

Committees of Influence: Parliamentary Committees with the capacity to change Australia's counter-terrorism laws

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Introduction

Parliament's reputation rests on its capacity to engage effectively with the community it represents and its ability to perform its core functions. These functions include the protection of individual rights. Parliamentary committees also provide a unique opportunity for the Parliament to connect with the people, to listen to their views and hold the Executive branch of government to account for its actions. In this way, parliamentary committees present a vital opportunity for the Parliament to restore and enhance its reputation within the broader community, and may, as Associate Professor Grenfell explores, contribute to Parliament's reputation as the 'pre-eminent' institution for defending rights.

The opportunity provided by parliamentary committees to enhance and restore Parliament's reputation is particularly pronounced when the Parliament is considering proposed laws that have a deep impact on individual rights and freedoms and on the shared values of the Australian community. Counter-terrorism is one such area. Well over 50 separate counter-terrorism Acts have been passed since the fall of the Twin Trade Towers in September 2001,¹ with significant consequences for individual rights and civil liberties;² the criminal justice system;³ approaches to intelligence collection and policing;⁴ and Australia's multicultural community.⁵

This paper focuses on how the Commonwealth parliamentary committee system has engaged with these laws and considers this system's role in Australia's parliamentary model of rights protection.⁶ Instead of focusing exclusively on the recently established Parliamentary Joint Committee of Human Rights (PJCHR),⁷ this paper also considers other committees that have engaged in detailed scrutiny of counter-terrorism laws since 2001.

The paper does not argue that parliamentary scrutiny is a sufficient form of rights protection in the area of counter-terrorism law making. But it finds that parliamentary committees, particularly the Senate Standing Committee on Legal and Constitutional Affairs (the LCA Committee) and the Parliamentary Joint Committee on Intelligence and Security (the PJCIS), are making a rights-enhancing difference to the shape of these laws. The paper uses two case

study examples, the LCA Committee's inquiry into the Anti-Terrorism (No 2) Bill 2005 (the Control Orders Bill) and the PJCIS's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Citizenship Bill), to highlight what this looks like in practice. It also finds that these parliamentary committees can enhance deliberative processes⁸ in counter-terrorism law making, for example by giving a voice to those who may be disproportionately affected by the proposed laws.

Finally, the Paper finds that different parliamentary committees have different influences on the law making process and this has changed over time. This is illustrated by considering the influential role the LCA Committee played in the development of the first major tranches of counter-terrorism law, and comparing this to the strong legislative impact of the PJCIS in more recent years.

Part One: The Story of Two Committees of Influence

This part of the paper looks at the work of the LCA Committee and its inquiry into the Control Orders Bill and the PJCIS's inquiry into the Citizenship Bill. It aims to identify some of the different features of these two committees that may correlate to stronger or weaker influence on the law making process.

The Early Influencer: Senate Standing Committee on Legal and Constitutional Affairs

During the period from 2001 until 2013, the LCA Legislation Committee⁹ undertook 33 inquiries into proposed counter-terrorism Bills.¹⁰ Outside of the Senate Standing Committee on the Scrutiny of Bills (the SSBSC), which is required to consider all Bills, the LCA Legislation Committee emerged as the natural place for counter-terrorism Bills to be referred for inquiry and report. Committee members and the Committee Secretariat began to develop specialist skills, and interested and expert submission makers began to provide detailed submissions to inquiries, often in very large numbers.¹¹ The LCA Legislation Committee consistently produced detailed reports on the counter-terrorism Bills referred to it, and importantly, as explained below, the recommendations made by this Committee were often reflected in successful legislative amendments. An example of such an inquiry is the LCA Committee's November 2005 inquiry into Control Orders Bill.¹²

The Control Orders Bill

The Control Orders Bill constituted one of the most significant legislative contributions to the counter-terrorism regime in Australia. The Bill introduced preventative detention orders,

control orders, and updated sedition offences into the Commonwealth criminal law. Following considerable debate through the Council of Australian Governments process,¹³ the Bill was introduced into the House of Representatives on 3 November 2005 and immediately referred to the LCA Committee for inquiry and report by 28 November.¹⁴ Despite this very short time frame, the LCA Committee inquiry attracted 294 submissions, included three days of public hearings and resulted in a 302 page including 51 recommendations for change.¹⁵

The Control Orders Bill underwent significant legislative change from introduction to enactment, with 74 government amendments passed, and other unsuccessful amendments proposed.¹⁶ While the unique legislative history of this Bill means that not all of these amendments can be attributed solely to the work of parliamentary committees,¹⁷ the work of the LCA Committee had a discernible legislative impact.

For example, of the 51 recommendations made by the LCA Committee, 17 related to the proposed preventative detention order (PDO) regime, and sought to address the key concerns of submission makers.¹⁸ These recommendations translated into over 30 successful amendments to the PDO regime in the Bill that were attributed to the work of the Committee in the Supplementary Explanatory Memorandum¹⁹ and in the second reading speech of Senator Brandis QC, representing the Attorney General in the Senate.²⁰ The changes had clear rights enhancing impact, even if they failed to remedy the core rights concerns raised by submission makers.²¹

The LCA Committee also made a number of recommendations for changes to the proposed control order regime, aimed to address concerns raised by submission makers relating to the need to ensure access to natural justice and procedural fairness. These recommendations translated into successful government amendments that were attributed to the work of the LCA Committee²² and improved the procedural fairness of control order regime, for example by requiring that the person subject to the interim order be provided with notice of an application for confirmation, and relevant information supporting that application.²³

The LCA Committee recommended that Schedule 7 (which contained the proposed new sedition offences) be removed in its entirety and be subject to detailed consideration by the Australian Law Reform Commission (the ALRC).²⁴ As an alternative, the majority recommended that significant changes be made to both the proposed offences.²⁵ While Schedule 7 was not removed from the Bill, it was amended to limit the scope of the offence, clarify the burden of proof and expand the proposed 'good faith defence' in the manner set out

by the LCA Committee.²⁶ The Government adopted the LCA Committee's recommendation to refer both the sedition offences to the ALRC for inquiry.²⁷

The LCA Committee inquiry also had an important deliberative impact on law making in this area. In a period of less than three weeks the Committee was able to attract 294 written submissions from a wide range of individuals, community organisations, legal experts, government agencies, and a diverse range of religious and ethnic groups. This highlights the value attributed to the role of the inquiry by the broader Australian community. The LCA Committee's report also quoted many submissions and on occasion provided a forum for those who might be disproportionately impacted by the changes proposed in the Bill.²⁸ In this way, the LCA Committee can be seen as tool to enhance Parliament's reputation for meaningful community engagement by acting as a conduit between the people and the Parliament. The LCA Committee's inquiry and public hearings also provided an important platform for many of these submission makers to generate media coverage and contribute to the public debate on these laws.²⁹

Care must be taken not to overstate the legislative impact of the LCA Committee's report on the final content Control Orders Bill. Indeed, many of the features of the Bill that submissions makers and committee members themselves described as unfair, rights infringing or contrary to rule of law and criminal justice principles remained in the enacted Bill.³⁰ The submission makers themselves, or broader public commentary on the Bill, may have also had a direct influence on key Government and Opposition decision makers responsible for negotiating the successful legislative amendments that improved the rights protections in the Bill.

It is also important to note that a number of the concerns addressed by the LCA Committee in its report were also reflected in the report of the SSCSB,³¹ which for example, included findings that some features of the Control Order Bill may abrogate common law privileges.³²

Despite these important caveats, it is clear from the high rate of reference to the work of the LCA Committee in the Hansard debates that the Committee provided a critical forum to raise concerns and influence legislative change to this Bill.

For example, just over half of the 52 second reading speeches on the Control Orders Bill included substantive reference to, or praise for, the work of the LCA Committee.³³ The majority of this praise came from the Labor Opposition, who sought to claim credit for the LCA Committee inquiry occurring in the first place and were highly critical of the

Government's attempts to rush the legislation through the House and the Senate. For example, the Hon Robert McClelland MP said that:

In the short time available to it, the committee—once again in the area of national security—has clearly done a commendable job, as indeed has been the contribution of a number of Australians who give their evidence, often highly expert evidence, before these inquiries without cost to the Commonwealth. A number of Australians feel very strongly about this legislation. It is appropriate that there be a thorough analysis and scrutiny of legislation of this kind.³⁴

Members of the Government's backbench also praised the work of the LCA Committee³⁵ as did Senator Brandis, the Government's representative for the Attorney General in the Senate.³⁶

The members of the LCA Committee also made reference to the inquiry and the recommendations when the spike during the Second Reading debate. For example, the second reading speeches of the Chair (Senator Marise Payne) and Deputy Chair (Senator Trish Crossin) of the LCA Committee reveal the efforts undertaken by both sides of politics to garner bipartisan support for the recommendations made by the LCA Committee.³⁷

These comments, and the Supplementary Explanatory Memoranda accompanying the 74 successful amendments to the Control Orders Bill, demonstrate that even when the parliamentary scrutiny process is considered flawed (for example due to timing or politics or both)³⁸ the work of the LCA Committee can have a powerful impact on the way of counter-terrorism law is developed and debated.

The Control Order Bill case study demonstrates that parliamentary committee system can have a longer-term impact on the development and content of Australia's counter-terrorism laws. For example, the LCA Committee's report and recommendations feature prominently in a range of significant subsequent law reform developments including the Australian Law Reform Commission's Report *Fighting Words: A Review of Seditious Laws in Australia*.³⁹

While it took some time – and a change of Government – to see these changes reflected in law, the work of the LCA Committee again featured in the parliamentary consideration of the National Security Legislation Amendment Bill 2010, which implemented a number of the ALRC recommended reforms.⁴⁰ This can be seen as evidence of the parliamentary committee

system offering an opportunity to enhance Parliament's reputation as a responsive and deliberative law making body.

These developments have in turn resulted in legislative change that brings the current provisions relating to control orders, preventative detention orders, sedition and advocating terrorism related offences much closer too (but not yet in line with) the recommendations made by the LCA Committee in its 2005 inquiry.⁴¹

Despite this impressive track record, over the last three to five years the capacity of the LCA Legislation Committee to influence the shape of proposed counter-terrorism laws has substantially decreased, to the point where it is no longer the natural committee to inquire into these types of Bills. The newer committee - the PJCIS - has emerged as a committee of influence in the most recent tranche of counter-terrorism legislation in Australia.

The Recent High Strike Rate of the Parliamentary Joint Committee on Intelligence and Security

Since the election of the 44th Parliament in 2013, the work of the PJCIS⁴² has included a strong focus on inquiring into proposed new counter-terrorism laws and the Committee has reported in detail on each of the key counter terrorism legislative reforms.⁴³

In the period 2014-2015 the PJCIS made 109 recommendations for change, all of which were accepted by government, and resulted in 63 successful amendments to the bills.⁴⁴ This extensive acceptance of committee recommendations is rare and according to David Monk, such acceptance of recommendations 'is a significant achievement for a committee in most Westminster parliaments and should be recognised as such'.⁴⁵

It is important to note that during this same period, these Bills were *not* referred to the LCA Committee for inquiry, with the exception of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.⁴⁶

As will be discussed further in the below, this signals and important shift away from the LCA Committee as source of influential parliamentary scrutiny of counter-terrorism laws, towards the PJCIS as the natural home for such laws to be referred for inquiry and report.

Again, care must be taken not to overstate the impact of the PJCIS on the content of Australia's more recent tranche of counter-terrorism laws, however it is clear that in many instances the changes attributed to the work of the PJCIS have been rights-enhancing, even if they have left in place the core rights-concerning legal mechanism sought to be introduced.⁴⁷ It is also clear

that the recent PJCIS inquiries have provided a forum for the human rights implications of these laws to be considered, even if not satisfactorily resolved.⁴⁸

The Citizenship Bill

The Citizenship Bill was introduced within the context of a broader bipartisan and politically popular ‘tough on terror’ policy, with a particular focus on disrupting and deterring so called ‘foreign fighters’ - young Australians travelling overseas to participate in or support terrorist activity and returning to Australia radicalised and posing a serious terrorist threat.⁴⁹

Immediately after introducing the Citizenship Bill to the Senate, the federal Attorney General referred the Bill to the PJCIS for inquiry and report.⁵⁰ An attempt by the Greens to have the Citizenship Bill referred to the LCA Committee was defeated, leaving Greens Senator Penny Wright to lament the exclusion of the minor parties and the cross bench from the scrutiny process.⁵¹

The two technical scrutiny committees, the SSCSB and the PJCHR also considered and reported on the Citizenship Bill, and while not the subject of focus in this Paper, their contributory role to the work of the PJCIS is relevant to the resulting legislative and other influence of that committee.

The PJCIS’s inquiry into the Citizenship Bill spanned just over two months, attracted around 50 written submissions, including from legal experts, representatives of Muslim communities, human rights experts and government departments, and involved three public hearings in addition to private briefings.⁵² As discussed below, the PJCIS inquiry clearly provided an effective forum for submission makers to express concerns with the Citizenship Bill, but it did not match the LCA Committee in terms of volume or diversity of submissions and witnesses.

The PJCIS report was extensive, spanning 180 pages and covering a broad range of issues in some detail.⁵³ The PJCIS's report also incorporated concerns articulated by a relatively diverse group of submission makers in written submissions and at the three public hearings, including by directly reflecting some of these concerns in its findings and specific recommendations for legislative reform.⁵⁴

In a number of instances, these recommendations, implemented as successful legislative amendments and attributed in the supplementary Explanatory Memorandums to the work of the PJCIS, could be described as important rights enhancing changes to the Bill. For example, the amendments make it clear that before a dual national could have their citizenship

'renounced' by doing something terrorist-related overseas, they must at least have *intended* to engage in the particular prescribed conduct (rather than been reckless or negligent).⁵⁵ The amendments also narrow the range of conduct that can trigger the provisions,⁵⁶ set out the person's rights of review⁵⁷ and make it clear that the laws cannot be applied to children under 14.⁵⁸ While these changes by no means remedy the full range or even the most severe intrusions into individual rights and freedoms posed by the Bill, they nevertheless constitute specific and substantive improvements.

The PJCIS's relatively high public profile and respect among submission makers and government agencies and departments also generated a consistently high level of praise from parliamentarians, particularly the two major parties. In the case of the Citizenship Bill, this was voiced most passionately by members of the Labor Opposition, such as Michael Danby MP:

The evolution of this legislation, like the metadata legislation, shows the value of the committee system and the increasing influence of the PJCIS. ... Committees might be seen as too slow for the 24/7 news cycle and the Twitterati, but the result is a pragmatic solution is best for the Australian people – as in this case – and it shows that we parliamentarians are doing our job.⁵⁹

The Citizenship Bill example demonstrates the PJCIS's capacity to work closely with government agencies and departments, and to achieve a near perfect strike rate when it comes to translating recommendations into legislative results, at a time when the LCA Committee is deliberately sidelined from participating in formal scrutiny of the Bill. This trend is also apparent with respect to the formal parliamentary scrutiny of other counter-terrorism Bills since 2013.⁶⁰

The Citizenship Bill case study also demonstrates the ongoing importance of the technical scrutiny committees and the role they play in alerting parliament to the key issues of concern arising from laws of this nature. This is evident both in terms of the PJCIS's reference to the findings of the SSCSB and the PJCHR in its report, and in the relationship between the key issues focussed on by both the SSCSB and the PJCHR and successful legislative amendments made to the Bill.⁶¹ This is not to say that the core rights-offending features of the counter-terrorism Bills were removed, but it is clear that by working together, the SSCSB, the PJCHR and the PJCIS, can collectively influence rights-enhancing change.

Part 2. What Explains this Shift in Influence?

There are three key factors that may explain the particularly strong influence of the PJCIS, as both an effective mechanism for affecting legislative change: the broader political context of the more recent tranche of counter-terrorism laws, access to expert advice and the provision of a safe forum for the unprejudiced discussion of problems. Each of these factors is discussed below. However, there are also features of the PJCIS that may present challenges for its long term effectiveness, particularly as a form of rights protection and as a facilitator of deliberative processes. These features are also discussed below.

Factor One: Political Context

The most influential factor is likely to be closely connected to the broader political and institutional context in which the latest tranche of counter-terrorism laws was introduced.

The local and global experience of terrorism has shifted in the last 15 years from horror and outrage at specific terrorist acts, to a general acceptance that home grown and international terrorism is now part of the geo-political landscape. This shift has had a deep impact on the way Australians and their elected representatives respond to proposed laws in this area. Unlike the period from 2001-2005, where it remained politically viable to question the need for specific terrorism measures in light of the existing criminal law, by 2013 almost no one in parliament was prepared to question the necessity of the heavy counter-terrorism legislative agenda of the Abbott-Turnbull Government. In this context, it is no surprise that the PJCIS (with its major party only membership and reach to both Houses of Parliament) was the committee of choice for the Abbott Turnbull Governments when faced a diverse mix of political personalities in the Senate.

It is also possible to view the legislative influence of the PJCIS more cynically, as an example of deliberate legislative overreach with respect to a politically popular issue, followed by more moderate post-scrutiny amendments designed to ensure support from the Opposition, resulting in a legislative regime that continues to seriously abrogate individual rights.⁶²

But while significant, these explanations do not fully explain why so many legislative changes were made in response to parliamentary committee work on these laws, and why so many of those changes had important rights-enhancing features.

Perhaps another more nuanced reading of the Citizenship Bill example is to see the PJCIS as delivering on some of the broader goals of the parliamentary scrutiny system, which include

providing: a forum for the provision of expert advice about the content and practical effect of proposed laws and a safe political space to discuss how to improve provisions, or to modify rights-intrusive features. As will be discussed further below, when compared with the LCA Committee, it appears that the PJCIS is competing strongly on these indicators.

Factor Two: Access to expert advice

Unlike the LCA Committee, the members of the PJCIS (and the Committee's Secretariat) are chosen by the Prime Minister, required to be security cleared and are authorised to access otherwise confidential national security information.⁶³ This has enabled the members of the PJCIS to establish strong and trusting relationships with key Commonwealth law enforcement and intelligence agencies. The relatively recent practice of law enforcement and intelligence agencies providing a standing secondee to support the Secretariat staff of the PJCIS, helps entrench these close working relationships and further improves the chances of the PJCIS recommendations resulting in legislative change.⁶⁴ These relationships allow Committee members to confidentially test proposed findings or recommendations against the views of those directly responsible for giving practical effect to the laws, before making their views publicly known.

In contrast, the LCA Legislation Committee has no special powers to receive national security information, and no real capacity to build up long term relationships with key agencies. Its regularly changing, multiparty membership, and very heavy and diverse workload, mean that its strengths centre on its ability to shift quickly between different subject matters and to engage a broad range of Senators and submission makers in its work. These same features make it difficult to establish relationships of trust with certain agencies.

The PJCIS also has a strong track record of attracting high quality, detailed submissions from a range of individuals and organisations with the legal expertise. These submission makers regularly offer specific recommendations for legislative change or provide operational insights to strengthen the policy case for the proposed reforms.⁶⁵ This public profile as the 'forum of choice' for articulate and high profile submission makers solidifies the political status of the PJCIS, and enhances its capacity to generate media attention.⁶⁶

Factor Three: A safe forum for unprejudiced discussion of problems

The Citizenship Bill example also demonstrates the capacity of the PJCIS to provide a politically safe forum in which the Government can engage in negotiations with the Opposition, away from the public performance and recording of Hansard, but with the benefit of public

input and the tabled reports of the SSCSB and PJCHR. The strong bipartisan support for both the broad policy objectives underpinning the counter-terrorism laws, and for achieving consensus within the PJCIS, makes the Committee the perfect place for Government to 'gauge the reaction of its backbenches to a proposal' and to discuss the types of compromises that might be required to secure bipartisan support.⁶⁷

The factors leading to the willingness of the Coalition Government being open to negotiation with the Labor Opposition with respect to the detail of the Citizenship Bill may be limited to this specific case study, but could also point to broader structural factors at play at the Commonwealth level such as the presence of a hostile or difficult Senate that necessitates bipartisan support to ensure the passage of counter-terrorism Bills.

However, it is also important to have regard to the particular features of the PJCIS that, particularly when compared with the LCA Committee, may present challenges for its long term effectiveness as a form of rights protection and as a facilitator of deliberative processes.

Providing a forum for voices to be heard?

As noted above, the PJCIS inquiry into the Citizenship Bill attracted submissions from a large number of submission makers and included evidence from a diverse range of witnesses, including those who are likely to be disproportionately affected by the Bill.⁶⁸

Despite this, there appear to be some participants in the parliamentary committee system that question the legitimacy of the PJCIS as either a forum to promote more deliberative democracy or as a mechanism to improve the effectiveness, fairness of balance in counter-terrorism law. Unsurprisingly these participants include the minor parties and independents who are excluded from membership of the PJCIS,⁶⁹ but it may be that other submission makers, individuals and organisations are questioning the capacity of the PJCIS (with its major party only membership and close relationship with key agencies) to offer robust, independent and rights based scrutiny of counter-terrorism laws. These perceptions are supported by the fact that the number and diversity of submission makers and witnesses to PJCIS inquiries during its recent period of strong legislative influence is considerably less than those to LCA Committee at its most influential period.⁷⁰

A (limited) mechanism to protect rights?

Despite the exceptionally close relationship between the PJCIS and the law enforcement and intelligence agencies, many of its recommendations made in respect of the latest tranche of counter-terrorism Bills have tightened the scope of the power initially afforded to these

agencies, or strengthened the judicial or other oversight applying to the use of these powers by these agencies.

While some might suggest that this is more about adjusting initial legislative overreach than improving the fairness of the law, it is also possible to conclude that even parliamentarians who have a political self interest in ignoring or diluting parliamentary scrutiny are prepared to undertake their committee role diligently and persuade their respective parties to adjust the Bills that they so publicly support.

For example, Hansard indicates that almost every one of the 60 federal parliamentarians who spoke about the Citizenship Bill talked about ‘rights, liberties and freedoms’, with most frequent attention being given to well-entrenched common law rights and rule of law concepts such as access to judicial review and limits on executive power.⁷¹ This suggests that while the majority of parliamentarians may not yet attribute any political consequences to voting for laws that unduly infringe the full range of internationally protected human rights,⁷² they at least want to create the public impression that scrutiny of laws against some relatively narrow set of rights is part of the legitimate role of parliament.⁷³

The Hansard debates also highlight the fact that the high strike rate and political legitimacy of the PJCIS may in part be due to the benefit the committee derives from the work of other parliamentary committees and independent oversight bodies. For example, since 2011 the PJCIS and its frequent submission makers have regularly drawn upon the work of the Independent National Security Legislation Monitor (INSLM) - which has served as a respected, impartial and credible expert voice on counter-terrorism law, and the legal options that exist to tackle particular threats.⁷⁴

The wealth of existing scrutiny material in this area also means that the PJCIS can adopt the type of rights discourse that resonates most strongly with the Parliament and Government of the day. In the context of the 44th parliament, this discourse draws more heavily on common law rights or constitutionally inspired concepts, rather than direct reference to international human rights principles.⁷⁵

This approach contrasts with that of the LCA Committee. As the Control Order Bill example shows, the LCA Committee’s reports included findings and recommendation framed in explicitly ‘human rights’ terms, reflecting the language used by many submission makers to its inquiries. While the LCA Committee’s more explicit rights based approach may have

strengthened its legitimacy in the eyes of human rights advocates and some minor parties, independents and backbenchers, it did not always resonate with the Government of the day. This may explain why the legislative strike rate of the LCA Committee (even at the height of its influence) was lower than the PJCIS, while at the same time its capacity to enhance deliberative processes remained high.

This paper has not looked in detail at the role of the SSBSC and the PJCHR, however it is clear that these committees play an important role in developing a culture of scrutiny at the Commonwealth level. While the scrutiny criteria applied by the SSCSB appears to resonate more strongly among parliamentarians (particularly of the 44th Parliament),⁷⁶ there is some evidence that the PJCIS and its submission makers are beginning to look more carefully at the work of the PJCHR to support their submissions and recommendations.⁷⁷

Conclusion

The Citizenship Bill and Control Order Bill case studies show that particular parliamentary committees can emerge as more powerful than others, which in turn provides important insights into what committee features are most likely to enhance Parliament's reputation or facilitate rights-enhancing legislative change.

In the Citizenship Bill example, a myriad of factors led to the government and parliament conferring on the PJCIS report a high level of legitimacy. Significant amongst these factors are that the PJCIS is a committee with bipartisan membership and a close, respected relationship with key government agencies. These features allow it to explore improvements to the proposed counter-terrorism law in a politically safe environment and express these changes in a politically comfortable rights discourse.

The Control Orders example suggests that the LCA Committee's more diverse membership has the potential to increase the range and diversity of those involved in the inquiry process to promote more explicit parliamentary engagement with human rights concepts. It also highlights that parliamentary scrutiny of counter-terrorism laws can have important long term rights enhancing results.

Both case studies suggest that providing meaningful opportunities for public participation in helps to develop and entrench a broader culture of respect for the formal scrutiny process, among submission makers who begin to see their concerns or suggestions reflected in

committee reports and recommendations, and parliamentarians themselves, who can begin to see a political as well as principled reason to take formal parliamentary scrutiny seriously.

The case studies also show that the legitimacy and status attributed to a particular parliamentary committee depends on both its legislative influence *and* its independence from the Executive. This may provide an important warning for the future effectiveness and legitimacy of both the PJCIS (which may be at risk of being 'too close' to law enforcement and intelligence agencies to be considered truly independent) and the LCA Committee (whose declining legislative influence in this area may result in key participants looking for other more effective forums to affect rights enhancing change).

While the adequacy of the current model either as a form of rights protection or as facilitator of deliberative democracy may remain contested,⁷⁸ the case studies considered in this paper show that parliamentary committees can have a positive impact on the final shape of Australia's counter-terrorism laws, and on the reputation of the Commonwealth Parliament.

¹ For an overview of Australia's counter-terrorism laws see: George Williams, Nicola McGarrity and Andrew Lynch, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015); see also George Williams, 'A decade of Australian anti-terror laws' (2011) 35(3) *Melbourne University Law Review* 1136; George Williams, 'The legal assault on Australian democracy : the annual Blackburn lecture' (2015)(236) *Ethos* 18.

² For an example of commentary on the impact of Australia's counter-terrorism laws on rights and liberties see: Michael Brett YOUNG, 'Civil rights v national security' (2009) 83(10) *Law Institute Journal* 6; Williams, above n 1; Spencer ZIFCAK, 'Anti-terrorism legislation and the protection of human rights' (2006) 18(1) *Legaldate* 1; Jenny Hocking, *Terror laws : ASIO, counter- terrorism and the threat to democracy* (University of New South Wales Press 2004). Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Human rights implications of the Anti-Terrorism Bill 2005', 18 October 2005 (report prepared at the request of Jon Stanhope, MLA, Chief Minister of the ACT); P. Mathew, 'The Anti-Terrorism Bill 2005: Are We Crossing The Line?', Human Rights and Equal Opportunity Commission Forum on National Security Laws and Human Rights, ACT Legislative Assembly, 31 October 2005.

³ For an example of commentary on the impact of Australia's counter-terrorism laws on the criminal justice system see Law Council of Australia, 'Anti-Terrorism Reform Project' (Paper October 2013) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Dec2012Update-Anti-TerrorismReformProject.pdf>>; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005 ' (2007) 10(1) *The Flinders Journal of Law Reform* 3; Department of the Parliamentary Library, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Department of the Parliamentary Library Information and Research Services, Commonwealth, 2001-2002).

⁴ For an overview of some of the challenges of policing in the context of Australia's counter-terrorism laws see Council of Australian Governments Counter-Terrorism Review Committee, Commonwealth, Canberra *Review of Counter-Terrorism Legislation* (2013) 14 May 2013. See also Sharon Pickering et al, *Counter-Terrorism Policing and Culturally Diverse Communities*, Victorian Police No (2007).

⁵ For example see Petro Georgiou, 'Multiculturalism and the war on terror' (Paper presented at the Castan Centre of Human Rights Law Annual Conference, Monash University, Melbourne, 18 October 2005). See also S J

Mullins, 'Australian Jihad: Radicalisation and Counter-Terrorism' (2011) 140 *Analysis of the Real Instituto Elcano* 1.

⁶ For an evaluation of the work of the Parliamentary Joint Committee on Human Rights see: Lisa Burton and George Williams, 'Australia's exclusive parliamentary model of rights protection' (2013) 34(1) *Statute Law Review* 58.; George; Reynolds Williams, Daniel, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

⁷ Burton and Williams, above n 1; Williams, above n 1.

⁸ For a discussion of the concept of deliberative democracy and the role of parliamentary committees in enhancing deliberative democracy in Australia see John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998).; Dominique Dalla-Pozza, 'Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws' (2008) 23(1) *Australasian Parliamentary Review* 39.

⁹ The LCA Legislation Committee is part of a pair of Standing Committees: one designed to conduct inquiries into the provisions of Bills referred to it by the Senate (the Government chaired Legislation Committee) and one designed to conduct inquiries on broader matters of public interest referred to it by the Senate (the non-government chaired References Committee). The Legislation Committee has three government members, two opposition members and one independent or minor party member. The References Committee has two government members, three from the opposition and one independent or minor party member. Both Committees receive guidance from the Senate itself as to the focus of its inquiry, and how much time it has before being required to report to the Senate on the outcome of its work. The LCA Committee is established under Senate, Parliament of Australia, *Standing Order* 25.

¹⁰ Ibid.

¹¹ For example, the LCA Committee received 435 submissions to its inquiry into the *ASIO Legislation Amendment Bill 2002*, 431 submissions to its inquiry in the *Security Legislation Amendment (Terrorism) Bill No 2 2002* and 294 submissions to its inquiry into the Control Orders Bill.

¹² On 3 November 2005, the Senate referred the above Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 28 November 2005. Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), [1.1].

¹³ For further background to the Control Orders Bill see Sue Harris Rimmer et al, *Bills Digest Anti-Terrorism Bill (No. 2)* of Digest No 64 of 2005, 18 November 2005. Greg CARNE, 'Prevent, detain, control and order? Legislative process and executive outcomes in enacting the Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10(1) *Flinders Journal of Law Reform* 17; Paul FAIRALL and Wendy Lacey, 'Preventative detention and control orders under federal law : the case for a bill of rights' (2007) 31(3) *Melbourne University Law Review* 1072; Murray MCINNIS, 'Anti-terrorism legislation : issues for the courts' (2006)(51) *AIAL forum* 1; Bret Walker, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011) < <http://www.dpmc.gov.au/publications/INSLM/index.cfm>>.

¹⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), [1.1].

¹⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), Recommendations, [1.3]-[1.5].

¹⁶ See Parliament of Australia Website, 'Anti-Terrorism Bill (No. 2) 2005 Bills homepage', <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2469> (accessed 16 August 2016). See also Anti-Terrorism Bill (No. 2) 2005 Supplementary Explanatory Memorandum available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2469_ems_9ae6228d-e3c5-46d9-af1e-745712d818d5%22> (accessed 16 August 2016).

¹⁷ The Bill was introduced against the backdrop of the 2005 London bombings and during a period when the Howard Government enjoyed a clear Senate majority for the first time since 1980. Many members of the Labor Opposition held strong concerns about components of the Bill that sought to criminalise certain organisations and replace and expand existing sedition offences. The proposed new preventative detention order regime (PDO) was also attracting public attention from legal groups and human rights advocates, who drew attention to the criticisms levelled against similar schemes in the United Kingdom. This was played out on the national stage in the context of the September 2005 meeting of the Council of Australian Governments (COAG) called

by Prime Minister Howard. A confidential draft version of the Control Orders Bill was considered in detail by COAG and later publicly released by then ACT Chief Minister Stanhope. For further information see Library, above n ; See also Hon. J. Howard (Prime Minister), *Counter-Terrorism Laws Strengthened*, media release, Canberra, 8 September 2005.; see further Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Human rights implications of the Anti-Terrorism Bill 2005', 18 October 2005 (report prepared at the request of Jon Stanhope, MLA, Chief Minister of the ACT).

¹⁸ These concerns related to: the adequacy of the procedural safeguards within the proposed PDO application and confirmation regime; access to the courts, including the right to judicial review; the conditions of detention and standards of treatment, including conditions governing detention of minors; the broad discretion to prohibit contact with the outside world, including contact between minors and their parents; and the restrictions imposed on detainees' lawyers and their discussions with their client.

¹⁹ Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum, Schedule 4, Items 25-64.

²⁰ Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

²¹ For example, the changes: provided for special assistance to be offered to person subject to a PDO if the person has inadequate knowledge of English language or disability; ensured that the person subject to an interim PDO is given notice of application for continued preventative detention order ; prescribed a set of criteria to be considered before making a prohibited contact order as part of a PDO; ensured that the Ombudsman is contacted when making an application for a PDO ; meant that the person subject to an interim PDO would have an opportunity to make submissions to the AFP that the order should be revoked ; meant that the person subject to an interim PDO would be provided with a summary of the grounds on which the order is made; provided a range of specific procedural safeguards for minors detained under PDO, including permitted contact with parents or support persons (albeit with new disclosure offences added), ensured that minors are not detained with adults ; and set out the need to establish guidelines to provide for the special circumstances of young persons and persons who are incapable of managing their own affairs and who are detained and a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person detained under a PDO. See Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum, Schedule 4, Items 25-64, see also Anti-Terrorism Bill (No. 2) 2005 Bill correction to the explanatory memorandum available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2469_ems_93150d84-7c07-418c-8c65-92b69a1f7948%22> (accessed 16 August 2016).

²² Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum Schedule 3, Items 4-26. See also Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

²³ Anti-Terrorism Bill (No. 2) 2005 Bill new clause 104.12A(2) and related amendments (Supplementary Explanatory Memorandum Item 13). The amendments also clarified that it is a requirement that that the person subject to the control order be provided summary of the grounds on which the order should be made (albeit with exceptions relating to the disclosure of national security information); clarified that the interim control order be served personally on the person; provided for the Queensland Public Interest Monitor to be advised of any interim control orders issued in Queensland; and authorised the lawyer of person subject to the control order to request information and be present to represent the person at the time of confirmation. See Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum Schedule 3, Items 4-26.

²⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), Recommendations 27 and 28, see also Chapter 5 'Sedition and Advocacy'.

²⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), Recommendation 9, see also Chapter 5 'Sedition and Advocacy'.

²⁶ Anti-Terrorism Bill (No. 2) 2005 Bill, Schedule of the amendments made by the Senate, Items 68-72 available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fsched%2Fr2469_sched_561025b0-3bc7-435a-b842-3d6cf44042bc%22> (accessed 23 August 2016)

²⁷ An On 1 March 2006, the Government issued formal Terms of Reference for an Australian Law Reform Commission (ALRC) inquiry, which included consideration of whether the new offences in Schedule 7 of the Control Orders Bill 'effectively address the problem of urging the use of force or violence'.

²⁸ For example, the Report documents the Australian Muslim Civil Rights Advocacy Network's concerns with the Bill, including that: "the broad offences and powers proposed in the Bill will create a risk that innocent people will be caught up in the system and that the laws will further alienate and radicalise disaffected people, especially Muslim youth who may be more vulnerable to the extremist ideology of terrorists." Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005*, 28 November 2005 (Commonwealth of Australia), Chapter 2 'Preventative Detention Orders' ,[2.17] see also Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the *Provisions of the Anti-Terrorism Bill No 2*, Public Hearing Transcript (Sydney, Thursday, 17 November 2005) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/terrorism/hearings/171105 (accessed 16 August 2016).

²⁹ See for example Annie Pettit and Vicki Sentas, 'Terrorism : laws for insecurity' (2005) 30(6) *Alternative Law Journal* 283.; International Commission of Jurists Australia, 'ICJ Australia Denounces New Counter-Terrorism Laws', media release, 17 October 2005; Law Council of Australia, 'International Legal Concern Grows re Anti-terror Laws', media release, 12 October 2005; Law Society of New South Wales, 'Government Abuses Power Over Anti-Terrorism Laws', media release, 14 October 2005; Professor Hilary Charlesworth (ANU), Professor Andrew Byrnes (UNSW), Gabrielle McKinnon (ANU), 'Human Rights Implications of the Anti-Terrorism Bill 2005', letter to the A.C.T. Chief Minister, 18 October 2005; Professor George Williams (UNSW). 'Jumping the gun on terror', *The Age*, 27 October 2005, p. 15; Sir Gerard Brennan, 'Whitlam and jurists condemn legislation', *Sydney Morning Herald*, 25 October 2005; Professor Don Rothwell (University of Melbourne), 'Terrorism threat increases need for basic human rights protection: experts', *ABC Lateline*, 25 October 2005.

³⁰ For example see Professor Williams, Dr Lynch, Dr Saul, Gilbert and Tobin Centre of Public Law, University of New South Wales, *Submission 80*; Professor Donald Rothwell, Challis Professor of International Law, Sydney Centre for International and Global Law, The University of Sydney, *Submission 188*; Mr Simeon Beckett, *Committee Hansard* 14 November 2005, p. 42. See also Dr Ben Saul, *Committee Hansard*, 14 November 2005; Mr John North (Law Council of Australia) , *Committee Hansard*, 14 November 2005; Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*; Professor Joseph and Mr Abraham, Castan Centre for Human Rights, *Submission 114*.

³¹ Senate Standing Committee on Scrutiny of Bills, *Alert Digest No 13 of 2005*, (9 November 2005) 8.

³² For example, the SSCSB drew attention to the control order and preventative detention order provisions and their potential to exclude the Attorney General's decisions from judicial review. On these latter matters, the SSBSC ultimately accepted the further information provided by the Attorney General, including information that pointed to the availability of administrative review *Ibid*, 10-16.

³³ For example see Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 84 (Robert McClelland); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 88 (Judi Moylan); Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 13 (Joseph Ludwig).

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 84 (Robert McClelland).

³⁵ For example, Judi Moylan MP noted that: "This legislation has not been entered into lightly. There have been, as my colleague the member for Barton said, a number of gyrations of this legislation—something in excess of 60 drafts. This has been done in consultation with appropriate state and territory ministers and premiers. That is the correct way to proceed in a matter that, as I said, gives such unprecedented powers to our agencies. It has now been before a Senate committee. That Senate committee, I believe from the quick reading that I have made of its recommendations, has listened to the views of a number of people and has made some very sensible recommendations. I believe applying a five-year sunset clause—shortening it from the proposed 10 years—is sensible with a review. Sometimes we have to erect barriers by way of legislation, but our laws are not immutable and we need to constantly look at the appropriateness of the laws we pass in this place and make the necessary changes. I think calling for a review is an excellent recommendation." Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 88 (Judi Moylan)

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

³⁷ See Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 125 (Patricia Crossin) and Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 6 (Marise Payne).

³⁸ See for example, Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 13 (Joseph Ludwig); Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 58 (Simon Crean). For commentary see PETTITT and Sentas, above n ; Andrew Lynch, 'Legislating with urgency : the enactment of the Anti-Terrorism Act (No 1) 2005' (2007) 30(3) *Melbourne University Law Review* 747; Janet L. Hiebert,

'Parliamentary Review of Terrorism Measures' (2005) 68(4) *Modern Law Review* 676; John Uhr, 'Terra infirma?: Parliament's uncertain role in the 'War on Terror'. [Paper in Thematic Issue: Counter-Terrorism Laws.]' (2004) 27(2) *University of New South Wales Law Journal* 339..

³⁹ The key recommendations of the ALRC included that the term 'sedition' be removed from federal criminal law and the sedition related offences introduced by the Control Orders Bill changed to 'Treason and urging political or inter-group force or violence' (Recommendations 1, 2 and 3). The ALRC also recommended changes to the advocating terrorism and sedition offences introduced by the Control Orders Bill to ensure that there was a 'bright line distinction' between offending conduct and freedom of expression (Recommendation 9). Australian Law Reform Commission, Commonwealth, Canberra *Fighting Words: A Review of Sedition Laws in Australia* (2006).

⁴⁰ The LCA Committee's report on the Control Orders Bill also featured prominently the following inquiries into counter-terrorism laws: 2012 COAG review of counter-terrorism legislation Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2012); Committee, Commonwealth, Canberra (2013) 14 May 2013. Independent National Security Legislation Monitor 2011 annual report Walker, Bret, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011) < <http://www.dpmc.gov.au/publications/INSLM/index.cfm>>; 2008 Sheller Review Report of the Security Legislation Review Committee Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006) June 2006, (The Hon. Simon Sheller, AO, QC).; and the Parliamentary Joint Committee on Intelligence and Security, Review of Security and Counter-Terrorism Legislation (2006).

⁴¹ Similar conclusions can be drawn from the LCA Committee's earlier reports on counter-terrorism law, such as its reports on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 which, following much parliamentary debate, ultimately resulted in the subsequent Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] being introduced, reflecting many of the LCA Committee's recommended changes. The LCA Committee's report on the Anti-Terrorism Bill 2004, albeit much smaller in size and attracting far fewer submission makers, also had a strong legislative impact on the shape of the Bill as enacted, with many (but not all) of the LCA Committee's recommendations for legislative change reflected in legislative amendments.

⁴² The PJCIS is a joint committee established by the *Intelligence Services Act 2001* (Cth). Its membership, which is also statutorily prescribed, has so far been limited to Members and Senators from the major political party, and it regularly attracts parliamentarians with past experience in military, law enforcement or related fields. *Intelligence Services Act 2001* (Cth) Part 4, s28 (2) provides that "The Committee is to consist of 11 members, 5 of whom must be Senators and 6 of whom must be members of the House of Representatives."

⁴³ These are: the National Security Legislation Amendment Bill (No. 1) 2014; the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No.1) 2014; the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014; the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015; and the Counter-Terrorism Legislation Amendment Bill (No.1) 2015.

⁴⁴ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, above n 11, 3. The Bills examined during this period were the Counter -Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; National Security Legislation Amendment Bill (No 1) 2014; Counter-Terrorism Legislation Amendment Bill (No 1) 2014) and the Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014.

⁴⁵ David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *The Journal of Legislative Studies* 1, 8.

⁴⁶ The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was referred to the LCA Committee, but did not result in a public inquiry with the majority of the LCA Committee instead deciding 'not to call for or accept submissions, nor hold hearings' and instead deferring to the work of the PJCIS. This notice is provided on the Parliament of Australia Website 'Senate Legal and Constitutional Affairs Committee, Completed Inquiries, Counter -Terrorism Legislation Amendment (Foreign Fighters) Bill 2014' http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Foreign_Fighters (accessed 16 August 2016).

⁴⁷ For example, in the case of the Counter -Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the recommendations of the PJCIS resulted in a significant narrowing of the scope of the proposed new entering a declared areas offence, but failed to remove the offence completely, meaning that the Bill continued to raise serious human rights concerns for many commentators and submission makers. For example see Gabrielle

APPLEBY, 'The 2014 counter-terrorism reforms in review' (2015) 26(1) *Public Law Review* 4; George. Williams, 'National security reforms stage two foreign fighters' (2014); Spencer ZIFCAK, 'Proportionality lost' (2014)(133) *Arena Magazine* 20.

⁴⁸ See for example, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) ch 2, where reference to 'human rights' or human rights organisations occurred over 100 times; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) ch 4 ("Matters of principle and effectiveness") particularly pp 47-62, where the PJCIS discusses Australia's international human rights obligations under the subheading "Australia's International Obligations").

⁴⁹ For an overview of the key features of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 see Department of Parliamentary Services (Cth), *Bills Digest: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No 15 of 2015, September 2015. See also S Pillai, 'The rights and responsibilities of Australian citizenship: A legislative analysis' (2014) 37(3) *Melbourne University Law Review* 736-785.

⁵⁰ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *New Parliamentary inquiry into Citizenship Bill* (2015). The parliamentary committee inquiries into the Citizenship Bill were also set against a broader public discussion about Australian citizenship - the notion of a 'common bond, involving reciprocal rights and obligations' - taking place in part via the Government's public consultation on its discussion paper: Department of Immigration and Border Protection, 'Australian Citizenship, Your Right, Your Responsibility' (Discussion Paper, Department of Immigration and Border Protection).

⁵¹ Senator Wright said "The Prime Minister indicated that this significant legislation, which will be looking at the revocation of one of the most fundamental rights in a democracy—that of citizenship—would be given a full inquiry, but that means it will only go to the Parliamentary Joint Committee on Intelligence and Security. The only members of that committee are government and opposition members, and all nine men on that committee have had past associations with the military, security and spy agencies through government. This means that those other MPs in this parliament who represent people who have voted for the Greens and Independents will not have the ability to ask and inform ourselves properly, and it will not be transparent for the public. It is a shame and it should not keep happening." Commonwealth, *Parliamentary Debates*, Senate, 25 June 2015 4600.e (Penny Wright).

⁵² *Ibid.* The PJCIS received 43 submissions and 7 supplementary submissions. Public hearings were held on 4, 5 and 10 August 2015 and the PJCIS also received one private briefing and conducted one classified hearing. The PJCIS requested two extensions of time for issuing its report on the Citizenship Bill, finally issuing its Advisory Report on 4 September 2015.

⁵³ These issues included: the constitutionality of the Bill, the compliance of the Bill with Australia's international human rights obligations, the effectiveness of the Bill as a response to the particular threat of terrorism posed by foreign fighters, the application of the Bill to children, the need for oversight and accountability in the exercise of executive power under the Bill and the question of retrospective application of the post-conviction based provisions.

⁵⁴ For example, the PJCIS report includes quotations and references attributable to submission makers such as Professor George Williams, Professor Helen Irving, Dr Rayner Thwaites, Commonwealth Ombudsman, Australian Human Rights Commission, Law Council of Australia, Attorney General's Department, Federation of Ethnic Communities' Councils of Australia, Refugee Council of Australia, Professor Ben Saul, Professor Kim Rubenstein, Australian Defence Association, Department of Immigration and Border Protection, the Executive Council of Australian Jewry, Australian Lawyers for Human Rights, Refugee Council of Australia, Muslim Legal Network, and Unicef Australia.

⁵⁵ *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) amended clause 33AA(3).

⁵⁶ *Ibid.*, amended clause 33AA(2).

⁵⁷ *Ibid.*, amended clause 33AA(11).

⁵⁸ *Ibid.*, amended clause 33AA(1).

⁵⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015 (Michael Danby). 13117- 13118.

⁶⁰ For example, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was referred to the PJCIS for inquiry and report, and was also subject to scrutiny by the SSCSB and the PJCHR. As noted above, the Bill was also referred to the Senate Legal and Constitutional Affairs Legislation Committee, however the majority of this Committee deferred its inquiry to the PJCIS, and only a dissenting report by Australian Greens Senator Penny Wright was issued. The PJCIS made 37 recommendations for amendments to the Bill. All of these recommendations were supported by Government. The National Security Legislation Amendment Bill (No 1) 2014 was also referred to the PJCIS for inquiry and report, and was also subject to scrutiny by the SSCSB and the PJCHR. The PJCIS made 17 recommendations for amendments to the Bill, all of which were supported by the Government. Similar experiences occurred with respect to the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (all but one of the 16 of the PJCIS recommendations were supported by Government) and the Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014 (all 39 of the PJCIS's recommendations were supported by Government). These Bills were also subject to scrutiny by the SSBSC and the PJCHR.

⁶¹ For example, in Chapter 8 (entitled "Children") of the PJCIS's report on the Citizenship Bill, the findings of the PJCHR were referred to on six occasions, including extensive quotes from the PJCHR's report. The recommendations made by the PJCIS relating to children included that the Bill be amended to limit the extent of its application to children (Recommendation 20), which also reflected the findings of the PJCHR. PJCIS Recommendations 2, 6, 8, 9 are designed to narrow the scope of offences for which the conviction-based provisions of the Bill would apply, responding to concerns raised by the SSCSB in its *Alert Digest 7/15* report at p 8. A range of other PJCIS recommendations reflect concerns raised by the SSCSB, for example those relating to concerns as to adequate judicial review, which were reflected in PJCIS Recommendation 14.

⁶² See for example Jonathon Holmes, 'Tyrannical citizenship bill an attack on our liberties', *Sydney Morning Herald* (online), 26 August 2015 <<http://www.smh.com.au/comment/tyrannical-citizenship-bill-an-attack-on-our-liberties-20150824-gj6tub.html#ixzz3wF2JLt1x>>. This media article explores themes previously considered by George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* 258; Andrew Lynch, 'Legislating with Urgency: The Enactment of the Anti-Terrorism Act (No 1) 2005' (2007) 30(3) *Melbourne University Law Review* 747.

⁶³ The detailed procedures and information access and disclosure requirements of the PJCIS are contained in *Intelligence Services Act 2001* Schedule 1.

⁶⁴ For a discussion of the secondee arrangements to the PJCIS see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) 278-9.

⁶⁵ See for example, the following submissions to the PJCIS's inquiry into the Citizenship Bill: Law Council of Australia, *Submission No 26*; Professor Helen Irving, *Submission No 15*; Muslim Legal Network (NSW), *Submission No 27*; Professor Ben Saul, *Submission No 2*; Councils for civil liberties across Australia, *Submission No 31*; Dr Rayner Thwaites, *Submission No 16*; Professor Kim Rubenstein, *Submission No 35*; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission No 17*. A full list of submissions is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Report> (accessed 13 June 2016).

⁶⁶ See, for example, ABC Radio National, 'Security committee recommends 27 changes for citizenship laws to pass', *PM*, 4 September 2015 (Naomi Woodly) <<http://www.abc.net.au/news/2015-09-04/security-committee-recommends-27-changes-for/6751684>>. David Rowe, 'Powerful committee of MPs backs stripping citizenship, but calls for changes', *Sydney Morning Herald* (online), 4 September 2015 <<http://www.smh.com.au/federal-politics/political-news/powerful-committee-of-mps-backs-stripping-citizenship-but-calls-for-changes-20150904-gjf4or.html#ixzz3wF02tQ15>>. The SCLCA once enjoyed a similar status among submission makers in the area of counter-terrorism, however in recent years it has been surpassed by the PJCIS and its strong track record of having its recommendations implemented into legislative change.

⁶⁷ David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *The Journal of Legislative Studies* 1, 7.

⁶⁸ Public hearings were also held as part of the inquiry, where evidence was received from a diverse range of submission makers, including Executive Council of Australian Jewry, Federation of Ethnic Communities' Councils of Australia, legal academics, Refugee Council of Australia, Amnesty International, Australian Human Rights Commission and the Australian Federal Police. For a full list of witnesses to the Public Hearings see

Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) Appendix B.

⁶⁹ See for example New Matilda, 'Senate Passes Foreign Fighters Bill Despite Human Rights Risk' (29 October 2014) < <https://newmatilda.com/2014/10/29/senate-passes-foreign-fighters-bill-despite-human-rights-risk/>>; Josh Taylor, 'Civil liberties be damned: meet the new chair of Parliament's national security committee' *Crikey* (25 February 2016) < <https://www.crikey.com.au/2016/02/25/civil-liberties-be-damned-meet-the-new-chair-of-parliaments-national-security-committee/>>.

⁷⁰ For example, the PJCS received 43 submissions to its inquiry into the Citizenship Bill, 46 submissions to its inquiry into the Foreign Fighters Bill, 17 submissions to its inquiry into the Counter Terrorism Amendment Bill No 1 2014 and 204 submissions to its inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. By way of contrast, the LCA Committee received 435 submissions to its inquiry into the *ASIO Legislation Amendment Bill 2002*, 431 submissions to its inquiry in the *Security Legislation Amendment (Terrorism) Bill No 2 2002* and 294 submissions to its inquiry into the Control Orders Bill.

⁷¹ See for example Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015 13558 (Warren Entsch); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13326 (Lisa Chesters); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13117 – 13118, 9504. (Michael Danby).

⁷² For further discussion of the Australian Parliament's lack of engagement with international human rights law see George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136; George Williams and Lisa Burton, 'Australia's Exclusive Model of Parliamentary Rights Protection' (2013) 34 *Statute Law Review* 58-94; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046.

⁷³ As Labor member Terri Butler observed in her second reading speech on the Bill: 'governments should be very careful before diminishing people's civil, political and other rights in the name of security. We as a parliament should be very careful to ensure that the laws that we scrutinise and balance those rights, those obligations, those concerns and those imperatives. If we do not do that, we are not just failing the people affected by the bill at hand, we are failing the tradition of Western democracies, where parliaments have been at pains to ensure that the laws we make and the decisions we make, whether in times of conflict or in times of peace, continue to maintain the values we share.' Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015 (Terri Butler) 13296.

⁷⁴ Bret Walker SC was appointed as the first INLSM. His 2011 Annual Report contains an analysis of the Control Orders Bill. See Walker, Bret, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011).

⁷⁵ This focus on 'traditional rights and freedoms' was led by Attorney General the Hon George Brandis QC, including through a wide-reaching reference to the Australian Law Reform Commission. It is also evident through the Attorney's response to the Bill of Rights debate in Australia during the 2008-2010 period. For example see George Brandis, 'New Australian law reform inquiry to focus on freedoms' (2013) <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>>; George Brandis, 'The Debate we Didn't Have to Have: The Proposal for an Australian Bill of Rights' (Speech delivered at the James Cook University Law School, Townsville, 14 August 2008) <<http://www.austlii.edu.au/au/journals/JCULawRw/2008/2.html>>; Australian Law Reform Commission, Report 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2 March 2016).

⁷⁶ For example, of the 60 Second Reading speeches made with respect to the Citizenship Bill, 40 included specific reference to the scrutiny principles that form part of the SSCSB mandate, compared with 12 specific references to the notion of 'human rights' or related international law concepts.

⁷⁷ For example 12 Second Reading speeches given with respect to the Citizenship Bill referred to human rights, with a smaller handful of these speeches engaging in relatively detailed analysis of international human rights law concepts, and one substantive reference to the work of the PJCHR.

⁷⁸ For an evaluation of Australia's parliamentary model of human rights protection see Williams, George; Reynolds, Daniel, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; for a discussion of the role of parliamentary committees in facilitating deliberative democracy see Dalla-Pozza, Dominique, 'Promoting deliberative debate? The

submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws' (2008) 23(1) *Australasian Parliamentary Review* 39; Uhr, John, 'Terra infirma?: Parliament's uncertain role in the 'War on Terror'. [Paper in Thematic Issue: Counter-Terrorism Laws.]' (2004) 27(2) *University of New South Wales Law Journal* 339.