Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees

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Abstract
Australia’s parliamentary model of rights protection depends in large part on the capacity of the federal Parliament to scrutinise the law-making activities of the Executive government. Emergency law-making undertaken in response to the COVID-19 pandemic has challenged the Australian Parliament’s capacity to provide meaningful scrutiny of proposed laws, particularly identifying and addressing the impact of emergency powers on the rights of individuals. In this context, the work of parliamentary committees has become increasingly important. Special committees, such as the Senate Select Committee on COVID-19, have been set up to provide oversight and review of Australia’s response to the pandemic. This article gives an early glimpse into the key features of the COVID-19 Committee and the way it may interact with other committees within the federal system to scrutinise the government’s legislative response to the pandemic. It also offers some preliminary thoughts on the capacity of these committees to deliver meaningful rights scrutiny.

Keywords
COVID-19, Parliament, parliamentary scrutiny, individual rights, deliberation

In response to the complex and potentially devastating threat posed by COVID-19 Parliaments around Australia have transferred unprecedented powers to executive governments and their agencies, often with the full support of the communities they represent. At the federal level, this includes imposing travel bans to prevent Australians from leaving the country, empowering the Minister for Health to ‘issue any direction to any person’ in order to ‘prevent or control’ the spread of COVID-19 in Australia and authorising the Minister for Families and Social Services to change ‘any qualification criteria’ and ‘any payment rate’ for any social security payment without seeking approval from Parliament.

1 Andrew Edgar, ‘Law-making in a Crisis: Commonwealth and NSW coronavirus regulations’, AUSPUBLAW (Blog Post, 30 March 2020) https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations.
2 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) (25 March 2020).
3 Biosecurity Act 2015 (Cth) s 478.
4 Coronavirus Economic Response Package Omnibus Bill 2020, Schedule of the amendment made by the Senate (22 March 2020) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6521.

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By any measure, this constitutes an extraordinary transfer of power away from the parliament towards the executive with clear impacts on individual rights. Perhaps these extraordinary powers were and will continue to be necessary. Perhaps their potential impact on the rights of citizens and on the important oversight role that parliament plays within our constitutional democracy is proportionate to the risk posed by COVID-19 to the lives, health and economic security of our community. Legislators did not pause long to contemplate those questions. These laws were passed within days, sometimes hours, with limited safeguards and a heavy reliance on sunset provisions some of which are dependent on the pandemic being officially called to an end.

From within this rush of emergency law-making and institutional power transfer, one parliamentary oversight mechanism managed to struggle to its feet. The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days, parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.

This instinctual reliance on a mechanism designed to provide parliamentarians with the space to deliberate and examine executive decision-making says something important about the parliamentary model of rights protection that exists in Australia. It also raises important questions as to whether parliamentary committees are up to the job – particularly when the stakes are so high and the political terrain so uncertain.

This article provides an early glimpse into the key features of the specialist parliamentary committee set up to oversee the extraordinary powers transferred to the executive in response to COVID-19 at the federal level. It also offers some preliminary thoughts on the capacity of this committee, and other committees within the federal parliamentary system – such as the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee) – to deliver meaningful rights scrutiny and hold the executive to account in these exceptional circumstances.

Of course, the capacity of any individual committee to influence the outcome of a policy proposal or fate of a legislative provision is difficult to measure and often dependent on political factors. After all, at the end of the day, the most a parliamentary committee can do is publish a report, make recommendations and, sometimes, move to disallow a regulation. Many commentators and scholars suggest this form of rights scrutiny is particularly weak in the face of executive dominance or politically popular legislative agendas, although research into other experiences of urgent law-making suggests that when different committees work together the rights impact of this form of parliamentary scrutiny can be significant and positive. It is this capacity for different parliamentary committees (with different mandates, membership and attributes) to work together that perhaps offers the most hope when it comes to ensuring robust rights scrutiny of the government’s response to the COVID-19 pandemic.
**Parliamentary committees and rights scrutiny in Australian Parliaments**

As Grenfell has observed, a ‘spectrum’ exists when it comes to parliamentary rights scrutiny in Australia, and the role parliamentary committees play in assessing and reporting on the rights impacts of proposed or existing laws or examining the extent to which law-making power is transferred into the hands of the executive.14

At one end of the spectrum are the more sophisticated, structured and systematic approaches to legislative scrutiny found within the parliaments of the Commonwealth, Victoria, Australian Capital Territory (ACT) and Queensland, where rights scrutiny conducted by parliamentary committees occurs within the context of statutory prescribed rights mandates.15 An example of this type of ‘technical scrutiny’16 of proposed or existing legislation is the work of the federal Human Rights Committee and the Scrutiny of Bills Committee. Both Committees review all Bills for compliance with prescribed rights-focused17 or rights-related18 criteria and report to the Senate. At the other end of the spectrum are jurisdictions like Western Australia, South Australia and the Northern Territory, which lack any overarching human rights legislation and instead rely on a largely ad hoc system of parliamentary committee review that varies in sophistication and scope across these jurisdictions.19 And in Tasmania, the Subordinate Legislation Committee has a mandate that includes scrutinising regulations to determine whether it unduly trespasses on personal rights and liberties, but its willingness to review all forms of delegated legislation (such as directives or determinations) remains uncertain, and has come into sharp focus in the context of the COVID-19 pandemic.20

In these jurisdictions, specially constituted ‘select’ committees are often relied upon to examine or test the policy merits behind a proposed new law and raise the alarm about any potential rights impacts or excessive transfers of power to the executive. These select committees are often granted a range of inquiry powers to engage with the public on the issues referred to them by their originating resolution,21 but they are rarely required to undertake a detailed rights analysis of proposed legislation. Flexible in mandate, timeframe and outputs, it is this form of ‘select’ or ‘inquiry-based’ committee that has been employed to undertake the COVID-19 oversight role in a number of Australian jurisdictions. For example, special select COVID-19 Committees have been established in South Australia,22 and the ACT23 with broad terms of reference and wide powers to call for public submissions and request information from government. In NSW, the Legislative Council’s Public Accountability Committee has been tasked with undertaking an inquiry into NSW government’s management of the COVID-19 pandemic.24 As discussed below, a Senate Select Committee on COVID-19 has also been established at the federal level.

**Special Select COVID-19 Committees**

On 8 April 2020, the Australian Senate resolved to establish a Select Committee on COVID-19 (COVID-19 Committee) to inquire into the federal government’s response to the COVID-19 pandemic.25 The Senate has given the COVID-19 Committee a long lead time to report, with a deadline of 30 June 2022, however the Committee called for submissions from the public by 28 May 2020 in what appears to be a rolling approach to public engagement. The terms of reference of this special committee include ‘the Australian Government’s response to the COVID-19 pandemic’ and ‘any related matters’.26

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14Grenfell (n 7) 19.
15Julie Debeljak and Laura Grenfell, ‘Diverse Australian Landscapes of Law Making and Human Rights: Contextualising Law Making and Human Rights’ in Debeljak and Grenfell (eds), Law Making and Human Rights 1, 17.
16For discussion of the term ‘technical scrutiny’ (as opposed to merits or policy-based scrutiny), see Senate Standing Committee for Scrutiny of Bills, Parliament of Australia (2012) Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee [2.11]. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries/futuredirection2011/index.
17Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) ss 3.7.
18The Scrutiny of Bills Committee’s scrutiny criteria includes considering whether bills or Acts, by express words or otherwise ‘tresspass unduly on personal rights and liberties’. Parliament of Australia, Senate Standing Order 24 (1)(a) (last amended 29 November 2017) https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00/b05.
19See Sarah Murray, ‘Western Australia: The Case for More Formalised and Heightened Rights Protection’ in Debeljak and Grenfell (eds), Law Making and Human Rights 471, 473; Laura Grenfell, ‘South Australia: Ad Hoc and Unsystematic Rights Protection in Law-Making’ in Debeljak and Grenfell (eds), Law Making and Human Rights 499, 501; Laura Grenfell, ‘Northern Territory: Taking a Rights-Scrutiny Leap Forward and Then Sliding Backwards’ in Debeljak and Grenfell (eds), Law Making and Human Rights 561, 562–3.
20Brendan Gogarty and Gabrielle Appleby, ‘The role of Tasmania’s subordinate legislation committee during the COVID-19 emergency’ (2020) 45(3) Alternative Law Journal 188.
21See, eg, Parliament of Australia, Senate Standing Orders 34–38 (last amended 17 October 2019) https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00/b05.
22South Australia, Parliamentary Debates, Legislative Council, 8 April 2020, 476 (Kyam Maher).
23Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 2 April 2020, 758 (Andrew Wall).
24Public Accountability Committee, Parliament of New South Wales, ‘Parliamentary Oversight Established into the NSW Government’s Management of the COVID-19 Pandemic’ (Media Release, 27 March 2020) https://www.parliament.nsw.gov.au/lcdocs/other/13243/MediaRelease%20-%2020%20March%202020%20-%20%20%20Management%20of%20COVID-19%20pandemic.pdf.
25Senate, ‘COVID-19 Select Committee Appointment’ (Senate Journal No 48, Parliament of Australia, 8 April 2020) 1580 (Senate Journal No 48) https://parlinfo.aph.gov.au/parlInfo/download/chamber/Journals/1e02e7-c692-4266-81ee-20d05ca814ae/toc_pdf?sen-jn.pdf+Type=application/pdf.
26Ibid.
The Commonwealth COVID-19 Committee has a majority of non-government Senators and is chaired by Senator Katy Gallagher, Labor Party Senator from the ACT, supported by Victorian Liberal Senator James Paterson as Deputy Chair. Five other Senators make up the Committee, including Shadow Home Affairs Minister Kristina Keneally, Tasmanian Senator Jacqui Lambie and Australian Greens Senator Rachel Siewert.27 A long list of other Senators can be part of the work of the COVID-19 Committee as ‘participating’ members28 – an interesting feature of the Commonwealth committee system not replicated in all Australian jurisdictions.

The breadth of the COVID-19 Committee’s mandate is deliberately wide and does not denote a specialist ‘rights’ focus or demand technical scrutiny of proposed or existing legislation. Instead it is designed to provide a forum for a broader discussion of the impacts and effectiveness of the government’s COVID-19 response. On the one hand, this broad mandate suggests that the Committee may be well placed to respond to the dynamic features of the government’s COVID-19 response, and question and test a wide range of policy and legislative measures. On the other hand, it gives rise to genuine questions as to whether the Committee has the capacity to undertake a detailed or holistic analysis of the government’s response, or whether key components of the laws and policies made in this area will slip through without adequate scrutiny.

While it is clear the COVID-19 Committee does not have an explicit role in scrutinising any laws made in response to COVID-19 for rights impacts, this does not exclude or limit the Committee from undertaking an important rights scrutiny role. As discussed below, research into other forms of emergency law-making suggests that it is the way that different committees within the federal parliamentary system work together that plays an important rights-enhancing role, and provided a key forum for rights issues to be explored in a public way.30 A preliminary look at the work of federal parliamentary committees in response to the COVID-19 pandemic suggests that this type of multi-committee engagement may also be a determinative factor when it comes to rights scrutiny in this context.

Standing Scrutiny Committees and COVID-19

In the jurisdictions with more sophisticated committee systems, select committees like the COVID-19 Committee generally work alongside other committees in the system, including the older, pre-existing ‘standing’ committees such as the Scrutiny of Bills Committee or the Standing Committee for Delegated Legislation (the Delegated Legislation Committee), which have existed at the federal level for many decades and focus on ‘technical scrutiny’ of proposed laws against certain rights-based criteria, rather than evaluating policy merits.31 At the federal level, these two committees – along with the statutory-based Human Rights Committee – have been busy looking at COVID-19 laws despite the initial exodus of parliamentarians from Canberra. For example the Human Rights Committee has met regularly by teleconference and produced a number of detailed reports on the human rights compatibility of primary and delegated legislation relating to the COVID-19 pandemic.32 The Delegated Legislation Committee has also committed to continue to meet regularly ‘to ensure that there is appropriate parliamentary oversight of all delegated legislation, particularly executive-made laws which implement COVID-19 response measures’ and has published a list of all COVID-19 related delegated legislation registered on the Federal Register of Legislation.33 The Delegated Legislation Committee has also ‘sounded the alarm’ on the concerning trend towards excluding key parts of the government’s COVID-19 response from the scope of its scrutiny through the process of exempting certain forms of delegated legislation (such as directives or determinations) from the operation of the standard disallowance process.34

This ‘technical scrutiny’ work has clearly already been useful to the submission makers to the COVID-19 Committee, with a number of written submissions...
making reference to the work of the Scrutiny of Bills Committee, the Delegated Legislation Committee and the Human Rights Committee, and many more submissions utilising the scrutiny framework applied by these committees in their own analysis of the rights-related impacts of the government’s response to COVID-19.

Are parliamentary committees up to the job?

Of course, reference to rights scrutiny reports is one thing, but changing the content of the law or direction of the policy is quite another. The burning question arising from the current context is whether the special COVID-19 parliamentary committees – either going solo or working alongside other committees – are up to the job when it comes to providing a meaningful check on executive power and scrutinising rights impacts.

Other scholars, including Dalla-Pozza, Rajanayagam, Reynolds and Williams, Grenfell and Debeljak, and Fletcher have also carefully examined the role that parliamentary committees play in rights protection in the context of law-making in response to other types of serious threats or public emergencies.43

There is no consensus view among these scholars as to whether parliamentary committees can provide meaningful rights protection and hold the executive to account in these contexts. For example, Reynolds and Williams, and Rajanayagam warn that without structural reform which contemplates an active role for the courts, parliamentary models of rights protection are fatally flawed. Despite this divergence, there is a degree of commonality when it comes to identifying the relevant factors that may be determinative when it comes to a committee’s (or system of committees’) overall influence or impact. These common factors include:

- The deliberative capacity of the committee44 – such as the extent to which the committee is able 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.
- The political characteristics of the committee45 – 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 agencies46 – 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.
- Consideration of the function of the committee as either ‘policy scrutiny’ or ‘technical scrutiny’47 – such as whether the Committee is tasked with undertaking compliance-related activity by assessing proposals against a prescribed list of criteria, or if 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.
- The basis of the committee’s existence as either part of a sophisticated system of committees or operating on an ad hoc basis – highlighting the ‘spectrum’ of experiences documented by Grenfell and noted above.48

36See, eg, Public Law and Policy Unit, Submission No 183 to Senate Select Committee on COVID-19, Parliament of Australia, Inquiry into the Government’s response to COVID-19 (28 May 2020) (Senate Select Committee on COVID-19, Inquiry); Justice & Society Unit of the University of South Australia, Submission No 193 to Senate Select Committee on COVID-19, Inquiry (28 May 2020); Human Rights Law Centre, Joint Submission No 79 to Senate Select Committee on COVID-19, Inquiry (28 May 2020).
37Institute of Public Affairs, Submission No 246 to Senate Select Committee on COVID-19, Inquiry (28 May 2020); Kate Galloway, Submission No 74 to Senate Select Committee on COVID-19, Inquiry (28 May 2020); Equality Rights Alliance, Submission No 88 to Senate Select Committee on COVID-19, Inquiry (28 May 2020); Community and Public Sector Union, Submission No 142 to Senate Select Committee on COVID-19, Inquiry (28 May 2020); Public Interest Advocacy Centre, Submission No 150 to Senate Select Committee on COVID-19, Inquiry (28 May 2020).
38Each of these authors provided chapters in Debeljak and Grenfell, Law Making and Human Rights.
39See, eg, Adam Fletcher, Australia’s Human Rights Scrutiny Regime (Melbourne University Press, 2018).
40Shawn Rajanayagam, ‘Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act’ in Debeljak and Grenfell (eds), Law Making and Human Rights 67.
41See, eg, Daniel Reynolds and George Williams, ‘Evaluating the Impact of Australia’s Federal Human Rights Scrutiny Regime’ in Debeljak and Grenfell (eds), Law Making and Human Rights 67.
42See, eg, 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.
43See, eg, Ian Holland, Senate Committees and the Legislative Process, Parliamentary Studies Paper No 7 (Crawford School of Economics and Government, ANU, 2009); http://www.aph.gov.au/ParliamentSittings/PSP07_Holland.pdf; see also Bryan Horrigan, ‘Reforming Rights-Based Scrutiny and Interpretation of Legislation’ (2012) 37(4) Alternative Law Journal 228.
44This relationship between committees and the executive is explored in Sarah Moulds, ‘Forum of choice? The legislative impact of the Parliamentary Joint Committee of Intelligence and Security’ (2019) 29(4) Public Law Review 285.
45See, eg, David Kinley and Christine Ernst, ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ (2012) 1 European Human Rights Law Review 58.
46Grenfell (n 7) 23–5.
47Grenfell and Debeljak, and Fletcher have also carefully examined the role that parliamentary committees play in rights protection in the context of law-making in response to other types of serious threats or public emergencies.
Timing of the issue of committee reports and recommendations — including whether the Committee’s reports, recommendations or findings may be tabled or published prior to the enactment of the proposed law or before the cessation of any relevant disallowance period or sunset provision.

Within each factor tensions arise. For example, establishing relationships of trust between committee members and key executive agencies in times of emergency can be critical to developing viable, practical, less rights-intrusive alternatives ‘behind closed doors’ before public recommendations for reform are made. However, these same relationships can undermine public and political confidence that the committee is acting ‘independently’ when undertaking its scrutiny role.

Applying these factors to the federal COVID-19 Committee, an interesting image emerges. Some factors point towards the Committee having some influence when it comes to improving the rights compliance of the laws enacted in response to COVID-19 or providing a meaningful check on executive power. For example, the broad and diverse membership of the Committee suggests that it will be well positioned to attract input from a wide range of experts, community organisations and individuals, provided it can overcome the practical challenges associated with ‘online’ or ‘virtual’ public engagement. This is no small challenge but one that could be overcome with the provision of adequate resources, including the use of senior Secretariat staff with experience in utilising innovative consultation techniques in previous committee inquiries. While it is likely that the absence of any capacity to host ‘face to face’ public inquiries alters the optics of committee scrutiny which can be central to attracting media attention or generating external political pressure to support the work of these bodies, the COVID-19 Committee has been particularly skilled at utilising social media (including Facebook and Twitter) to publicise its public hearings.

The interesting political shift away from entrenched ideological positions towards a pragmatic approach to policy development in this area also points to the potential for a committee like this to provide a ‘safe space’ for members to change their mind in the face of compelling evidence. Federal-level experimentation with novel models of engaging with experts — such as the National Cabinet approach — also provides interesting new platforms from which to consider the deliberative potential of a committee like this.

As noted above, the federal COVID-19 Committee also exists within a sophisticated system of parliamentary committees, a small handful of which continue to actively scrutinise the COVID-19 laws and delegated legislation. These ‘technical scrutiny committees’ — including the Scrutiny of Bills Committee, the Delegated Legislation Committee and the Human Rights Committee — have the potential to furnish both the COVID-19 Committee and its submission makers with important, detailed information about the extent to which these laws adhere to rights principles — even if the COVID-19 Committee itself does not focus exclusively or explicitly on the rights impacts of the laws. The use of technical scrutiny reports by high profile submission makers (such as the Law Council of Australia, Australian Medical Association and the Institute of Public Affairs) to the COVID-19 Committee could prove to be an integral ‘link in the chain’ when it comes to drawing public and parliamentary attention to rights abrogating aspects of the government’s legislative response to COVID-19, even if the COVID-19 Committee itself is not required to look in detail at each relevant law.

Pulling against these factors are political characteristics of Committee which appear to lack authority, at least at this early stage. The Committee’s membership is heavily weighted towards the Opposition and cross bench — reflecting the debate that ensued in the Senate at the time the COVID-19 laws were passed. While some members are senior political figures (such as Senator Kristina Keneally), the political landscape is highly dynamic. Although initially keen to ‘not stand in the way’ of the Australian government’s COVID-19 response, Opposition and non-government Senators have since engaged in more nuanced political positioning on these issues.

Over time this could give way to a politicisation of the inquiry function of the Committee, diluting the depth of any legislative or policy analysis or skewing the overall focus of the Committee.

46 Timing of tabling reports has been subject to detailed consideration by Dalla-Pozza see, eg, Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Legislative Framework: How Deliberative has Parliament Been?’ (2016) 24(4) Public Law Review 271; see also Reynolds and Williams (n 38) 67.
47 Moulds (n 43).
48 Some of these innovative practices are foreshadowed in Carolyn Hendriks and Adrian Kay, ‘From “Opening Up” to Democratic Renewal: Deepening Public Engagement in Legislative Committees’, Government and Opposition, 7 August 2017, 20–21.
49 See, eg, K Barton, ‘Community Participation in Parliamentary Committees: Opportunities and Barriers’ (Department of the Parliamentary Library, Research Paper No 10, 1999).
50 This ‘link in the chain’ was evident in the case of parliamentary scrutiny of counter-terrorism laws, see Moulds (n 29) ch 6 (which explores the ‘public impact’ of rights scrutiny by parliamentary committees).
51 See, eg, Edgar (n 1); Twomey (n 8).
52 See, eg, Dennis Shanahan, ‘Albanese goes all in with high-stakes gamble over JobKeeper’, The Australian (online, 16 May 2020) https://www.theguardian.com/australia-news/2020/may/16/australian-parliament-jobs-jobkeeper; Michelle Grattan, ‘Free childcare ends July 12, with sector losing JobKeeper but receiving temporary payment’, The Conversation (online, 8 June 2020) https://theconversation.com/free-childcare-ends-july-12-with-sector-losing-jobkeeper-but-receiving-temporary-payment-140253.
53 This risk of politicisation of committees is considered briefly in Laura Grenfell and Julie Debeljak, ‘Future Directions for Engaging with Human Rights in Law-Making’ in Debeljak and Grenfell (eds), Law Making and Human Rights 789, 818–9. See also Halligan (n 11).
This leads to the inevitable finding that there are many unknowns that could go either way when it comes to the impact of the COVID-19 Committee. Relationships the Committee is able to forge with key government agencies (including Centrexlink, the Australian Federal Police (AFP), Department of Health) and state and territory bureaucracies could be deterministic of its overall success. Research into the role of the specialist Parliamentary Joint Committee on Intelligence and Security (PJCIS) suggests that establishing strong relationships of trust with key agencies such as the Australian Security Intelligence Organisation and the AFP provides committee members with the opportunity to 'workshop' legislative and regulatory alternatives 'behind closed doors' and generate consensus views across the political divide. This research also suggests that when committees work closely with executive agencies they can also have significant rights-enhancing impacts on the final shape of the law as they move to identify less rights-intrusive ways to achieve the same shared policy goals.

This type of trajectory could occur in the context of COVID-19 if the Committee was able to develop these close relationships with key agencies. From a practical perspective this could mean requesting secondes from key agencies to help advise the Committee’s Secretariat staff or providing the Committee with ‘private briefings’ on key aspects of the practical implementation of the existing laws, and on legislative alternatives. Of course, this closeness with the executive could also give rise to questions about the independence and rigour of the committee as a scrutiny body – and may be resisted by members of the committee. If this occurs, the COVID-19 Committee would be highly dependent on the submissions it receives from the community and external experts, some of whom may lack a capacity or appetite for public engagement in committee processes.

In the COVID-19 context, a range of additional factors are likely to be in play when it comes to anticipating the overall impact of these special select committees. In particular, the fact that sitting calendars have been subject to change significantly alters both the political dynamic in which these committees operate, and the timeframes within which these committees are working. For example, by 17 April 2020, the Scrutiny of Bills Committee had issued its first Scrutiny Digest concerning the Australian government’s Coronavirus Economic Response Package Omnibus Bill 2020, calling on the proponents to provide advice regarding the ‘Henry VIII clauses’ that empower Ministers to modify primary legislation through delegated legislation in the social security context. 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’ and queried the ‘criteria ministers will consider before determining whether it is appropriate to defer sunsetting under the provisions of the bill’. 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, and too late to give rise to any direct legislative amendments. However, as research into other forms of urgent or emergency law-making shows, this does not of itself render meaningless the work of the Scrutiny of Bills Committee (or other technical scrutiny committees such as the Delegated Legislation Committee or Human Rights Committee) when it comes to influence or impact on the future shape of the law. Consideration of the roles of these committees in scrutinising Australia’s counter-terrorism laws, for example, shows that publicly documenting the rights-abrogating features of proposed laws can have a rights enhancing impact on future iterations of these laws, even if this comes too late for immediate amendments to be made and even when the impact is far from completely remedial from a rights perspective.

This is most likely to be the case if the scrutiny occurs within a broader parliament committee system where other committees – such as the COVID-19 Committee – are able to utilise these scrutiny reports as part of their broader public inquiry functions.

It is too early to see how all these factors will play out, or to accurately guess the impact of the Senate Select Committee on COVID-19 or other parliamentary committees within the federal system when it comes to rights scrutiny of the government’s response to the pandemic. It may take years to evaluate their role and

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54 The relationship between parliamentary committees, executive agencies and extra-parliamentary oversight bodies is explored in Moulds (n 43). The possibility of the Senate Select Committee on COVID-19 collaborating with other statutory review bodies when scrutinising the government’s response to COVID-19 is discussed in Public Law and Policy Unit Submission (n 35).

55 Ibid.

56 Ibid 15.

57 Ibid 16.

58 See, eg, Grenfell and Moulds (n 13) 40; cf Rajanayagam (n 40) 647.

59 Ibid.

60 Ibid.
influence, particularly if regard is had to the long reporting timeframes. It may be that the sceptics of Australia’s ‘exclusively parliamentary’ model of rights protection are proved right, and that without more significant structural change (such as the establishment of judicial oversight of rights-infringing laws and policies) there is little prospect of robust rights scrutiny at the federal level. However, this preliminary glimpse at the work of the COVID-19 Committee and its engagement with other scrutiny committees within the federal system suggest reasons for hope. Perhaps by working together, these committees can play an important rights-enhancing role and provide a key forum for the rights-infringing aspects of the government’s COVID-19 response to be explored in a public way.

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63 For further discussion of rights scrutiny culture in Australia see Scott Stephenson, From Dialogue to Disagreement in Comparative Rights Constitutionalism (Federation Press, 2016); Grenfell and Debeljak (n 53) 789.
64 For further discussion of the ‘exclusively parliamentary’ model of rights protection, see Williams and Burton (n 9) 257; See also Fletcher (n 12) 31, 62; Reynolds and Williams (n 38) 67, 96.