v Western Australia* [2021] HCA 5; (2021) 272 CLR 505, [50] and [62] (Kiefel CJ and Keane J); [114] (Gageler J); [180] (Gordon J); and [218] (Edelman J).

In this case, the High Court held that there was a legitimate purpose of protecting public health and that the law was proportionate to achieving it.[35] There were in-built restrictions on the use of the emergency powers in WA. They could only be exercised for the purpose of managing the adverse effects of a declared emergency, and an emergency could only be declared where extraordinary measures were required to minimise loss of life and harm to health. If the powers were exercised for other purposes, such as political purposes, their exercise would be invalid. But that was not the case here.

Chief Justice Kiefel and Justice Keane said '[i]t may be accepted that the restrictions are severe but it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measures'.[36]

While the terminology has differed over the years, all the examples I have described lead to the same conclusion. Section 92 is not absolute. The interstate movement of people may be restricted, but only where there is a legitimate purpose, such as public health and safety, and only if the law is proportionate to achieve that legitimate purpose. This approach is also consistent with overseas authorities from countries facing similar problems. For example, a challenge to lockdown laws in the United Kingdom was defeated on the basis that the relevant regulations were made for a legitimate purpose and were proportionate.[37]

Commonwealth override powers

But if states could validly enact these laws, could they still be overridden by the Commonwealth? Section 109 of the Constitution provides that where valid Commonwealth and state laws conflict, the Commonwealth law prevails and the state law is inoperative to the extent of the inconsistency. The High Court has also held that the Commonwealth may enact a law that covers a particular field to the exclusion of any state law in that field. So could this be done in a way that forced the opening of state borders?

The Commonwealth Parliament can only legislate upon matters that fall within the heads of power conferred upon it by the Constitution. One of those powers is the external affairs power.[38] It can be used to implement treaty obligations, including those in human rights treaties, such as the right to freedom of movement. For example, article 12 of the *International Covenant on Civil and Political Rights* includes a 'right to liberty of movement'. But article 12 is expressly subject to the qualification that it may be restricted, as provided by law, where this is necessary to protect public health, amongst other things. The United Nations Human Rights Committee, in interpreting this qualification, has stated that any restriction must be proportionate and the least intrusive means of achieving the applicable purpose.[39]

Commonwealth legislation to give effect to this right of freedom of movement would probably not have been capable of overriding state border closures if those state laws were regarded

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[35] *Palmer v Western Australia* [2021] HCA 5, [77]-[81] (Kiefel CJ and Keane J); [153]-[166] (Gageler J); [205]-[208] (Gordon J); [280]-[291] (Edelman J).

[36] *Palmer v Western Australia* [2021] HCA 5, [81].

[37] *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

[38] Australian Constitution, s 51(xxix).

[39] Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), 67th sess, UN Doc (2 November 1999) [14].

as necessary to protect public health and proportionate in their application. This is because the Commonwealth's implementation of the treaty obligation would be regarded as only 'partial' and inconsistent with the terms and intent of the provision. This may well be the reason why this approach was not taken.

The Commonwealth, however, has another relevant power, being the power to make laws with respect to quarantine.[40] This is a concurrent power, meaning that both the Commonwealth and the states can make laws about quarantine, but if there is an inconsistency, the Commonwealth law prevails. In the past, for example, the Commonwealth took over state quarantine stations.

The Commonwealth could have exercised this power to enact a comprehensive law with respect to quarantine of people suffering from diseases, which included the management of the movement of people carrying (or potentially carrying) a disease across state borders. Theoretically, this could have excluded the application of state laws that required permission to cross borders or required entrants to meet other types of quarantine requirements—although it would depend upon the drafting whether or not the law remained within the scope of the head of power and validly excluded the operation of the state law.

In practice, however, the implementation of such a comprehensive Commonwealth law was probably well beyond the capability of the Commonwealth to manage. This, again, is probably why the Commonwealth did not pursue this course. It was not so much a lack of legal power, but the absence of the capacity to give effect to a comprehensive quarantine scheme—not to mention the politics of being responsible for thousands of deaths consequential upon opening up a state to a deadly disease. Politically, there was greater benefit in carping against border closures than being responsible for the consequences of opening up state borders.

Conclusion

What does all this tell us? The states can, in rare circumstances, restrict movement across state borders, if it is for a legitimate purpose, such as protecting public health, and the law is proportionate. Such a law can exclude everyone from a state premier, such as Henry Lefroy, or a wealthy businessman, such as Clive Palmer. But if there is not a clear justification for restricting interstate movement, as opposed to intra-state movement, as was the case during the war, then a law that does so may be struck down, so that love-lorn young women, or Sydney gangland figures, as the case may be, may travel across the country with impunity. Love may have laughed at rail permits, but so did young Dulcie, who seemed better able to get her way to Perth than Henry or Clive.

[40] *Australian Constitution* s 51(ix).