DOES PARLIAMENT DO ENOUGH? EVALUATING STATEMENTS OF COMPATIBILITY UNDER THE *HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT*

SHAWN RAJANAYAGAM*

I INTRODUCTION

The case against judicial rights review has been gaining steam for a number of years.[1] The view, most notably espoused by Jeremy Waldron,[2] that rights are the subject of reasonable disagreement and thus ought to be defined in the public square rather than the courtroom, has a number of prominent advocates.[3] Australia's federal human rights framework, which denies the judiciary a role in the enforcement of human rights, rests on this theoretical premise.

The key component of Australia's federal human rights scheme is the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*HRPS Act*'). The *HRPS Act*, passed by the Gillard Labor Government, enacts a two-part scheme of legislative rights review: first, it requires legislators who introduce Bills into Parliament to prepare a statement of compatibility ('SOC') explaining the Bill's compatibility with human rights;[4] and secondly, it requires the newly established Parliamentary Joint Committee on Human Rights ('PJCHR') to examine Bills for their human rights compatibility.[5]

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* BIGS (Syd), JD (Melb). A previous version of this article was originally submitted for assessment at Melbourne Law School, University of Melbourne. I thank Professor Carolyn Evans, Professor Stephen Gardbaum, Scott Stephenson, Sophie Molyneux, Nick Boyd-Caine, Katherine France and the anonymous referees for their insightful comments on earlier drafts. All errors are, of course, mine alone.

1 One indicator of this is the recent publication of an edited collection that is the first volume to comprehensively address the role of legislatures in the protection of human rights: see Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015).

2 See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

3 See, eg, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Janet L Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235.

4 *HRPS Act* s 8.

5 *HRPS Act* s 7.

In his second reading speech to the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), then Attorney-General Robert McClelland stated that its measures '[would] deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues'.[6] The *HRPS Act* has now been in effect for more than three years.[7] The time is therefore ripe to consider whether the *HRPS Act* has at least begun to deliver on its promises.

The focus of this article's attention is on the obligation to produce SOCs when introducing a Bill into Parliament. This choice has been made for two reasons. First, while there exists a relative wealth of literature on the topic of parliamentary scrutiny committees and human rights,[8] there has been far less written on the role of SOCs in creating a human rights culture. Secondly, the SOC phase of legislative rights review provides a very important marker by which to assess the degree to which human rights have become embedded in the policymaking and legislative processes. It is unsurprising – indeed, it is expected – that a parliamentary committee established for the purpose of scrutinising legislation for its compatibility with human rights will demonstrate a sophisticated approach to human rights. But just as important is the *HRPS Act*'s effect upon parliamentarians and bureaucrats who, if not for its existence, would have no obligation to take human rights into account in developing and implementing policy.[9]

Of course, I acknowledge that there can be no strict dichotomy between the two parts of the review process. One of the key functions of post-enactment review through parliamentary scrutiny committees is to hold parliamentarians to account when their SOCs are not up to standard. This in turn helps to engender human rights literacy in government departments. The two processes are therefore mutually reinforcing. However, that does not wholly undermine the utility of evaluating SOCs independently of the PJCHR scrutiny process. Such an evaluation sheds light on broader problems with the scheme of legislative rights review and suggests avenues for reform.

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6 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland).

7 All of its provisions had taken effect by 4 January 2012: *HRPS Act* s 2(1).

8 See, eg, Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* 785; Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' (2007) 3 *European Human Rights Law Review* 231; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41. Even those articles that purport to analyse legislative rights review schemes more generally tend to focus on the parliamentary scrutiny stage of the process: see, eg, Anthony Lester, 'Parliamentary Scrutiny of Legislation under the *Human Rights Act 1998*' (2002) 33 *Victoria University Wellington Law Review* 1; Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 453.

9 See Elizabeth Kelly, '*Human Rights Act 2004*: A New Dawn for Rights Protection?' (2004) 41 *AIAL Forum* 30, 33.

The article proceeds as follows. Part II outlines the scrutiny regime that the *HRPS Act* requires. Part III explains the methodology by which I will assess SOCs. There, I seek to answer some crucial interpretive questions about what the *HRPS Act* requires of SOCs. Part IV uses two case studies to measure SOCs against the standards articulated in Part III and concludes that there are a number of shortfalls in parliamentarians' efforts thus far. Part V canvasses some potential reasons for the failures identified in Part IV. Part VI concludes.

II THE *HRPS ACT*: AN OVERVIEW

The *HRPS Act* was the outcome of the Labor Government's National Human Rights Consultation. The National Human Rights Consultation Committee ('NHRCC') handed down its report in September 2009, having received over 35 000 submissions.[10] It recommended that the government enact a bill of rights similar to the 'dialogue model' bills of rights enacted in Canada, the United Kingdom, New Zealand, Victoria and the Australian Capital Territory.[11] While there are some important differences between these regimes, they share one notable commonality: they all take as their premise the proposition that, while courts have an important role to play in the protection of human rights, ultimate authority should be vested in the legislature to determine whether rights infringements are justifiable.[12]

The *HRPS Act*, passed over two years after the release of the NHRCC's report, bears little resemblance to what the NHRCC recommended.[13] Rather, as Dixon has noted, the *HRPS Act* goes to unusual lengths to limit the courts' role in enforcing human rights.[14] Instead, it seeks to promote human rights through purely parliamentary processes. There are three central provisions that realise this aim and therefore require particular attention.

Section 3(1) defines 'human rights' for the purposes of the *HRPS Act*. The term 'human rights' here means the rights and freedoms enumerated in seven major international human rights treaties: the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[15] the *International Covenant on Economic,*

10 Attorney-General's Department (Cth), *National Human Rights Consultation Report* (2009) <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

11 National Human Rights Consultation, *National Human Rights Consultation Report* (2009) ch 15 ('*NHRC Report*'). See *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *Human Rights Act 1998* (UK) c 42 ('*UKHRA*'); *New Zealand Bill of Rights Act 1990* (NZ) ('*NZBORA*'); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

12 See generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

13 On the reasons for this, see Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11 *International Journal of Constitutional Law* 870, 888–9.

14 Rosalind Dixon, 'A New (Inter)National Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 75, 75.

15 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Social and Cultural Rights ('*ICESCR*'),[16] the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*'),[17] the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*'),[18] the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[19] the *Convention on the Rights of the Child* ('*CRC*'),[20] and the *Convention on the Rights of Persons with Disabilities*.[21] It can be seen that this definition is exceptionally broad: 'well over 100' rights and freedoms are protected.[22] This coverage goes far beyond the standard approach of bills of rights – or at least the Commonwealth bills of rights mentioned above – which tend only to protect civil and political rights.[23] Even South Africa's Bill of Rights,[24] one of the few that protects socio-economic rights, pales in comparison to the *HRPS Act*'s scope.

Section 8 introduces the first element of the two-stage parliamentary review process. It requires members of Parliament ('MPs') who introduce a Bill into Parliament to prepare an SOC that includes an assessment of whether the Bill is compatible with human rights. Section 9 imposes the same obligation with respect to delegated legislation that is disallowable within the meaning of section 42 of the *Legislative Instruments Act 2003* (Cth) ('*LIA*'). Both sections provide that an SOC is not binding on a court or tribunal[25] – though the courts may still consider SOCs as relevant extrinsic material[26] – nor does the failure to prepare an SOC affect a law's validity, operation or enforcement when it is passed.[27] By requiring MPs to prepare SOCs, the *HRPS Act* seeks to entrench consideration of human rights issues from the early stages of the policy development process.[28] That is, legislators and bureaucrats will, it is hoped, consider human rights as another bloc of concerns weighing in favour of, or against, a given policy.

Section 7 provides for the second stage of legislative rights review. It states that the newly created PJCHR will examine Bills for their compatibility with

16 Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
17 Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).
18 Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).
19 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
20 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
21 Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
22 David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58, 61. See also Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing To Lead by Example?"' (2015) 26 *Public Law Review* 19, 27.
23 Gardbaum, above n 12, 51. Cf *Human Rights Act 2004* (ACT) s 27A, which protects the right to education.
24 See *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2.
25 *HRPS Act* ss 8(4), 9(3).
26 See generally Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42 *Federal Law Review* 1. Meagher concludes that SOCs are unlikely to be useful for the purposes of statutory interpretation: at 5–13.
27 *HRPS Act* ss 8(5), 9(4).
28 Kinley and Ernst, above n 22, 68; James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *AIAL Forum* 13, 16.

human rights and produce reports for Parliament.[29] The value of parliamentary committees in the protection of human rights has been the subject of much scholarship.[30] It is generally agreed that parliamentary committees play two key roles in fostering rights protection. First, they can provide valuable assistance to parliamentarians, who lack the time and expertise to make a nuanced assessment of the human rights issues raised by a given piece of legislation.[31] Secondly, they can ensure that legislation that may be incompatible with human rights is brought to Parliament's attention by seeking further explanation from a legislator where an SOC papers over human rights issues.

However, the effectiveness of the PJCHR is limited in a number of ways. It cannot, of course, compel a government not to implement a policy because of its human rights incompatibility.[32] The PJCHR's effectiveness is further blunted by the fact that no legal consequences are attached to a failure to prepare an SOC.[33] While the PJCHR may seek to persuade them otherwise, if a legislator is committed to a policy, it can be pushed through without any regard being paid to human rights issues. This has a significant crosscutting effect on the 'culture of justification' that the *HRPS Act* purports to entrench.[34] Finally, the PJCHR does not enter the fold until a policy has been finalised and a Bill drafted, such that its ability to effect change at such a late stage is significantly diminished.[35]

The *HRPS Act* is a step forward, if a moderate one, for rights protection at the federal level. While it is staunch in its resolution to prevent the courts from enforcing human rights, that is not fatal to its efficacy, nor should it be read as closing the door on Australia passing a bill of rights, either legislative or constitutional. Canada experimented with a statutory bill of rights[36] for two decades before passing a constitutional bill of rights.[37] It has been suggested that the decision to enact a constitutional bill of rights was largely due to two factors: first, the fact that the *Canadian Bill of Rights* applied only to federal laws;[38] and

29 The PJCHR is created by s 4 of the *HRPS Act*.

30 See above n 8.

31 Evans and Evans, 'Legislative Scrutiny Committees', above n 8, 786.

32 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58, 63. It is entirely reasonable that a committee should not have a veto power. Given that the Senate effectively exercises a veto power with respect to legislation (assuming that the government does not have a majority in both houses), it might be considered inappropriate (not to mention unconstitutional) for committees – which are inherently less representative than the notoriously unrepresentative Senate – to usurp this function.

33 *HRPS Act* ss 8(5), 9(4).

34 See Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

35 At least in a formal sense. Moreover, I have been unable to locate any evidence that suggests that the PJCHR is involved in assisting bureaucrats in considering human rights issues at an earlier stage.

36 See *Canadian Bill of Rights*, SC 1960, c 44.

37 See *Canadian Charter of Rights and Freedoms*.

38 Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (Irwin Law, 4th ed, 2009) 17, citing Bora Laskin, 'An Inquiry into the Diefenbaker *Bill of Rights*' (1959) 37 *Canadian Bar Review* 77.

secondly, the conservative interpretation given to it by the Supreme Court,[39] leading to a situation where the Court was 'adjudged to have less reconciled parliamentary sovereignty and judicial review of legislation than permitted the former to swallow the latter'.[40] This should provide those in favour of a bill of rights with some comfort: the door has not yet been shut on judicial review (strong- or weak-form) in Australia.[41]

Having outlined the regime established by the *HRPS Act*, I turn now to outlining a method of appraising SOCs.

III A FRAMEWORK FOR EVALUATING SOCS

Given that 'in many respects [the SOC process] is where the biggest impact of [parliamentary bills of rights] will be felt',[42] it is surprising that there has been remarkably little groundwork done to establish a methodology by which SOCs can be evaluated for their consistency with the aims of the legislation that requires their creation. Any methodology that seeks to evaluate SOCs must take account of the design issues that have faced parliaments that have enacted systems of political rights review. The methodology must also be crafted to the particular legislative regime by ensuring that the standards against which SOCs are judged have a basis in the text and structure of the legislation.

The closest we have come to an evaluative framework is an article written by Simon Evans.[43] While his concern in that article was to propose that a formal

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39 Walter S Tarnopolsky, 'The Historical and Constitutional Context of the Proposed *Canadian Charter of Rights and Freedoms*' (1981) 44(3) *Law and Contemporary Problems* 169. Cf Janet Hiebert, 'The Evolution of the Limitation Clause' (1990) 28 *Osgoode Hall Law Journal* 103, 106–24.

40 Gardbaum, above n 12, 99; see generally: at 98–100. Cf *R v Drybones* [1970] SCR 282, 294 (Ritchie J for Fauteux, Martland, Judson, Ritchie and Spence JJ), in which the Supreme Court held that if a statutory provision could not be reasonably interpreted without impermissibly infringing one of the rights protected by the *Canadian Bill of Rights*, that provision was rendered inoperative unless Parliament expressly declared otherwise.

41 However, there may be constitutional barriers to establishing a legislative bill of rights at the federal level following the High Court's decision in *Momcilovic v The Queen* (2011) 245 CLR 1: see below n 195 and accompanying text. It should also be noted that there is no reason that the *HRPS Act* could not be watered down or repealed altogether. Dissatisfaction with human rights statutes is not uncommon. For instance, there was speculation that the *Victorian Charter* would be repealed after the election of the Liberal Government in 2010. The Government ultimately decided to retain the *Victorian Charter* but stated that it would seek 'specific legal advice' regarding certain issues raised by the Scrutiny of Acts and Regulations Committee's four-year review, of which nothing ultimately came: see Victorian Government, *Parliament of Victoria Scrutiny of Acts and Regulations Committee: Review of the Charter of Human Rights and Responsibilities Act 2006* (Government Response, 14 March 2012) 3 [1.12]. Similarly, the Conservative Party recently released a policy document proposing the repeal of the *UKHRA*, to be replaced with a 'British Bill of Rights and Responsibilities': Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (3 October 2014). See also Nicholas Watt, 'Michael Gove To Proceed with Tories' Plans To Scrap *Human Rights Act*', *The Guardian* (London), 12 May 2015, 9.

42 Kelly, above n 9, 33.

43 Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665.

human rights scrutiny process be adopted in Australia,[44] he notes a number of design issues that face legislatures seeking to introduce statutory bills of rights. These design issues also provide us with a rubric against which SOCs can be assessed. On his view there are at least five questions that statutory bills of rights must address:

- scope – the rights covered;
- coverage – whether non-government Bills are subject to the same requirement, and whether delegated legislation is also covered;[45]
- content – the type of reasoning that must be engaged in;
- integration – the extent to which the SOC is embedded in the policy process; and
- responsibility – in whom the obligation to prepare an SOC is vested.[46]

The *HRPS Act* supplies us with the standard for three of these criteria. The scope of the SOC obligation is clear: Bills are to be assessed against the standards articulated in the seven human rights treaties to which reference was made earlier.[47] So too for coverage and responsibility: section 8 of the *HRPS Act* states that 'member[s] of Parliament' must prepare SOCs. Section 8 does not differentiate between government and non-government Bills, and makes it clear that the responsibility is vested in the MP rather than the Attorney-General, as is the case in New Zealand[48] and the Australian Capital Territory.[49] Further, section 9 states that an SOC need only be prepared in respect of disallowable legislative instruments as defined by section 42 of the *LIA*.

The relevance of these criteria to our analysis does not require detailed exposition. Clearly, a failure to consider a relevant human right, for instance, will disclose a deficiency in a particular SOC. The criteria may also become relevant in a second way. This is because the particular design choices made by Parliament may provide a partial explanation for the deficiencies in SOCs. I explore these design issues as a cause of shortcomings in SOCs more fully in Part V.

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44 His model differs slightly from the *HRPS Act*, as he suggests that review of SOCs is better undertaken by either the courts or an independent executive agency: ibid 693–702. In this respect, his work builds on George Winterton's proposal for an Australian Rights Council modelled on the French Conseil constitutionnel: see George Winterton, 'An Australian Rights Council' (2001) 24 *University of New South Wales Law Journal* 792.

45 Evans did not consider delegated legislation as part of his study because of the differences in the legislative process and the availability of judicial review: Simon Evans, above n 43, 666 n 2. Notwithstanding the fact that delegated legislation need not always be considered by Parliament, it can be used to effect significant human rights infringements: see below Part V(C). As such, I have included it in the assessment framework.

46 Ibid 689.

47 *HRPS Act* s 3(1) (definition of 'human rights').

48 *NZBORA* s 7. See also Grant Huscroft, 'The Attorney-General's Reporting Duty' in Paul Rishworth et al (eds), *The New Zealand Bill of Rights* (Oxford University Press, 2003) 195; Paul Rishworth, 'Human Rights' [2005] *New Zealand Law Review* 87.

49 *Human Rights Act 2004* (ACT) s 37.

In contrast to scope, coverage and responsibility, the integration and content criteria are left undefined by the *HRPS Act*. As such, it is necessary to address them in more detail.

A Integration

The integration criterion is tough to analyse because it requires evidence that is difficult to obtain. While academics have written on the question whether legislative bills of rights have affected the practice of legislatures,[50] such analyses typically involve very little consideration of the degree to which human rights considerations are integrated in the legislative and policymaking process. One reason for this may be that such an analysis produces the most meaningful results if undertaken on the basis of interviews with parliamentarians and their staff about when, and to what extent, human rights are considered in the formulation and implementation of policy. Empirical research about the relationship between Parliament and human rights in Australia is very scarce.[51] Cabinet guidelines and the like, which have been discussed in some articles,[52] provide only a limited insight into the extent to which human rights considerations are entrenched in the legislative process. This is because guidelines tell only half the story. A powerful analysis must move beyond the aspiration of how human rights considerations *ought* to operate and provide a picture of how they *actually* operate in practice.[53]

Nonetheless, it is worth giving the half of the story that we do have. Before doing so, however, the integration guidelines from other jurisdictions should be noted for purposes of comparison. Simon Evans argues that in New Zealand and the United Kingdom, human rights considerations are well integrated in the policy process.[54] In New Zealand, the *Cabinet Manual* requires that the Ministry of Justice be consulted on all Bills at the early stages of the legislative process.[55] The United Kingdom Cabinet Office's *Guide to Making Legislation* requires that

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50 See, eg, Andrew Geddis, 'The Comparative Irrelevance of the *NZBORA* to Legislative Practice' (2009) 23 *New Zealand Universities Law Review* 465, 487, where it is concluded that the *NZBORA* 'has not significantly changed … how Parliament makes law'.

51 One notable exception is Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329 (published before the passage of the *HRPS Act*). Indeed, in a methodology for assessing the human rights performance of legislatures published by the same authors, empirical analysis plays an important role: Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 545, 563–9. Janet Hiebert and James Kelly have conducted similar research for their recent book comparing the New Zealand and United Kingdom approaches to legislative rights review: Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, 2015).

52 Simon Evans, above n 43, 692–3; Lester, above n 8, 4–5; Janet L Hiebert, 'Parliament and the *Human Rights Act*: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4 *International Journal of Constitutional Law* 1, 12–13.

53 See Gardbaum, above n 12, 47.

54 Simon Evans, above n 43, 693.

55 Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual* (2008) 91 [7.31], 96 [7.62].

departmental legal advisers prepare a memorandum on a proposed Bill's compatibility with human rights for the Parliamentary Business and Legislation Committee (a Cabinet committee) before the Bill is introduced into Parliament.[56] Evans's observations may be extended to Victoria. The Victorian Department of Justice guidelines state that '[t]he *Charter* is intended to be an integral part of policy development'.[57] The guidelines go on to stipulate that human rights impact statements are required throughout the legislative process, from the original policy proposal stage through to when the policy is being considered by Cabinet.[58]

By contrast, the Bill of Rights Unit of the Department of Justice and Community Safety, which is responsible for the implementation of the *Human Rights Act 2004* (ACT), requires departmental staff to consult with the Bill of Rights Unit and to 'integrate *HRA* thinking into the policy development and drafting process'.[59] As Simon Evans notes, this indeterminate obligation is not likely to be effective at institutionalising human rights considerations in the policy process.[60]

Even further removed from the strong integration models of the United Kingdom, New Zealand and Victoria is the current state of affairs under the *HRPS Act*. No formal parliamentary guidelines require that human rights considerations be entrenched from the policy development stage. While the Department of the Prime Minister and Cabinet's *Legislation Handbook* has not been updated in quite some time,[61] the *Cabinet Handbook* was last updated in March 2012,[62] two months after the *HRPS Act* had come into force.[63] Further, the Commonwealth Attorney-General's Department has issued guidance on the preparation of statements of compatibility[64] and guidance sheets on human

56 Cabinet Office (UK), *Guide to Making Legislation* (2014) 14 [3.10], 44 [8.1], 64 [10.52]. See also Lester, above n 8, 4.

57 Human Rights Unit, Department of Justice (Vic), *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2008) 23.

58 Ibid 27.

59 Bill of Rights Unit, Department of Justice and Community Safety (ACT), *Guide to ACT Departments on Pre Introduction Scrutiny: The Attorney General's Compatibility Statement under the Human Rights Act 2004* (2004) 3.

60 Simon Evans, above n 43, 693.

61 See Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2000).

62 See Department of the Prime Minister and Cabinet (Cth), *Cabinet Handbook* (7th ed, 2012).

63 *HRPS Act* s 2(1).

64 Attorney-General's Department (Cth), *Assessment Tool for Preparing Statements of Compatibility for Bills and Legislative Instruments* <www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/AssessmentTool.doc>; Attorney-General's Department (Cth), *Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/Flowchart.pdf>; Attorney-General's Department (Cth), *List of Guidance Sheets and Policy Triggers* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/PolicyTriggers.pdf>.

rights,[65] but has not issued any guidelines about the points at which human rights considerations should be injected into the policymaking process.

While this is disappointing, we have seen only a partial picture. Evans and Evans, writing before the introduction of the *HRPS Act* when parliamentary scrutiny for human rights issues was based on a more nebulous 'civil liberties approach' centred on 'negative freedom'[66] and the rule of law,[67] found that '[m]ost … parliamentarians who were interviewed … believed that parliaments could make a real contribution to the protection of human rights'.[68] This demonstrates that Australian parliamentarians take (or at least took) human rights issues seriously when formulating policy – at least at the level of principle.

The available evidence is therefore insufficient to come to any firm conclusions on the issue of integration except to say that guidelines that more strongly embed human rights considerations are desirable. But given this uncertainty, there will be no further analysis of the integration criterion. Let me turn now to the content requirement.

B Content

In a commentary on the *HRPS Act* published shortly after its enactment, Rosalind Dixon noted two key issues left unanswered by the legislation. First, the *HRPS Act* does not explain whether it is intended to foster compliance with international human rights norms, or whether it should be seen as entrenching a culture of human rights based on justification and contestation.[69]

Secondly, and relatedly, the *HRPS Act* contains no express direction as to whether SOCs – or, indeed, the PJCHR – ought to engage with international and comparative law sources when scrutinising legislation.[70] This may be contrasted with the express permission to engage with international law in the United Kingdom,[71] Australian Capital Territory[72] and Victoria's[73] bills of rights. While the rights protected by the *HRPS Act* are contained in international treaties, this does not entail the conclusion that international (if not necessarily comparative) sources should be consulted. In *Momcilovic v The Queen*, the High Court counselled against the indiscriminate use of international and comparative human rights sources due to the 'variety of legal systems and constitutional settings' in

65 Attorney-General's Department (Cth), *Public Sector Guidance Sheets* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/default.aspx>. See also Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (2014) <http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf>.

66 See generally Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty: Incorporating Four Essays on Liberty* (Oxford University Press, 2002) 166.

67 See Evans and Evans, 'Legislative Scrutiny Committees', above n 8, 793–5.

68 Evans and Evans, 'Messages from the Front Line', above n 51, 343.

69 Dixon, above n 14, 78–80.

70 Ibid 76.

71 *UKHRA* s 2(1).

72 *Human Rights Act 2004* (ACT) s 31(1).

73 *Victorian Charter* s 32(1).

which these sources are located.[74] To this may be added the fact that most domestic bills of rights modify certain *ICCPR* rights, such that comparative sources must be treated with caution.[75]

While the PJCHR has issued a Practice Note detailing its expectations for SOCs, it does not explicitly address either of these issues. Instead, it merely states that SOCs must 'provide sufficient information about the purpose and effect of the proposed legislation'.[76] But this statement takes us no closer to articulating criteria for the assessment of SOCs. As such, it is necessary to grapple with both of the issues identified by Dixon in order to formulate the standard against which the content of SOCs should be evaluated.

1 Compliance or Contestation?[77] The Function of Legislative Rights Review under the HRPS Act

The question whether the *HRPS Act* seeks to promote a compliance- or contestation-based understanding of human rights goes to the core of the *HRPS Act*'s purpose.[78] Moreover, the uncertainty about the *HRPS Act*'s aim is closely tied to the issue of engagement with case law. If the *HRPS Act*'s aim is to foster compliance with international human rights law, then clearly it will be necessary to consult international and comparative sources as they provide an authoritative interpretation of the scope of a given right and whether limitations are justifiable. On this view, international and comparative sources essentially become binding upon the legislator, curbing the legislator's ability to use certain means to achieve a given policy end.[79] By contrast, in Dixon's view, if the aim of the *HRPS Act* is to promote 'good faith debate over the meaning and relevance of [human rights] norm[s]', the imperative to engage with international and comparative sources may be weakened.[80]

Most importantly, the *HRPS Act* itself refers to legislation being '*compatible* with human rights'.[81] What is meant by 'compatible' is not made clear. There are statements in the extrinsic material that point in opposite directions as to whether the legislation imposes a requirement of compliance or contestation. On the one hand, consider the statement by then Attorney-General Robert McClelland in his second reading speech for the Human Rights (Parliamentary Scrutiny) Bill 2011 (Cth):

> The government believes that Australia can, and should, live up to its obligations under these important [human rights] treaties, not simply because this is the right thing to do but because the principles that are contained in those documents

74 (2011) 245 CLR 1, 37 [19] (French CJ); see also: at 87–90 [148]–[161] (Gummow J), 123 [280] (Hayne J), 183 [453] (Heydon J).

75 See, eg, George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 895–6.

76 Parliamentary Joint Committee on Human Rights, *Practice Note 1* (September 2012) 2.

77 I have appropriated these terms from Dixon, above n 14, 78–9.

78 Ibid 78.

79 Ibid 78–9.

80 Ibid 79.

81 *HRPS Act* ss 8(3), 9(2) (emphasis added). See also: at ss 7(a)–(b).

> provide a protection against unwarranted, unjustified or arbitrary interference in the fundamental rights enjoyed by all individuals irrespective of their colour, background or social status.[82]

The reference to Australia 'liv[ing] up to its obligations' under international human rights law seems to suggest compliance is the aim of the *HRPS Act*. But the Attorney-General's statement in the very next sentence of the second reading speech seems to cut the other way:

> the implementation of these two measures – that is, statements of compatibility on human rights and the establishment of a new Parliamentary Joint Committee on Human Rights – establishes a dialogue between the executive, the parliament and ultimately the citizens they represent.[83]

References to dialogue between the government and the public do not have compliance with human rights norms as their focus. Rather, they invoke the notion that rights and their proportionate limitations are defined by the public through an inclusive and participatory process.

The existing scholarship on the *HRPS Act* has not sought to answer this question despite Dixon noting that 'the question … merits a great deal more attention'.[84] Kinley and Ernst make passing reference to the PJCHR having a mandate of scrutinising legislation for '*compliance* with human rights',[85] but do not unpack what, in their view, 'compliance' entails. Williams and Burton do not address the matter at all.

Evans and Evans, in an article outlining their methodology for assessing the human rights performance of legislatures, take the view that judicial rulings 'cannot resolve the moral, political and philosophical disagreements at the heart of many rights issues'.[86] They suggest that an evaluation of Parliament's human rights performance should not focus solely on compliance, but also the process by which legislatures engage with rights questions. In particular, the assessment should consider whether a given legislative procedure leads to 'deliberative processes that give proportionate attention to human rights issues'.[87]

I would adopt the position that Evans and Evans put forward. Their understanding of legislative rights review as rooted in contestation is reflected in the purposes of the *HRPS Act*: namely, to inculcate in federal Parliament (and presumably the Australian people) a culture comfortable with discussing important public policy issues through a rights paradigm, but also to recognise that courts ought to play no role in instilling that culture through judicial enforcement. If Parliament took the view that SOCs must comply with human rights norms as defined in international law, it would make sense to give the courts a role in policing compliance. As such, imposing a requirement that SOCs comply with human rights norms as defined by courts and treaty bodies would

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82 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland).

83 Ibid.

84 Dixon, above n 14, 80.

85 Kinley and Ernst, above n 22, 63 (emphasis added).

86 Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 51, 551.

87 Ibid 551–2.

push against this purpose, essentially introducing judicial rights review by the back door.

To be clear, on the contestation model of parliamentary scrutiny I have expounded, statements of compatibility may say that a given law does not breach human rights norms when, on its proper construction, that view is incorrect. This view does not unduly strain the meaning of 'compatible' such that it becomes entirely empty. On the interpretation that I propose, an SOC may find a Bill is 'compatible' with human rights if such a finding is reasonably arguable. David Luban's 'bell curve' metaphor can be used to help us identify when a position is reasonably arguable.[88] In his view, a position is not reasonably arguable if it falls towards the ends of the bell curve. Whether the position taken by an SOC is reasonably arguable is a matter to be determined by the interpretive community[89] – in the case of the *HRPS Act*, the public at large, Parliament and the PJCHR. This reading of the *HRPS Act* best promotes the legislative purpose while remaining faithful to the text.

2 The Use of International and Comparative Sources

Does concluding that the *HRPS Act* inculcates a conception of rights rooted in contestation mean that international and comparative sources need not be considered? There are a number of arguments to say the answer is yes. First, Dixon notes that

> MPs … will generally face quite different time and resource constraints to judges, and thus be quite differently placed in terms of their capacity to engage with [international and comparative] sources. How far MPs should go in considering such sources under the [*HRPS Act*], therefore, should also be considered a largely open question.[90]

This concern may be exacerbated by the expansive definition of human rights in section 3(1) of the *HRPS Act*.[91] One would also not be surprised if some would take issue with the idea of citing foreign jurisprudence at all: consider the views of James Allan and Grant Huscroft, who express significant scepticism about the citation of foreign and international law, primarily on the basis that these sources lack the democratic credentials of domestic legal sources:

> It is one thing – and perhaps in itself a difficult thing – to justify the power handed to domestic judges to interpret a domestic bill of rights adopted after debate and disagreement and some sort of head counting exercise some time in the nation's past. It is a significantly different thing … to try to justify giving a role to the decisions of foreign courts and international tribunals to gainsay elected … legislators.[92]

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88 See David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 193–4; see generally: at 192–7.

89 Ibid 195.

90 Dixon, above n 14, 76 (citations omitted). See also Williams and Burton, above n 32, 73; Evans and Evans, 'Messages from the Front Line', above n 51, 342–3.

91 See above nn 15–21 and accompanying text.

92 James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts' (2006) 43 *San Diego Law Review* 1, 58.

While the context in which Allan and Huscroft's statement sits – the debate about the citation of foreign law in *judicial* decisions on rights sparked by the decision of the United States Supreme Court in *Roper v Simmons*[93] – is quite different to citation by legislators, their argument applies with some force to the SOC context. That is, why should Australian parliamentarians pay any heed to the views of foreign judges deciding cases in a completely different social and legal context?

In my view SOCs ought to engage international and comparative sources if they are reasonably necessary to the analysis. The qualifier 'reasonably necessary' is intended to exclude scenarios where the conclusion of a rights limitation analysis is obvious from the beginning. In other words, where legislation clearly breaches a human right (or clearly does not), there is nothing to be gained from the citation of foreign materials. In this way it is hoped that the resource constraints problem can be minimised.

The commitment to citing international and comparative legal sources is not in tension with a contestation-based understanding of the *HRPS Act*. It does not entail legislators merely following the views of 'foreigners'.[94] It is perfectly acceptable for the legislator preparing a Bill to note the opinion of a court or treaty body on human rights issues and raise a principled disagreement with that interpretation. Paying heed to the views of foreign courts and human rights treaty bodies does not 'gainsay'[95] anyone; it merely requires good faith engagement with the opinions of well-regarded human rights institutions.

Dixon argues that a requirement to engage with international and comparative sources may be contrary to the premise of the *HRPS Act* that I have argued for, suggesting that

> it may lead MPs to delegate responsibility for the preparation of statements of compatibility to their departments, and thus … remove deliberation over questions of human rights protection to a context that is far less public, political and participatory. The desirability of engagement with other sources, therefore, will largely depend on the ability of government departments, non-government organisations and/or academics to make such international and comparative jurisprudence accessible and intelligible to MPs.[96]

Hiebert has made a related point, noting that in jurisdictions with parliamentary bills of rights, legislators have taken a very cautious approach in order to avoid the prospect of a judicial finding of inconsistency with human

93 543 US 551, 578 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

94 See ibid 608 (Scalia J for Rehnquist CJ, Scalia and Thomas JJ) (2005).

95 Allan and Huscroft, above n 92, 58.

96 Dixon, above n 14, 79–80.

rights.[97] This subverts the purposes of eschewing strong form judicial review in the first place. Can it therefore be said that using international and comparative sources is anathema to the very idea of legislative rights review?

Addressing Dixon's point first, making human rights jurisprudence accessible to legislators (and through them the public) is not a particularly onerous task. While case law may at first seem esoteric to the layperson, Waldron is correct to argue that human rights questions, even if clothed in legal language, are essentially moral ones.[98] If that is so, then explaining human rights jurisprudence – that is to say, explaining moral problems – is less complicated than explaining, say, the application of the principle established by *Kable v Director of Public Prosecutions (NSW)*,[99] which involves vexed questions of doctrine and granular legal analysis. Waldron also argues that the fundamentally moral character of human rights questions means that courts, which speak predominantly in the language of precedent, are ill-equipped to address rights questions.[100] This point might be thought to weigh against my argument, but in fact it does not. Even if we concede that judicial reasoning on rights is often muddied by the doctrine of precedent, we need not accept the conclusion that Parliament should therefore ignore rights jurisprudence altogether. Though courts' opinions may to some extent be distorted by precedent, they have a history of engagement with difficult rights questions and their views should therefore be taken seriously. Put differently, Waldron does not go as far as saying that judicial views on rights are wholly irrelevant, and nor should parliamentarians. Finally, Waldron's criticism is limited to courts and does not apply with the same force to entities like the United Nations Human Rights Committee, whose jurisprudence is not clouded by questions of precedent to the same degree.

Moreover, Hiebert's point is weakened when applied to Australia's 'exclusive parliamentary model'.[101] A large part of her thesis is dedicated to legislators being fearful of the consequences of passing legislation that courts may find to be inconsistent with rights – a declaration of inconsistency or, in Canada, a finding of invalidity.[102] The *HRPS Act* does not include any provision for judicial rights review, so the imperative to treat case law as binding in the

97 Janet L Hiebert, 'Governing Like Judges?' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 43–52. This is particularly prevalent in Canada given the Supreme Court's power to invalidate – rather than merely declare incompatible – legislation for inconsistency with the *Canadian Charter of Rights and Freedoms*: at 45. Tushnet has described the process of legal analysis in political rights review as a form of policy distortion: Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245. His argument is concerned with demonstrating the distortion associated with legislating '*in the shadow of* judicial review': at 266 (emphasis added). For the reasons I give below, those concerns are attenuated, if not entirely inapposite, when applied to a system that decouples judicial from political rights review.

98 This point lies at the heart of Waldron's case against strong form judicial rights review: see, eg, Waldron, *Law and Disagreement*, above n 2, 11–12.

99 (1996) 189 CLR 51.

100 Waldron, 'The Core of the Case against Judicial Review', above n 2, 1382–6.

101 See Williams and Burton, above n 32.

102 Hiebert, 'Governing like Judges?', above n 97, 43–8.

context of legislative rights review is significantly weakened: legislators need not be fearful of the legal and political costs of a judicial declaration of inconsistency or invalidity.

International and comparative sources will assist the parliamentarian in defining the bounds of what is reasonable under Luban's bell curve[103] and therefore in evaluating whether the proposed legislation falls within those limits. There is no compelling reason not to consider them.

C Conclusion on Methodology

In summary, the evaluation that follows is premised on the view that legislative rights review under the *HRPS Act* is characterised by contestation, not compliance. I have argued that in order to ensure that proportionate attention is dedicated to human rights concerns, SOCs must engage with international and comparative sources. The extent of that engagement will depend on the gravity of the Bill's rights implications. However, SOCs need not find that legislation complies with human rights as defined by treaty bodies and human rights courts.

The obligation to engage with international and comparative sources is an obligation of conduct, not an obligation of result. The purpose of engaging with these sources is to grapple with the ideas that they raise, not to follow them blindly. Making sure the views espoused in international and comparative legal sources are contemplated goes a considerable way to ensuring that the deliberation on these issues is robust and proportionate.

IV EVALUATING SOCS UNDER THE *HRPS ACT*

A Case Studies and Parliamentary Protection of Human Rights

The methods by which parliamentary protection of human rights can be analysed are manifold.[104] Evans and Evans argue that evaluation of legislatures' human rights performance should involve qualitative analysis, primarily because it allows for 'more detailed analyses of the processes under exploration than … quantitative measurements do'.[105] While they do not argue that quantitative analysis is wholly irrelevant,[106] qualitative analysis is more useful in the context of SOCs because it allows for a 'more precise targeting' of particular legislative pathologies.[107]

The only study that seeks to assess the effectiveness of the *HRPS Act* in practice is by Williams and Burton.[108] They assess all of the statements of compatibility from 4 January 2012 (when the *HRPS Act* came into effect) to the

103 See above nn 88–9 and accompanying text.
104 See generally Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 51.
105 Ibid 560.
106 Ibid 564–7.
107 Ibid 561.
108 See Williams and Burton, above n 32.

end of June 2012.[109] They make reference to a variety of SOCs in support of general conclusions drawn from the entire corpus of 129 SOCs tabled during that period.[110] As can be seen, their analysis is quantitative and conducted at a high level of abstraction. For the reasons given by Evans and Evans, such an approach, while helpful to the extent that it can give a bird's-eye view of parliamentary practice, tends not to be useful in pinpointing particular problem areas that need to be addressed.

This article takes a different approach: the case study method. Evans and Evans argue that case studies are an effective method of evaluating the human rights performance of legislatures. In so doing, they suggest that

> [a] good range of case-studies will include examples of legislation that is both particularly protective of human rights, and legislation that is particularly inconsistent with human rights, while ensuring that the data from the comprehensive analysis of legislation is used to clearly identify how typical particular case-studies are of the legislature in question.[111]

There are two case studies analysed here: the regional processing legislation introduced by the Department of Immigration and Citizenship,[112] and the National Disability Insurance Scheme ('NDIS') legislation introduced by the Department of the Treasury. As we shall see, these case studies raise a variety of human rights issues and come from two departments of government whose degree of familiarity with human rights issues are quite different. As such, they satisfy the criteria that Evans and Evans suggest and illuminate a range of problems with parliamentary practice pursuant to the *HRPS Act*.

B Regional Processing Legislation

Beginning in September 2011, the Labor Government introduced a series of legislative changes that sought to modify the *Migration Act 1958* (Cth) ('*Migration Act*'). The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) ('*Regional Processing Act*') was a response to the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, in which the Court found that the Government's decision to transfer asylum seekers to Malaysia was not authorised by the *Migration Act*.[113] The effect of the *Regional Processing Act* was to allow the Minister for Immigration to designate a country as a regional processing country provided that they thought it was in the national interest to do so.[114] In so doing, the Minister was required to consider whether the regional processing country has given the Australian Government assurances that persons transferred for

109 Ibid 80.

110 See ibid.

111 Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 51, 568; see generally: at 567–9.

112 Now the Department of Immigration and Border Protection. Hereafter I will refer to the Department of Immigration and the Minister for Immigration without cataloguing the changes in nomenclature.

113 (2011) 244 CLR 144. See also Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) 2.

114 *Migration Act* ss 198AB(1)–(2), as inserted by *Regional Processing Act* sch 1 item 25.

processing would not be refouled and that it would make an assessment, or permit the assessment, of whether the transferred persons were refugees within the meaning of international refugee law.[115] However, whether a country could be designated a regional processing country 'need not be determined by reference to the international obligations or domestic law of that country'.[116] Because the *Regional Processing Act* was introduced into Parliament before the *HRPS Act* came into force, no SOC had to be prepared.[117] However, upon the PJCHR's request, then Minister for Immigration Chris Bowen provided an SOC (albeit after the legislation had been passed).[118]

The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) ('*Unauthorised Maritime Arrivals Act*') was enacted after the *HRPS Act* had come into force. It had the effect that 'irregular maritime arrivals who arrive[d] anywhere in Australia [were] subject to the same regional processing arrangements as those who arrive[d] at a previously excised offshore place'.[119]

The *Migration Amendment Regulation (No 5) 2012* (Cth) had the effect of preventing 'irregular maritime arrivals' from proposing that humanitarian or refugee visas be granted to their family members. As it was a disallowable legislative instrument, it was subject to the SOC requirement under section 9 of the *HRPS Act*.

Finally, in late 2012, the Minister for Immigration designated Nauru and Papua New Guinea as regional processing countries in accordance with the *Regional Processing Act*.[120] As mentioned above, only certain pieces of delegated legislation are subject to the requirement to produce an SOC.[121] The instruments that designated Papua New Guinea and Nauru were not disallowable legislative instruments. This was because item 26 of section 44(2) of the *LIA* exempted certain legislative instruments made under parts 1, 2 and 9 of the *Migration Act*. Section 198AB, which gave the Minister the power to make designations, falls

115 *Migration Act* s 198AB(3)(a)(i), as inserted by *Regional Processing Act* sch 1 item 25.

116 *Migration Act* s 198AA(d), as inserted by *Regional Processing Act* sch 1 item 25.

117 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation* (2013) 49 [2.80] ('*Examination of the Regional Processing Act*').

118 Ibid 50 [2.83], citing Letter from Chris Bowen, Minister for Immigration and Citizenship (Cth), to Harry Jenkins, 15 November 2012 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Activity/migration/correspondence/~/media/Committees/Senate/committee/humanrights_ctte/activity/migration/correspondence/min_response.ashx>. The PJCHR criticised the Government for failing to provide an SOC before being prompted, even though there was no obligation to do so: ibid 51 [2.85].

119 *Examination of the Regional Processing Act*, above n 117, 7 [1.25].

120 Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 10 September 2012; Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 9 October 2012.

121 *HRPS Act* s 9(1).

within part 2 of the *Migration Act*. Accordingly, no SOC was produced in respect of either instrument.[122]

Dealing as it does with Australia's obligations with respect to asylum seekers, this package of legislation raises many paradigmatic human rights issues. A number of the rights that the regional processing scheme engages – for instance, the obligation of non-refoulement under the *ICCPR*[123] and the prohibition on arbitrary detention[124] – are the subject of a significant and developed body of law. However, the legislation also involved a number of other rights, such as those contained in *ICESCR*, which have a less developed jurisprudence.[125] Moreover, the Department of Immigration should be starting with a more sophisticated understanding of human rights than most government departments, as its work raises rights issues – particularly civil and political rights – regularly. In light of this, the SOCs ought to demonstrate a level of sophistication that might not be exhibited in other instances.

The Minister's SOC concluded that the *Regional Processing Act*, the *Unauthorised Maritime Arrivals Act* and the *Migration Amendment Regulation (No 5) 2012* (Cth) complied with the human rights obligations specified in the *HRPS Act*.[126] As regards the *Regional Processing Act*, the SOC runs to six pages, concluding that none of the rights considered (from the *ICCPR* and *CRC*) were infringed. The SOC for the *Migration Amendment Regulation (No 5) 2012* (Cth) was about the same length and reached the same conclusion.

For the most part, the SOCs demonstrate a sophisticated understanding of most of the human rights principles engaged by the legislation. For instance, the description of the jurisprudence in relation to articles 7 and 9 of the *ICCPR* in the SOC for the *Regional Processing Act* largely mirrors the PJCHR's exposition in its subsequent examination of the tranche of legislation.[127]

The SOCs also engage with less well-known rights, including provisions of the *CRC* and rights relating to families contained in the *ICCPR*.[128] One shortcoming, however, is that the SOCs fail to engage with any relevant economic, social and cultural rights that may have been engaged by the legislation. In particular, the PJCHR's report noted that the right to health,[129] the

122 *Examination of the Regional Processing Act*, above n 117, 49 [2.81].
123 *ICCPR* art 7.
124 Ibid art 9.
125 See *Examination of the Regional Processing Act*, above n 117, 44 [2.59], citing *ICESCR* arts 6, 9, 11–12.
126 Letter from Chris Bowen, Minister for Immigration and Citizenship (Cth), to Harry Jenkins, 15 November 2012, 1; Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth) attachment A; Explanatory Statement, *Migration Amendment Regulation (No 5) 2012* (Cth) attachment B.
127 See, eg, *Examination of the Regional Processing Act*, above n 117, 58–9 [2.114], citing Letter from Chris Bowen, Minister for Immigration and Citizenship (Cth), to Harry Jenkins, 15 November 2012, 4.
128 Letter from Chris Bowen, Minister for Immigration and Citizenship (Cth), to Harry Jenkins, 15 November 2012, 4–5; Explanatory Statement, *Migration Amendment Regulation (No 5) 2012* (Cth) attachment B, 2–5.
129 *ICESCR* art 12.

right to work,[130] the right to an adequate standard of living[131] and the right to social security[132] were all enlivened by the legislation[133] but not considered by the Minister.

The main way in which the SOCs failed to adhere to the content standards articulated in Part III(B) above is a failure to move beyond the citation of primary materials. It is clear from the content of the SOCs that the Department of Immigration understands how these rights provisions have been interpreted by international human rights institutions. The failure to cite case law and general comments therefore stems from a failure of process, rather than a lack of human rights literacy. In this respect the Department's practice can be contrasted with the PJCHR's examination of the package of legislation.[134] The PJCHR – no doubt with significant assistance from its legal adviser, Professor Andrew Byrnes of the University of New South Wales[135] – regularly cites cases and the United Nations Human Rights Committee's general comments in its exposition of the rights engaged by the legislative package.[136] This reform, though in one sense cosmetic, is not superficial. Citation of cases and general comments plays an important educative role: legislators and, through them, the public, are inculcated with respect for international legal sources (although they are not, as I have said, bound by them). But perhaps more importantly, it is important to bear in mind that the PJCHR is a vital component of the audience for SOCs.[137] Citation of legal authorities – and I am not suggesting that the citation must extend to academic sources – provides strong evidence that proportionate attention has been devoted to a piece of legislation's human rights implications.

In relation to the contestation-based understanding of the *HRPS Act*, generally the arguments made by the Minister are plausible (if not necessarily popular with human rights advocates). However, at times, the Minister made arguments that are towards the edges of Luban's bell curve.[138] In particular, the argument that the requirement to consider whether the regional processing country has given assurances that transferred persons will not be refouled is consistent with article 7 of the *ICCPR* rests on thin legal foundations. First, diplomatic assurances concerning non-refoulement are not a necessary condition of a country being designated as a regional processing country – they are merely a factor that must be considered. Further, such assurances are worth little when one considers the weak human rights protection in Papua New Guinea and

130 Ibid art 6.
131 Ibid art 11.
132 Ibid art 9.
133 See *Examination of the Regional Processing Act*, above n 117, 44 [2.59].
134 See *Examination of the Regional Processing Act*, above n 117.
135 The importance of a legal adviser to the work of human rights scrutiny committees has been noted elsewhere: see, eg, Kinley and Ernst, above n 22, 66.
136 See especially *Examination of the Regional Processing Act*, above n 117, 44–8 [2.59]–[2.77].
137 Bureaucrats and other legislators are other notable segments of the audience.
138 See above nn 88–9 and accompanying text.

Nauru.[139] In their submission to the PJCHR's inquiry, Crock and Martin went as far as suggesting that the SOC evidenced bad faith on the part of the Minister in fulfilling his *HRPS Act* obligations.[140]

In stark contrast to these generally positive findings stands the SOC for the *Unauthorised Maritime Arrivals Act*. This SOC, as the PJCHR noted, was the subject of significant criticism.[141] The reasoning provided is cursory in the extreme: the analysis runs to just over two pages. Moreover, the SOC merely extracts the provisions of the relevant treaties, failing to cite case law and general comments. Its justification for the rights infringements that it effects is non-existent. The SOC states the purpose of the amendment and concludes that whatever infringement there may be is reasonable in the circumstances without explanation.[142]

For the most part, the SOCs prepared for the regional processing legislation show promising signs. There are, however, a number of deficiencies, the most important of which is the abject failure of the SOC for the *Unauthorised Maritime Arrivals Act* to meet the standards articulated in the *HRPS Act*. The PJCHR was right to note its disappointment in the Minister's shallow analysis.[143] The failure to consider the relevant economic, social and cultural rights implications of the legislation also needs to be rectified; it will not do to merely ignore some of the rights that are meant to be protected by the *HRPS Act*.

It should also be remembered that, as I noted earlier, the Department of Immigration is likely to be working from a far stronger base of assumed human rights knowledge given the regularity with which its legislation engages rights. This may be contrasted with the positions of other government departments whose policy proposals are less likely to engage rights, or will engage 'softer' rights – that is, rights that have been described as 'aspirational' or about which there is little secondary material.[144] It is to one of those departments that I now turn: the Treasury, which was responsible for the NDIS legislation.

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139 See, eg, Jane McAdam, Submission No 6 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) Package of Legislation*, 11 January 2013, 8–10 [20]–[28]; Mary E Crock and Hannah Martin, Submission No 7 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) Package of Legislation*, 15 January 2013, 10–11.

140 Crock and Martin, above n 139, 2.

141 See *Examination of the Regional Processing Act*, above n 117, 50–1 [2.84], citing Penelope Mathew, Submission No 6 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, 12 December 2012 and Castan Centre for Human Rights Law, Submission No 17 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, December 2012.

142 See Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth) attachment A, 2–3.

143 See *Examination of the Regional Processing Act*, above n 117, 51–2 [2.87].

144 See Williams and Burton, above n 32, 72–3.

C NDIS Legislation

The NDIS healthcare program was introduced into Parliament in May 2013 by the Gillard Labor Government, as the existing social security system for people with disabilities was considered to be 'broken'.[145] One piece of the legislative scheme was the *Medicare Levy Amendment (DisabilityCare Australia) Act 2013* (Cth), which increased the Medicare levy from 1.5 per cent to 2 per cent in order to fund the NDIS. A suite of legislation making other amendments was also introduced.[146] All of the Bills were introduced on 15 May 2013 and passed by both Houses of Parliament the next day.[147]

There were two SOCs for the 12 pieces of legislation introduced. Both SOCs stated that the legislation did not engage any of the human rights enumerated in the *HRPS Act*.[148] This presumably meant that it did not *infringe* any of the relevant rights, as one of the effects of the NDIS was to advance the rights of persons with disability in accordance with the protections in the *Convention on the Rights of Persons with Disabilities*.[149]

However, the PJCHR's subsequent examination of the NDIS legislation found that it had potentially adverse effects on a number of rights. First, it engaged the rights to social security and an adequate standard of living, guaranteed by articles 9 and 11 of the *ICESCR* respectively, because it included

145 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 May 2013, 3327 (Kevin Andrews).

146 DisabilityCare Australia Fund Bill 2013 (Cth); Family Trust Distribution Tax (Primary Liability) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Fringe Benefits Tax Amendment (DisabilityCare Australia) Bill 2013 (Cth); Income Tax (First Home Saver Accounts Misuse Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Income Tax (TFN Withholding Tax (ESS)) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Income Tax Rates Amendment (DisabilityCare Australia) Bill 2013 (Cth); Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Superannuation (Excess Non-concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Superannuation (Excess Untaxed Roll-Over Amounts Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Taxation (Trustee Beneficiary Non-disclosure Tax) (No 1) Amendment (DisabilityCare Australia) Bill 2013 (Cth); Taxation (Trustee Beneficiary Non-disclosure Tax) (No 2) Amendment (DisabilityCare Australia) Bill 2013 (Cth).

147 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 14–16 May 2013, Legislative Instruments Registered with the Federal Register of Legislative Instruments 20 April – 17 May 2013* (2013) 9 [1.33] ('*NDIS Report*').

148 Explanatory Memorandum, DisabilityCare Australia Fund Bill 2013 (Cth) 5; Explanatory Memorandum, Medicare Levy Amendment (DisabilityCare Australia) Bill 2013 (Cth), Fringe Benefits Tax Amendment (DisabilityCare Australia) Bill 2013 (Cth), Income Tax Rates Amendment (DisabilityCare Australia) Bill 2013 (Cth), Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Superannuation (Excess Non-concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Superannuation (Excess Untaxed Roll-Over Amounts Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Income Tax (TFN Withholding Tax (ESS)) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Income Tax (First Home Saver Accounts Misuse Tax) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Family Trust Distribution Tax (Primary Liability) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Taxation (Trustee Beneficiary Non-disclosure Tax) (No 1) Amendment (DisabilityCare Australia) Bill 2013 (Cth), Taxation (Trustee Beneficiary Non-disclosure Tax) (No 2) Amendment (DisabilityCare Australia) Bill 2013 (Cth), 18 [2.5].

149 Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). See *NDIS Report*, above n 147, 10 [1.37].

increases in tax rates on superannuation contributions.[150] The PJCHR's report noted that 'while it may be that any impact on those rights that would result from the increase in tax rates in order to fund [the NDIS] would be readily justified, the statement of compatibility should have referred to the rights engaged by each bill'.[151]

The NDIS legislation also affected certain rights because of its impact on New Zealand citizens resident in Australia. Some background on Australia's migration regime is necessary to understand this point. The Special Category Visa ('SCV') is a temporary visa granted to New Zealand citizens who travel to Australia pursuant to the Trans-Tasman Travel Arrangement.[152] It allows them to reside in Australia indefinitely without holding permanent residency. In 2001, the *Agreement on Social Security between the Government of Australia and the Government of New Zealand*[153] was concluded, under which New Zealand citizens resident in Australia are no longer eligible for certain social security benefits unless they hold a permanent visa. The treaty was implemented into Australian law via amendments to section 7 of the *Social Security Act 1991* (Cth).

The test for social security eligibility in section 7 of the *Social Security Act 1991* (Cth) is duplicated in section 23 of the *National Disability Insurance Scheme Act 2013* (Cth). In other words, New Zealand citizens who do not hold permanent visas are ineligible for the coverage afforded by the NDIS scheme.[154] As the PJCHR noted, the potentially discriminatory application of the scheme engaged rights guaranteed by *CERD* and the *ICESCR*.[155] The Treasurer's failure to pick up on these issues is particularly egregious given that the Committee on the Elimination of Racial Discrimination heard a communication in 2008 that was specifically about the application of the *Social Security Act 1991* (Cth) to SCV holders.[156] The conclusion in that case was that the exclusion of SCV holders from certain social security benefits did not constitute impermissible discrimination.[157] This does not excuse the Treasurer from the requirement to consider the case in the SOC. As noted above, the PJCHR requires that SOCs consider rights implications even if the limitations imposed are readily justifiable.[158] Related to this is the second right that the PJCHR report discussed as relevant to the NDIS: the right to social security guaranteed by article 11 of *ICESCR*. Article 2(2) of the *ICESCR* provides that its protections must be applied without discrimination on the basis of, relevantly, national origin. Clearly the

150 *NDIS Report*, above n 147, 10 [1.37].
151 Ibid 10 [1.38].
152 See *Migration Regulations 1994* (Cth) sch 2 subclass 444.
153 Signed 28 March 2001, [2002] ATS 12 (entered into force 1 January 2002).
154 *NDIS Report*, above n 147, 12–13 [1.46]–[1.47].
155 Ibid 13 [1.47].
156 Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 39/2006*, 72nd sess, UN Doc CERD/C/72/D/39/2006 (3 March 2008) ('*D F v Australia*').
157 Ibid 7 [7.2], quoted in *NDIS Report*, above n 147, 13–14 [1.50].
158 See above n 151 and accompanying text.

NDIS legislation, which excluded SCV holders from its coverage, engaged this right and therefore required justification.[159]

One final issue raised by the PJCHR merits attention: as mentioned earlier, the NDIS legislation was passed the day after it was introduced into Parliament.[160] Without exploring the issue in great detail, the PJCHR noted that the *HRPS Act* requires that sufficient time be given for Parliament to scrutinise legislation for its human rights compatibility.[161] While in this instance the swift passage of the legislation may be defensible having regard to its rights-protective character (at least in some respects), it should be borne in mind that such a short turnaround time on the passage of legislation can have obvious detrimental effects by narrowing the space for proportionate deliberation.[162] Williams and Burton note that in circumstances where the government feels compelled to respond to an 'imminent threat', the SOC process may become a sham if it is complied with at all:

> In practice, the requirement to table an SOC may be ignored altogether, legislation may be vaguely asserted to be compatible with human rights because it is necessary to meet an urgent threat, or an obvious incompatibility with rights may be excused because of the political imperative to act.[163]

On the whole, the SOCs for the NDIS legislation reveal serious shortcomings on the part of the Treasury to live up to the standards of the *HRPS Act*. A failure to recognise the human rights that were engaged by the legislation suggests that the Treasury has failed to come to grips with its obligations under the *HRPS Act*, let alone to discharge those obligations by reference to relevant international legal sources. The Treasury, as expected, appears to be far less 'rights-literate' than the Department of Immigration. The SOCs for the NDIS legislation disclose a problem that is more far-reaching than the problems identified in relation to the regional processing legislation considered in Part IV(B) above.

D Concluding Observations

The case studies evidence significant inconsistency in the consideration of rights issues in SOCs. In some instances, SOCs dedicate proportionate attention

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159 *NDIS Report*, above n 147, 15 [1.54].

160 See above n 147 and accompanying text.

161 *NDIS Report*, above n 147, 10–11 [1.40].

162 The impact of emergency lawmaking on legislative deliberation has been explored in detail elsewhere: see, eg, Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747; George Williams, 'A Decade of Australian Anti-terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1164; Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38 *Melbourne University Law Review* 709, 730–2, 741. This issue also arose in the context of the 2014 reforms to anti-terror legislation, all of which were introduced into, and then enacted by, Parliament within a very short time. As such, parliamentary scrutiny bodies – of which the PJCHR was one – were significantly constrained in their ability to discharge their duties: see Gabrielle Appleby, 'The 2014 Counter-terrorism Reforms in Review' (2015) 26 *Public Law Review* 4, 4–8. Both the NDIS and the anti-terror reforms raise interesting questions as to the interaction between the prevalence of emergency lawmaking and the process of political rights review under the *HRPS Act*. It is not possible within the confines of this article to properly tease out the implications of that relationship.

163 Williams and Burton, above n 32, 93.

to the rights infringements that proposed legislation creates, whereas in others, they devote only cursory attention to rights issues or fail to identify that rights are engaged in the first place. All of the SOCs studied show a reluctance to cite foreign and international legal sources even though the language of SOCs shows that some departments clearly have a sophisticated understanding of the relevant rights. The SOCs considered in this Part generally do not make arguments that are far-fetched, thus exceeding the contestation-based understanding of human rights that I argue the *HRPS Act* enshrines, with the exception of the *Unauthorised Maritime Arrivals Act*.

Most of these issues are easily fixed: where SOCs do not cite foreign and international sources, the departments clearly know they exist, such that citing them is not particularly onerous; and legislation that violates human rights on any reasonable understanding ought to be scrutinised strictly (both in parliamentary committees and in public forums). The inconsistency in the application of certain basic standards is more worrisome given how long the *HRPS Act* has been in force. If the *HRPS Act* is to succeed, governments cannot do away with its requirements in the name of political expediency, or avoid scrutiny by passing legislation expeditiously. Yet that appears to be exactly what occurred with respect to the *Unauthorised Maritime Arrivals Act* and the NDIS legislation respectively. But is all the blame to be laid at the door of parliamentarians? It is this issue to which the next Part is addressed.

V IMPROVING THE LEGISLATURE'S HUMAN RIGHTS PERFORMANCE: SOME QUESTIONS OF DESIGN

The pathologies identified in the preceding Part are significant. Effort is required on the part of parliamentarians if SOCs are to meet the standards of the *HRPS Act*. However, it is worth pausing to also consider whether, quite apart from failures on the part of legislators to discharge their obligations, the *HRPS Act* itself has certain design deficiencies that must be rectified in order to create a legislative regime that is more effective in its promotion and protection of human rights.[164] I consider three potential design flaws that may bear upon Parliament's inadequate rights deliberation: the broad definition of human rights in section 3(1) of the *HRPS Act*, the lack of consequences for failing to produce an SOC, and the fact that some delegated legislation is exempt from the operation of the *HRPS Act*.

164 I do not mean to suggest that design issues and failures on the part of legislators are the only possible reasons for the shortcomings in the SOC process. For instance, Hiebert has argued that certain elements of the Westminster system – namely executive domination of Parliament and strong party discipline – significantly inhibit the quality of legislative rights deliberation in the United Kingdom: Janet L Hiebert, 'Governing under the *Human Rights Act*: The Limitations of Wishful Thinking' [2012] *Public Law* 27, 39–42; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39, 44–7. Hiebert's point is likely true of the Australian experience as well, but I will not explore it in any detail here.

A Fewer Rights, More Protection?

Williams and Burton argue that the broad scope of the *HRPS Act* is to the detriment of its ability to protect rights. In their view, requiring parliamentarians and their staff to maintain a working knowledge of over 100 human rights is extremely unrealistic:

> the task of understanding and synthesising the broad list of international human rights with Australian law remains a herculean one. … As a result, the analysis, potentially conducted by departmental employees with no expertise in international law or even legal training, may be broad-brush and simplistic.[165]

This type of resource constraints argument is a common one in scholarship on human rights and legislatures.[166] As Williams and Burton suggest, a sophisticated understanding of *all* of the relevant rights would require significant resources, most likely in the form of advice from trained lawyers from the Attorney-General's Department. Yet as the regional processing SOCs demonstrated, there are other departments that have expertise in human rights issues. This is unsurprising given the regularity with which certain departments' policies touch on paradigmatic human rights. However, that is certainly not the case for all, or even perhaps the majority of, government departments.

Williams and Burton's argument is borne out to varying extents in both of the case studies examined in Part IV. One of the flaws that stands out in both instances is a failure to engage rigorously with the economic and social rights issues raised by the legislation.[167] However, the regional processing case study also demonstrated certain problems[168] that could potentially be attributed to 'cutting corners' because of resource constraints.

The solution that Williams and Burton (implicitly) suggest is narrowing the definition of human rights in section 3(1) of the *HRPS Act*. At its narrowest, this would involve defining 'human rights' to mean only the civil and political rights protected by the *ICCPR*,[169] although there are various other intermediate positions. But there are some problems with this proposal.

First, the argument is flawed, at least in relation to economic, social and cultural rights. It seems to be substantially based on the propositions that

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165 Williams and Burton, above n 32, 73 (citations omitted). Cf Kinley and Ernst, above n 22, 61, who consider the 'staggering' scope of the *HRPS Act* to be a positive. It is worth noting that George Williams was the chair of the Human Rights Consultation Committee responsible for proposing the *Victorian Charter*. The Committee ultimately recommended against the inclusion of economic, social and cultural rights: Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) iii.

166 See, eg, Dixon, above n 14, 76; Evans and Evans, 'Messages from the Front Line', above n 51, 342–3; David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law* 323, 324–6.

167 See above nn 125, 150–9 and accompanying text.

168 See above nn 134–6, 141–2 and accompanying text.

169 This is the approach taken by all of the 'Commonwealth model' bills of rights, with the exception of the *Human Rights Act 2004* (ACT), which protects the right to education through s 27A: see Andrew Byrnes, 'The First ESC Right in Australia? The Inclusion of the Right to Education in the ACT *Human Rights Act 2004*' (Paper presented at the Annual International Human Rights Day Community Forum, ACT Human Rights Commission, 10 December 2012).

enforcing economic, social and cultural rights involves an intervention in the government's resource allocation decisions, and that these rights are, of their nature, vague and uncertain. This reasoning was used to avoid extending the application of the *Victorian Charter* to include economic, social and cultural rights.[170] However, such arguments have far more force when concerned with the possibility of *judicial* involvement in such sensitive areas. When one takes the fact that the *HRPS Act* excludes the judiciary from the interpretation of these purportedly sensitive rights issues together with the observation that economic and social rights 'matter most' to ordinary Australians,[171] the case for excluding economic, social and cultural rights is weakened. The same logic may be extended to many of the other rights that are protected by the *HRPS Act*.

The fact that parliamentarians must learn about a great deal of rights is not a bad thing. To the extent that this might be seen as an unrealistic expectation, some impetus must be placed on the Attorney-General's Department to provide more assistance to government departments. The Department website states that its International Human Rights and Anti-discrimination Branch can be consulted for assistance on individual statements.[172] The logic behind this seems to be that by minimising the involvement of human rights specialists, the responsible department is pressed to think about the human rights issues itself, thus fulfilling the integration criterion mentioned earlier. But the NDIS example shows that less rights-literate departments may require more training to *identify* rights issues, let alone to address them proportionately. The Attorney-General's Department should be more proactive in consulting with government departments to ensure that they are able to pick up on potential rights issues. This would have the dual effect of ensuring quality rights deliberation while also educating parliamentarians about the rights issues that their legislation raises (thus lessening the need to provide assistance in the future).

More generally, the fear that there are too many rights listed is overblown. In the case of departments such as the Department of Immigration, the list of rights relevant to its policies is long: its legislation engages a variety of rights from almost all of the treaties listed in section 3(1). However, for many departments some treaties are more relevant than others. For the Treasury, *ICESCR* rights will be of central relevance; for the Department of Social Services, *ICESCR*, *CEDAW* and *CERD* will take precedence; and so on. Departments will naturally develop competencies in the areas where their legislation commonly engages rights. Where the issues are foreign to them, they can consult the Attorney-General's Department for further advice. Over time, however, human rights literacy in government should steadily improve.

In short, merely truncating the list of rights protected by the *HRPS Act* will do little to solve the problems with SOCs that I have identified. Those problems

170 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 44–5 [215]–[223].

171 See *NHRC Report*, above n 11, 344.

172 Attorney-General's Department (Cth), *Parliamentary Scrutiny* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx>.

can be adequately addressed through increased efforts on the part of parliamentarians and better, more proactive support from the Attorney-General's Department.

B A Lack of Consequences

On its face, the *HRPS Act* requires that SOCs be produced to accompany each Bill introduced into Parliament. But can it be said that an SOC is 'required' if a failure to produce an SOC has no legal consequence?[173] Moreover, the SOC process is itself a matter of form – legislation may be passed even if the PJCHR has not had the opportunity to scrutinise the Bill and its SOC. While the PJCHR may issue warnings or note its disappointment, the SOC process is still 'entirely self-regulating'.[174]

The incidence of complete failure to produce an SOC is rare. Williams and Burton note that in the six-month period of their study, only 5 of 134 Bills that were tabled in Parliament were not accompanied by an SOC.[175] But consider scenarios where the department fails to identify that rights were engaged, as was the case in both case studies discussed here,[176] or, like the Minister for Immigration's SOC for the *Unauthorised Maritime Arrivals Act*, considers the relevant rights in the most perfunctory manner.[177] Strictly speaking, these are not contraventions of the *HRPS Act*, but it is nonetheless worth ensuring that these SOCs are properly scrutinised and that attention is drawn to their deficiencies before they are passed by Parliament.

Reform options seem limited. The *HRPS Act* probably could not be amended so as to prevent legislation that is constitutionally permissible from being passed where no SOC has been produced – this would be in conflict with principles of parliamentary sovereignty.[178] And an approach that would involve the courts adjudicating legislators' decisions not to promulgate an SOC risk circumventing the *HRPS Act*'s stated aim of keeping the courts away from rights.

More research must be conducted into potential procedures designed to ensure that parliamentary scrutiny of human rights issues is not sidelined except where absolutely necessary.

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173 See *HRPS Act* ss 8(5), 9(4).

174 Williams and Burton, above n 32, 90.

175 Ibid 80.

176 See above nn 125, 150–9 and accompanying text. More than half the legislation introduced into Parliament in the six-month period studied by Williams and Burton falls into this category: Williams and Burton, above n 32, 80.

177 See above nn 141–2 and accompanying text.

178 George Winterton has suggested the contrary: George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167. Even if he is right – and the weight of scholarly opinion suggests that he is not – the propriety of manner and form requirements is open to significant doubt: see Carolyn Evans, 'Entrenching Constitutional Reform in Victoria' (2003) 14 *Public Law Review* 133, 136–7.

C Delegated Legislation: A Human Rights Blind Spot

The final design weakness is the *HRPS Act*'s coverage of delegated legislation. The benefits of delegated legislation are well known and need not be rehearsed in detail here. Pearce and Argument state three situations in which delegated legislation is 'legitimate and desirable, subject to certain safeguards': where it saves pressure on parliamentary time; where the legislation is too technical or detailed to be suitable for parliamentary consideration; or where the legislation deals with rapidly changing or uncertain situations.[179] While allowing the executive to create instruments having the force of law is in tension with the separation of powers, it is seen as an indispensable aspect of the modern administrative state. Justice Stephen summed up this tension between expediency and principle in *Watson v Lee*, where he stated:

> For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn …[180]

The *LIA* was intended to cure this opacity by setting up a Federal Legislative Instruments Register and establishing a scheme of parliamentary scrutiny.[181] The scrutiny scheme applies to disallowable legislative instruments,[182] a term that is defined by reference to 'legislative instruments', which is in turn defined by sections 5–7 of the *LIA*. Section 5(1) states that the decision must be 'of a legislative character', and section 5(2) sets out circumstances in which an instrument is taken to satisfy this criterion, such as where the instrument determines the law or alters or its content, or where the instrument has the effect of affecting privileges, interests, rights or obligations.[183]

The committee tasked with the five-year review of the *LIA* noted three major problems with this definition: its circularity, the uncertainty surrounding what constitutes application of the law in a particular case, and the exclusion of certain

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179 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 6 [1.9].

180 (1979) 144 CLR 374, 394. Cf Lord Hewart, *The New Despotism* (Ernest Benn, 1929) 21, where it is suggested that the proliferation of delegated legislation was part of a 'persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts'. The permissible limits on delegated legislation were recently tested in *Williams v Commonwealth [No 2]* (2014) 252 CLR 416. While significant attention was devoted to this issue in written and oral argument, the majority held that it was unnecessary to address the limits on the power to delegate: at 455 [30] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also Ronald Williams, 'Plaintiff's Submissions', Submission in *Williams v Commonwealth [No 2]*, S154/2013, 28 February 2014, 10–16 [37]–[66]; Transcript of Proceedings, *Williams v Commonwealth [No 2]* [2014] HCATrans 92 (6 May 2014) 493–563 (B W Walker SC).

181 Argument describes the *LIA* as the 'single most important development in delegated legislation for at least half a century': Stephen Argument, 'Delegated Legislation' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 134, 135.

182 See *LIA* s 42.

183 The wording of s 5(2) reflects the criteria of 'legislative' acts discussed in cases such as *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185, 194–202 [43]–[77] (The Court).

instruments that are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[184] I do not propose to address these issues in great detail here except to say that it is clear that many pieces of delegated legislation are excluded. To the committee's criticism may be added the two exclusions in the *LIA*: section 7 declares certain instruments not to be legislative instruments, while section 44 declares certain instruments not to be disallowable legislative instruments. While many of these exclusions have a minimal effect on rights, this is not always the case.

The definition of disallowable legislative instruments in the *LIA* is picked up in the *HRPS Act*, under which only such instruments are required to be subject to an SOC.[185] The lacunae in the *LIA* scrutiny regime are thus reproduced in the SOC context. As the regional processing case study demonstrates, often it is delegated legislation, rather than the enabling statute, that is the real trigger of human rights issues. In that instance, the instruments designating Nauru[186] and Papua New Guinea[187] as regional processing countries for the purpose of section 198AB of the *Migration Act* were the instruments that had a tangible effect on the rights of those subject to the migration regime. Without a designation, the regional processing scheme was incomplete, as there was no designated country to which asylum seekers could be transported. And some countries would, if designated, probably raise no human rights issue at all: what if New Zealand were designated a regional processing country instead? Item 26 of section 44(2) of the *LIA* relevantly exempts instruments made under parts 1, 2 and 9 of the *Migration Act*. The instruments of designation were made under section 198AB(1) of the *Migration Act*, which is situated in part 2, and so were excluded from the SOC requirement.

In most instances, instruments under the relevant parts of the *Migration Act* should not be subject to *HRPS Act* scrutiny, as they do not effect a change in the content of the law.[188] Take the ministerial determinations required by sections 198AD and 198AE as examples. Section 198AD(5) requires the Minister to determine to which regional processing country unauthorised maritime arrivals should be taken. Section 198AE(1) gives the Minister the ability to determine that the requirement to remove an unauthorised maritime arrival does not apply

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184 Legislative Instruments Act Review Committee, Parliament of Australia, *2008 Review of the Legislative Instruments Act 2003* (2009) 15–17. Pearce and Argument suggest that '[w]hile the definition might have its difficulties, it must be remembered that those issues are largely addressed by the express designation of instruments, as legislative or not, in Commonwealth legislation': Pearce and Argument, above n 179, 33 [2.8].

185 *HRPS Act* s 9(4). The usual scrutiny process for delegated legislation, conducted by the Senate Regulations and Ordinances Committee, also requires that the instrument satisfy s 42 of the *LIA* before scrutiny takes place.

186 Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 10 September 2012.

187 Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 9 October 2012.

188 Cf *LIA* s 5(2)(a).

to a person.[189] Both determinations inherently targeted the application of the law to particular persons or to a class of persons, and are thus properly characterised as administrative in character. Therefore, they need not be subject to the scrutiny requirements of the *HRPS Act*. By contrast, instruments of designation are inherently law-creating: they fundamentally alter the character of the legislative scheme set up by the *Migration Act* by determining where unauthorised maritime arrivals will be sent, a matter which, in turn, determines whether and to what extent those peoples' human rights will be threatened.

Given the impact that delegated legislation can have on rights, the lack of human rights scrutiny is highly dissatisfactory. So much has been recognised by human rights advocates such as Fr Frank Brennan, chair of the NHRCC.[190] Clearly this is an issue that must be rectified. The 'differences in the legislative process'[191] for legislative instruments are not a sufficient reason to exempt them from the *HRPS Act*'s operation. If Parliament truly takes rights seriously, then it must extend the coverage of section 9 beyond the requirements of the *LIA*.

VI CONCLUSION

The *HRPS Act* ought to have sounded a clarion call for the protection of human rights at the federal level. So far, however, the legislators who are subject to its obligations have not lived up to that promise. The SOCs that have been considered here are markedly inconsistent in their adherence to the requirements of the *HRPS Act*. In some instances they dedicate proportionate attention to the rights issues that are raised by a particular policy, while in others the relevant rights are given perfunctory attention or not identified at all. At best, it may be argued that the scheme will, with some small tweaks, work as planned; at worst, that legislators have used parliamentary scrutiny as a fig leaf to cover up clear breaches of human rights. But not all the blame is to be laid at the doors of the responsible MPs. The *HRPS Act* itself has certain structural weaknesses that, taken together, are a significant impediment to effective legislative deliberation on rights issues.

What is encouraging is that most of the problems that have been identified are not impossible to remedy. Legislators and bureaucrats must take their *HRPS Act* obligations more seriously, and the Attorney-General's Department (and perhaps even the PJCHR) must provide more assistance and training to equip government departments with skills necessary to discharge their obligations. However, the lack of consequences for failing to table an SOC and the loopholes for delegated legislation are, I have contended, significant structural issues

189 Section 198(1A) gives the Minister the power to revoke such a determination if they consider it to be in the public interest.

190 Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 17 December 2012, 46 (Frank Brennan), quoted in *Examination of the Regional Processing Act*, above n 117, 49–50 [2.82].

191 Simon Evans, above n 43, 666 n 2.

requiring sustained consideration. Parliament should consider whether these areas are in need of reform in order to better promote the proper consideration of human rights issues. Attention must also be devoted to the extent to which human rights considerations have become ingrained in the policy process. This cannot be done through arms-length legal analysis of the type conducted here in Part III(A). Empirical studies similar to those conducted by Evans and Evans,[192] and Hiebert and Kelly,[193] can provide crucial insights into the extent to which the *HRPS Act*'s obligations have become an integrated and essential part of policy formulation.

The ambitions of this article are relatively modest. I hope to have identified some of the pathologies that have attended the preparation of SOCs and pointed to some of the design flaws in the *HRPS Act* that have contributed to those shortcomings. But I explicitly have *not* addressed the question of what implications my arguments have for the desirability or utility of an exclusively parliamentary model of rights protection. In this respect my position may be contrasted with that of Williams and Burton, who contend, after their appraisal of SOCs, that one of the critical weaknesses of the *HRPS Act* is the lack of judicial involvement.[194] This appears to entail the conclusion that a statutory or constitutional bill of rights is the appropriate mode of rights protection, with parliamentary scrutiny an adjunct to curial enforcement. Yet even if we leave to one side the doubtful constitutionality of a federal legislative bill of rights following the High Court's decision in *Momcilovic v The Queen*,[195] such a reaction overstates the point. This is because there is simply not enough evidence of the deliberative processes and the human rights outcomes that have attended the entry into force of the *HRPS Act* for any firm conclusions to be drawn about whether such a scheme is capable of providing, and in fact does provide, adequate protection of human rights. An extended project that seeks to address this important question would add considerably to the continuing public debate about how we protect human rights in Australia.

For the moment, however, we must be content to observe that parliamentarians' practice in respect of SOCs has been less than salutary. Parliament must begin to reassess its practices if it is to contribute to a rich human rights debate at the federal level.

192 Evans and Evans, 'Messages from the Front Line', above n 51.

193 Hiebert and Kelly, above n 51.

194 Williams and Burton, above n 32, 91–3.

195 (2011) 245 CLR 1. Williams and Burton seek to downplay the uncertainty attending the decision: Williams and Burdon, above n 32, 90. However, at the very least, it casts significant doubt on the constitutionality of a statutory bill of rights at the federal level: see generally Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1.