

THE REVIEW OF AUSTRALIA'S ASYLUM LAWS AND POLICIES: A CASE FOR STRENGTHENING PARLIAMENT'S ROLE IN PROTECTING RIGHTS THROUGH POST-ENACTMENT SCRUTINY

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[The central contention of this article is that there is a need for greater involvement of legislators in overseeing a systematic and rights-based scrutiny of the impact of legislation and policy. The recent operation of Australia's asylum laws and policies, in particular, provides an illustration of the reforms required. Challenges to the rights of non-citizens in Australia and other jurisdictions serve as a reminder of the extent of change required before rights are firmly entrenched in the processes of government. A useful step forward would be to enhance the role of legislators in setting the criteria and agenda for post-enactment scrutiny in light of issues raised during pre-legislative scrutiny.]

CONTENTS

I	Introduction.....	84
II	The Objectives of Post-Legislative Scrutiny	87
	A First Objective: The Use of Independent Criteria to Evaluate the Impact of Legislation	87
	B Second Objective: Towards a Rights-Based Standard of Post-Enactment Scrutiny	89
	C Third Objective: Enhancing the Role of Parliament	91
III	An Evaluation of the Post-Enactment Review of Australia's Asylum Laws and Policies	93
	A Post-Legislative Scrutiny Mechanisms in Australia — A State of Flux	94
	B First Objective: Independent Scrutiny Criteria	95
	1 Executive Review	95
	2 The Use of Independent Criteria by Parliamentary Committees.....	96
	C Second Objective: The Use of Rights to Scrutinise the Impact of Legislation.....	97
	1 The Budget Process	98
	2 DIAC's Use of the Outcomes/Outputs Framework	100
	3 The Application of the Outcomes/Outputs Framework to Detention Services	101
	D Third Objective: Enhancing Parliament's Post-Enactment Scrutiny Role	102
	1 The Budget Process	102
	2 Parliamentary Inquiries.....	102
	3 Parliamentary Tabling Procedures	104

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4	Utilising the Expertise of Independent Agencies	106
IV	Enhancing Rights Protection through Improvements in Post-Enactment Scrutiny.....	107
	A Internal Monitoring.....	108
	B Independent Criteria	108
	C Parliament's Involvement and Input.....	110
	D Tabling Procedures	113
V	Conclusion.....	114

I INTRODUCTION

The basic proposition in this article is that there is a need for greater involvement of legislators in a systematic and rights-based scrutiny of the impact of legislation and policy. To date, reformist literature on the role of Parliament in the scrutiny process in Australia and elsewhere has primarily focused on the benefits of greater parliamentary involvement in the scrutiny of Bills before enactment ('pre-legislative scrutiny').¹ Scholars have charted the evolution of pre-legislative scrutiny through the work of parliamentary committees such as the United Kingdom's Joint Committee on Human Rights and Australia's Senate Scrutiny of Bills Committee.² The use of pre-legislative scrutiny as a tool for rights protection has figured significantly in these studies³ — the accounts of pre-legislative scrutiny are increasingly sophisticated and display a general rights agenda.

On the other hand, how the avenues of parliamentary scrutiny might also contribute to the scrutiny of the impact and operation of legislation after enactment is a comparatively neglected area of Anglo-Australian scholarship.⁴ This is despite the fact that there has been a significant push for greater involvement of parliamentarians in post-enactment scrutiny within the UK Parliament for some

¹ See Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Papers on Parliament No 47, Department of the Senate, Parliament House, Canberra, 2007) 24–5 <<http://www.aph.gov.au/SENATE/pubs/pops/index.htm>>; Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 60; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91; David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law* 323; David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252; Janet Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26 *Federal Law Review* 115.

² See Kinley, above n 1, 252–3; Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 323–4, 345; Horrigan, above n 1, 72.

³ See Horrigan, above n 1, 67–9; Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 323–4, 347; Kinley, above n 1; Feldman, 'The Impact of Human Rights on the UK Legislative Process', above n 1, 92–3.

⁴ There are notable exceptions, however, including an article in this journal by Simon Evans calling for the incorporation of human rights into Regulation Impact Statements (discussed further in Part IV below). However, Evans's principal concern is to demonstrate the benefits this would have during the policy formulation process: see Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665.

time.⁵ Various UK parliamentary reports have recommended that legislators both set the criteria for post-legislative scrutiny by the executive⁶ and provide oversight of that evaluation process through the existing parliamentary committee structure.⁷ The movement culminated in the UK Law Commission's 2006 report on post-legislative scrutiny, which 'found there to be overwhelming support for the principle that there should be a more systematic approach to post-legislative scrutiny and that the process for such scrutiny should be controlled by Parliament.'⁸ At the time of writing, the Law Commission's report was 'under active consideration by the government.'⁹

In Australia, on the other hand, there has been comparatively little historical interest in the idea of post-enactment scrutiny by Parliament outside Senate estimates hearings. There are signs that the Commonwealth Parliament is now turning its attention to entrenching a process of post-enactment review with respect to controversial pieces of legislation. In particular, the new terrorism laws introduced following the attacks of 11 September 2001 have seen a number of post-enactment review mechanisms trialled, including review by the Parliamentary Joint Committee on Intelligence and Security ('PJCIS'),¹⁰ the Security Legislation Review Committee¹¹ and the Australian Law Reform Commission.¹² Yet a recent report of the PJCIS observed that '[t]he limited mandate of each review mechanism has prevented a more holistic assessment of the terrorism law framework.'¹³ This observation reflects the general situation that, compared to the growth in Parliament's involvement in pre-legislative scrutiny,

⁵ See Select Committee on Procedure, *The Working of the Select Committee System*, House of Commons Paper No 19-I, Session 1989–90 (1989) lxviii–ix; Hansard Society, *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (1992) 95; Select Committee on Modernisation of the House of Commons, *The Legislative Process*, House of Commons Paper No 190, Session 1997–98 (1997); Select Committee on the Constitution, *Parliament and the Legislative Process*, House of Lords Paper No 173-I, Session 2003–04 (2004).

⁶ Select Committee on the Constitution, above n 5, 46.

⁷ *Ibid.* See also Commission to Strengthen Parliament, *Strengthening Parliament* (2000) 44; Liaison Committee, *Annual Report for 2003*, House of Commons Paper No 446, Session 2003–04 (2004) 27.

⁸ Law Commission, UK, *Post-Legislative Scrutiny*, Cm 6945 (2006) 5.

⁹ United Kingdom, *Written Answers to Questions*, House of Commons, 14 March 2007, vol 458(2), col 321W (Jack Straw).

¹⁰ See *Intelligence Services Act 2001* (Cth) s 29(1)(ba); *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006). PJCIS was formerly known as the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD'). See PJCAAD, Parliament of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (2005). This review was authorised under *Intelligence Services Act 2001* (Cth) ss 29(1)(bb)(i), (ii), repealed by *ASIO Legislation Amendment Act 2006* (Cth) s 3, sch 2(33).

¹¹ See *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4(1). See, eg, Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006).

¹² On 1 March 2006 the Attorney-General referred the operation of *Anti-Terrorism Act [No 2] 2005* (Cth) sch 7 and *Crimes Act 1914* (Cth) pt IIA to the Australian Law Reform Commission for review. The final report was tabled in Parliament on 31 July 2006: Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia*, Report No 104 (2006).

¹³ PJCIS, above n 10, 18.

post-enactment scrutiny by the Commonwealth Parliament remains stunted and unsystematic.

Rather than attempt a sweeping study of post-enactment scrutiny in Australia, this article aims to contribute to calls for an enhanced role for the Commonwealth Parliament in post-legislative scrutiny by critically analysing the post-enactment review of Australia's asylum laws and policies. Concentrating on a discrete area of government policy reflects the basic point that effective post-legislative scrutiny is best achieved by fostering a flexible, responsive and tailored approach, rather than a 'one size fits all' approach.¹⁴ At the Commonwealth level, this article argues that the legislative and general purpose standing committees of the Senate — which have the role of inquiring into and reporting on 'the performance of departments and agencies allocated to them'¹⁵ — have a central role to play in ensuring focused and effective post-enactment review of legislation by government and independent agencies within their purview.

Moreover, evaluating the post-enactment review of asylum laws and policies has importance in its own right. The recent operation of Australia's refugee laws provides a stark illustration of the potential adverse consequences of a system where a vulnerable group within society does not have the protection of effective and coordinated rights-based post-enactment review. In particular, there is an imperative for more effective post-enactment review in the asylum arena given the executive's and Parliament's broad constitutional powers with respect to the exclusion, expulsion and detention of aliens.¹⁶

In an interdisciplinary spirit, and to foster greater dialogue between public law and international law, this article also aims to indirectly contribute to the specialist literature on the rights of refugees under international law. Strong, rights-focused national institutions are central to the implementation and entrenchment of refugee rights. The thrust of this article should be seen as progressing a general call for greater institutional and rights protection of refugees within the domestic legal and political milieu of states. Ultimately, an effective refugee rights regime depends on an interdependent international and legal framework that has, as its benchmark, a core set of human rights standards.

This article will first outline the key purposes of post-enactment scrutiny. Part III examines the extent to which those objectives are met in the context of the current post-legislative scrutiny mechanisms applied to Australia's asylum laws and policies. In light of the shortfalls identified, Part IV considers potential reform and proposes an enhanced role for Senate legislative and general purpose standing committees. It is suggested that these committees should proactively set the post-legislative review agenda in a way that focuses on specific rights concerns either raised during the pre-legislative scrutiny process or triggered during the implementation phase, while simultaneously utilising the resources and expertise of government and independent agencies.

¹⁴ Law Commission, *Post-Legislative Scrutiny*, above n 8, 15, 20, 28.

¹⁵ Commonwealth, *Standing Order of the Senate* O 25(2).

¹⁶ See generally *Ruddock v Vadarlis* (2001) 110 FCR 491; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1.

II THE OBJECTIVES OF POST-LEGISLATIVE SCRUTINY

Before examining the post-enactment scrutiny of Australia's asylum laws and policies, it is necessary to consider what post-enactment scrutiny is and what it is intended to achieve. As the UK Law Commission noted in its 2006 report on post-legislative scrutiny, the definition and purpose of post-legislative scrutiny are more or less the same.¹⁷ In other words, post-enactment scrutiny is defined largely in terms of what it is intended to achieve and by reference to the mechanisms in place to carry out those objectives. Although a sensible observation, the problem, as noted by the Law Commission in its earlier consultation paper, is that there is in fact no agreement on either the objectives or mechanisms of post-legislative scrutiny.¹⁸

A First Objective: The Use of Independent Criteria to Evaluate the Impact of Legislation

The first uncertainty relates to whether post-enactment scrutiny involves the use of standards independent of the legislative measure. On the face of it, there appears to be a fundamental disagreement between the UK Law Commission's idea of the purpose of post-enactment scrutiny and the purpose envisaged by leading scrutiny scholars. Without distinguishing between pre- and post-legislative scrutiny, David Feldman defines scrutiny of legislation as 'a matter of testing legislation by reference to certain standards, and seeking to ensure that it meets those standards, whether or not one approves of what the legislation is trying to achieve.'¹⁹ In this sense, scrutiny is a '*principled activity*' that tests legislative measures against standards or criteria that are independent of the measures themselves.²⁰

In contrast, the Law Commission states that the purpose of post-legislative scrutiny is 'to address the effects of the legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively.'²¹ In light of this purpose, the Commission states that the reasons for fostering a more systematic post-enactment scrutiny regime in the UK are fourfold: first, determining whether legislation is 'working out in practice as intended'; secondly, contributing to 'better regulation'; thirdly, improving the 'focus on implementation and delivery of policy aims'; and fourthly, identifying and disseminating 'good practice'.²² Consequently, while Feldman and other scrutiny scholars highlight the use of independent standards to review a legislative measure, the Law Commission appears to propose that the purpose of

¹⁷ Law Commission, *Post-Legislative Scrutiny*, above n 8, 7.

¹⁸ Law Commission, UK, *Post-Legislative Scrutiny: A Consultation Paper*, Consultation Paper No 178 (2006) 13.

¹⁹ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 329.

²⁰ Dawn Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 *Macquarie Law Journal* 33, 36 (emphasis in original). See also Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 328.

²¹ Law Commission, *Post-Legislative Scrutiny*, above n 8, 7.

²² *Ibid* 13.

legislative scrutiny is simply to assess the impact of legislation against criteria derived from the underlying policy of the measure itself.

On its face, the Law Commission's position on scrutiny appears to fall within the 'instrumentalist' camp. In accordance with the instrumentalist approach to scrutiny, the purpose of scrutiny is to highlight any divergence between parliamentary intention and the operation of legislation. Instrumentalists, represented here by Luzius Mader, argue that 'elucidating the gap between legislative intentions and the results achieved may be an impetus to the adaptation of legal norms.'²³ This approach fits nicely within traditional notions of the separation of powers, which assume a clear legislative intent, an executive to carry that intent into effect, and a judiciary to arbitrate on the meaning of legislation in cases of disagreement.

There are two major problems with an instrumentalist approach to post-enactment scrutiny. The first is that the instrumentalist position assumes that 'the Parliament' is a relatively cohesive entity and that Parliament's intention is clear. However, Parliament is far from cohesive.²⁴ Parliament is a diverse body, containing the political executive, members of the opposition, minor parties, independents, committees, and an increasingly disgruntled and outspoken government backbench, all within a bicameral legislature.²⁵ The presence of these factors suggest that while 'parliamentary intent' may be a necessary legal fiction in legitimising the judiciary's determination of the meaning of legislation, it should be jettisoned as a reason for constraining the use of standards 'outside' legislation in any post-legislative scrutiny process.

A second and related point is that the instrumentalist approach does not sit well with the current work undertaken by parliamentary scrutiny committees. Standards that judge the 'fitness of the legislation for its declared purpose' are merely some of the standards that parliamentary scrutiny committees employ.²⁶ Others derive from constitutional law, including the inappropriate delegation of legislative power, formal conceptions of the rule of law, and rights.²⁷ As a result, while the instrumentalist position does not guarantee any greater degree of scrutiny in accordance with standards that are independent of the legislative measure, in practice parliamentary scrutiny is heading this way.

It is also arguable that the use of independent scrutiny criteria fits within the instrumentalist framework if it is accepted that 'the Parliament' consists of more than the legal fiction of its intention. For the purposes of elucidating and legitimising Parliament's use of independent scrutiny standards after enactment, the legislative intent is found instead within Parliament's law-making procedures which include the working of committees within their terms of reference. The use of independent scrutiny criteria represents an example of what Jeffrey

²³ Luzius Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22 *Statute Law Review* 119, 131.

²⁴ John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 41, 44–6.

²⁵ *Ibid* 46.

²⁶ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 329.

²⁷ See *ibid* 329–30; Horrigan, above n 1, 70.

Goldsworthy refers to in a more general sense as the 'structuring' of the law-making function through the law-making procedures of Parliament.²⁸ In this way, post-enactment parliamentary scrutiny can legitimately cover those instances where, for example, the political executive has 'chanced its arms' and gone against the warnings of parliamentary committees that a legislative measure risked breaching independent scrutiny criteria. There are therefore important reasons why post-legislative scrutiny should extend beyond merely evaluating the gap between policy and implementation to include the application of independent scrutiny criteria.

B *Second Objective: Towards a Rights-Based Standard of Post-Enactment Scrutiny*

Assuming that the application of independent scrutiny criteria is an objective of post-enactment review, there is also no firm agreement on the extent to which those criteria include human rights. There are several possible arguments in favour of encouraging the use of human rights during post-legislative scrutiny. The first is that employing human rights criteria at both the pre- and post-legislative scrutiny stages has the benefit of integrating the scrutiny criteria employed throughout the legislative process, leading to greater certainty and clarity in the making and implementation of law.²⁹ This argument recognises that pre-legislative scrutiny and post-legislative scrutiny are complementary.

This argument has the most force in the UK, where the introduction of the *Human Rights Act 1998* (UK) c 42 has resulted in the growing use and awareness of human rights as an important standard against which legislative measures are scrutinised.³⁰ The creation of the Joint Committee on Human Rights ('JCHR'), with the broad ambit to consider 'matters relating to human rights in the United Kingdom',³¹ has seen a steady growth in the use of human rights criteria by parliamentary committees to scrutinise Bills and by government when formulating legislative and policy measures. In Australia, on the other hand, although human rights feature as an increasingly important source of criteria employed during pre-legislative scrutiny, their definition and application by government and Parliament remains chequered.³² Therefore, calls for greater use of human rights in post-enactment scrutiny must go hand in hand with strengthening pre-legislative rights scrutiny.

There is some evidence to support the application of human rights criteria to post-enactment review. Significantly, the UK Law Commission's report, while

²⁸ Jeffrey Goldsworthy, 'Introduction' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 1, 5. On the concept of 'structuring', see generally Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969) chs 3–5.

²⁹ Law Commission, *Post-Legislative Scrutiny: A Consultation Paper*, above n 18, 31.

³⁰ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', above n 1, 330–1; Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] *Public Law* 219, 222–3.

³¹ UK, *Standing Orders of the House of Commons: Public Business 2007* O 152B(2)(a).

³² See Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes', above n 4; Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights', above n 1, 8–13; Horrigan, above n 1, 70–2.

on its face adopting an instrumentalist approach to post-legislative scrutiny, implicitly accepts the role of human rights criteria when viewed in the context of the developing role of pre-legislative rights scrutiny in the UK. One of the major recommendations of the Commission for improving the UK's patchy post-enactment scrutiny regime is that departmental select committees, in conjunction with a new joint committee, should bear the primary responsibility for setting the criteria for post-enactment scrutiny.³³ Taking into account the prevailing use by parliamentary scrutiny committees of human rights, the Law Commission presumably foresees the application of those same criteria to the post-legislative phase. The JCHR's 2007 annual report expressly draws attention to areas in which it has evaluated the impact of 'particular legislative provisions which have raised human rights concerns (for example in relation to asylum seekers)'³⁴ and expresses its intention to continue to develop its post-enactment scrutiny role.³⁵ It is worth noting in this respect that the Commission cites approvingly the JCHR's stated intention 'to undertake more work on post-legislative scrutiny, "for example on implementation of primary legislation through regulations or guidance, or on *whether the implementation of legislation has produced unwelcome human rights implications*".'³⁶

Recent experience in Australia also provides evidence of the use of human rights criteria as a source of post-legislative review standards. The post-enactment review of Australia's terrorism laws is an important example of where the impact of controversial, high-profile legislative measures has attracted rights-focused post-enactment review. Most significantly, the report of the Security Legislation Review Committee, established to review the impact of legislative amendments to Australia's terrorism laws in the wake of September 11, expressly dealt with the impact of those changes on human rights.³⁷

Yet, as illustrated by the discussion of the post-enactment review of Australia's asylum laws and policies below, the application of rights during post-enactment scrutiny remains underdeveloped in Australia. Therefore, current practice at the pre- or post-legislative scrutiny stages offers only partial support for the argument that evaluating the impact of legislation on human rights should be an objective of the scrutiny process. However, there are two additional, convincing reasons to support this objective. The first is that adherence to rights in the scrutiny process fosters Australia's engagement with international law and its compliance with international obligations.³⁸ The second is that the use of human rights criteria during pre- and post-legislative scrutiny is consistent with a

³³ Law Commission, *Post-Legislative Scrutiny*, above n 8, 28.

³⁴ JCHR, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, House of Lords Paper No 38, House of Commons Paper No 270, Session 2007–08 (2008) 22.

³⁵ *Ibid* 33.

³⁶ Law Commission, *Post-Legislative Scrutiny*, above n 8, 53 (emphasis added), citing the JCHR, *The Committee's Future Working Practices*, House of Lords Paper No 239, House of Commons Paper No 1575, Session 2005–06 (2006) 26.

³⁷ Security Legislation Review Committee, above n 11, 39–42.

³⁸ Hilary Charlesworth et al, *No Country Is an Island: Australia and International Law* (2006) 156–60.

rationale for democratic government that enables the 'detection and correction' of abuses of political power.³⁹

C Third Objective: Enhancing the Role of Parliament

A further purpose of post-enactment review is to ensure the greater involvement of Parliament in the scrutiny of the laws that it has passed. The Law Commission's report begins by recognising that government should bear the primary onus of keeping legislation under review.⁴⁰ Following on from this recommendation, however, the Law Commission recommends that Parliament should play a central oversight role in post-legislative scrutiny.⁴¹ While the Commission's inquiry extended to the full gambit of post-enactment mechanisms (including internal departmental reviews and quality audits, external audits by the National Audit Office and reviews by the Commission), it ultimately concludes that the departmental select committees and a new joint committee should have the power to determine what should be reviewed, and to undertake the review or commission others to do so.⁴²

The Law Commission's recommendations in this regard reflect key arguments for greater parliamentary involvement in post-enactment scrutiny. First, engaging legislators in post-legislative scrutiny is seen as strengthening Parliament's role in all stages of the legislative process. Legislators need to move from passive recipients of government information to active actors in the formulation of the criteria for monitoring government programmes. As with policy formulation and law-making, the evaluation of the impact of legislation and policy begins well before annual reports are presented to Parliament. Giving legislators a greater role in this process is seen as a way of enhancing Parliament's role generally. As stated by Lord Norton of Louth, the Chairman of the UK Parliament Constitution Committee at the time of its 2004 report recommending greater parliamentary involvement in post-legislative scrutiny,

[t]he implementation stage of legislation constitutes a parliamentary black hole. By addressing it, by moving forward in a way similar to that in respect of pre-legislative scrutiny, there is the potential to develop a new and significant role for Parliament, ensuring that it plays a role at all stages of the legislative process.⁴³

Lord Norton's statement captures the spirit of various UK parliamentary reports that recommend that legislators set the criteria for post-legislative scrutiny by the executive and provide oversight of that evaluation process through the existing parliamentary committee structure.⁴⁴

³⁹ Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 319, 323.

⁴⁰ Law Commission, *Post-Legislative Scrutiny*, above n 8, 20–3.

⁴¹ *Ibid.* 28.

⁴² *Ibid.*

⁴³ UK, *Parliamentary Debates*, House of Lords, 6 June 2005, vol 672, col 752 (Lord Norton of Louth).

⁴⁴ See above nn 6–7.

A second reason put forward for greater parliamentary involvement in post-enactment scrutiny is that the awareness of post-legislative scrutiny is likely to have a 'salutary effect' in focusing the minds of legislators at the pre-scrutiny stage on the difficulties, or side effects, that may arise during the implementation of the legislation.⁴⁵ On the other hand, it could be argued that legislators already fully consider the possible impact of legislation during the pre-legislative scrutiny process.⁴⁶ Proponents of this latter view can cite pre-legislative scrutiny mechanisms that encourage consideration of the potential impact of Bills on human rights. For example, in the UK, Canada and New Zealand, responsible Ministers are required to certify a Bill's compatibility or incompatibility with rights.⁴⁷ Furthermore, parliamentary scrutiny committees already draw legislators' attention to the possible adverse impacts of legislation on rights.⁴⁸

Yet a third benefit of greater parliamentary involvement in post-legislative scrutiny largely overcomes this objection, for post-legislative scrutiny can facilitate the systematic, routine and collective monitoring of key areas or provisions *queried* by legislators during the pre-legislative scrutiny process. Even where pre-legislative scrutiny mechanisms are in operation, there is the risk that government will push legislation through Parliament that poses serious concerns for human rights. This may arise when the government considers that the policy objectives of the Bill take precedence to upholding human rights. Another reason may be that, despite concerns being raised by the opposition or the minor parties in parliamentary debates or during committee proceedings that a proposed measure may infringe rights, governments are still willing to 'chance their arms'.⁴⁹ During the pre-legislative scrutiny phase, legislators could target areas where there are concerns regarding human rights that warrant post-enactment scrutiny.⁵⁰

This leads to the fourth argument in support of greater parliamentary involvement in post-legislative scrutiny: namely, an increase in rights protection. A main proponent of this view in the pre-legislative scrutiny context, David Kinley, argues that '[t]he principal responsibility for ensuring better levels of protection and promotion of human rights through law must lie in the first instance with governments and legislatures.'⁵¹ Kinley goes on to suggest that despite the judiciary's important role in implementing rights 'it is incumbent on the political organs of government to take the lead in terms of both of the substance and procedure of human rights observance.'⁵² Kinley's position makes sense given the magnitude and scope of decision-making in modern departments of state. Greater parliamentary involvement in rights protection also engenders a concep-

⁴⁵ Law Commission, *Post-Legislative Scrutiny: A Consultation Paper*, above n 18, 30.

⁴⁶ *Ibid.*

⁴⁷ See Feldman, 'The Impact of Human Rights on the UK Legislative Process', above n 1, 97–8; Hiebert, above n 1, 124; Kinley, above n 1, 253.

⁴⁸ See generally Kinley, above n 1.

⁴⁹ Feldman, 'The Impact of Human Rights on the UK Legislative Process', above n 1, 93.

⁵⁰ See JCHR, *The Work of the Committee in the 2001–05 Parliament*, House of Lords Paper No 112, House of Commons Paper No 552, Session 2004–05 (2005) 43.

⁵¹ Kinley, above n 1, 252.

⁵² *Ibid.*

tion and practice of democratic government, in turn enabling the detection and correction of abuses that flow from what Tom Campbell refers to as the 'paradox of politics' — 'the powers that governments must have to promote wellbeing can and are used by those who hold political power to benefit themselves at the expense of those they are meant to protect and support.'⁵³ Involving Parliament in the process of entrenching international human rights also promises that the government will take Australia's international obligations more seriously.⁵⁴

A fifth reason for involving Parliament in post-enactment review is that Parliament can operate as an independent 'trigger' for instigating further review. Parliament's intervention might flow from concerns expressed by the courts or in the general media and civil society, or from an automatic trigger for review provided for in legislation. As mentioned above, in Australia the terrorism laws introduced after September 11 include provisions for an automatic review by a range of parliamentary and independent bodies.⁵⁵ Similar review clauses are found in the UK's terrorism legislation.⁵⁶

A final and related benefit of parliamentary involvement is that a critical element of an effective post-enactment scrutiny regime is that there exists a body with an eagle eye's view of what is scrutinised, when, by whom, and according to what criteria. Parliamentary committees emerge as likely contenders for this role because they already perform the role of scrutinising Bills and departmental operations. They also have the authority to refer those matters to the department or an independent body for review, or to undertake a follow-up review themselves. A review might entail the examination of the effect of implementing a particular Act or provision within an Act, or might be as broad as a wide-ranging policy review.⁵⁷

In summary, the objectives of a post-enactment scrutiny regime include the application of independent standards to assess the implementation and operation of legislation. Arguably, depending on the nature of the legislation under scrutiny, rights criteria applied in the pre-legislative scrutiny of legislation should also form the basis for post-enactment scrutiny. A further objective is to ensure that the mechanisms for scrutiny, which principally consist of government and independent agencies, are ultimately subject to Parliament's oversight, including the setting of review criteria. The following examination of the post-enactment scrutiny of Australia's asylum laws and policies demonstrates a mixed record of achieving those objectives.

III AN EVALUATION OF THE POST-ENACTMENT REVIEW OF AUSTRALIA'S ASYLUM LAWS AND POLICIES

The following analysis tests the current mechanisms for post-legislative scrutiny in the area of Australia's asylum laws and policies against the main objectives of post-enactment scrutiny outlined in Part II above. Those objectives

⁵³ Campbell, above n 39, 323.

⁵⁴ Charlesworth et al, above n 38, 157.

⁵⁵ See above nn 10–12 and accompanying text.

⁵⁶ See *Terrorism Act 2000* (UK) c 11, s 126; *Prevention of Terrorism Act 2005* (UK) c 2, s 14(3).

⁵⁷ Editorial, 'Post-Legislative Scrutiny' (2006) 27 *Statute Law Review* iii, v–vi.

include: (1) the employment of independent scrutiny criteria to evaluate legislation; (2) the application of pre-legislative rights scrutiny criteria to legislation where appropriate; and (3) the systematic involvement of Parliament in the post-enactment review process. Before evaluating the asylum laws, it is worth noting the rapidly changing institutional environment in which post-legislative scrutiny currently takes place at the Commonwealth level.

A Post-Legislative Scrutiny Mechanisms in Australia — A State of Flux

There are a number of different institutions and mechanisms that perform a post-enactment review function at the Commonwealth level in Australia. They include parliamentary committees, parliamentary tabling procedures, the Ombudsman, the Human Rights and Equal Opportunity Commission ('HREOC'), the Auditor-General, the budget process, performance reporting, as well as traditional oversight tools such as parliamentary debate and a legislator's constituency role. Many of these mechanisms are in a state of flux. Institutions and agencies are changing from within as new values jockey for position with traditional public law values. Agencies are also being given new functions: for example, the Commonwealth Ombudsman's new role as the Immigration Ombudsman,⁵⁸ or the Auditor-General's appointment as an officer of the Parliament with the power to undertake audits of government programmes at their own discretion.⁵⁹ Furthermore, the nature of public administration is changing and has seen the bestowal of traditional government functions on private contractors, and the adoption of new performance management and managerial 'whole of government' techniques of administration.⁶⁰

Parliament is also changing. If we take into account the long life of legislatures, many of these developments are comparatively recent. Only since 1989 have legislative and general purpose standing committees had a continuing reference on annual reports of departments and agencies, giving the committees the 'ability to subject those bodies to continuing scrutiny.'⁶¹ Pre-legislative scrutiny by parliamentary committees is itself an example of the development of Parliament's role within the broad constitutional ambit to 'make laws for the peace, order, and good government of the Commonwealth'.⁶²

All of these mechanisms and trends are evident in the immigration portfolio, making it a good case study of the effectiveness of post-enactment scrutiny in Australia's dynamic political milieu.

⁵⁸ See *Migration Act 1968* (Cth) ss 486N–O, 486Q; *Ombudsman Act 1976* (Cth) s 4(4).

⁵⁹ *Auditor-General Act 1997* (Cth) s 8.

⁶⁰ Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Report* (2002) 149–51, 158–60.

⁶¹ Harry Evans, 'Restructuring the Senate's Committee System' (1995) 78 *Canberra Bulletin of Public Administration* 25, 26. See also Stephen Argument, 'Annual Reporting by Commonwealth Departments and Statutory Authorities' (1991) 6(1) *Legislative Studies* 16, 22.

⁶² *Australian Constitution* s 51.

B *First Objective: Independent Scrutiny Criteria*

1 *Executive Review*

In step with the UK Law Commission's recognition that government should bear a large burden of the post-enactment scrutiny process, the scrutiny of the implementation and operation of Australia's asylum laws and policies begins with the department responsible for their implementation — the Department of Immigration and Citizenship ('DIAC'). Few would contest the benefits of continual self-monitoring and evaluation by DIAC of its implementation of the *Migration Act 1958* (Cth) ('*Migration Act*') and associated legislation.

Yet if a principal objective of post-enactment scrutiny is the application of independent standards to scrutinise the operation of legislation, then DIAC's regime for evaluating the workings of Australia's asylum laws and policies is patchy. This contrasts with other components of Australia's immigration programme that undergo periodic and comprehensive reviews to assess the operation of the different visa classes and subclasses that apply under the *Migration Act*.⁶³ Even here, however, the terms of reference for reviews by the executive can tend to encourage an instrumentalist approach to scrutiny that downplays or excludes the employment of criteria that are independent of the legislation or the underlying policy. This will usually involve reference to 'efficiency' and 'effectiveness' and 'policy objectives'. One recent example is the DIAC-sponsored review of Australia's General Skilled Migration ('GSM') visas.⁶⁴ DIAC confined the terms of reference of the review to evaluating the 'efficiency and effectiveness' of the current structure and operation of the GSM visas, and whether they achieved the 'objectives' of the GSM visas as identified by DIAC.⁶⁵

In relation to the refugee and humanitarian programme, DIAC appears even less enthusiastic about employing independent scrutiny standards to evaluate the continuing impact of the *Migration Act* in critical controversial areas. One key example is the lack of DIAC-sponsored evaluation of the government's policy of denying refugee settlement services to temporary protection visa holders. In the major review of DIAC's settlement services in 2003, the terms of reference expressly stated that '[t]he review will not re-visit the Government policy that settlement services funded by the Commonwealth are available only to permanent entrants.'⁶⁶ As a result, while the report made important recommendations as to how DIAC might improve the provision of services to permanently 'resettled' refugees, including tools for the oversight of private contractors,⁶⁷ the

⁶³ See, eg, Bob Birrell, Leslyanne Hawthorne and Sue Richardson, DIAC, *Evaluation of the General Skilled Migration Categories* (2006).

⁶⁴ *Ibid.*

⁶⁵ See *ibid* 6–7.

⁶⁶ Department of Immigration and Multicultural and Indigenous Affairs, *Report of the Review of Settlement Services for Migrants and Humanitarian Entrants* (2003) 330. DIAC was then known as this Department.

⁶⁷ See *ibid* 295–317. See also Submission to Minister for Citizenship and Multicultural Affairs, *Review of Settlement Services for Migrants and Humanitarian Program Entrants*, 2002, 3 (Refugee Council of Australia).

report failed to address the ‘elephant in the room’ (temporary protection visa holders without access to ‘resettlement’ services).

The government has also been slow to employ independent criteria to scrutinise other harsh components of the refugee and humanitarian programme, including the mandatory detention policy. Evaluation of the impact of the detention policy, when it has occurred, has tended to take place against criteria that perpetuate the policy objectives underlying detention. Significantly, this is evidenced in the terms of reference issued by the Minister for Immigration to the Palmer Inquiry into the unlawful detention of Cornelia Rau, an Australian permanent resident.⁶⁸ In the terms of reference, the Minister for Immigration limited the inquiry to ‘any necessary systems/process improvements.’⁶⁹ This foreclosed any critical evaluation of the government’s policy of mandatory detention embodied in s 189 of the *Migration Act*.

These observations should not detract from the substantial improvements within DIAC that followed the Palmer Inquiry, including greater coordination of information systems, tighter internal audits and greater control of private contractors.⁷⁰ The Palmer Inquiry also played an important part in creating a climate conducive to the government’s relaxation of the mandatory detention policy in 2005⁷¹ and acted as one of the ‘triggers’ for parliamentary post-enactment scrutiny of the detention and removal powers found in the *Migration Act*.⁷² At the same time, the continuing absence of any systematic and comprehensive government system for review of the *Migration Act* according to independent criteria remains a major concern — particularly in light of the recent Immigration Ombudsman’s findings that DIAC unlawfully detained over 200 Australian permanent residents or citizens under s 189 of the *Migration Act*.⁷³

2 *The Use of Independent Criteria by Parliamentary Committees*

In comparison to review by the executive, the preparedness of parliamentary committees to apply independent scrutiny criteria to review Australia’s mandatory detention policy varies depending on the reviewing body. In its 2000 report, *Not the Hilton*, the Joint Standing Committee on Migration pursued a line of investigation which was accepting of the mandatory detention policy. It concluded that ‘Australia’s detention administration is appropriate and profes-

⁶⁸ See generally Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report* (2005); Angus Francis, ‘Accountability for Detaining and Removing Unlawful Non-Citizens: The Cases of Vivian Solon and Cornelia Rau’ (2005) 30 *Alternative Law Journal* 263.

⁶⁹ Palmer, above n 68, 196.

⁷⁰ See Andrew Metcalf, Department of Immigration and Multicultural Affairs, *DIMA Plan Launch* (18 July 2006); DIAC, *Palmer Report — Two Years of Progress — The Secretary’s Introduction* (2007).

⁷¹ See generally *Migration Amendment (Detention Arrangements) Act 2005* (Cth); *Migration and Ombudsman Legislation Amendment Act 2005* (Cth).

⁷² See Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Administration and Operation of the Migration Act 1958* (2006) 1–2.

⁷³ The Ombudsman’s reports are summarised in Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases* (2007) 24–5.

sional.⁷⁴ The Joint Committee reviewed various aspects of detention (including health, education and security) without reference to independent criteria scrutinising the duration and conditions of detention. Since 2004 and 2005, when concerns over Australia's detention policy mounted, the Joint Committee has taken a more critical appraisal of detention services.⁷⁵ Yet it is hard to identify any precise independent criteria that the Joint Committee employs to assess the workings of the policy.

The Senate Standing Committee on Legal and Constitutional Affairs ('SSCLCA'), which has responsibility for scrutinising Bills in the immigration portfolio and reporting on the performance of DIAC,⁷⁶ has displayed greater willingness to apply specific and tailored independent criteria to evaluate the impact of Australia's mandatory detention policy. While the terms of reference of its 2000 report on Australia's refugee and humanitarian programme expressly excluded the issue of the 'legitimacy' of detaining illegal arrivals,⁷⁷ the terms of reference applied human rights as criteria for scrutinising other elements of Australia's asylum laws.⁷⁸ Human rights criteria, including international instruments, United Nations High Commissioner for Refugees ('UNHCR') guidelines and the views of the UN Human Rights Committee, also provided the benchmark for the SSCLCA's scrutiny of Australia's mandatory detention policy in 2006.⁷⁹ SSCLCA's greater willingness to engage in scrutiny using independent rights criteria reflects its expertise in the use of independent rights criteria to scrutinise Bills in the immigration portfolio.⁸⁰ At the same time, as the following discussion illustrates, the application of human rights by the SSCLCA has not filtered down into government processes for the collection of information presented to Parliament through other reporting mechanisms.

C Second Objective: The Use of Rights to Scrutinise the Impact of Legislation

In contrast to the SSCLCA, the use of human rights as independent post-enactment criteria at the departmental level is lacking in certain controversial areas of DIAC's operations. This is particularly apparent in the case of Australia's offshore processing of asylum claims. Aside from being subject to a

⁷⁴ Joint Standing Committee on Migration, Parliament of Australia, *Not the Hilton: Immigration Detention Centres: Inspection Report* (2000) 89.

⁷⁵ See Joint Standing Committee on Migration, Parliament of Australia, *Detention Centre Contracts: Review of Audit Report No 1, 2005–2006, Management of the Detention Centre Contracts — Part B* (2005); Joint Standing Committee on Migration, Parliament of Australia, *Report of the Inspections of Baxter Immigration Detention Facility and Port Augusta Residential Housing Project, April 2005* (2005) 13–14.

⁷⁶ Commonwealth, *Standing Order of the Senate* OO 25(1), (2).

⁷⁷ Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) xxv.

⁷⁸ *Ibid* xxix.

⁷⁹ Senate Legal and Constitutional References Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 72, 169–72.

⁸⁰ See, eg, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006).

much lesser standard of internal monitoring and review by DIAC, which is not compensated by individual external tribunal or judicial review.⁸¹ Australia's offshore processing of asylum claims has also fallen through the gaps in the traditionally important accountability and scrutiny mechanisms of the budget process.

1 *The Budget Process*

By way of background, in addition to internal reviews and monitoring, DIAC also participates in a form of post-enactment review through the gathering of performance information with measures presented in DIAC's portfolio budget statements and annual report.⁸² The collection of performance information is designed to ensure that the executive is accountable to Parliament, and through it the people, for the spending of public money. In Australia, '[i]n the past twenty years in particular there have been significant changes in the way that the executive government presents its budget to the parliament for approval and in the way in which it accounts for past expenditure.'⁸³ Since the transition to outcomes/outputs accrual budgeting in 1999–2000, departments have become the provider of 'outputs' to their Minister, who is the 'purchaser'.⁸⁴ Budgetary allocations are no longer 'made in the context of allocating funds to departments or other organisational units ... but to departmental outputs that contributed to specified outcomes.'⁸⁵ Thus, departments of state are required to assess their programmes against how efficiently and effectively they achieve identified policy aims expressed in terms of outcomes and outputs and measured by quantitative and qualitative performance measures.⁸⁶

The Minister for Immigration presents their portfolio's outcomes and outputs to Parliament for approval in portfolio budget statements each year, acknowledging in the transmittal letter that they do so 'by virtue of [their] responsibility for

⁸¹ Australia's offshore processing of asylum claims was governed by an interim policy document issued by the Department of Immigration and Multicultural and Indigenous Affairs: Onshore Protection Branch, Department of Immigration and Multicultural and Indigenous Affairs, *Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons Taken to Declared Countries* (Onshore Protection Interim Procedure Advice No 16, 2002). Under the procedures, asylum seekers processed on third countries have no right of appeal to the Refugee Review Tribunal. Section 494AA(1) of the *Migration Act* also places a bar on legal proceedings in any court relating to the status, detention or removal of an 'offshore entry person'. This bar is expressly subject to the High Court's jurisdiction under s 75 of the *Australian Constitution*: see *Migration Act* s 494AA(3).

⁸² See Australian National Audit Office ('ANAO'), *Management of the Detention Centre Contracts — Part B: Department of Immigration and Multicultural and Indigenous Affairs*, Audit Report No 1 of 2005–06 (2005) 68.

⁸³ Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) 69.

⁸⁴ Robert Gregory and Martin Painter, 'Parliamentary Select Committees and Public Management Reform in Australasia: New Games or Variations on an Old Theme?' (2003) 106 *Canberra Bulletin of Public Administration* 63, 63.

⁸⁵ *Ibid.*

⁸⁶ See *Finance Minister's Orders for Finance Reporting (Incorporating Policy and Guidance) 2007* (Cth) O 121. This is issued under *Financial Management and Accountability Act 1997* (Cth) s 63. See also *Combet v Commonwealth* (2005) 224 CLR 494, 523 (Gleeson CJ) ('*Combet*').

accountability to the Parliament and, through it, the public.⁸⁷ The Department's annual report is presented to Parliament as a 'report on performance',⁸⁸ which evaluates the Department's performance against the outcomes and outputs set out in the portfolio budget statements and portfolio additional estimates statements.⁸⁹ Parliament then has the opportunity, through Senate estimates hearings conducted by the SSCLCA, to question the Minister and Department officers concerning the realisation of outcomes and outputs developed by DIAC to benchmark their performance.⁹⁰

Although formally concerned with the expenditure and appropriation of public funds, the outcomes/outputs framework is a centrepiece of post-enactment scrutiny.⁹¹ First, it allows a department such as DIAC, and senators during estimates hearings, to get a systems-level analysis, or a 'snapshot', of decision-making and implementation of laws and policies which otherwise would be lost in the mass of decision-making in a portfolio which annually delivers a migration programme of more than 140 000 people.⁹² Secondly, estimates hearings provide parliamentarians with an important opportunity to question department officers and Ministers concerning the administration and operation of the relevant regulatory framework.⁹³

Yet the outcomes/outputs framework, as it currently operates, can obscure the objectives of government programmes and lead to a lack of transparency in the budget statements laid before Parliament. A recent report of the Senate Finance and Public Administration Committee acknowledged this fact, concluding that 'the broad formulation of outcomes has accompanied a loss of program detail and specificity in the appropriation process of the Parliament. This poses challenges for parliamentary scrutiny.'⁹⁴ The challenges are heightened by the High Court decision of *Combet v Commonwealth* ('*Combet*'),⁹⁵ in which the High Court effectively relinquished the scrutiny of government expenditure to the Parliament, serving 'notice that Parliament has to deal itself back into the appropriations process' if executive expenditure is to be subject to any control.⁹⁶

The lack of transparency is intensified by the fact that the outcomes/outputs framework is not simply a value free process that reports to Parliament whether

⁸⁷ Commonwealth, *Portfolio Budget Statements 2006–07: Immigration and Multicultural Affairs Portfolio*, Budget Related Paper No 1.12 (2006) iii. See also Commonwealth, *Portfolio Budget Statements 2007–08: Immigration and Citizenship Portfolio*, Budget Related Paper No 1.13 (2007) iii, where words to the same effect were used. On portfolio budget statements, see generally *Appropriation Act (No 1) 2005–2006* (Cth) ss 3–4; *Combet* (2005) 224 CLR 494, 525 (Gleeson CJ).

⁸⁸ Department of Immigration and Multicultural and Indigenous Affairs, *2004–05 Annual Report* (2005) pt 2.

⁸⁹ See, eg, DIAC, *Annual Report: 2006–07* (2007).

⁹⁰ See, eg, Legal and Constitutional Legislation Committee, Parliament of Australia, Estimates (Budget Estimates), *Official Committee Hansard*, 23 May 2006.

⁹¹ Harry Evans, 'Senate Estimates Hearings and the Government Majority in the Senate' (Address delivered at the National Press Club, Canberra, 11 April 2006) 1.

⁹² Andrew Metcalf, above n 70.

⁹³ Harry Evans, above n 91, 1.

⁹⁴ Senate Standing Committee on Finance and Public Administration, above n 83, 74.

⁹⁵ (2005) 224 CLR 494.

⁹⁶ John Uhr, 'Appropriations and the Legislative Process' (2006) 17 *Public Law Review* 173, 174.

public funds have been, or are to be, spent in the 'efficient' and 'effective' achievement of stated policy aims. In reality, the setting of outcomes and outputs, and the determination of what performance reporting measures should assess the efficient and effective meeting of those goals, necessarily involves significant, value laden decisions that can lie obscured beneath general and vaguely expressed outcomes and outputs.⁹⁷

2 DIAC's Use of the Outcomes/Outputs Framework

The influence of policy on the outcome/output framework is reflected in DIAC's use of outcomes and outputs to report on its performance in relation to Australia's offshore processing of refugee claims. Outcome 1 of the immigration portfolio is framed in terms of '*contributing to Australia's society and its economic advancement through the lawful and orderly entry and stay of people*'.⁹⁸ To provide further guidance, this outcome is divided into supporting outputs.⁹⁹

Output 1.6 (offshore asylum seeker management)¹⁰⁰ covers Australia's offshore processing regime — the so-called 'Pacific Solution'. Australia's Pacific Solution, which is in the process of disbandment under the recently elected Labor government, refers to the Howard government's policy of processing claims for onshore refugee arrivals in the territory of other states.¹⁰¹ The policy was designed to deter future boat arrivals of asylum seekers by ensuring that they did not get direct access to Australia's onshore refugee status determination process.¹⁰² Processing took place according to what the government claimed were the UNHCR processing standards — a lower standard of processing than that available onshore.¹⁰³ As early as 2002, the UNHCR expressed the view that applying a lower processing standard offshore was 'discriminatory' and not in accordance with Australia's 'international protection obligations'.¹⁰⁴

⁹⁷ See *Combet* (2005) 224 CLR 494, 523, 525–6 (Gleeson CJ).

⁹⁸ See Commonwealth, *Portfolio Budget Statements 2007–08*, above n 87, 19 (emphasis in original).

⁹⁹ The output structure of DIAC has been revised in the latest Portfolio Budget Statements: see *ibid* 21–2.

¹⁰⁰ Output 1.6 was previously classified as Output 1.5: *ibid*.

¹⁰¹ This policy was introduced by a package of legislation in 2001: see *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). For an overview of the Pacific Solution, see Submission to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, 26 July 2002, Submission No 26 (Angus Francis); Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 22 May 2006, Submission No 60 (Angus Francis).

¹⁰² See Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) 2; Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) 5.

¹⁰³ Senate Legal and Constitutional References Committee, Parliament of Australia, *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters* (2002) 31. See also Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) 15–16.

¹⁰⁴ Submission to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, July 2002, Submission No 30, 4 (United Nations High Commissioner for Refugees). See

The way DIAC developed output 1.6 as a new output for Australia's offshore processing centres downplayed these concerns. Specifically, output 1.6 effectively obscured any problems with the programme by subjecting it to performance measures qualitatively 'lower' than those used to assess the efficient and effective achievement of the outputs set for Australia's onshore regime. The relevant performance measure under this output was: 'Persons in offshore processing centres [are to be] ... given the opportunity to have any claims for refugee asylum considered against Refugee Convention standards.'¹⁰⁵ Not surprisingly, DIAC's annual report declared in positive terms to Parliament that the offshore processing centres 'in Nauru and [Papua New Guinea] have been effective in delivering offshore asylum seeker processing.'¹⁰⁶ Yet this failed to indicate that the UNHCR contested the 'standard' applied to offshore processing. While from the perspective of identifying expenditure it was justifiable to set a new set of outcomes, outputs and performance measures for the offshore scheme, the way this was done obscured the 'inefficiencies' in the scheme.

Hence, a major risk of the outcomes/outputs framework is that it can lead to the downplaying of the importance of rights in the evaluation process. Procedural qualities like efficiency and effectiveness are introduced as values that 'overwhelm more substantive principles'.¹⁰⁷ The efficient achievement of performance measures becomes the benchmark for how government and Parliament should evaluate programmes — a form of 'actuarial justice'.¹⁰⁸ In short, the budget reporting of Australia's offshore processing programme subsumed the rights of refugees under disingenuous scrutiny criteria.

3 *The Application of the Outcomes/Outputs Framework to Detention Services*

Another example of this trend is DIAC's approach to the reporting of its performance in delivering detention services. After an evaluation of DIAC's monitoring, assessing and reporting on its own performance in relation to detention, the Australian National Audit Office ('ANAO') 'found that the quality measures listed in [DIAC's portfolio budget statements] ... are activities rather than indicators against which performance can be assessed.'¹⁰⁹ The ANAO report further found that DIAC 'did not ... define, or measure "lawful, appropriate, humane and efficient detention".'¹¹⁰ Again, vague and indefinite perform-

also Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 22 May 2006, Submission No 75, 6 (United Nations High Commissioner for Refugees).

¹⁰⁵ Department of Immigration and Multicultural and Indigenous Affairs, above n 88, 139.

¹⁰⁶ *Ibid.*

¹⁰⁷ Sarah Armstrong, 'Bureaucracy, Private Prisons, and the Future of Penal Reform' (2003) 7 *Buffalo Criminal Law Review* 275, 277.

¹⁰⁸ For a discussion of actuarial justice, or the 'new penology', see generally Jonathan Simon, 'The Ideological Effects of Actuarial Practices' (1988) 22 *Law and Society Review* 771; Jonathan Simon and Malcolm M Feeley, 'True Crime: The New Penology and Public Discourse on Crime' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control: Essays in Honor of Sheldon L Messinger* (1995) 147; Ryken Grattet and Valerie Jenness, 'The Reconstitution of Law in Local Settings: Agency, Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime' (2005) 39 *Law and Society Review* 893, 905.

¹⁰⁹ ANAO, *Management of the Detention Centre Contracts*, above n 82, 69.

¹¹⁰ *Ibid.* 92.

ance measures circumvented the use of rights criteria that have an obvious application to what is humane detention.

D *Third Objective: Enhancing Parliament's Post-Enactment Scrutiny Role*

1 *The Budget Process*

To date, Parliament has been far from successful in curing the defects in executive review. When examining Parliament's role in post-enactment scrutiny, it is important to take into account the diversity of Parliament and the complexity of the law-making procedures within Parliament.¹¹¹ Parliament has a number of distinct post-enactment scrutiny functions that reflect this diversity. First, Parliament is at the apex of the budget reporting process undertaken by DIAC.¹¹² While senators take the opportunity during estimates hearings to address concerns with the operation of legislation, legislators have generally been passive actors in setting the measures or criteria that establish the parameters for the evaluation process. In this context, Parliament is 'a policy-influencing legislature, which can modify or reject measures brought forward by government but cannot substitute or formulate policies of its own.'¹¹³ The High Court case of *Combet* highlighted that 'Parliament has done little to protect the rights of "the legislature" to set terms and conditions on the government's use of public funds appropriated in the budget.'¹¹⁴

As a result, DIAC and other departments have traditionally prepared budget documents and annual reports by reference to ministerially approved objectives and performance measurements rather than criteria set by Parliament.¹¹⁵ As the apex of the annual outcome budget and appropriations reporting cycle, Parliament's role in the post-enactment and post-formulation scrutiny role is reliant on the performance reporting criteria and methodology employed by departments. This has led to a divergence between the criteria that Parliament uses to evaluate the operation of programmes during the budget process and the criteria it employs to scrutinise Bills, thereby undermining the systematic and effective application of independent scrutiny criteria during the budget process.

2 *Parliamentary Inquiries*

In addition to its formal role as the apex of the budget process, Parliament's oversight role in the implementation of law and policy in the asylum area also takes place through ad hoc inquiries undertaken by parliamentary committees. The Senate has initiated a number of important ad hoc reviews through its committee structure into the administration and operation of the *Migration Act* and associated policy.¹¹⁶ In addition, the SSCLCA has also taken the opportunity

¹¹¹ See above n 24 and accompanying text.

¹¹² See above Part III(C)(1).

¹¹³ Malcolm Aldons, 'Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?' (2003) 18(1) *Australasian Parliamentary Review* 79, 81.

¹¹⁴ Uhr, 'Appropriations and the Legislative Process', above n 96, 176.

¹¹⁵ Argument, above n 61, 17.

¹¹⁶ See, eg, Senate Legal and Constitutional References Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 72; Senate Legal and Constitutional Refer-

when scrutinising amending Bills to review the operation of the *Migration Act*.¹¹⁷ Although the SSCLCA plays the key scrutiny function, the Joint Standing Committee on Migration has also engaged in ad hoc inquiries that review the operation of aspects of Australia's immigration programme, such as the detention regime.¹¹⁸

Despite these important parliamentary initiatives, post-enactment review by Parliament is not systematic, being overly reliant on 'triggering' events that achieve national notoriety. The return of 'Ms Z' to China, the 'children overboard' affair, and the detention of Cornelia Rau and Vivian Solon are all examples where the glare of public attention prompted the Senate to engage in an ad hoc review of controversial aspects of Australia's immigration laws and policies.¹¹⁹ Outside estimates hearings, legislators are generally reliant on an amending Bill to trigger an opportunity for post-enactment review at the pre-legislative scrutiny stage, such as the introduction of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.¹²⁰

A further issue is that there is little integration between the pre- and post-legislative scrutiny stages. Where pre-legislative scrutiny and post-legislative scrutiny reports of the SSCLCA employ a range of human rights in evaluating a Bill, there is no systematic follow-up of concerns expressed during the pre-legislative scrutiny stage either in the estimates process or in the reviews conducted by ad hoc committees. The SSCLCA does not generally flag provisions or areas of concern for follow-up after enactment. However, there are signs of change. In the inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, the SSCLCA recommended the use of a traditional sunset clause requiring a 'public and independent review' of 'the Bill's operation and practical effect' if the government proceeded with the Bill against the Committee's recommendations.¹²¹ While a welcome initiative that mirrored sunset clauses in the terrorism laws introduced since September 11, the Committee's recommendations fail to specify who should conduct the review, what criteria should be applied and whether the SSCLCA would have any role in the review process. As it turned out, the sunset clause did not eventuate because the Prime Minister withdrew the Bill on 14 August 2006¹²² in light of reports that government senators were threatening to cross the floor to vote down the Bill. Yet the SSCLCA's willingness to put forward the sunset clause indicates a

ences Committee, *A Sanctuary under Review*, above n 77; Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Report* (2004).

¹¹⁷ See, eg, Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, above n 80.

¹¹⁸ See Joint Standing Committee on Migration, Parliament of Australia, *Asylum, Border Control and Detention* (1994); Joint Standing Committee on Migration, *Not the Hilton*, above n 74.

¹¹⁹ See Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, above n 77; Senate Select Committee on a Certain Maritime Incident, above n 60; Senate Legal and Constitutional References Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 72.

¹²⁰ See Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, above n 80.

¹²¹ *Ibid* 63.

¹²² Commonwealth, *Parliamentary Debates*, Senate, 7 December 2006, 115 (Government Responses to Parliamentary Committee Reports).

growing awareness of the importance of post-enactment review processes within Parliament and the SSCLCA's role in fostering that process as it applies to the immigration portfolio.

3 *Parliamentary Tabling Procedures*

Another potential avenue of post-enactment scrutiny is the parliamentary tabling procedure that has become an important feature of the *Migration Act*. Tabling procedures were introduced into migration decision-making as a matter of policy in the 1980s to ensure accountability of the Minister to Parliament where the Minister substituted their decision for a decision or recommendation of a review officer or tribunal.¹²³ Their introduction reflected the fact that the doctrine of ministerial responsibility was considered by government to be the traditional basis for political accountability to Parliament for the exercise of executive authority under the *Migration Act*.¹²⁴

Amendments to the *Migration Act* codified the tabling procedure as a means of ensuring the Minister's accountability to Parliament for the exercise of the power to override a decision of the Immigration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal and review officers by substituting a decision more favourable to the applicant.¹²⁵ The Minister was required to table in Parliament a statement outlining the decision set aside and the reasons for the Minister's decision. Such a statement was required to be tabled within 15 sitting days after the decision concerned was set aside, 'referring in particular to the Minister's reason for thinking that his or her actions are in the public interest.'¹²⁶ The tabling procedure now applies to a range of personal discretions exercised by the Minister under the *Migration Act*, including provisions that specify that the Minister's permission is a precondition to a valid visa application.¹²⁷

A common weakness afflicts these powers — Parliament does not know why the Minister decides not to intervene in a tribunal's decision or why the Minister permits a person to make a valid application for a visa. Where the Minister does intervene, the decisions for their intervention tabled in Parliament are skeletal. The following extracts taken from Ministerial statements tabled under the *Migration Act* are typical of the information provided to Parliament:

¹²³ Initially, this tabling requirement was with regards to criminal deportation decisions: see Commonwealth, *Parliamentary Debates*, House of Representatives, 4 May 1983, 167 (Stewart West, Minister for Immigration and Ethnic Affairs). See generally Human Rights Commission, *Human Rights and the Deportation of Convicted Aliens and Immigrants*, Report No 4 (1983).

¹²⁴ John McMillan, *Parliament and Administrative Law*, Research Paper No 13 of 2000–01, Parliamentary Library, Parliament of Australia (2000) 17.

¹²⁵ *Migration Legislation Amendment Act [No 2] 1989* (Cth) s 3, inserting ss 61, 64U (repealed) into the *Migration Act*; *Migration Reform Act 1992* (Cth) ss 23, 26, 32, inserting ss 115G, 121, 150L, 166BE, 166HL (repealed) into the *Migration Act*. See also Commonwealth, *Parliamentary Debates*, Senate, 8 December 1988, 3759 (Robert Ray, Minister for Immigration, Local Government and Ethnic Affairs).

¹²⁶ *Migration Act* ss 61(7)–(10), 64U(3)–(6) (repealed).

¹²⁷ See, eg, *Migration Act* ss 33, 46A, 46B, 48B, 72, 91L, 91Q, 195A, 351, 391, 417, 454, 501J.

Example 1 (*Migration Act* s 46B):

In July (month) 2005 I exercised my power under subsection 46B if [sic] the *Migration Act 1958* in relation to a family of two (2) unlawful non-citizens to enable them to apply for Temporary Safe Haven (Class UJ). In view of the particular circumstances of these unlawful non-citizens, I concluded that it was in the public interest that the couple be permitted to apply for Temporary Safe Haven (Class UJ) visas.¹²⁸

Example 2 (*Migration Act* s 48B):

Although the client has previously been found not to be someone to whom Australia has protection obligations, due to a change in circumstances, I consider it is in the public interest to exercise my power under s 48B of the Act to allow the client to make a further application.¹²⁹

Example 3 (*Migration Act* s 91L):

In July (month) 2005 I exercised my power under subsection 91L if [sic] the *Migration Act 1958* in relation to a family of two (2) non-citizens, who held subclass 449 Humanitarian Stay (Temporary) visas, to enable them to apply for Class UO Temporary (Humanitarian Concern) visas. In view of the particular circumstances of these non-citizens, I concluded that it was in the public interest that the couple be permitted to apply for Class UO Temporary (Humanitarian Concern) visas.¹³⁰

The lack of any indication concerning the criteria for the exercise of the Minister's intervention power stymies any debate that could take place in Parliament based on these statements. In brief, legislators are unable to assess what conditions are dictating the exercise of the Minister's personal powers. In March 2004, the Senate Select Committee on Ministerial Discretion in Migration Matters found that there was a general lack of transparency and accountability in the ministerial intervention powers found in the *Migration Act* 'due to the inadequacy of statements tabled in parliament and lack of public information on the operation of the powers'.¹³¹ The Committee recommended that the Minister 'provide sufficient information to allow parliament to scrutinise the use of the powers'.¹³² According to the Committee, this 'should include the minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation'.¹³³ The government members on the Committee

¹²⁸ Statement to Parliament, *Statement under Subsection 46B(2) of the Migration Act 1958*, Parliament of Australia, 14 July 2005 (Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs).

¹²⁹ Statement to Parliament, *Exercise of Ministerial Discretion under Section 48B of the Migration Act 1958*, Parliament of Australia, 4 July 2005 (Peter McGauran, Minister for Citizenship and Multicultural Affairs).

¹³⁰ Statement to Parliament, *Statement under Subsection 91L(3) of the Migration Act 1958*, Parliament of Australia, 14 July 2005 (Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs).

¹³¹ Senate Select Committee on Ministerial Discretion in Migration Matters, above n 116, 163.

¹³² *Ibid* 119.

¹³³ *Ibid*. See also other recommendations: at 119, 132, 164.

contested the findings of the majority, not accepting that the ‘existing transparency and accountability of the system are inadequate.’¹³⁴

As a result of the inadequate statements provided, the tabling procedures in the *Migration Act* remain generally under-utilised as a potential avenue for more rigorous post-enactment scrutiny by Parliament.

4 *Utilising the Expertise of Independent Agencies*

In addition to the role of DIAC and Parliament in scrutinising the operation of the *Migration Act*, the Auditor-General in conjunction with the ANAO, the Commonwealth Ombudsman and HREOC each has a role in auditing, investigating and reviewing the implementation and impact of asylum laws and policies.

The Auditor-General assists Parliament in maintaining accountability for government spending. Section 8(1) of the *Auditor-General Act 1997* (Cth) appoints the Auditor-General as an officer of the Parliament.¹³⁵ The Auditor-General, with the assistance of the ANAO, performs this function through a programme of ‘performance audits’ of the self-monitoring and evaluation conducted by departments.¹³⁶ In this capacity, the ANAO has performed a number of audits of DIAC programmes.¹³⁷

While an independent agency, the ANAO’s performance audits of DIAC sometimes follow the outcomes and outputs framework established by DIAC.¹³⁸ When this occurs, the underlying policy agenda imbedded in performance reporting measures can undermine the effectiveness and comprehensiveness of ANAO auditing as an independent scrutiny mechanism. This becomes apparent upon examination of ANAO’s approach to auditing Australia’s onshore refugee determination process. At the height of the Pacific Solution, the ANAO reported that Australia’s onshore processing regime met the quality measures used to assess output 1.2 ‘refugee humanitarian entry and stay’.¹³⁹ This may have been true. Yet this finding ignored output 1.6 (offshore asylum seeker management), discussed above.¹⁴⁰ No-one reading the audit report would know that the Pacific Solution had replaced the onshore protection determination process for nearly all unlawful boat arrivals, leading to substantially lower standards of procedural fairness. This blinkered approach, while perhaps methodically correct from an

¹³⁴ Senate Select Committee on Ministerial Discretion in Migration Matters, above n 116, 189. See generally Government Member recommendations: at 184–9.

¹³⁵ Linda English and James Guthrie, ‘Mandate, Independence and Funding: Resolution of a Protracted Struggle between Parliament and the Executive over the Powers of the Australian Auditor-General’ (2000) 59(1) *Australian Journal of Public Administration* 98, 110.

¹³⁶ Keith Mackay, ‘Two Generations of Performance Evaluation and Management System in Australia’ (2003) 10 *Canberra Bulletin of Public Administration* 9, 15.

¹³⁷ See, eg, ANAO, *The Management of Boat People: Department of Immigration and Multicultural Affairs; Australian Protective Service; Australian Customs Service — Coastwatch*, Audit Report No 32 of 1997–98 (1998); ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory: Department of Immigration and Multicultural and Indigenous Affairs*, Audit Report No 57 of 2001–02 (2002); ANAO, *Management of the Processing of Asylum Seekers: Department of Immigration and Multicultural and Indigenous Affairs*, Audit Report No 56 of 2003–04 (2004).

¹³⁸ See ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory*, above n 137; ANAO, *Management of the Processing of Asylum Seekers*, above n 137.

¹³⁹ See generally ANAO, *Management of the Processing of Asylum Seekers*, above n 137.

¹⁴⁰ See above Part III(C)(2).

auditing point of view, failed to acknowledge the reality of Australia's on-shore/offshore processing regime.

In addition to the ANAO, the Commonwealth Ombudsman is performing an increasingly important evaluation function in the immigration area generally. The *Migration and Ombudsman Legislation Amendment Act 2005* (Cth) gives the Ombudsman a formal role as Immigration Ombudsman,¹⁴¹ with the duty to investigate and make recommendations on the appropriateness of detention arrangements for long-term detainees.¹⁴² The recent reports of the Commonwealth Ombudsman have drawn attention to major systemic deficiencies in DIAC's administration of the detention provisions.¹⁴³ HREOC has also undertaken a number of illuminating investigations into the operation of Australia's immigration laws and policies.¹⁴⁴ Most recently, HREOC conducted a high-profile examination of Australia's policy of detaining children in immigration detention,¹⁴⁵ leading to amendments to the *Migration Act* in 2005 that introduced the 'principle that a minor shall only be detained as a measure of last resort.'¹⁴⁶

In summary, while various post-enactment review mechanisms are employed in the immigration portfolio, they are unsystematic and discordant. The next Part puts forward suggestions for improving post-enactment review in this area that have general relevance to other portfolios.

IV ENHANCING RIGHTS PROTECTION THROUGH IMPROVEMENTS IN POST-ENACTMENT SCRUTINY

This section suggests some basic reform proposals designed to cure the deficiencies evident in the post-enactment scrutiny regime discussed in Part III. The mechanisms for post-enactment review and the nature of the scrutiny criteria are linked and will be dealt with together. The proposals follow the basic thrust of the UK Law Commission's report, which is that post-enactment scrutiny reform should be 'evolutionary' — 'consistent with the way in which the system of government has developed' — and that 'more systematic post-legislative scrutiny may take different forms.'¹⁴⁷ In this respect, the following comments highlight the important potential role of the SSCLCA in tailoring a rights-focused, systematic post-enactment review of the *Migration Act* and associated policy.

¹⁴¹ See *Ombudsman Act 1976* (Cth) s 4(4), inserted by *Migration and Ombudsman Legislation Amendment Act 2005* (Cth) s 8.

¹⁴² *Migration Act* s 486O, inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) s 3, sch 1(19).

¹⁴³ See above n 73 and accompanying text.

¹⁴⁴ See, eg, HREOC, *Those Who've Come across the Seas: Detention of Unauthorised Arrivals* (1998).

¹⁴⁵ HREOC, *A Last Resort? The National Inquiry into Children in Immigration Detention* (2004).

¹⁴⁶ *Migration Act* s 4AA(1), amended by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) s 3, sch 1(1).

¹⁴⁷ Law Commission, *Post-Legislative Scrutiny*, above n 8, 20.

A Internal Monitoring

The criticism of DIAC's internal monitoring should not belittle the vital importance of having the executive engage in constant and vigilant review of the administration of the *Migration Act*. Given the complexity and multitude of decisions made by DIAC each year within a wide-ranging migration programme, DIAC must remain primarily responsible for evaluating the administration and operation of the *Migration Act*.¹⁴⁸ The Immigration Ombudsman's recent reports into the unlawful detention of Australian permanent residents and citizens draw attention to the need for senior officers in all departments to examine errors in individual decision-making with an eye to larger problems in need of reform.¹⁴⁹ In this regard, the Ombudsman's recommendations are in step with the UK Law Commission's emphasis on the importance of government engagement in post-enactment scrutiny.¹⁵⁰

At the same time, it is unlikely that the process of internal review will result in the appropriate *legislative*, as opposed to *systemic*, reforms unless there are meaningful independent scrutiny criteria. Systemic decision-making errors and the adverse impact of the regulatory framework are often inseparable. The government's mandatory detention policy is a case in point. The 'catastrophic'¹⁵¹ decision-making processes evident under the mandatory detention and removal regime were not simply a consequence of systemic failings within DIAC but also the regulatory framework. This framework engendered the exercise of unfettered coercive powers by mandating the detention of unlawful non-citizens irrespective of age,¹⁵² the duration of detention¹⁵³ or the conditions of detention.¹⁵⁴ Internal review criteria, therefore, should not just examine and remedy systemic errors. Although reforms in 'data management, case management, record keeping, internal audit[ing], client service, stakeholder engagement, training, governance arrangements, cultural values, [and] compliance operations' are welcome,¹⁵⁵ systemic improvements will not cure an intrinsically inhumane regime.

B Independent Criteria

As a general observation, internal reviews should also have recourse to scrutiny standards set by Parliament which are independent of the policy objectives informing the legislative or policy measure. What is required is a clear and independent set of scrutiny standards that can be applied both at the

¹⁴⁸ Commonwealth Ombudsman, *Lessons for Public Administration*, above n 73, 22–3.

¹⁴⁹ *Ibid.*

¹⁵⁰ Law Commission, *Post-Legislative Scrutiny*, above n 8, 21.

¹⁵¹ Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter: Report under the Ombudsman Act 1976 by the Commonwealth Ombudsman, Prof John McMillan, of an Inquiry Undertaken by Mr Neil Comrie AO APM* (2005) xv.

¹⁵² See generally *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1.

¹⁵³ See generally *Al-Kateb v Godwin* (2004) 219 CLR 562.

¹⁵⁴ See generally *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

¹⁵⁵ Commonwealth Ombudsman, *Lessons for Public Administration*, above n 73, 22.

pre-legislative and post-enactment phase by government, Parliament and independent agencies. Certainty and clarity in the criteria can lead to greater precision and objectivity in post-enactment government assessments and monitoring of legislation, as well as provide a framework for parliamentary intervention or input from independent review agencies. Criteria should also recognise the potential for regulatory and systemic impact on rights.

One specific proposal is that standards could take the form of a checklist.¹⁵⁶ The UK Law Commission favours the insertion of a post-enactment scrutiny checklist in an expanded regulation impact statement ('RIS').¹⁵⁷ Simon Evans advocates a human rights impact statement as part of an integrated rights and economic RIS.¹⁵⁸ He observes that providing for human rights standards in RISs would have the added benefit of concentrating the minds of departmental officers during the law and policy formulation process.¹⁵⁹ An advantage with this proposal in the Australian context is the renewed importance placed on RIS since the better regulation reforms in 2006 and 2007. RISs are required to set out the objectives of a new measure and a strategy for its implementation, including a review, where a measure impacts on businesses, individuals or the community.¹⁶⁰

Expanding RISs to include independent scrutiny criteria (including rights criteria) that have had input from parliamentary committees might not seem such a big step. However, it might be argued that RISs are not the best vehicle for independent rights scrutiny criteria given that the primary rationale for RISs is to lower the 'costs' of regulatory impact on business, individuals and the community.¹⁶¹ RISs are required to assess regulation (legislation, regulations and quasi-regulations) against 'efficiency' and 'effectiveness' goals that are measured in terms of the 'costs and benefits' of regulation.¹⁶² Individuals are 'consumers' and the potential costs identified include higher prices for goods and services, less competition, and 'reduced utility' of goods and services.¹⁶³ In this light, Simon Evans observes that the regulatory impact analysis that informs RISs

tends to treat all relevant factors as quantifiable and commensurable. This leads to sometimes arbitrary weightings being used to combine the scores assigned to those factors. Morally- and ethically-laden concepts cannot necessarily be so

¹⁵⁶ See House of Lords Select Committee on the Constitution, *Parliament and the Legislative Process: The Government's Response*, House of Lords Paper No 114, Session 2004–05 (2005) 7; Oliver, 'Improving the Scrutiny of Bills', above n 30, 224–7.

¹⁵⁷ Law Commission, *Post-Legislative Scrutiny*, above n 8, 19. The term used by the Law Commission is a 'Regulatory Impact Assessment' or 'RIA'. This is functionally equivalent to a RIS.

¹⁵⁸ Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes', above n 4, 686.

¹⁵⁹ *Ibid* 686–8.

¹⁶⁰ Commonwealth, *Best Practice Regulation Handbook* (2007) 54–5.

¹⁶¹ *Ibid* iii, 1–2.

¹⁶² *Ibid* 1.

¹⁶³ *Ibid* 70–1.

easily reduced: for instance, some may consider ascribing economic value to aspects of human life and health to be offensive.¹⁶⁴

Inserting a rights-focused ‘checklist’ into RISs as currently envisaged by the government’s better regulation framework runs the risk of ‘flattening’ rights criteria alongside economic considerations. There would therefore need to be a clear statement of the significance and primacy of the rights criteria set out in the RIS, which Evans asserts can be maintained through different measures for human rights and other economic criteria.¹⁶⁵ Subject to this qualification and to the requirement below for greater parliamentary input into the criteria in an RIS, a rights checklist inserted into an RIS would allow for an integrated approach to post-enactment review that would be missing from an independent, stand-alone rights checklist.

The RIS can also inform the outcomes/outputs framework and performance criteria employed in the budget process. If this were manageable within this framework, it would allow senators in the estimates process to engage in the setting of performance criteria — a radical suggestion given the historical passivity of Parliament in this area, though Parliament may be beginning to assert itself following the *Combet* decision.¹⁶⁶ Independent agencies, particularly HREOC, might also cooperate with the ANAO and departments in incorporating rights into performance reporting in a way that does not ‘flatten’ or subsume human rights alongside economic measurements. This would follow the UK plan that the Commission for Equality and Human Rights ‘will work in “light touch” partnership with public sector inspection bodies to develop criteria relating to human rights in their performance assessment frameworks.’¹⁶⁷

C Parliament’s Involvement and Input

The operation of Australia’s asylum laws and policies reveals the danger in having no supreme oversight body that is prepared to look outside the policy objectives of the legislation. Evans argues that an independent executive agency is best placed to audit RISs prepared by departments as part of the pre-legislative scrutiny phase.¹⁶⁸ Without discussing the merits of this proposal with respect to pre-legislative scrutiny, in the context of post-enactment scrutiny arguably members of Senate legislative and general purpose standing committees are better placed to see the ‘big picture’, and therefore to decide what is reviewed, when, by whom, and according to what criteria. Their position also gives them

¹⁶⁴ Simon Evans, ‘Improving Human Rights Analysis in the Legislative and Policy Processes’, above n 4, 683–4.

¹⁶⁵ *Ibid* 692.

¹⁶⁶ See Senate Standing Committee on Finance and Public Administration, above n 83.

¹⁶⁷ United Kingdom, *Fairness for All: A New Commission for Equality and Human Rights*, Cm 6185 (2004) 31. See also United Kingdom Audit Commission, *Human Rights: Improving Public Service Delivery* (2003); JCHR, *Commission for Equality and Human Rights: Structure, Functions and Powers*, House of Lords Paper No 78, House of Commons Paper No 536, Session 2003–04 (2004); Francesca Klug and Claire O’Brien, “‘Fairness for All’? An Analysis of Human Rights Powers in the White Paper on the Proposed Commission for Equality and Human Rights’ [2004] *Public Law* 712, 715–16.

¹⁶⁸ Simon Evans, ‘Improving Human Rights Analysis in the Legislative and Policy Processes’, above n 4, 701–2.

the legitimacy to do this. It is interesting to note that most respondents to the Law Commission's consultation paper favoured a Parliament-led, rather than government-led, post-enactment review process.¹⁶⁹ While the Law Commission's final report properly stressed the importance of involving both,¹⁷⁰ the Law Commission endorsed the submission that parliamentary committees should retain ultimate power over the post-enactment scrutiny process.¹⁷¹

Working out the mechanics for engaging Parliament in a systematic way in the post-scrutiny process is a challenge. Recent initiatives by the Australian government give Parliament little or no role in overseeing systematic post-enactment review. The government's new best practice regulation requirements, which 'provide that regulation (not subject to sunset or other statutory review provisions) be reviewed' by departments every five years,¹⁷² envisage an exclusively government-led post-enactment review process.

The new Office of Best Practice Regulation ('OBPR') sends each department a list of regulatory initiatives (legislation, regulation and quasi-regulation) made five years before, and the department is responsible for assessing which of these regulations are reviewed and how that review takes place.¹⁷³ There is also a requirement that the department publish an 'annual regulatory plan' that includes upcoming reviews of regulation.¹⁷⁴ The OBPR is given the role of monitoring and reporting on compliance.¹⁷⁵ The OBPR also receives 'all Cabinet submissions and memoranda proposing regulation', and reports 'to Cabinet on compliance with the best practice regulation requirements and on whether the level of analysis in RISs is adequate.'¹⁷⁶

Parliament has no role in the better regulation process unless the RIS is included in explanatory material tabled in Parliament.¹⁷⁷ While Parliament can obviously amend the legislative measure, it is not contemplated that it might amend the RIS to insert its own criteria and timetable for post-enactment review. There is also no requirement under the better regulation process to table the five-yearly review reports in Parliament. Consequently, if Parliament desires to have a greater role in the post-enactment review process as it currently stands, it will put forward a formal review or sunset clause — a process so far reserved for only the most controversial of Bills.

A more systematic approach would be for Parliament to have input into the RIS, including what was to be reviewed, the applicable criteria, the timing of the review(s), the expected role of parliamentary committees and independent agencies, and any requirements for tabling of the report in Parliament. This should take place earlier rather than later in the policy formulation process, as by the scrutiny stage 'the executive has already decided on its policy objectives, the

¹⁶⁹ Law Commission, *Post-Legislative Scrutiny*, above n 8, 23.

¹⁷⁰ *Ibid* 23, 28.

¹⁷¹ *Ibid* 28.

¹⁷² Commonwealth, *Best Practice Regulation Handbook*, above n 160, 11.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* 12.

¹⁷⁶ *Ibid* 13.

¹⁷⁷ *Ibid* 32, 36.

need for legislation to achieve those objectives, the legislative model and the concrete terms of proposed legislation.¹⁷⁸

Ideally, this role would be performed by the legislative and general purpose standing committee that has responsibility for the portfolio giving rise to the legislative measure. This would be the SSCLCA in the immigration portfolio. Advantages would include that the SSCLCA could insert references into the RIS that link to concerns raised in its pre-legislative scrutiny reports. In this way, the SSCLCA could use the better regulation and RIS framework as a vehicle for monitoring the recommendations or concerns flagged in its scrutiny reports, thereby increasing its “after sales service”.¹⁷⁹ This would allow a more tailored, responsive and effective means of post-enactment scrutiny, giving the SSCLCA the opportunity to insist on specific post-enactment review criteria that go to the nub of the controversial or contested aspects of a legislative measure.

Obviously, these proposals would necessitate a proactive and well-resourced parliamentary scrutiny committee structure. They would require not only resources, but also the political will of the legislative and general purpose standing committee to proactively scrutinise government legislative initiatives and the time in which to do so. Generally, the Coalition government’s control of the Senate from 2005 led to a decrease in the effectiveness of Senate committees across estimates hearings and reference and legislation committee review functions.¹⁸⁰ It is early days yet to speculate how far the 2007 election result will alter this state of affairs, although the new Leader of the Government in the Senate has previously expressed his support for a robust Senate.¹⁸¹

While the rules of the Senate remain susceptible to change by a majority of senators, the potential benefit of a more systematic rights review process once included in the rules and practice of the Senate is that it will regularise a rights scrutiny culture within the structured processes of law-making. The SSCLCA’s much publicised stand against the Howard government’s controversial 2006 Bill to extend the offshore processing of asylum claims suggests a growing human rights culture within Parliament that threatens to shake the political executive’s growing hold over the Senate.¹⁸²

In addition to the avenues for post-enactment review offered during the formal legislative process, it is important that both government and Parliament retain a flexible approach to the ‘triggers’ for post-enactment review. While the better regulation and performance-reporting frameworks provide for a certain level of certainty and consistency, it is likely that there will be instances where government policy circumvents the effective operation of both frameworks. Although the Australian Commonwealth *Legislation Handbook* recommends that ‘rules

¹⁷⁸ Simon Evans, ‘Improving Human Rights Analysis in the Legislative and Policy Processes’, above n 4, 670.

¹⁷⁹ Geoffrey Lindell, ‘How (and Whether?) to Evaluate Parliamentary Committees — From a Lawyer’s Perspective’ (August 2005) *About the House* 3.

¹⁸⁰ Harry Evans, ‘Constitutionalism, Bicameralism and the Control of Power’ (Report to Senate, Parliament of Australia, 26 September 2006) 9.

¹⁸¹ Chris Evans, ‘Two Years of Government Senate Control’ (Speech delivered to the Subiaco Branch of the Australian Labor Party Irish Club, Subiaco, 28 June 2007).

¹⁸² Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, above n 80, 59.

which have a significant impact on individual rights and liberties' should be implemented through primary legislation.¹⁸³ Australia's offshore processing regime demonstrates the capacity for government to circumvent law-making processes through the use of policy. As described above, policy can also obscure performance reporting checks and balances. Thus, post-enactment scrutiny should also take into account the impact of policy¹⁸⁴ and this may require 'triggers' that are outside the formal better regulation and RIS framework. In addition, there is the likelihood that instances will arise where regulation affects the rights of individuals in ways unforeseen by government or Parliament during the law-making process. Departments and parliamentary committees should be able to respond to those situations outside the bounds of formal post-implementation time frames.

D *Tabling Procedures*

Lastly, the powers under the *Migration Act* that are subject to the tabling procedure span a range of ministerial discretions with direct bearing on human rights. Effective use of the tabling requirements to scrutinise the exercise of key ministerial discretions under the *Migration Act* is an important potential source of rights protection for immigrants and refugees. A more systematic use of the tabling procedures in tandem with independent agency oversight would constitute a viable additional source of rights protection.

A positive improvement in the tabling regime has come about due to the establishment of the Commonwealth Ombudsman's role as Immigration Ombudsman. Since amendments to the *Migration Act* in 2005, the Minister is required to table in Parliament the Immigration Ombudsman's assessment of the appropriateness of the detention arrangements of long-term detainees.¹⁸⁵ The Minister's statements accompanying the Ombudsman's recommendations regarding long-term detainees tabled in Parliament under s 486P are generally detailed responses to the Ombudsman's assessment of factors that the Ombudsman has identified as relevant to the appropriateness of detention: health and welfare, security and safety, the attitude to removal and the appropriateness of granting a visa to the detainee.¹⁸⁶

At the same time, tabling procedures should not be used to the exclusion of the courts, which remain an important mechanism for scrutinising the lawfulness of individual decisions made under the *Migration Act*. In this respect, it would be wrong to suggest that the courts are just 'another' avenue of review or 'scrutiny'. The High Court has consistently maintained its constitutional responsibility for determining the legality of executive decision-making in the immigration area

¹⁸³ Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) 3.

¹⁸⁴ Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes', above n 4, 671.

¹⁸⁵ *Migration Act* s 486P, inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) s 3, sch 1(19).

¹⁸⁶ Statement to Parliament, *Response to Ombudsman's Statements Made under s 486O of the Migration Act 1958*, Parliament of Australia, 14 June 2006 (Amanda Vanstone, Minister for Immigration and Multicultural Affairs).

despite repeated attempts to exclude such review.¹⁸⁷ A similar process is evident in the UK, where judges have even hinted at a new doctrine of common law constitutionalism that might permit the judiciary to strike down any attempt to ouster their jurisdiction to hear appeals in the immigration and asylum areas.¹⁸⁸

V CONCLUSION

Significant hurdles lie in front of strengthening the protection of rights through improvements in post-enactment scrutiny. At the end of the day, the implementation and effective operation of a systematic rights-focused post-enactment review regime will depend on the degree to which a human rights culture takes hold in the Commonwealth Parliament. Nevertheless, increased consideration of human rights in the area of refugee rights — indicated in the 2005 amendments to Australia's mandatory detention policy,¹⁸⁹ the 2006 government backbench revolt against extensions of offshore processing of asylum claims¹⁹⁰ and the SSCLCA's rejection of the same¹⁹¹ — offers more than a glimmer of hope that a human rights culture is on the rise in Parliament. Ultimately, greater involvement of Parliament in fostering a systematic, rights-focused post-enactment review regime stands to benefit citizens and non-citizens alike.

¹⁸⁷ See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 concerning the effect of the privative clause in *Migration Act* s 474. See generally Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588; Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law under the *Australian Constitution*' (2003) 14 *Public Law Review* 219; Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51; Justice Ronald Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 *Sydney Law Review* 37.

¹⁸⁸ Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 378, 404–5.

¹⁸⁹ *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

¹⁹⁰ See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 40–4 (Petro Georgiou), 49–52 (Russell Broadbent), 57–60 (Judith Moylan).

¹⁹¹ Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, above n 80, 59.