Australia's Human Rights Scrutiny Regime. Democratic Masterstroke or Mere Window Dressing?, by Adam Fletcher. Carlton: Melbourne University Press, 2018. pp. 427, Paperback RRP $49.99. ISBN: 9780522874105

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In 2008, Australia's federal government established a National Human Rights Consultation Committee (NHRCC) tasked with consulting the Australian community on the subject of human rights and reporting on how best to enhance and protect those rights. The NHRCC reported in 2009. In 2010, federal Attorney-General Robert McClelland launched a National Human Rights Framework, encapsulating the Government's response to the NHRCC report.

Despite the NHRCC's endorsement, the Framework did not include a statutory bill of rights or provide for judicial oversight. The Attorney-General said that this was done in order to minimise divisiveness and preserve parliamentary sovereignty. Instead, a *Human Rights (Parliamentary Scrutiny) Act 2011* (Scrutiny Act) was passed. Broadly speaking, it aims to enhance the recognition of human rights in policy and legislative development, and in parliamentary debate. Reflecting NHRCC recommendations and the Government's Framework, the *Scrutiny Act* requires a statement of compatibility (SOC) to be prepared and presented for bills introduced into Parliament, and for disallowable legislative instruments. SOCs must include an assessment of whether the bill or instrument is compatible with 'human rights' found in seven core international human rights instruments. The *Scrutiny Act* also provides for the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR's tasks include reporting to Parliament on bills, legislative instruments, and Acts for compatibility with prescribed human rights. It has no power to conduct 'own motion' inquiries outside this framework.

Australia's Human Rights Scrutiny Regime. Democratic Masterstroke or Mere Window Dressing? joins a number of scholarly assessments of this unique bipartite scrutiny regime and makes significant contributions to the literature. It is detailed, wide-ranging and highly readable, making it an important resource for scholars and students

in disciplines such as political science and law, as well being accessible to the interested general reader.

In Chapter 1, Fletcher sketches the *ad hoc* nature of rights protections in Australia and what Hilary Charlesworth has called the nation's 'reluctance about rights'.[56] Chapter 2 describes the Framework and the *Scrutiny Act* and considers the potential constitutional issues associated with a tripartite dialogue model, and the potential strengths and weaknesses of a bipartite dialogue scheme. This material provides important contextual information for the assessments contained in Chapters 3, 4 and 5.

In Chapter 3, Fletcher examines SOCs in the period 2012–2015. Here he makes a number of significant contributions. These include analysing 239 SOCs that accompanied bills, devising a ranking scheme, and identifying trends in quality. Usefully, too, he interviews public servants responsible for drafting SOCs or responding to PJCHR requests for further information. While he acknowledges improvements in SOCs, he ranks 50% or more of them in each year studied as substandard. In the period under review, Fletcher observes that public servants were increasingly accepting of the regime. However, they also highlighted the need for ongoing human rights training to assist with the preparation of SOCs and requests from the PJCHR. Fletcher notes that funding for community and public sector education and training, promised in the Framework and initially delivered, was removed in the 2014 Budget.

The PJCHR is regarded by Fletcher as 'arguably the most important element of the [scrutiny] regime'. In Chapter 4, he subjects its resourcing and work, as well as the activities of its chairs and members, to close analysis. Like other scholars, he acknowledges the quality of PJCHR reports, describing them as generally 'detailed, comprehensive and, at times, surprisingly forthright'. Fletcher also praises committee initiatives designed to make its work more accessible and informative. These include providing tabling statements, annual reports, and guidance notes for public servants. He concludes that it has been diligent in pursuing unsatisfactory SOCs. Nevertheless, he identifies a number of failures including lack of timeliness in reporting and infrequent use of public hearings. Further, he argues that the PJCHR's divergence from a technical, consensus model of reporting in the 44th Parliament constituted a risk to

[56] Hilary Charlesworth, 'The Australian Reluctance about Rights'. *Osgood Hall Law Journal* 31(1) 1993, pp. 195-232.

its reputation and influence. However, the effectiveness of a technical scrutiny model and the place of dissent in PJCHR reports deserve further consideration by scholars.

In Chapter 5, Fletcher's assessment of the PJCHR's impact on policy making and legislation is enhanced by interviews with public servants and PJCHR members, and by an analysis of the tone and content of Ministerial responses to the committee's requests for further information. He acknowledges that making impact assessments is fraught with difficulty. And perhaps not surprisingly, he finds little evidence of legislative change directly attributable to the PJCHR, few references to its reports in parliamentary debate and minimal engagement with the media or the public. In addition, he notes that, on balance, the Ministerial responses to requests for further information that he studied were 'perfunctory, dismissive and even impolite'.

Fletcher also points out that the PJCHR's impact is undermined by the fact that its members lack seniority and contrasts this with influential committees such as the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Further, he finds that the committee's influence has suffered because of the failure of most of its chairs and members during the period of review to champion its work in Parliament or publicly. Instead, some have denigrated it.

Assessments of the period 2016–2018 in a recent volume, edited by Julie Debeljak and Laura Grenfell, reaffirm earlier research and Fletcher's own views about the impact of the PJCHR.[57] However, as Laura Grenfell and Sarah Moulds[58] and Zoe Hutchinson[59] have suggested separately, the PJCHR's influence on other parliamentary committees, such as the PJCIS, warrants further investigation.

Chapter 5 is also bolstered by comparative assessments of parliamentary committee influence in Australia and in selected overseas jurisdictions, enabling Fletcher to identify potential mechanisms for improvement in the scrutiny regime. Building on his earlier chapters, Fletcher concludes that the scrutiny regime alone is insufficient to create a rights-respecting culture. He identifies features of the Australian political

[57] Julie Debeljak and Laura Grenfell (eds.), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*. Sydney: Lawbook Co, 2020.

[58] Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia'. *UNSW Law Journal* 41(1) 2018, pp. 40–79.

[59] Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years'. *Australasian Parliamentary Review* 33(1) 2018, pp. 72–107.

process—including executive dominance in the House of Representatives, party discipline, horse-trading, bipartisanship, majoritarianism and, in the case of national security legislation, claims of 'urgency'—as helping to undercut the regime. Fletcher argues that the 'nature of politics' and legislative process 'militates against the effectiveness of parliamentary rights review' and that the scrutiny regime's effectiveness would be enhanced if Australia had a human rights act coupled with some form of judicial oversight. Nonetheless, he concludes that the differences in impact of other scrutiny regimes cannot be ascribed solely to judicial involvement in those jurisdictions. His examination of those regimes thus provides useful suggestions for improvements to the federal scrutiny system.

The scrutiny regime was intended to promote human rights dialogue between the executive and Parliament, inform and improve policymaking and legislation and, through the committee process, enhance participatory democracy. Given Australia's 'reluctance about rights' and the lack of bipartisan support for the *Scrutiny Act*, these were ambitious goals. Fletcher credits the PJCHR with producing impressive reports. However, he says that while dialogue between the executive and the PJCHR has occurred, this dialogue has not extended to Parliament as a whole. He also finds that the regime has not significantly enhanced legislative consistency with human rights obligations. Nor has it, for the most part, facilitated public engagement in committee processes.

Fletcher considers that only structural change can address fundamental problems with a bipartite scrutiny regime. Nonetheless, he argues that useful enhancements could be made to the existing regime. These are found in Chapters 3, 4 and 5, and are broadly summarised in the concluding chapter. In particular, he recommends amending the *Scrutiny Act* to require detailed compatibility assessments as well as incompatibility assessments of bills and all legislative instruments, involving the PJCHR in pre- and post-legislative scrutiny, re-introducing human rights training for public servants, and providing training for parliamentarians and parliamentary staff. Additionally, Fletcher suggests allowing a minimum time for PJCHR review before bills can be debated in Parliament, and he proposes sensible changes to the PJCHR's mandate, powers and composition.

A few small steps have been taken since the book's publication. The PJCHR has attempted to prompt timely responses from legislation proponents by establishing a register of correspondence. It has also instituted a Statement of Compatibility project that aims to improve SOCs through the provision of more guidance materials, liaison with government agencies and training of officials. Further, the committee's reports are now available on Austlii.

If pursued, these are welcome initiatives but do not detract from Fletcher's pessimistic conclusions or his view that the bipartisan support at senior political levels, which is essential if the PJCHR is to be 'truly effective', is unlikely at present. He does not dismiss the possibility that a government more receptive to human rights may be elected in the future. However, this may be some way off. In 2011 the federal Opposition, which is now in government, failed to support the Scrutiny Act. And, during debates in October 2019 on a private Senator's Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019, old criticisms of the legislation and the 'human rights industry' resurfaced, including from a former PJCHR member. If the political climate does change, there should be a review of the regime as was originally planned but never undertaken. Fletcher's book would be an important resource for any review that occurs.