

Bond University

Bond Law Review

Volume 35

Issue 1

2023

Governing in Troubled Times: Exploring Australia's Commitment to Human Rights Through Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Nicholas Bulbeck

Australian National University

Follow this and additional works at: <https://blr.scholasticahq.com/>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Governing in Troubled Times: Exploring Australia's Commitment to Human Rights Through Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

NICHOLAS BULBECK*

Abstract

The Australian government has emphasised social cohesion in addressing contemporary challenges. Arguing the legal protection of human rights could support social cohesion, this article examines the most recent federal human rights initiative – the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). While the Act's effectiveness has recently been assessed, assessments relied on analysis of Statements of Compatibility produced before 2016. The article addresses this gap. Analysing 46 statements from the final six months of 2019 against criteria derived from the scrutiny regime, it argues statement quality was generally poor, supporting existing conclusions the Act is relatively ineffective. It argues reform is required, suggesting a National Human Rights Act should be re-examined. This could both protect human rights in Australia and support social cohesion in a challenging global environment.

I Introduction

We live in challenging times with a global pandemic and climate change being just two of the issues dominating headlines. In addition, there is a perception that democracy around the world is in decline.¹

* Research Assistant, ANU College of Law, Australian National University. I would like to thank Associate Professor Ryan Goss for his guidance and support during the research project on which this article is based, as well as Associate Professor Amelia Simpson whose feedback on that project also contributed to this article. I would further like to thank Dr Anne Macduff for her enthusiastic support and encouragement, as well as Professor Mark Nolan, Dr Mareike Riedel, Dr Dominique Dalla-Pozza, and Ms Ayla Bower-Williams for their invaluable feedback on various drafts. Finally, I would like to thank the anonymous reviewer for their thoughtful and constructive comments. Naturally, any deficiencies or errors in the article are my own.

¹ See, eg, The Economist Intelligence Unit, *Democracy Index 2020: In Sickness and in Health?* (Report, 3 February 2021) 4; Frederick DeVeaux, Ekaterina Golovanova and Angeley Mullins, *Democracy Perception Index 2021* (Report, 5 May 2021) 9–13.

The rise of an authoritarian China, an anti-democratic turn in certain eastern European countries, as well as division and dysfunction in established democracies have all been held up as examples of this.²

A key resource the Australian Government has emphasised in addressing contemporary issues is social cohesion³ which it defines in terms of celebrating diversity while striving ‘for a unified and harmonious nation.’⁴ A more detailed, academic definition of the concept can be found in the work of Joseph Chan, Ho-Pong To, and Elaine Chan, who define social cohesion in terms of the interactions (covering both attitudes and behaviours) between individuals within communities and also between individuals and public institutions such as governments.⁵ Under this definition, the presence of trust,⁶ participation,⁷ a sense of belonging, and the absence of major inter-group divisions⁸ are all important elements of a socially cohesive society.

Studies of Australia suggest that the level of social cohesion is relatively high.⁹ However, there is room for improvement. For example, the 2021 Mapping Social Cohesion survey by the Scanlon Foundation noted that trust in the federal government declined significantly (from

² See, eg, Vijay Gokhale, ‘China is Gnawing at Democracy’s Roots Worldwide’, *Foreign Policy* (Web Page, 18 December 2020) <<https://foreignpolicy.com/2020/12/18/china-democracy-ideology-communist-party/>>; Samuel Petrequin, ‘European Report Finds Waning of Democracy in Poland, Hungary’, *AP News* (online, 1 October 2020) <<https://apnews.com/article/virus-outbreak-checks-and-balances-poland-hungary-europe-e3bca7b1fcae74f071eb585cb03d0db5>>; Sarah Repucci, *From Crisis to Reform: A Call to Strengthen America’s Battered Democracy* (Report, March 2021) 1–3.

³ Alan Tudge, ‘Keeping Australia Together at a Time of COVID’ (Speech, National Press Club, 28 August 2020) <<https://minister.homeaffairs.gov.au/alantudge/Pages/Adress-to-the-National-Press-Club---.aspx>>. There is a body of literature demonstrating the importance of social cohesion to communities. For example, it has been linked to an increased willingness to receive a vaccination against COVID-19 and has been highlighted as an important resource in responding to disasters: Diana Cárdenas et al, *COVID-19 in Australia: What Factors Drive Pro-Vaccination Behaviour?* (Report, 2021) <<https://www.anu.edu.au/files/guidance/COVID%2019%20in%20Australia%2C%20What%20factors%20drive%20pro-vaccination%20behaviour.pdf>>; Rae L Jewett et al, ‘Social Cohesion and Community Resilience During COVID-19 and Pandemics: A Rapid Scoping Review to Inform the United Nations Research Roadmap for COVID-19 Recovery’ (2021) 51(3) *International Journal of Health Services* 325, 330.

⁴ Department of Home Affairs, ‘About Social Cohesion’ (Web Page, 9 February 2021) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/social-cohesion/about-social-cohesion>>.

⁵ Joseph Chan, Ho-Pong To and Elaine Chan, ‘Reconsidering Social Cohesion: Developing A Definition and Analytical Framework for Empirical Research’ (2006) 75(2) *Social Indicators Research* 273, 290.

⁶ In other individuals, public institutions such as government, and public figures.

⁷ Both in communal life, and in the public sphere (for example, joining political parties and voting).

⁸ Chan, To and Chan (n 5) 290, 294.

⁹ Andrew Markus, *2021 Mapping Social Cohesion* (Report, November 2021) 16, 24–5; Mike Colledge and Chris Martyn, *Social Cohesion in the Pandemic Age: A Global Perspective* (Report, October 2020) 16 <<https://www.ipsos.com/sites/default/files/ct/news/documents/2020-10/report-social-cohesion-and-pandemic-2020.pdf>>.

a record high in 2021) back towards the consistent low levels recorded since 2007.¹⁰ The survey also registered increased concern about racism in Australia, persistence of what the report described as a ‘hierarchy of racial preference’, and increased experience of discrimination amongst those born in non-English speaking countries.¹¹

I would argue that one mechanism that might be drawn on to enhance social cohesion is the legal protection of human rights. This protection may take many forms, for instance, via a ‘dialogue model’ of rights promotion or a National Human Rights Act.¹² There are a number of reasons why human rights may have this effect.

Firstly, the legal protection of human rights could increase social cohesion by promoting trust in government, an area successive Scanlon Foundation surveys have found to be an issue in Australia.¹³ This may occur because human rights add greater accountability for government by offering an additional layer of legal protection where government actions negatively affect individuals or communities.¹⁴ Further, protecting human rights may also increase the quality of government policy, as human rights provide an incentive for the government to more carefully consider how its actions affect individuals, communities, and their rights.¹⁵

Secondly, legal protection of human rights may be particularly valuable for those individuals or communities who are marginalised or experience forms of disadvantage or discrimination. This could flow both from the symbolic value of human rights in providing a visible set of standards that all members of society are entitled to,¹⁶ but also by providing an independent legal basis for individuals or communities to challenge actions that fall below those standards. These effects may help foster a sense of belonging¹⁷ as well as challenge divisions within the community, both of which would support social cohesion.¹⁸

Further, Gabrielle McKinnon has argued that ‘an Australian bill of rights has the potential to significantly enhance social cohesion’.¹⁹ This

¹⁰ Markus (n 9) 9.

¹¹ Ibid 11–3.

¹² For discussion of the ‘dialogue model’, see below Part II(A).

¹³ Markus (n 9) 9.

¹⁴ See, eg, Hans-Otto Sano, ‘Human Rights and Development: Human Rights Principles and Their Indicators’ (2013) 31(3) *Nordic Journal of Human Rights* 381, 395–6.

¹⁵ See, eg, Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (Report, 2007) 1–2 <<https://www.ohchr.org/sites/default/files/Documents/Publications/GoodGovernance.pdf>>.

¹⁶ For an example of this in relation to protections against racial discrimination and hate speech see Katharine Gelber and Luke McNamara, ‘Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harm Occasioned and the Remedies Provided’ (2016) 39(2) *University of New South Wales Law Journal* 488, 508.

¹⁷ Ibid.

¹⁸ See, eg, Chan, To and Chan (n 5) 294.

¹⁹ Gabrielle McKinnon, ‘Social Cohesion and Human Rights: Would a Bill of Rights Enhance Social Cohesion in Australia?’ in James Jupp, John Nieuwenhuysen and Emma Dawson (eds), *Social Cohesion in Australia* (Cambridge University Press, 2007) 191, 203.

is because it can help negotiate social conflicts by ‘providing a transparent mechanism for balancing rights against other social objectives, without undermining the role of the democratically elected legislature.’²⁰

On the basis that human rights could help support social cohesion, the bulk of this article focusses on an assessment of the most recent commonwealth initiative to promote and protect human rights — the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*‘Scrutiny Act’*). There are already a number of comprehensive assessments of the *Scrutiny Act*, mostly notably those conducted by Daniel Reynolds, Winsome Hall, and George Williams from 2020,²¹ and Adam Fletcher in 2018.²² These analyses raised serious questions about the effectiveness of the *Scrutiny Act*, for example, pointing to its failure to improve the consistency of Australian laws with international human rights obligations,²³ and suggesting there is little evidence to show the Act is having a practical impact on the promotion and protection of human rights in Australia.²⁴

However, one limitation of these reviews was that they relied on assessments of Statements of Compatibility (‘SOCs’) created in 2015 or earlier.²⁵ As SOC are one of the two, core elements of the *Scrutiny Act*,²⁶ analysis of more recent examples is a useful addition to these broader assessments of the Act. This article seeks to undertake such an analysis.

Based on an analysis of 46 SOC attached to Bills introduced in the second half of 2019, this article will argue that SOC have become an accepted yet formulaic and marginal element of the legislative development process. While the obligation to present a SOC is universally complied with, the actual quality of these documents is often relatively poor. This supports conclusions by Reynolds, Hall, and Williams, as well as Fletcher, that the *Scrutiny Act’s* approach to promoting and protecting human rights in Australia has been relatively ineffective.²⁷

Due to this ineffectiveness, the article also argues that reform in the Australian Government’s approach to promoting and protecting human rights is required. An example of such a reform would be the

²⁰ Ibid 195–200, 202–3.

²¹ Daniel Reynolds, Winsome Hall and George Williams, ‘Australia’s Human Rights Scrutiny Regime’ (2020) 46(1) *Monash University Law Review* 256.

²² Adam Fletcher, *Australia’s Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Publishing, 2018).

²³ Ibid 216.

²⁴ Reynolds, Hall and Williams (n 21) 297.

²⁵ Ibid 261. For the most comprehensive and recent study of SOC (which covered SOC created from the beginning of 2012 to the end of 2015), see Fletcher (n 22) ch 3.

²⁶ The other core element being the Parliamentary Joint Committee on Human Rights: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pt 2 (*‘Scrutiny Act’*).

²⁷ Reynolds, Hall and Williams (n 21) 297; Fletcher (n 22) 216.

introduction of a National Human Rights Act. This could not only better protect the human rights of all Australians, but may also further the government's goal of supporting social cohesion.

The structure of this article is as follows: Part II outlines the context in which the *Scrutiny Act* was created, its aims, and how it operates; Part III outlines existing literature assessing SOC's and develops a standard for assessing SOC quality; Parts IV through VIII apply this standard to 46 SOC's; Part IX discusses the results of this analysis and their implications, and Part X offers a conclusion.

II The Scrutiny Act

Australia is the only developed democracy without a Bill of Rights or National Human Rights Act.²⁸ At present, the Australian Capital Territory, Victoria and Queensland have enacted their own human rights legislation.²⁹ However, the only direct rights protection at the federal level is a small number of rights protected by the *Constitution*,³⁰ legislative protection against certain forms of discrimination,³¹ and some further legislative recognition of certain rights of people with disabilities.³²

The most recent attempt to create a more substantive human rights regime at the federal level followed the National Human Rights Consultation. Beginning in 2008, the Consultation was tasked with investigating how best to recognise and protect human rights in Australia.³³ The Consultation's final report found that further measures were required to protect human rights in Australia and recommended that, amongst other measures, Australia adopt a National Human Rights

²⁸ See, eg, Gillian Triggs, *Why an Australian Charter of Rights is a Matter of National Urgency* (Web Page, 13 August 2019) <<https://theconversation.com/why-an-australian-charter-of-rights-is-a-matter-of-national-urgency-121411>>.

²⁹ *Human Rights Act 2004* (ACT) ('HRA ACT'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'); *Human Rights Act 2019* (Qld) ('HRA Qld').

³⁰ For example, section 116 of the *Constitution* provides limited protection in relation to religion, and the High Court has recognised certain implied rights in the *Constitution* such as the implied freedom of political communication: see, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³¹ While various rights are addressed by federal anti-discrimination legislation, these do not provide comprehensive coverage of the rights Australia has agreed to protect under international human rights law. Further, they are framed as 'negative rights' to be free from discrimination (ie differential treatment) on particular grounds, rather than 'positive', stand-alone rights that can be claimed by individuals: see *Australian Human Rights Commission Act 1986* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

³² *National Disability Insurance Scheme Act 2013* (Cth) sub-ss 3(1)(a), (i).

³³ *National Human Rights Consultation* (Report, September 2009) <<https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>> 3 ('Consultation').

Act.³⁴ However, the government opted not to follow this recommendation on the basis that it would be too divisive.³⁵

Instead, the government proposed a national Human Rights Framework. Changes introduced in the framework were aimed at ‘enhancing understanding and respect for human rights in Australia and ensuring appropriate recognition of human rights issues in legislative and policy development.’³⁶ This was to be achieved by embedding human rights in the legislative process, as well as through community education, engaging with stakeholders on human rights, reviewing existing legislation for human rights compatibility, and harmonising federal anti-discrimination legislation.³⁷

Though other elements of the framework have fallen by the wayside,³⁸ human rights remain embedded in the federal legislative process through the *Scrutiny Act*.

The *Scrutiny Act* was designed to ‘improve parliamentary scrutiny of new laws for consistency with Australia’s human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development.’³⁹ Human rights in this context are rights contained in seven international instruments⁴⁰ signed by Australia.⁴¹ The mechanisms in the Act to realise this goal are the Parliamentary Joint Committee on Human Rights (‘PJCHR’) and SOCs.

The role of the PJCHR is set out in Part 2 of the Act. It is a scrutiny committee approaching legislation from a technical, human rights perspective⁴² and working within the legislative process to produce

³⁴ Ibid xxxiv (recommendation 18), 349–50.

³⁵ Commonwealth Government, *Australia’s Human Rights Framework* (Report, April 2010) 1 (‘Framework’).

³⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General) 271.

³⁷ *Framework* (n 35) 3.

³⁸ See, eg, ‘Anti-Discrimination Bill 2012 Shelved by Australian Government’, *Equal Rights Trust* (Web Page, 26 March 2013) <<https://www.equalrightstrust.org/news/anti-discrimination-bill-2012-shelved-australian-government>>.

³⁹ McClelland (n 36) 271.

⁴⁰ These are the *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 212 (entered into force 4 January 1969) (‘*ICERD*’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘*ICESCR*’); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981) (‘*CEDAW*’); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*CAT*’); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*CROC*’); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (‘*CRPD*’).

⁴¹ *Scrutiny Act* (n 26) s 3(1) (definition of ‘human rights’).

⁴² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (June 2015) ii (‘*Guide to Human Rights*’).

detailed scrutiny reports assessing the compatibility of Bills and legislative instruments with Australia's international human rights obligations.⁴³ The PJCHR also makes recommendations aimed at improving human rights compatibility⁴⁴ and engages with legislative proponents by asking for further information where SOC's are not sufficiently detailed to assess compatibility.⁴⁵ Further, it has conducted a number of inquiries into human rights issues.⁴⁶ The PJCHR is supported by an external legal advisor and a secretariat including staff with expertise in international human rights law.⁴⁷

Part 3 of the *Scrutiny Act* outlines the obligation to present SOC's alongside Bills and legislative instruments. These statements were introduced as a way of assisting Parliament to consider the human rights impact of proposed laws.⁴⁸ The *Scrutiny Act* requires the Member of Parliament who introduces a Bill to present a SOC to the relevant House of Parliament.⁴⁹ SOC's must include an assessment of compatibility with human rights,⁵⁰ though assessments are not binding on courts or tribunals⁵¹ and a failure to provide a SOC has no legal consequence for the proposed law.⁵² The PJCHR has published guidelines outlining its expectations in relation to the content of SOC's,⁵³ and the Attorney-General's Department has developed detailed resources to assist SOC drafters.⁵⁴ SOC's are generally attached to the relevant explanatory memorandum or statement, and are publicly available.

⁴³ Parliamentary Joint Committee on Human Rights, 'Scrutiny Reports: Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011', Parliament of Australia (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.

⁴⁴ See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 12, 20 October 2021) 50–1 [2.72]–[2.78].

⁴⁵ See, eg, *ibid* 37–46 [2.63]–[7.13].

⁴⁶ Parliamentary Joint Committee on Human Rights, 'Completed Inquiries', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_Inquiries>.

⁴⁷ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2020* (Report, 13 May 2021) 9 [2.18]–[2.19] ('*Annual Report 2020*').

⁴⁸ *Framework* (n 35) 8.

⁴⁹ *Scrutiny Act* (n 26) s 8(2).

⁵⁰ *Ibid* s 8(3).

⁵¹ *Ibid* s 8(4).

⁵² *Ibid* s 8(5).

⁵³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Drafting Statements of Compatibility* (Guidance Note No 1, December 2014) ('*Guidance Note 1*').

⁵⁴ Attorney-General's Department, 'Statements of Compatibility' (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>>.

A. *Human Rights Promotion and Protection Through Dialogue*

The *Scrutiny Act* is premised on a dialogue-based approach to promoting and protecting human rights.⁵⁵ In theory, institutionalising the consideration of human rights in the legislative process and creating a dialogue between the Parliament and the executive is meant to lead to more consistent consideration of human rights issues and, ultimately, allow the Parliament to better promote and protect human rights.⁵⁶

Under the *Scrutiny Act*, this dialogue occurs through the executive drafting SOC⁵⁷ (which will consider and justify the human rights impact of a Bill or legislative instrument) and the scrutiny and recommendations of the PJCHR. The PJCHR conducts its scrutiny by assessing the Bill or legislative instrument alongside the associated SOC, and routinely asks the executive for further information related to the compatibility of the Bill or legislative instrument. This dialogue can, at least in theory, result in changes or alterations to the Bill or instrument under consideration. The SOC and PJCHR scrutiny report can also inform broader parliamentary deliberations on the merits of Bills, allowing for relevant human rights considerations to be raised and debated.

However, unlike in other jurisdictions which employ a dialogue model for promoting and protecting human rights,⁵⁸ the *Scrutiny Act* is an exclusively parliamentary model.⁵⁹ In other jurisdictions the courts are given a role in the human rights dialogue to act as an independent check, testing the human rights compatibility of legislation. For example, a court may put the Parliament on notice by making a declaration of incompatibility when a law cannot be interpreted consistently with a human right,⁶⁰ or may invalidate the law to the extent of the incompatibility.⁶¹ This external check adds an incentive for Parliament to engage in a genuine effort to address human rights considerations when debating legislation.

⁵⁵ McClelland (n 36) 271.

⁵⁶ Ibid.

⁵⁷ Though the Member of Parliament who introduces a Bill is formally responsible under the *Scrutiny Act*, in practice the executive often drafts SOC⁵⁷: Julie Debeljak, 'Does Australia Need a Bill of Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thompson Reuters, 2013) 50 [3.90].

⁵⁸ See, eg, *HRA ACT* (n 29) pts 4–5; *Charter* (n 29) pt 3 divs 1, 3; *HRA Qld* (n 29) pt 3 divs 1, 3.

⁵⁹ George Williams and Lisa Burton, 'Australia's Exclusively Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 59.

⁶⁰ See, eg, *Human Rights Act 1998* (UK) s 4; *HRA ACT* (n 29) s 32; *Charter* (n 29) s 36; *HRA Qld* (n 29) s 53.

⁶¹ See, eg, *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*'); Sara Jackson, 'Designing Human Rights Legislation: "Dialogue", the Commonwealth Model and the Role of Parliaments and Courts' (2007) 13 *Te Mata Koi: Auckland University Law Review* 89, 95–8.

Absent the involvement of the courts, the *Scrutiny Act* represents an attempt to create a scheme where Parliament self-regulates on issues of human rights.⁶² This follows Australia's traditional approach of emphasising Parliament's role in rights protection⁶³ and also reflects the Human Rights Consultation's finding that most people believed Parliament should be the entity with primary responsibility for protecting rights (though the courts were also viewed as important in this regard).⁶⁴ However the novelty of this design choice in removing the additional safeguard provided by the courts makes an assessment of the effectiveness of the *Scrutiny Act* all the more important.

III Assessing SOC's

This Part briefly discusses earlier literature assessing SOC quality, then outlines the standard I developed for this article to assess SOC's.

A. *Existing Literature Assessing SOC's*

Overall, existing literature has suggested that SOC quality has often been poor, though with some signs of improvement. I briefly outline the more substantial SOC studies below.

Firstly, George Williams and Lisa Burton conducted an analysis of 129 SOC's covering the first six months of the *Scrutiny Act*'s operation.⁶⁵ Based on this sample, Williams and Burton noted that 'most SOC's are brief and many display a disturbing lack of analytical rigour' with explanations of bills often 'brief and opaque'.⁶⁶ On the whole, the review found significant variety in the length, level of analysis, and detail in the SOC's studied.⁶⁷

Secondly, Shawn Rajanayagam used a case study approach to analyse SOC's attached to two legislative packages introduced in 2012 and 2013.⁶⁸ This review noted substantial inconsistencies in how SOC's addressed rights issues, with some appropriately analysing rights infringements whilst others only doing so in a cursory manner or failing to note that rights were even engaged.⁶⁹ However, despite the inconsistency in quality, Rajanayagam noted that arguments advanced by SOC's were generally not far-fetched.⁷⁰

⁶² Williams and Burton (n 59) 59.

⁶³ Ibid 58–60.

⁶⁴ *Consultation* (n 33) app B 7.

⁶⁵ Williams and Burton (n 59).

⁶⁶ Ibid 81.

⁶⁷ Ibid 86.

⁶⁸ Shawn Rajanayagam, 'Does Parliament Do Enough: Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1062–3, 1067.

⁶⁹ Ibid 1069–70.

⁷⁰ Ibid 1070

Finally, Fletcher conducted the most recent and comprehensive assessment of SOC's to date, looking at 239 SOC's accompanying Bills introduced from the beginning of 2012 to the end of 2015.⁷¹ Fletcher's analysis noted 'moderate yet relatively steady improvement in the average quality of SOC's' though with the caveat that 'substandard' SOC's made up 50% or more of those produced in each year studied.⁷² Further, Fletcher noted recurring issues including poor analysis of criminal offence provisions and a systematic lack of evidence to support arguments advanced in SOC's.⁷³ However, the analysis concluded that there was 'a cautious message of progress' towards the goals set for SOC's by the *Scrutiny Act*.⁷⁴

B. *A Standard for Assessing SOC Quality*

To develop a standard I drew from three sources: the *Scrutiny Act*, the second reading speech by the Attorney-General, and the practice of the PJCHR. Based on the requirements, guidance, and expectations set out in these sources, I developed four criteria to measure SOC's against.⁷⁵ These criteria are:

1. Is the SOC a stand-alone document?
2. Does it identify relevant human rights?
3. Does it come to a reasonable conclusion on human rights compatibility?
4. Does it appropriately analyse human rights limitations?

An in-depth explanation of each of these criteria is included at the beginning of the relevant analysis in Parts V to VIII below.

In terms of developing these criteria, I decided against using criteria from existing SOC studies for a number of reasons. Firstly, of the studies referenced above, I found Fletcher's provided the most detailed and structured criteria for assessing SOC quality.⁷⁶ However, while Fletcher's five criteria influenced my thinking on assessing SOC's, I opted against adopting them for two reasons. Firstly, I think it is important when assessing the human rights analysis in a SOC to look at both the quality of the argumentation, as well as the plausibility of the conclusion. An assessment of compatibility with human rights is the

⁷¹ Fletcher (n 22) 101.

⁷² Ibid 116.

⁷³ Ibid 111–2.

⁷⁴ Ibid 117.

⁷⁵ Fletcher's work analysing SOC's also played a role in informing which features of SOC's should be the focus of analysis. He identified five criteria which substantially overlap with my own: see *ibid* 101.

⁷⁶ *Ibid*. The study by Williams and Burton focused on commenting on certain aspects of SOC's, without setting out detailed criteria against which to assess quality: Williams and Burton (n 59) 80–8. Further, Rajanayagam's work included five criteria for assessing SOC's, though I found their emphasis to be quite broad and not as prescriptive a standard as I was looking for to assess SOC quality: see Rajanayagam (n 68) 1051–61.

only obligation in the *Scrutiny Act* regarding the contents of a SOC,⁷⁷ so the plausibility of an assessment's conclusion seems like an important consideration. However, this was not specifically addressed in Fletcher's criteria. Secondly, Fletcher included engagement with international materials and Attorney-General's Department guidance as two distinct criteria. As SOC's are intended to alert Parliament to relevant human rights considerations,⁷⁸ I think the substance of what they communicate (ie does it provide sufficient information?) is more important than the type of materials referenced. Accordingly, while use of such material may enhance a SOC's ability to perform its intended function, I think that the references in and of themselves are not so important that they merit being independent criteria on par with criteria such as the coverage of rights or quality of argumentation.⁷⁹ On this basis, rather than adopting Fletcher's criteria, I developed my own as outlined above and explained in detail at the beginning of Parts V to VIII below.

Finally, to capture the overall quality of the SOC's analysed I adopted a scale developed by Fletcher.⁸⁰ From lowest quality to highest, I rated SOC's as 'perfunctory', 'inadequate', 'adequate', 'good', or 'excellent.' These ratings reflected my assessment of how each SOC performed against the four criteria, with equal weight given to each. Further, whereas Fletcher used these ratings as a 'relative' indicator of quality (ie a SOC rated 5/5 on Fletcher's scale indicated it was amongst the best examples of SOC's analysed in the study)⁸¹ I instead used this as an 'absolute' indicator of quality (ie how the SOC compared against the criteria, regardless of the performance of other SOC's analysed). I chose this approach on the basis that, for example, it seemed less useful to characterise a SOC as 'excellent' if it did not perform well against the criteria, even if it performed better than all others analysed.

In terms of SOC's considered, I conducted my analysis using SOC's attached to Bills introduced during the first six months of the 46th Parliament, from 1 July to 31 December 2019. In total, 188 Bills were introduced during this period.⁸² For reasons of workload (and following Fletcher's example),⁸³ I focused on SOC's which were attached to Bills the PJCHR found raised human rights concerns. According to the PJCHR, a Bill does not raise human rights concerns if it does not engage

⁷⁷ *Scrutiny Act* (n 26) ss 8(3), 9(2).

⁷⁸ McClelland (n 36) 271.

⁷⁹ Fletcher (n 22) 101.

⁸⁰ See *ibid* 101–2.

⁸¹ *Ibid* 101.

⁸² Parliament of Australia, *Bills Search Results* (Web Page, August 2020) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results?_VIEWSTATEGENERATOR=20B6B7A5&st=1&sr=1&q=&ito=1&expand=False&drvH=0&pnuH=0&f=01%2F07%2F2019&to=31%2F12%2F2019&pf=dd%2Fmm%2Fyyyy&pto=d%2Fmm%2Fyyyy&bs=1&pbh=1&bhor=1&ra=1&np=1&pmb=1&g=1&ps=100>.

⁸³ Fletcher (n 22) 101.

human rights, or does not impermissibly limit human rights.⁸⁴ This left me with a sample of 46 SOC's. Further, I also drew on PJCHR scrutiny reports to provide a baseline human rights analysis of each Bill.

IV Overview of SOC Quality

Using the quality ratings described above, the results for the 46 SOC's are outlined in Table 1. For a full list of the relevant Bills, including acronyms, origin, and quality ratings, see the Appendix at the end of the article.

Table 1
Quality of SOC's

Measure of quality		Perfunctory	Inadequate	Adequate	Good	Excellent	Total
All SOC's	No.	9	16	17	4	0	46
	%	19.57	34.78	36.96	8.70	0	100
Government SOC's	No.	3	12	17	4	0	36
	%	8.33	33.33	47.22	11.11	0	100
Non-government SOC's	No.	6	4	0	0	0	10
	%	60.00	40.00	0	0	0	100

Overall, the quality of SOC's was relatively poor with none characterised as 'excellent'⁸⁵ and 25 SOC's (around 54%) fell short of 'adequate.'⁸⁶ Reasons for overall poor quality will be discussed in detail in the following sections, however common issues included inadequate explanations of Bills, some doubtful conclusions on compatibility with human rights, and generally poor human rights argumentation.

However, it is important to note the distinction between government SOC's (ie SOC's attached to Bills introduced by the government) and non-government SOC's (those attached to Bills introduced by

⁸⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 1, 12 February 2019) 68 [1.238] ('*Report 1 of 2019*').
⁸⁵ This reflects the fact that, while some SOC's were better than others, none performed well against all four criteria I adopted to determine SOC quality.
⁸⁶ While using a different standard to assess SOC quality, Fletcher reached a similar conclusion for each year he studied: Fletcher (n 22) 116.

opposition, third party, or independent Members or Senators). Non-government SOC's assessed were uniformly poor, routinely failing to provide adequate descriptions of Bills, omitting relevant rights, including dubious conclusions on compatibility, and not providing human rights arguments for rights limitations. Against all four criteria, the non-government SOC's studied performed poorly.

Another important point to contextualise the results above is that the three 'perfunctory' government SOC's identified are the result of a disagreement between the Department of Finance and the PJCHR on whether appropriation Bills require a SOC with substantive analysis. For all three of these SOC's the Department of Finance argued the relevant Bills⁸⁷ have a narrow constitutional role to appropriate money and do not confer any broader authority, the implication being that no human rights analysis was required.⁸⁸ In turn, the PJCHR noted levels of government expenditure might have consequences for the realisation of economic, social, cultural, civil and political rights as well as equality and non-discrimination, and that reductions in spending could be a regressive step and limit those rights.⁸⁹ Consequently, the PJCHR argued appropriation Bills are susceptible to human rights analysis and should contain a SOC reflecting this.⁹⁰ While this issue remains unresolved, it means there were no instances of government SOC's attempting a substantive human rights analysis and being categorised as 'perfunctory'.

Overall, while the SOC's analysed skewed poor, I would argue that government SOC's tended to demonstrate a basic level of human rights literacy which, though not always adequate, never amounted to a mere assertion of compatibility without further analysis.

The following Parts will discuss the analysed SOC's in detail, focusing on each of the four criteria. While this analysis draws on all 46 SOC's, it is important to remember that non-government SOC's will tend to be overrepresented in discussion of SOC deficiencies.

V Stand-Alone Documents

This criterion asks whether SOC's are confined to a single document that is sufficiently understandable (including by non-human rights experts such as Parliamentarians) without recourse to additional information.

⁸⁷ Appropriation (Parliamentary Departments) Bill (No 1) 2019–2020 (Cth) ('A(PD) Bill'); Appropriation Bill (No 1) 2019–2020 (Cth) ('A(No 1) Bill'); Appropriation Bill (No 2) 2019–2020 (Cth) ('A(No 2) Bill').

⁸⁸ Eg Explanatory Memorandum, Appropriation (Parliamentary Departments) Bill (No 1) 2019–2020 (Cth) 4 [1]–[4] ('EM A(PD)').

⁸⁹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 4, 10 September 2019) 11–6 [1.23]–[1.37] ('Report 4 of 2019').

⁹⁰ Ibid 13–14 [1.30].

This reflects the expectations of the PJCHR,⁹¹ and accords with the Attorney-General's comments that SOC alert Parliament to relevant human rights issues.⁹² A SOC that is not self-contained, either due to being spread across multiple documents or because it does not provide adequate information, will likely be less effective in informing Parliament about human rights issues. When applying this criterion to SOC, I looked at whether there was a single document capable of being described as a SOC, and whether it contained adequate information including a sufficiently detailed explanation of the Bill's operation, and an explanation of the scope of the relevant rights including their content and in what circumstances they may be legitimately limited. This is important information if non-human rights experts are going to be able to understand the analysis in a SOC without needing to search for further information elsewhere.

A. *Inadequate Descriptions of Bills*

A common issue with SOC was the frequent lack of an adequate description of the Bill⁹³ with the few SOC containing comprehensive descriptions being the exception. This is not a new issue,⁹⁴ but it is one that appears not to have markedly improved since the obligation to produce SOC was introduced.

⁹¹ *Guidance Note 1* (n 53) 3.

⁹² McClelland (n 36) 272.

⁹³ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Related to Terrorism Offences) Bill 2019 (Cth) 3 [4]–[9] ('EM ASIOA'); Explanatory Memorandum, Migration Amendment (Streamlining Visa Processing) Bill 2019 (Cth) 10–11 ('EM MA(SVP)'); Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019 (Cth) 3 ('EM AF'); Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019 (Cth) 83 [2.2]–[2.4] ('EM TLA(CDR)'); EM A(PD) (n 88) 4; Explanatory Memorandum, Appropriation Bill (No 1) 2019–2020 (Cth) 4; Explanatory Memorandum, Appropriation Bill (No. 2) 2019–2020 (Cth) 4; Explanatory Memorandum, Australian Passports Amendment (Identity-matching Services) Bill 2019 (Cth) ('EM APA'); Explanatory Memorandum, National Integrity Commission Bill 2019 (Cth) 78 ('EM NIC'); Explanatory Memorandum, Social Services Legislation Amendment (Payment Integrity) Bill 2019 (Cth) 16, 18, 20 ('EM SSLA(PI)'); Explanatory Memorandum, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (Cth) 18 ('EM SS(A)A'); Explanatory Memorandum, Product Stewardship Amendment (Packaging and Plastics) Bill 2019 (Cth) 20 ('EM PSA'); Explanatory Memorandum, Emergency Response Fund (Consequential Amendments) Bill 2019 (Cth) 5 ('EM ERF'); Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 4 [7] ('EM CLA(SCAC)'); Explanatory Memorandum, Family Law (Self-Assessment) Bill 2019 (Cth) 41 ('EM FL'); Explanatory Memorandum, Australian Bill of Rights Bill 2019 (Cth) 6 ('EM ABR'); Explanatory Memorandum, Treasury Laws Amendment (International Tax Agreements) Bill 2019 (Cth) 57 [3.2]–[3.3] ('EM TLA(ITA)'); Explanatory Memorandum, Currency (Restrictions on the Use of Cash) Bill 2019 (Cth) 19 [2.2]–[2.3] ('EM C(RUC)'); Explanatory Memorandum, National Integrity (Parliamentary Standards) Bill 2019 (Cth) 19 ('EM NI'); Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019 (Cth) 2 ('EM ASADA(SIA)').

⁹⁴ Williams and Burton (n 59) 81–2.

In most SOC's where the description was inadequate, this was because it was overly brief or at a level of generality that was unhelpful. For example, the SOC for the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (Cth) ('TLA(CDR) Bill') contained only three paragraphs outlining the Bill's operation.⁹⁵ It noted the Bill introduces new criminal offences for failing to comply with certain obligations, though it provides few details about these obligations.⁹⁶ The description of the data-sharing elements of the Bill were similarly opaque.⁹⁷ Consequently, proper understanding of the TLA(CDR) Bill required consideration of the rest of the explanatory memorandum, meaning the SOC was not properly stand-alone.

Part of the reason for the inadequacy of descriptions was that some SOC's focused on the rationale for the measures in the Bill, without providing significant detail about the measures themselves. One example of this was the SOC attached to the Australian Passports Amendment (Identity-matching Services) Bill 2019 (Cth) ('APA Bill'). This SOC omitted the usual section providing an overview of the Bill, and though it did provide some details about how the identity matching services would operate,⁹⁸ it devoted significantly more time to outlining the rationale and benefits of the scheme.⁹⁹ While discussion of rationale and benefits of a Bill are certainly relevant for determining human rights compatibility (so useful information in a SOC) this does not displace the need for a proper description of the actual measures themselves.

A number of SOC's were an exception to this trend, providing thorough and comprehensive descriptions.¹⁰⁰ A good example is the SOC attached to the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) ('TEO Bill'). This Bill proposed a system of temporary

⁹⁵ EM TLA(CDR) (n 93) 83 [2.2]–[2.4].

⁹⁶ Ibid 83 [2.4], 86 [2.19]–[2.20].

⁹⁷ Ibid 83 [2.2], 84 [2.8]–[2.9], 85 [2.15].

⁹⁸ EM APA (n 93) 4–5 [15]–[17].

⁹⁹ Ibid 5–6 [18]–[21], [24]–[28], [30], 7 [39].

¹⁰⁰ Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity No 2) Bill 2019 (Cth) v–vi ('EM FWA(No 2)'); Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) 27–34 [1]–[52] ('EM TEO'); Explanatory Memorandum, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 (Cth) 17–9 [2]–[15] ('EM CLA(PPA)'); Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth) v–vi ('EM FWA'); Explanatory Memorandum, Identity-matching Services Bill 2019 (Cth) 40–3 ('EM IS'); Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (Cth) 5–8 [2]–[23] ('EM CTLA'); Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) 25–6 ('EM SSLA(DDT)'); Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 1–3 [1]–[19] ('EM ACA'); Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (Cth) 5–6 [2]–[11] ('EM AML'); Explanatory Memorandum, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) 63–5 [3.2]–[3.13] ('EM TLA(RM)'); Explanatory Memorandum, Student Identifiers Amendment (Higher Education) Bill 2019 (Cth) 5–6 ('EM SIA').

exclusion orders to bar certain individuals from entering Australia for a period of time, as well as return permits which place restrictions on individuals when they re-enter the country.¹⁰¹ The SOC included a comprehensive breakdown of the legislation including details such as the grounds on which orders could be made,¹⁰² limitations that may be placed on an individual before and after their return to Australia,¹⁰³ and how the reviewing authority would operate.¹⁰⁴ This detail meant the Bill was clearly understandable without looking elsewhere, supporting its ability to operate as a stand-alone document.

However, SOC's like the one attached to the TEO Bill were the exception, inadequate descriptions being more common.

B. *Characterisation of Rights and Limiting Principles*

Beyond SOC description of Bills, another factor is whether they characterised rights and outlined the circumstances in which they may be limited. This is particularly pertinent if SOC's are to inform Parliamentarians, many of whom will have no human rights background. As human rights law can be technical and specialised, providing a basic description of the content of rights and how they can be limited is important if SOC's are to be stand-alone documents.

By 'characterisation', I am referring to the identification of the content of a right. For example, the right to privacy under article 17 of the *International Covenant on Civil and Political Rights* ('ICCPR') encompasses elements of protection of the family, home, and data (amongst others),¹⁰⁵ as well as an obligation on states to take positive measures to protect privacy.¹⁰⁶ In terms of the limiting principle, this right may be limited where the limitation is lawful and not arbitrary, which has been interpreted by the United Nations Human Rights Committee ('HRC') as incorporating into article 17 notions of proportionality.¹⁰⁷

I proceeded on the basis that SOC's do not need a comprehensive outline of the scope of a right and how it may be limited, but they do need some basic explanations in order to operate effectively.

Most SOC's relied on the text of the treaty to characterise rights and outline limiting principles. For example, in relation to the right to freedom of movement, the SOC for the Crimes Legislation Amendment

¹⁰¹ EM TEO (n 100) 27 [4].

¹⁰² Ibid 28 [8]–[10], 29–30 [21].

¹⁰³ Ibid 31–2 [33], [35]–[36].

¹⁰⁴ Ibid 29 [15]–[18].

¹⁰⁵ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 541–59 [16.18]–[16.58].

¹⁰⁶ Ibid 540–1 [16.15]–[16.17].

¹⁰⁷ Ibid 535–7 [16.06]–[16.10], quoting Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy)*, 32nd sess (8 April 1988) ('General Comment 16').

(Police Powers at Airports) Bill 2019 (Cth) ('CLA(PPA) Bill') quoted article 12(1), (2) and (4) of the *ICCPR* to characterise the right.¹⁰⁸ Paragraph (3) was also quoted, as this outlines the circumstances in which freedom of movement may be limited.¹⁰⁹ In its analysis the SOC linked this limitation principle to the proportionality analysis the PJCHR has indicated is appropriate for rights limitations.¹¹⁰ While the SOC did not go to more detailed sources such as comments by the HRC, quoting the treaty text was adequate to provide some understanding of the relevance of the freedom of movement. Article 12(2) notes that everyone shall be free to leave any country and article 12(4) notes a right to enter one's own country. This was useful information as the proposed Bill included measures that may bar individuals from airports. Quoting these sections then provided important information on the right to freedom of movement in the context of the measures in the Bill.

However, a significant number of SOC's fell short of this standard, either because they failed to provide any meaningful characterisation of the relevant right or because they failed to identify the limitation principle.¹¹¹ Omissions in either instance could prevent a SOC from being self-contained, as confusion about a rights characterisation or limitation principles may require searching out additional material, which would prevent these SOC's from operating as stand-alone documents.

An example of this issue can be found in the SOC attached to the Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (Cth) ('CTLA Bill'). In relation to the freedom of expression, the SOC merely noted that '[t]he right to freedom of expression is protected in Article 19(2) of the *ICCPR*'¹¹² without providing further information characterising the right. In another example, the SOC attached to the TEO Bill failed to identify a relevant limitation principle. When discussing rights relating to families (specifically, *ICCPR* articles 17 and 23) it included a basic characterisation of the right but with little to

¹⁰⁸ EM CLA(PPA) (n 100) 20–1 [25]–[26].

¹⁰⁹ *Ibid* 21 [26].

¹¹⁰ *Ibid* 21 [28].

¹¹¹ EM TEO (n 100) 34 [53], 35 [61]–[62], 38 [80], [83]; Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 4 [10]–[14] ('EM CCA(AP)'); Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (Cth) xi, xiii–xv ('EM FWLA'); Explanatory Memorandum, Aged Care Quality and Safety Commission Amendment (Worker Screening Database) Bill 2019 (Cth) 5–6 ('EM ACQSCA'); EM APA (n 93) 6 [34]; EM CTLA (n 100) 15 [46]; EM NIC (n 93) 78–9; EM SSLA(PI) (n 93) 16, 18–9, 21; EM PSA (n 93) 20; EM FL (n 93) 42; Explanatory Memorandum, National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (Cth) 10–1 ('EM NCCPA'); EM ABR (n 93) 6; EM NI (n 93) 19; EM ASADA(SIA) (n 93) 4; Explanatory Memorandum, National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No 2) (Cth) 9–10.

¹¹² EM CTLA (n 100) 15 [46].

no detail about how the right may be limited.¹¹³ It provides some indication in this regard as the quoted text of article 17 included that ‘no one shall be subject to arbitrary or unlawful interference...’. This implies interference which is lawful and not arbitrary may be permitted, but the SOC did not explain this. Further, it could have noted the HRC’s development of the meaning of these terms,¹¹⁴ or PJCHR notes on how non-absolute rights may be limited.¹¹⁵

A failure to characterise a right or to explain how it may be limited meant SOC’s did not properly establish the basis for their human rights analysis. Consequently, for a significant number of SOC’s, this failure undermined their ability to operate as stand-alone documents, as additional resources or human rights expertise would be required to properly understand their analysis.

However, these poorer SOC’s were matched by a large number of SOC’s which included more nuanced discussion. For example, SOC’s referenced jurisprudence of the HRC,¹¹⁶ the Committee on Economic, Social and Cultural Rights (‘CESCR’),¹¹⁷ comments from the PJCHR,¹¹⁸ or (in one instance) academic commentary¹¹⁹ to help outline the scope of rights or how they may be limited. This is relevant because SOC’s that did this presented more thorough and nuanced explanations, a helpful addition for any readers without a human rights background.

An example of this was a SOC noting how the HRC has interpreted ‘arbitrariness’ (in the context of the prohibition on arbitrary detention in article 9 of the *ICCPR*) to relate to elements of ‘inappropriateness, injustice, and a lack of predictability.’¹²⁰ Another SOC referenced the CESCR’s characterisation of the right to social security under article 9 of the *International Covenant on Economic, Social and Cultural Rights* (‘*ICESCR*’). The SOC attached to the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (Cth) (‘SS(A)A Bill’) quoted the CESCR’s comment that this

¹¹³ EM TEO (n 100) 35 [61]–[62].

¹¹⁴ See, eg, *General Comment 16* (n 107).

¹¹⁵ *Guide to Human Rights* (n 42) 7–8 [1.15]–[1.22].

¹¹⁶ EM ASIOA (n 93) 5 [16], 7 [24]; EM TEO (n 100) 40 [92]; EM CLA(PPA) (n 100) 23–4 [48]–[49]; EM CCA(AP) (n 111) 5 [15], [19]; EM MA(SVP) (n 93) 11–2, 14; Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth) 11 (‘EM MA(SCT)’); Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) 25 (‘EM MLA(RPC)’); EM TLA(CDR) (n 93) 84 [2.7]; EM APA (n 93) 4 [14]; EM IS (n 100) 44; EM CTLA (n 100) 18 [62]; EM SSLA(PI) (n 93) 22; EM SSLA(DTT) (n 100) 32; EM SS(A)A (n 93) 23; EM TLA(ITA) (n 93) 58 [3.6]; EM C(RUC) (n 93) 21 [2.18]; EM ACA (n 100) 6 [30], 11 [58]; Explanatory Memorandum, Native Title Legislation Amendment Bill 2019 (Cth) 7 [10], 13 [45], 20–1 [91]–[92] (‘EM NTLA’); EM AML (n 100) 8 [29].

¹¹⁷ EM CCA(AP) (n 111) 4 [8]; EM FWA (n 100) vii; EM SSLA(PI) (n 93) 20, 22; EM SS(A)A (n 93) 20; EM NTLA (n 116) 7–8 [11]–[12]; EM FWA(No 2) (n 71) vii.

¹¹⁸ EM CTLA (n 100) 15 [45], 16 [49]; EM NTLA (n 116) 10 [23] n 9, 16 [65], 21 [97]; EM TLA(RM) (n 100) 65–6 [3.15], 70 [3.31].

¹¹⁹ EM CLA(PPA) (n 100) 22 [34].

¹²⁰ EM ASIOA (n 93) 5 [16].

article requires a country to provide ‘a minimum essential level of benefits to individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education’.¹²¹ These more comprehensive statements gave a good outline of the scope of this right and why it is relevant to Australia’s social security system generally, and the Cashless Debit Card programme in particular.

Finally, there were instances of SOC’s referencing additional international agreements to provide detail on Australia’s human rights obligations. Though not required, the PJCHR has noted that this may be helpful¹²² and I think it can provide important context for understanding a Bill’s human rights impact. For example, in relation to the rights of the child, the SOC attached to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) (‘CLA(SCAC) Bill’) discussed Australia’s obligations under the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*.¹²³ The Optional Protocol was used to demonstrate some of the more specific human rights obligations Australia had under international law, for example, ‘criminalising the offering, delivery [of] or accepting a child for sexual exploitation’.¹²⁴ This information provided important context for the measures included in that Bill, and made the SOC’s analysis easier to follow.¹²⁵

However, not all references to other instruments were so helpful or appropriate. The PJCHR has noted the Refugee Convention may be useful for interpreting some of Australia’s human rights obligations.¹²⁶ This convention was referenced in one SOC, though only to say that obligations under that convention are not included in the definition of human rights under the *Scrutiny Act*, so would not be discussed.¹²⁷ This reference appeared to flag the Department of Home Affairs’ unwillingness to go beyond basic requirements in relation to SOC’s, rather than representing an attempt to add useful information.

Further, there were two examples of SOC’s¹²⁸ invoking international instruments in a manner that I think was more likely to mislead than inform, with both referencing Convention number 87¹²⁹ of the International Labour Organisation. These SOC’s noted article 8(1) of the

¹²¹ EM SS(A)A (n 93) 20.

¹²² *Guidance Note 1* (n 53) 3.

¹²³ EM CLA(SCAC) (n 93) 4–5 [10].

¹²⁴ *Ibid* 4 [10].

¹²⁵ See *ibid* 6–7 [22]–[30].

¹²⁶ *Guidance Note 1* (n 53) 3.

¹²⁷ Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth) 10 (‘EM MA(RMT)’).

¹²⁸ EM FWA (n 100) vii, x; EM FWA(No 2) (n 100) vii.

¹²⁹ *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

Convention obliges workers and their organisations to obey the law, and used this to justify the regulation of unions. However, the SOC neglected to mention that article 8(2) of the Convention states that the law shall not impair the rights protected under the Convention. This is particularly relevant as the PJCHR found that the Bills were likely incompatible with human rights.¹³⁰ Accordingly, this was a selective use of international instruments which did not accurately convey the state of the relevant international law, so could potentially mislead rather than inform.

On the whole then, most SOC included basic yet adequate characterisation of rights and identification of limitation principles, generally relying on the text of the relevant treaty provisions. Some also included more sophisticated characterisation, drawing on appropriate guidance materials and additional treaty provisions. However, a significant number failed to provide adequate information and, I argue, some of the treaties invoked were misused.

C. *Conclusion on SOC as Stand-Alone Documents*

One final consideration is that of the 46 Bills considered, for 25 the PJCHR requested further information from the legislative proponent, suggesting that the SOC did not contain sufficient information to come to a conclusion on human rights compatibility. That is, they did not function as stand-alone documents. Of the remaining 21 SOC, for 14 of these the PJCHR did not provide any human rights analysis, either because the Bills were put forward by private Members or Senators, or because the Bill was similar to legislation previously analysed by the PJCHR. In both instances the PJCHR had no cause to consider whether the SOC provided insufficient information and ask for further details. Consequently, of the 32 SOC examined, in only 7 was there sufficient information for the PJCHR to come to a conclusion on human rights compatibility. In addition to SOC often lacking adequate descriptions of Bills and the adequate yet mixed level of rights characterisation and identification of limitation principles, this factor further suggests that SOC generally did not meet the criteria of being stand-alone documents. Consequently, though there were some examples of SOC that did well in this area, a large portion of SOC failed to effectively meet the criterion of being a stand-alone document, which undermined their overall quality.

¹³⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny report* (Scrutiny Report No 3, 30 July 2019) 15 [1.34], referencing Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 12, 28 November 2017) 120–1 [2.80], 127 [2.105], 131 [2.124], 136 [2.140]. Also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 4, 9 April 2020) 77 [2.87], 84–5 [2.104], 90 [2.119]–[2.120], 96–7 [2.135] (*Report 4 of 2020*).

VI Identification of Human Rights

This criterion asks whether the SOC identifies the full range of human rights engaged by a Bill. This requirement is implied by the *Scrutiny Act’s* obligation that a SOC include a human rights compatibility assessment,¹³¹ as well as the Attorney-General’s expectation that the SOC will inform Parliament about relevant human rights issues.¹³² The PJCHR also expects that SOC’s identify rights engaged by a Bill, though it does not require analysis of rights engaged in a minor or tangential way.¹³³ Considerations I focused on in applying this criterion included looking at which rights were identified and omitted in SOC’s, the distribution of rights amongst the SOC’s (ie whether there were any ‘gaps’ in the rights discussed), and whether SOC’s discussed instances of rights promotion by Bills. While this last item is not a priority for the PJCHR,¹³⁴ I think it is important to consider if SOC’s are to be capable of serving their role of informing Parliament.

A. Identification and Omission of Rights

The identification of rights in the 46 SOC’s was generally good (Table 2). Across the sample, most relevant rights were identified, though a substantial number of SOC’s failed to identify at least one relevant right.¹³⁵

Table 2
Identification of Rights in SOC’s

		Number of SOC’s	%
All SOC’s	All rights discussed	26	56.62
	One or more rights missing	20	43.48
	Total	46	100.00
Government SOC’s	All rights discussed	21	58.33
	One or more rights missing	15	41.67
	Total	36	100.00
Non-government SOC’s	All rights discussed	5	50.00
	One or more rights missing	5	50.00
	Total	10	100.00

On this analysis, over 40% of SOC’s failed to discuss at least one relevant right, though this was more common in non-government than government SOC’s.

¹³¹ *Scrutiny Act* (n 26) s 8(3).
¹³² McClelland (n 36) 272.
¹³³ *Guidance Note 1* (n 53) 3.
¹³⁴ *Guide to Human Rights* (n 42) ii.
¹³⁵ I determined whether rights were omitted by comparing the rights discussed in the SOC to those in the PJCHR report. Where there was no PJCHR analysis, I checked the description of the Bill and used this to gauge which rights appeared to be relevant.

However, of the 15 government SOC's that failed to identify a right, three of these were the appropriation Bills discussed above in Part IV. The failure in these was due to an argued lack of requirement for human rights analysis in SOC's attached to appropriation Bills, not due to the SOC's attempting and failing to identify relevant rights. Further, of the remaining 12 government SOC's that failed to identify rights, 8 of these omitted only one right.¹³⁶ Accordingly, of the government SOC's that attempted a substantive human rights analysis, approximately 64% of the time the SOC identified all relevant rights and most of the remaining SOC's omitted only one. This demonstrates that most of the rights issues raised by the Bills discussed in the government SOC's were addressed. This points to these SOC's being relatively effective at identifying human rights issues.

B. Distribution of Rights Discussed in SOC's

In the SOC's analysed, there was a clear preference for discussing rights from the *ICCPR* compared to other instruments (Table 3).

¹³⁶ Explanatory Memorandum, Transport Security Amendment (Serious Crime) Bill 2019 (Cth); EM AML (n 100); EM NTLA (n 116); EM ERF (n 93); EM MA(RMT) (n 127); EM CCA(AP) (n 111); EM TEO (n 100); EM ASIOA (n 93).

Table 3
*Instances of Discussion of Rights in SOC*s

Instrument ¹³⁷	Right discussed	Number*
International Covenant on Civil and Political Rights	Article 17 (privacy)	32
International Covenant on Civil and Political Rights	Article 14 (fair trial)	20
International Covenant on Civil and Political Rights	Article 9 (liberty)	11
Convention on the Rights of the Child ¹³⁸	Article 3 (child's best interests)	11
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ¹³⁹	All rights	11
International Covenant on Civil and Political Rights	Article 19 (freedom of expression)	10
International Covenant on Civil and Political Rights	Article 2 (equality and remedy)	10
International Covenant on Civil and Political Rights	Article 26 (non-discrimination)	9
International Covenant on Civil and Political Rights	Article 12 (freedom of movement)	8
International Covenant on Economic, Social and Cultural Rights	Article 6 – right to work	8
Convention on the Rights of Persons with Disabilities ¹⁴⁰	All rights	7
International Convention on the Elimination of all Forms of Racial Discrimination ¹⁴¹	All rights	5
Convention on the Elimination of All Forms of Discrimination Against Women ¹⁴²	All rights	3

* Number of SOCs discussing the right or instrument

While the preponderance of *ICCPR* rights in SOCs might suggest SOC drafters have blind spots in relation to other international instruments, the frequency of the omission of rights from SOCs does not back this up (Table 4).¹⁴³

¹³⁷ For a full list of all treaties including full citations, see above n 40.

¹³⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹³⁹ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁴⁰ Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

¹⁴¹ Opened for signature 21 December 1965, 660 UNTS 212 (entered into force 4 January 1969).

¹⁴² Opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981).

¹⁴³ Whether a right was omitted was generally determined by comparing the rights discussed in the SOC with those discussed in the relevant PJCHR scrutiny report.

Table 4
Instances of Omissions of Rights from SOC^s

Instrument	Right omitted	Number*
International Covenant on Civil and Political Rights	Article 2 (equality and remedy)	4
International Covenant on Civil and Political Rights	Article 12 (freedom of movement)	4
International Covenant on Civil and Political Rights	Article 14 (fair trial)	3
International Covenant on Civil and Political Rights	Article 21 (freedom of assembly)	3
Convention on the Rights of the Child	Article 9 (right to family life)	3
International Covenant on Civil and Political Rights	Article 17 (privacy)	2
International Covenant on Civil and Political Rights	Article 19 (freedom of expression)	2
International Covenant on Economic, Social and Cultural Rights	Article 6 (right to work)	1

* Number of SOC^s omitting the right

The most frequently omitted rights identified by the PJCHR were those contained in the *ICCPR*.¹⁴⁴ That there is significant overlap between the rights most frequently discussed and those most frequently omitted suggests the failure to engage with many non-*ICCPR* rights is not a blind spot of SOC drafters, but that these rights are less relevant to the scrutiny process as developed by the PJCHR. This is in line with the comment by the PJCHR that the *ICCPR* and *ICESCR* are the primary sources of rights, and that the other instruments tend to be more specialised and build off this foundation.¹⁴⁵ On this basis, the SOC^s considered did not systematically fail to discuss any particular rights, which further supports the conclusion that the identification of rights in the 46 SOC^s was quite strong.

C. Discussion of Rights Promotion

Finally, a significant number of SOC^s discussed human rights promotion.¹⁴⁶ An example of this was the SOC attached to the National

¹⁴⁴ Not included in this table are rights omitted from the SOC^s attached to the A(PD) Bill (n 87), A(No 1) Bill (n 87), and A(No 2) Bill (n 87) as it was not possible to determine which rights were omitted based on PJCHR analysis or the contents of the SOC. Further, rights omitted from the SOC for the Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019 (Cth) were not included because it omitted every right contained in the seven treaties.

¹⁴⁵ *Guide to Human Rights* (n 42) 10 [1.26].

¹⁴⁶ EM CCA(AP) (n 111) 3–4 [7]–[9]; Explanatory Memorandum, National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019 (Cth) 10–1 (‘EM NDISA’); EM IS (n 100) 57–8; EM SS(A)A (n 93) 26; EM ERF (n 93) 5; EM CLA(SCAC) (n 93) 5–6 [13]–[21], 7 [28]–[30], 11 [50]–[51], 13–4 [67]–[70]; EM ABR (n 93) 6; EM TLA(ITA) (n 93) 59

Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019 (Cth) ('NDISA Bill'). This SOC noted the Bill promoted the rights of people with a disability by putting in place measures to prevent carers from engaging in behaviour which is abusive or exploitative.¹⁴⁷

When included, arguments about human rights promotion generally appeared to be appropriate and reasonable. While not subject to the structured framework that is used to analyse rights limitations, discussion of rights promotion was often appropriate in the sense that the measures identified would likely affect the identified rights. Additionally, they appeared to be reasonable in the sense that arguments employed were not particularly strained or unconvincing. Essentially, measures that were argued to promote rights were probably capable of promoting the identified rights, and likely did in the circumstances. On the whole then, I found discussion of rights promotion was relatively common as well as appropriate.

D. *Conclusion on Identification of Rights*

All told, SOC's performed relatively well in this area. While a significant number of SOC's failed to identify at least one relevant right, in the case of most government SOC's, it was only one right that was omitted. Further, the rights discussed broadly reflected those that were relevant under the *Scrutiny Act*. While non-*ICCPR* rights were much less frequently discussed than *ICCPR* rights, this reflected the overall emphasis of the parliamentary scrutiny regime as it has developed through the practice of the PJCHR. Further, a significant number of SOC's contained relevant discussion of how the Bills promoted human rights, an important feature if SOC's are to help inform parliamentary debate on the human rights merits of Bills. Consequently, while the 46 SOC's studied left room for improvement in this area, they were broadly successful in identifying human rights.

VII Conclusions on Compatibility

This criterion is concerned with the plausibility of the human rights conclusion reached by the SOC. Specifically, is it plausible within the framework provided by international human rights law? This standard is based on the Attorney-General's comment that SOC's may justify restrictions on rights 'as permitted by the human rights treaties',¹⁴⁸ and

[3.14]; EM NTLA (n 116) 8 [13], 11 [31], 12–4 [34]–[50], 17–20 [71]–[85], 22 [100]–[101]; Explanatory Memorandum, Health Legislation Amendment (Data-matching and Other Matters) Bill 2019 (Cth) 4 ('EM HLA'); Explanatory Memorandum, Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019 (Cth) 6–7; EM SIA (n 100) 9.

¹⁴⁷ EM NDISA (n 146) 10–1.

¹⁴⁸ McClelland (n 36) 272.

the PJCHR's analytical framework which focuses on whether rights limitations are justifiable under international human rights law.¹⁴⁹

For the purposes of this analysis, I used the PJCHR's conclusions on compatibility in their scrutiny reports as a benchmark that the SOC conclusion can be compared against, due to those reports providing a relatively rigorous and objective point of comparison. However, a SOC coming to a different conclusion to the PJCHR on compatibility will not necessarily be an issue. After all, international human rights law is a subject on which reasonable minds may differ. However, in such instances I looked to see whether SOC's provided some nuance in their conclusion, for example, by noting that plausible human rights arguments might come to an alternative conclusion, or by identifying if the analysis relies on less popular human rights interpretations. If there is a gap between the PJCHR and SOC conclusions and no recognition of an alternative conclusion in the SOC's analysis, this could suggest the conclusion is suspect — a not unlikely possibility as existing literature has yet to identify a SOC admitting a Bill is incompatible with human rights.¹⁵⁰

As a starting point, all 46 SOC's claimed the relevant Bill was compatible with human rights. Of these 46, the PJCHR noted that 10 were likely compatible,¹⁵¹ 21¹⁵² were likely incompatible,¹⁵³ and the PJCHR came to no conclusion on 15.¹⁵⁴ Setting aside these 15, this means that for 21 of the remaining 31 Bills (about 67%), the SOC came to a different conclusion to the PJCHR on the compatibility of the Bill. Further, these SOC's did not acknowledge that there may be alternative human rights analysis that is plausible (and potentially stronger) that would result in a different conclusion.¹⁵⁵ They simply stated compatibility without adding nuance.

¹⁴⁹ *Guide to Human Rights* (n 42) 7–9 [1.12]–[1.23].

¹⁵⁰ Eg Fletcher (n 22) 115.

¹⁵¹ Where PJCHR language suggested the Bill was compatible, likely compatible, or compatible but recommended monitoring.

¹⁵² For two Bills, the Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth) and Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth), the PJCHR concluded they were compatible but with a dissenting opinion: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 6, 5 December 2019) 83–98 [2.12]–[2.46], 117–29 [1.1]–[1.39] (*'Report 6 of 2019'*); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 1, 5 February 2020) 143–56 [2.97]–[2.126], 167–9 [1.17]–[1.22] (*'Report 1 of 2020'*). Reading the SOC's and the legal advice provided to the PJCHR, I think the dissenting opinions were the more plausible conclusions so characterised them as likely incompatible.

¹⁵³ Where PJCHR language suggests the Bill is incompatible, possibly incompatible, likely incompatible or there is a risk of incompatibility.

¹⁵⁴ This is due to the PJCHR policy of not analysing private Members' or Senators' Bills unless they progress: *Report 4 of 2019* (n 89) 10 [1.21], or due to a lack of information: *Report 1 of 2020* (n 152) 93 [1.272].

¹⁵⁵ See, eg, EM FWA(No 2) (n 100) xii–xiv. Cf *Report 4 of 2020* (n 130) 90 [2.120].

As noted above, due to the technical, complex and sometimes contested nature of international human rights law, disagreement between SOC and PJCHR conclusions does not necessarily mean the SOC conclusion is incorrect. That said, the lack of nuance in SOC conclusions and the fact that no SOC to date has admitted incompatibility with human rights suggests, I would argue, that for SOCs claiming compatibility is the default position regardless of the merits of the associated Bill. It is not a conclusion arrived at via appropriate argumentation and analysis. If this is the case, then the gap in conclusions between SOCs and the PJCHR is due less to a difference of opinion on the finer points of human rights law and due more to an unwillingness to admit any shade of incompatibility by SOC drafters.

About 67% of SOC conclusions being at least questionable would be concerning if representative of SOCs generally. However, these numbers should be understood in context. The PJCHR does not comment on Bills that do not raise human rights concerns, or where rights limitations are already adequately justified.¹⁵⁶ Accordingly, this suggests the PJCHR agrees with the conclusions reached in SOCs for all Bills passed during the second half of 2019 that fall outside the sample analysed in this article (as I have focused on Bills that raised human rights concerns). Consequently, instances of a gap between PJCHR and SOC conclusions in the period studied was 21 out of 173,¹⁵⁷ or about 12% of the time. This suggests that SOCs in most cases reached reasonable conclusions on the compatibility of Bills with human rights.

In light of this analysis, I would argue there are serious questions regarding the conclusions in some SOCs. SOCs appear to be routinely asserting compatibility, regardless of the contents of the relevant Bill. This reflects poorly on SOC overall quality. However, this should not detract from the fact that a vast majority of all SOCs introduced over the studied period came to reasonable conclusions on compatibility, even if this was due to the underlying law generally being compatible with human rights, rather than appropriately rigorous human rights analysis in the SOCs.

VIII Quality of Human Rights Argumentation

This final criterion relates to how SOCs justify limitations on human rights and the quality of the argumentation that underpins their conclusions. In particular, my focus is on whether SOCs present arguments using an international human rights legal framework as suggested by the Attorney-General¹⁵⁸ and PJCHR Guidance Note 1.¹⁵⁹

¹⁵⁶ See, eg, *Report 1 of 2019* (n 84) 68 [1.238]

¹⁵⁷ The total number of Bills for this period was 188, minus 15 in which the PJCHR did not reach a conclusion.

¹⁵⁸ McClelland (n 36) 272.

¹⁵⁹ *Guidance Note 1* (n 53) 2–3.

Based on this guidance, I focused on the following aspects of SOC analysis. Firstly, the PJCHR has indicated some rights are absolute,¹⁶⁰ meaning they cannot be limited by Australia.¹⁶¹ Consequently, SOC's should not argue that Bills permissibly limit these rights. Secondly, for all other (ie, non-absolute) rights, the PJCHR indicates that limitations should generally be justified using a structured proportionality analysis. This means the rights limitation must be *prescribed by law*, pursue a *legitimate objective*, the limitation must be *rationally connected* to that objective, and the limitation must be *proportionate* to the objective sought.¹⁶² Thirdly, SOC's should argue for, rather than simply assert, conclusions and they should provide evidence to back up these arguments. This follows from the PJCHR's expectation that SOC's provide a 'detailed and evidence-based assessment.'¹⁶³ Finally, SOC's should consider if affected groups are particularly vulnerable when weighing up whether the impact of a measure is proportionate.¹⁶⁴

A. *Analysis of Absolute Rights*

One area in which SOC's performed well was their analysis of absolute rights. While it was rare for a SOC to acknowledge that a right is absolute,¹⁶⁵ analysis of absolute rights focused on arguing that the Bill would not limit the right, rather than arguing that limitations were permissible.

For example, the Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth) ('MA(SCT) Bill') sought to provide new grounds to cancel non-citizen's visas or refuse visa applications.¹⁶⁶ The right not to be subject to torture, cruel, inhuman or degrading treatment or punishment includes an obligation not to send individuals into countries where they may be subject to the same treatment, referred to as 'non-refoulement' obligations.¹⁶⁷ The measures in the Bill could result in the removal of individuals from Australia to other countries which potentially engages non-refoulement obligations. The attached SOC identified this issue and argued that there were sufficient

¹⁶⁰ Absolute rights identified by the PJCHR include: 'the right not to be subject to torture, cruel, inhuman or degrading treatment; the right not to be subject to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; [and] the right to be recognised as a person before the law': *Guide to Human Rights* (n 42) 7 [1.14].

¹⁶¹ *Ibid*

¹⁶² *Ibid* 7–8 [1.15]–[1.22]. However, it notes there is variation between rights as some rights have specific limitation clauses, and some instruments have general limitation clauses: at 7 [1.15]. In addition, some rights require that limitations not be 'arbitrary' or 'unlawful' which generally means a limitation must be necessary, reasonable, and proportionate with adequate safeguards: at 8 [1.22].

¹⁶³ *Guidance Note 1* (n 53) 4.

¹⁶⁴ *Ibid* 3–4.

¹⁶⁵ For one of the few examples, see EM MLA(RPC) (n 116) 25.

¹⁶⁶ EM MA(SCT) (n 116) 9.

¹⁶⁷ Joseph and Castan (n 105) 262 [9.98].

safeguards in place to detect instances of refoulement and prevent them from occurring.¹⁶⁸ The framing of the argument demonstrated the SOC understood the important distinction between absolute and non-absolute rights, and argued the matter appropriately.

In this aspect then the 46 SOC's met the requirement set out by the PJCHR that SOC's should not argue that limitations on absolute rights are permissible.

B. *Analysis of Non-Absolute Rights*

The following paragraphs discuss how the different elements of the structured proportionality analysis were addressed. Generally, most SOC's addressed each element of this analysis, though the quality of discussion in relation to each was frequently quite poor.

1 *Prescribed by Law*

The term 'prescribed by law' requires the rights limitation to have a clear legal basis and be sufficiently precise.¹⁶⁹ One consequence of these requirements is that discretionary powers must be properly circumscribed and incorporate safeguards to prevent their abuse.¹⁷⁰

Whether measures were according to the law was addressed in a significant number of SOC's,¹⁷¹ though many others failed to discuss this point.¹⁷² At one level, whether measures contained in Bills were prescribed by law was not an issue. A Bill becomes an Act once passed by Parliament so, at least in a narrow sense, all measures addressed by SOC's were prescribed by law. However, 'prescribed by law' also requires that the law be sufficiently accessible and precise for individuals to understand the legal consequences of their actions.¹⁷³ Essentially, it has a qualitative component that goes beyond mere authorisation by something designated a 'law'. Only a small number of SOC's provided a more in-depth analysis of 'prescribed by law' in this way.¹⁷⁴ Most SOC's which addressed the point merely noted the measures would take effect pursuant to a statute, therefore were prescribed by law.¹⁷⁵ However, there was only one instance where

¹⁶⁸ EM MA(SCT) (n 116) 11–2.

¹⁶⁹ *Guide to Human Rights* (n 42) 7 [1.16].

¹⁷⁰ *Ibid* 7–8 [1.17].

¹⁷¹ See, eg, EM TEO (n 100) 34 [56]; EM CLA(PPA) (n 100) 21 [28], 24 [53]; EM CCA(AP) (n 111) 5 [20]; EM FWA (n 100) vii; EM FWLA (n 111) vii; EM MA(SVP) (n 93) 12; EM MA(SCT) (n 116) 11; EM CTLA (n 100) 11 [31]; EM SSLA(DTT) (n 100) 27.

¹⁷² Eg EM ASIOA (n 93); EM MA(RMT) (n 127); EM MLA(RPC) (n 116); EM NDISA (n 146); EM ACQSCA (n 111); EM AF (n 93); EM TLA(CDR) (n 93); EM APA (n 93); EM IS (n 100); EM NIC (n 93); EM SSLA(PI) (n 93); EM SS(A)A (n 93); EM PSA (n 93).

¹⁷³ *Guidance Note 1* (n 53) 2.

¹⁷⁴ See, eg, EM MA(SVP) (n 93) 12; EM MA(SCT) (n 116) 11.

¹⁷⁵ See, eg, EM TEO (n 100) 34 [56]; EM CLA(PPA) (n 100) 21 [28], 24 [53]; EM CCA(AP) (n 111) 5 [20]; EM FWA (n 100) vii; EM FWLA (n 111) vii; EM CTLA (n 100) 11 [31]; EM SSLA(DTT) (n 100) 27.

PJCHR analysis suggested that measures in a Bill may not meet this ‘quality of law’ requirement.¹⁷⁶ This suggests that, while SOC’s which addressed this point did not provide substantive analysis, in most cases this was appropriate as few measures contained in Bills were contentious in this respect.

Overall, the discussion of whether measures were prescribed by law was uneven, with many addressing the point appropriately, though a large number failing to discuss this element of the proportionality analysis. This left the human rights analysis in these SOC’s incomplete, and meant many fell short of the standards set out by the PJCHR.

2 *Legitimate Objective*

‘Legitimate objective’ refers to the purpose behind the rights limitation. This objective may be prescribed by the relevant limitation principle,¹⁷⁷ or may be left open ended.¹⁷⁸ The objective must address an issue of ‘pressing or substantial concern’ and should be supported by evidence.¹⁷⁹

Most SOC’s identified legitimate objectives when justifying human rights limitations. However, the identification of a legitimate objective was often superficial, relying on a statement of the legitimate objective without providing argument or evidence for how it related to a pressing or substantial concern.

In this regard the SOC attached to the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) (‘CCA(AP) Bill’) was an anomaly. In justifying a limitation on the right to privacy, this SOC identified its objective as being to ‘reduce the malicious use of carriage services to encourage trespass, property damage or theft on private property.’¹⁸⁰ In justifying this objective, the SOC quoted the HRC and noted the communication the Bill intended to limit was not the type that article 17 of the *ICCPR* sought to protect.¹⁸¹ It also discussed some of the consequences of the criminal activity that the measure sought to address, and argued that this objective was compatible with the goals and aims of the *ICCPR*.¹⁸² This was unusual for the fact that it provided additional information and argumentation to support the identified objective. More commonly, SOC’s simply stated their objective and then moved on.¹⁸³

¹⁷⁶ See, eg, *Report 1 of 2020* (n 152) 112 [2.24]–[2.25], in relation to measures in the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth).

¹⁷⁷ Eg *ICCPR* (n 40) art 18(3).

¹⁷⁸ Eg *ibid* art 17(1).

¹⁷⁹ *Guidance Note 1* (n 53) 2.

¹⁸⁰ EM CCA(AP) (n 111) 5 [17].

¹⁸¹ *Ibid* 5 [18]–[19].

¹⁸² *Ibid* 5–6 [17], [20].

¹⁸³ Eg, EM TLA(RM) (n 100) 68 [3.19], 69 [3.29].

While SOC's generally did a good job identifying legitimate objectives, a significant issue was the lack of evidence used to support the objectives identified. Of the 46 SOC's, only 13 (or about 28%) used any sort of evidence. Accordingly, most SOC's failed to provide evidence. However, in those that did, the evidence was generally helpful in supporting the objectives. For example, one SOC included a reference to the National Terrorism Threat Level to justify the need for further police powers in airports,¹⁸⁴ and three referenced findings of the Royal Commission into Trade Union Governance and Corruption to justify regulation of unions.¹⁸⁵

However, evidence provided would have benefited from being more specific and detailed. For example, in relation to the Bill proposing increased police powers in airports, while a reference to the National Terrorism Threat Level was useful, more particular evidence demonstrating that airports are a prominent target for terrorism or of the number of discovered and averted terrorist plots against airports over the last decade would have significantly strengthened the SOC's argument in establishing the objective responded to a substantial and pressing concern.

Based on these considerations, the quality of argumentation in SOC's in establishing measures related to a legitimate objective was poor. While almost all SOC's addressed this element of the analysis, very few provided a detailed explanation of this point or evidence to back it up. Accordingly, most failed to meet the standard set by the PJCHR.

3 *Rational Connection*

The term 'rational connection' requires that measures creating the limitation are likely to achieve the legitimate objective.¹⁸⁶ Essentially, a measure which limits rights cannot be justified if it is not effective in achieving the legitimate objective. Rational connection should not be asserted but argued for with supporting evidence.¹⁸⁷

Again, there was inconsistency in the way SOC's addressed this part of the analysis. Overall, most SOC's went some way to identifying a rational connection between rights limitations and the legitimate objective.¹⁸⁸ However, how they did this was inconsistent.

A large number of SOC's addressed rational connection by providing an appropriate argument as to why the relevant limitations were capable of achieving the legitimate objective, in line with PJCHR

¹⁸⁴ EM CLA(PPA) (n 100) 21 [29];

¹⁸⁵ EM FWA (n 100) v, viii–x, xii–xiii, xv; EM FWLA (n 111) v–xii, xv; EM FWA(No 2) (n 100) v–viii, x–xi, xiii, xv–xvi.

¹⁸⁶ *Guide to Human Rights* (n 42) 8 [1.19].

¹⁸⁷ *Guidance Note 1* (n 53) 2.

¹⁸⁸ Eg EM MA(RMT) (n 127); EM MA(SVP) (n 93); EM MLA(RPC) (n 116); EM ACQSCA (n 111); EM AF (n 93); EM TLA(CDR) (n 93); EM NIC (n 93); EM SSLA(PI) (n 93); EM PSA (n 93).

expectations.¹⁸⁹ However, some SOC's relied on assertions rather than arguing this point.¹⁹⁰ Further, a significant number of SOC's provided the relevant information to demonstrate a rational connection, yet did not directly address this point in their argument.¹⁹¹ For example, the SOC attached to the Treasury Laws Amendment (International Tax Agreements) Bill 2019 (Cth) ('TLA(ITA) Bill') argued measures allowing Australian and Israeli tax authorities to share taxation-related information were compatible with the right to privacy.¹⁹² It stated that the measures pursued the legitimate objective of combatting tax evasion.¹⁹³ It then explained that this information improves the ability of Australian and Israeli authorities to undertake compliance activities that protect the integrity of their tax systems, and linked the measures to international standards set by the OECD to improve tax system integrity.¹⁹⁴ These factors point towards the measures being rationally connected to the legitimate objective, yet the SOC never stated this. This is an issue if SOC's are intended to inform Parliamentary debate, as clear and direct human rights analysis is more likely to be properly understood by individuals unfamiliar with international human rights law.

While most of the SOC's analysed either noted that a rational connection was present or provided sufficient information to demonstrate this, SOC's again performed poorly against the PJCHR's expectation that this connection be supported by evidence.

As noted above, only 13 SOC's included any form of evidence. Of these, most used the evidence to demonstrate that the legitimate objective is related to a concern that is pressing or substantial. While two SOC's used evidence to establish a rational connection, the first of these only provided vague evidence of the effectiveness of the relevant measures,¹⁹⁵ and the second (though more detailed) was selective about the findings of the referenced studies¹⁹⁶ with these studies' overall results being more equivocal on the effectiveness of the measures than the SOC suggested.¹⁹⁷ Consequently, most SOC's failed to provide any

¹⁸⁹ See, eg, EM ASIOA (n 93) 5 [17], 6 [22]; EM CLA(PPA) (n 100) 22 [38]–[39]; EM FWA (n 100) viii, xii–xiv, xvi; EM MA(SCT) (n 116) 11; EM CTLA (n 100) 11 [32]; EM SS(A)A (n 93) 19, 21–2, 24; EM CLA(SCAC) (n 93) 9 [39].

¹⁹⁰ See, eg, EM TEO (n 100) 34 [56]; EM CCA(AP) (n 111) 5–6 [20]; EM FWLA (n 111) vii, ix–x, xii.

¹⁹¹ See, eg, EM MA(SCT) (n 116) 11; EM NDISA (n 146) 11–2; EM APA (n 93) 4–5 [15]–[23]; EM IS (n 100) 46–50, 53, 57–8; EM SSLA(DTT) (n 100) 30–2; EM CLA(SCAC) (n 93) 12 [55]; EM NCCPA (n 111) 10; EM TLA(ITA) (n 93) 58 [3.9]–[3.10]; EM C(RUC) (n 93) 20–1 [2.8], [2.14]; EM ACA (n 100) 11 [53].

¹⁹² EM TLA(ITA) (n 93) 57 [3.1], [3.5].

¹⁹³ *Ibid* 58 [3.7].

¹⁹⁴ *Ibid* 58 [3.8]–[3.10].

¹⁹⁵ EM SSLA(DTT) (n 100) 29.

¹⁹⁶ EM SS(A)A (n 93) 19, 26.

¹⁹⁷ *Report 6 of 2019* (n 152) 44–7 [1.134]–[1.139].

evidence to back up this part of their analysis, and in those that did, the value of the evidence was questionable.

Overall, discussion of rational connection was mixed with many SOC's falling below the standard set out by the PJCHR. This was particularly the case in relation to the expectation that SOC's provide evidence to support the existence of a rational connection. SOC's including the relevant information but failing to address this point directly was another factor undermining SOC quality.

4 *Proportionate*

'Proportionality' addresses whether the rights limitation is proportionate to the objective pursued.¹⁹⁸ That is, whether the benefits outweigh the cost of the limitation. Relevant factors in addressing this element include whether less rights-restrictive means are available, whether adequate safeguards are in place, the extent of the interference with the right, and whether affected groups are vulnerable.¹⁹⁹

Broadly speaking, this was the element of the analysis that SOC's devoted the most space to discussing. For example, in its analysis of the right to privacy across 9 paragraphs, the SOC attached to the NDISA Bill devoted 6 of these to outlining why the rights limitation was proportionate, principally by discussing relevant safeguards.²⁰⁰

Across the sample studied there were some good examples of SOC's discussing considerations that were relevant to proportionality. For example, many SOC's included discussion of safeguards,²⁰¹ some argued that rights infringements were appropriately tailored to address the issue at hand without being overly restrictive,²⁰² others argued that the actual restriction on the right was relatively minor,²⁰³ and a few argued that alternative policy responses would be inadequate.²⁰⁴ These are all relevant considerations that help inform whether a rights limitation is permissible under international human rights law.

However, it was relatively rare for a proportionality analysis to be comprehensive in the sense of addressing all or most of these considerations in relation to a particular limitation. For example, the Health Legislation Amendment (Data-matching and Other Matters) Bill 2019 (Cth) ('HLA Bill') provided for certain Therapeutic Goods

¹⁹⁸ *Guide to Human Rights* (n 42) 8 [1.20].

¹⁹⁹ *Ibid* 8 [1.21].

²⁰⁰ EM NDISA (n 146) 12–4.

²⁰¹ See, eg, EM ASIOA (n 93) 6 [22], 7–8 [28]–[30], 10 [41]–[43]; EM FWLA (n 111) xv; EM MA(RMT) (n 127) 13; EM MA(SCT) (n 116) 10–1; EM NDISA (n 146) 12–4; EM TLA(CDR) (n 93) 84–5 [2.9], [2.12]–[2.15]; EM IS (n 100) 44–5, 47–8, 51–2, 54–6; EM CTLA (n 100) 13 [37], 14 [40]–[42], 24–5 [100].

²⁰² Eg EM CLA(PPA) (n 100) 22–3 [33]–[40], 26 [70]; EM FWA (n 100) xii; EM SSLA(PI) (n 93) 21–2.

²⁰³ Eg EM CLA(PPA) (n 100) 25 [56]; EM MA(SVP) (n 93) 15; EM NDISA (n 146) 11; EM IS (n 100) 52.

²⁰⁴ Eg EM FWLA (n 111) xv; EM IS (n 100) 51.

Administration information to be shared with the Chief Executive Medicare for the purposes of data matching, with the goal of supporting the integrity of Medicare.²⁰⁵ In arguing that this measure was compatible with the right to privacy, the SOC noted that the safeguards in the *Privacy Act 1988* (Cth) (*'Privacy Act'*) would operate, that information matching could only occur for the compliance and integrity functions of the Chief Executive Medicare, and that the Australian Information Commissioner would have oversight of the scheme.²⁰⁶ However, the SOC failed to provide detailed information where pertinent. For example, it did not outline the scope of the compliance and integrity functions of the Chief Executive Medicare which would bear on the amount and type of information shared under the scheme, and go to the extent of the rights limitation. Further, there was no discussion of the type of limitation involved, in the sense of particularising the type of information and assessing how significant a limitation on the right to privacy it would be if that information were shared. These are considerations that would have some bearing on whether the measures in the Bill were proportionate, but were not addressed in the SOC. This reflects a general issue amongst the SOC's studied that, while as a group there was a fair amount of nuance in their approach to proportionality, at the level of individual SOC's analysing particular rights, consideration of relevant factors was often limited.

Further, while many SOC's included discussion of whether a measure was proportionate, there was frequently a gap between the analysis of the measures and the actual conclusion on compatibility.²⁰⁷ For example, the CTLA Bill included measures that create a presumption against bail and parole for individuals with certain terrorism-related connections.²⁰⁸ The Bill provided that 'the decision maker must not grant bail or parole to the person unless satisfied that exceptional circumstances exist to justify [it]'.²⁰⁹ In its discussion of the right to liberty, the SOC established that Australia faces terrorism-related threats, and highlighted the case of Yacub Khayre who shot and killed a man while on parole, and was previously acquitted of terrorism offences.²¹⁰ However, even if accepted at face value that this is evidence requiring law reform in this area, the SOC did not establish why such a hard to dislodge presumption is the appropriate response or why some less intrusive measure may not be sufficient. Essentially, it failed to convincingly establish that this measure was proportionate. This creates

²⁰⁵ EM HLA (n 146) 4–5.

²⁰⁶ Ibid 5.

²⁰⁷ Eg ibid 12 [33], 15 [47], 16 [51]; EM CLA(SCAC) (n 93) 8–10 [34]–[47], 12–3 [62]–[66]; EM FWA(No 2) (n 100) viii–x; EM FWLA (n 111) viii–ix; EM MA(RMT) (n 127) 10–1.

²⁰⁸ EM CTLA (n 100) 10 [26].

²⁰⁹ Ibid 10 [27].

²¹⁰ EM CTLA (n 100) 5 [5], 11 [32].

a gap between the arguments advanced by the SOC and the conclusion it reached.²¹¹

Finally, a small number of SOC's engaged with the PJCHR's expectation that the effects of Bills on vulnerable groups be considered.²¹² This was most common when considering the impact of Bills on children, though there were examples of other groups such as persons with disabilities also being considered. However, some SOC's failed to address this consideration where clearly relevant. For example, in relation to the SS(A)A Bill, the PJCHR noted a report stating that feedback from participants in cashless welfare card trials suggested these cards were particularly unsuited for people with a disability or mental health issues.²¹³ The impact on these groups went unremarked in the SOC. Consequently, while this factor was considered in some SOC's, it was not systematically addressed.

5 *Additional Considerations*

A further issue in relation to the proportionality argument in SOC's was that a significant number failed to provide a structured proportionality analysis.²¹⁴ Particularly notable in this respect was the poor quality of SOC's seeking to justify measures in relation to criminal offences. This has been an ongoing issue for SOC's which the PJCHR sought to address by issuing a guidance note in 2014. The guidance note clarified that the PJCHR expects certain features of criminal offences such as placing an evidential or legal burden on the defendant to be justified on the basis of a structured proportionality analysis.²¹⁵ However, the SOC's studied failed to do this²¹⁶ often justifying the limitation by reference to the Guide to Framing Commonwealth Offences instead.²¹⁷

One instance of this can be found in the SOC attached to the TLA(CDR) Bill. Part of this SOC attempted to justify placing an evidential burden on the accused as part of a proposed offence.²¹⁸ This

²¹¹ Ibid 12 [34].

²¹² See, eg, EM TEO (n 100) 34 [57], 36 [67], [69], 42 [106]; EM ASIOA (n 93) 9–10 [38]–[43]; EM MLA(RPC) (n 116) 23–4; EM SSLA(PI) (n 93) 22; EM SSLA(DTT) (n 100) 29, 31, 33; EM CTLA (n 100) 13–4 [38]–[42]; EM PSA (n 93) 20.

²¹³ *Report 6 of 2019* (n 152) 46 [1.138].

²¹⁴ Eg EM CCA(AP) (n 111) 4 [10]–[14], 6 [22]–[27]; EM NDISA (n 146) 11–4; EM TLA(CDR) (n 93) 84–6 [2.6]–[2.16]; EM APA (n 93) 6–7 [34]–[39]; EM NIC (n 93) 78–9; EM SSLA(PI) (n 93) 18–9; EM SSLA(DTT) (n 100) 27–30; EM PSA (n 93) 20; EM ASADA(SIA) (n 93) 3–5; Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 (Cth) 6; EM FWA(No 2) (n 100) viii–x.

²¹⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Offence Provisions, Civil Penalties and Human Rights* (Guidance Note No 2, December 2014) 2 ('Guidance Note 2').

²¹⁶ See, eg, EM CCA(AP) (n 111) 4 [10]–[14]; EM TLA(CDR) (n 93) 86–7 [2.22]–[2.28].

²¹⁷ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Drafting Guide, September 2011) 50 [4.3.1].

²¹⁸ EM TLA(CDR) (n 93) 86–7 [2.22]–[2.28].

raises issues related to the presumption of innocence.²¹⁹ However, the SOC did not engage in a proportionality analysis, instead stating that the reverse burden offence was ‘appropriate’ as the information required was within the persons knowledge, a requirement to produce this material ‘should place no additional burden on the person’ because they should have these records to hand due to record-keeping requirements, and accordingly, ‘the limitation is reasonable in all circumstances’.²²⁰ This falls short of the PJCHR expectation in relation to justifying a reverse burden offence on human rights grounds and consequently reflects poorly on the SOC’s overall quality.

Another issue that emerged was that a number of SOC’s failed to address instances where relevant legislation had been found to be incompatible with human rights by the HRC.²²¹ This is relevant to the quality of human rights argumentation in a SOC because, as the relevant treaty body, the HRC is a highly authoritative voice on the scope and application of rights under the *ICCPR*. Accordingly, if the HRC finds that measures in a piece of legislation are incompatible with a right in a particular case, this may be relevant to SOC’s putting forward arguments about the human rights compatibility of measures related to that legislation.

For example, the SOC attached to the MA(SCT) Bill argued that measures in that Bill were compatible with the right to liberty. While it noted that people who have their visas cancelled due to amendments to the character test may be placed in immigration detention, it argued this was compatible with the right to liberty due to having adequate safeguards in place.²²² However, the SOC neglected to mention that this system of safeguards had previously been found inadequate by the HRC in *MGC v Australia*.²²³ In that case, the HRC found a violation of article 9(1) of the *ICCPR* for reasons including the lack of consideration for the need for detention and the lack of substantive review available to challenge the detention.²²⁴ The fact that the safeguards relied on in the SOC had been found lacking by the HRC is certainly a relevant consideration that would ideally be addressed by the SOC.

A similar situation occurred in relation to the continuing detention orders regime amended by the CTLA Bill. The Commonwealth regime

²¹⁹ *Guidance Note 2* (n 215) 1–2.

²²⁰ EM TLA(CDR) (n 93) 87 [2.25], [2.27]–[2.28].

²²¹ EM CTLA (n 100); EM MA(SCT) (n 116). Cf Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 2, 2 April 2019) 28 [1.105] (*Report 2 of 2019*); *Report 1 of 2019* (n 84) 69 [2.3]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Scrutiny Report No 12, 27 November 2018) 11 [1.32]–[1.33].

²²² EM MA(SCT) (n 116) 10–1.

²²³ Human Rights Committee, *Views: Communication No 1875/2009*, 113th sess, UN Doc CCPR/C/113/D/1875/2009 (7 May 2015) (*MGC v Australia*).

²²⁴ *Ibid* 17 [11.6].

is similar to regimes in New South Wales and Queensland²²⁵ which were found by the HRC to violate article 9 of the *ICCPR* in *Fardon v Australia*²²⁶ and *Tillman v Australia*.²²⁷ This issue went unremarked in the SOC.

C. *Conclusion on SOC Quality in Relation to Argumentation*

Based on these criteria, the quality of argumentation in SOC's was generally poor. SOC's displayed a basic level of human rights literacy and argumentation when justifying human rights limitations, for example, appropriately analysing absolute rights. However, SOC analysis was rarely comprehensive or thorough. Many aspects of the proportionality analysis went unaddressed or were simply asserted, and few SOC's included any evidence. While the 46 SOC's demonstrated a basic level of competency when justifying human rights limitations, they consistently fell below the standard outlined by the PJCHR.

IX Discussion of SOC Analysis in Context

Based on the analysis of the 46 SOC's in the previous sections, there are a number of broad observations I would make. Firstly, most SOC's demonstrated a basic understanding of human rights and level of human rights analysis. While not particularly nuanced or detailed, there was a basic level of competency here. Secondly, in relation to the four criteria I outlined, the SOC's generally did a good job identifying relevant human rights but frequently performed poorly in relation to being self-contained, their conclusions on compatibility, and the quality of their human rights argumentation. Thirdly, while there were some good examples of human rights analysis, these instances were the exception. Fourthly, this analysis highlights that many SOC's are failing to meet the standards set by the PJCHR. When combined, these observations paint a picture of SOC's being more than mere assertions of compatibility, yet falling far short of being rigorous, detailed, or nuanced examples of human rights analysis.

One striking feature of this conclusion is its consistency with the finding of previous literature on SOC quality. This is both in terms of the overall tenor of the conclusions in those reviews,²²⁸ as well as the specific issues with SOC's identified. For example, while using different criteria to determine quality, Fletcher's analysis reached the same conclusion that over 50% of SOC's in every year he studied were

²²⁵ *Report 2 of 2019* (n 221) 28 [1.105].

²²⁶ Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) 9 [8] ('*Fardon v Australia*').

²²⁷ Human Rights Committee, *Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010) 11 [8] ('*Tillman v Australia*').

²²⁸ Fletcher (n 22) 116; Williams and Burton (n 59) 81, 86; Rajanayagam (n 68) 1069–70.

substandard.²²⁹ Other observations made in existing literature which were also present in the 46 SOC^s analysed include that SOC^s: often failed to adequately describe Bills,²³⁰ provided overly brief or otherwise inadequate justification of human rights limitations,²³¹ lacked evidence to support the human rights analysis,²³² failed to note the impact of limitations on particularly vulnerable individuals,²³³ made some use (though not consistently) of international human rights legal materials,²³⁴ and failed to analyse criminal law provisions using a human rights analysis.²³⁵ These earlier reviews also concluded that SOC quality was uneven and often poor.²³⁶

These criticisms are also reflected in reports by the PJCHR. For example, in its 2018 annual report, the PJCHR noted that recurring issues with SOC^s included failing to identify relevant rights, insufficient information about the operation of legislation, lack of explanation as to how rights are engaged, and insufficient analysis of rights limitations according to the rights limitation criteria.²³⁷ The report then outlined a new ‘Statement of Compatibility project’ undertaken by the PJCHR in order to improve SOC quality,²³⁸ though there was no reference to this project in the PJCHR’s latest annual reports for 2019, 2020 or 2021.²³⁹

The combination of the conclusions of these earlier studies (covering SOC^s introduced from the start of 2012 to the end of 2015),²⁴⁰ the observations of the PJCHR from 2018, and my own results covering SOC^s introduced in the second half of 2019 permit a number of observations.

Firstly, while Fletcher noted that SOC quality improved from 2012 to 2015,²⁴¹ that progress appears to have stalled. This is suggested both by the PJCHR’s 2018 comments, and the fact that this analysis has encountered many of the same issues with SOC^s identified in earlier reviews. This could support Fletcher’s comment about a potential ‘plateauing’ of SOC quality.²⁴² Further, while the PJCHR has made

²²⁹ Fletcher (n 22) 116.

²³⁰ Ibid 106–7; Williams and Burton (n 59) 81–2.

²³¹ Fletcher (n 22) 106–8; Williams and Burton (n 59) 81–3; Rajanayagam (n 68) 1066.

²³² Fletcher (n 22) 112.

²³³ Ibid 109.

²³⁴ Ibid 110; Williams and Burton (n 59) 85; Rajanayagam (n 68) 1065.

²³⁵ Fletcher (n 22) 111–2.

²³⁶ Ibid 116; Williams and Burton (n 59) 86; Rajanayagam (n 68) 1069–70.

²³⁷ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2018* (Report, 12 February 2019) 35–6 [35] (‘*Annual Report 2018*’).

²³⁸ Ibid 36–7 [3.64]–[3.67].

²³⁹ See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2019* (Report, 26 August 2020); *Annual Report 2020* (n 47); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2021* (Report, 28 September 2022).

²⁴⁰ Williams and Burton (n 59) 80; Rajanayagam (n 68) 1062–4, 1067; Fletcher (n 22) 95.

²⁴¹ Fletcher (n 22) 116

²⁴² Ibid 100.

efforts to improve SOC quality,²⁴³ improvements were not readily apparent based on the 46 SOC's I analysed.

Secondly, problems with SOC quality have been an issue under both Labor and Coalition governments. Most SOC's prior to the election in 2013 were introduced by the Gillard or Rudd Labor governments. This covers the SOC's reviewed by Williams and Burton,²⁴⁴ Rajanayagam,²⁴⁵ and the first years of Fletcher's study.²⁴⁶ Further, most SOC's after the 2013 election were introduced by a Coalition government, covering the latter years of Fletcher's study and my own work. As noted above, there is significant consistency in the results and issues identified by these reviews, so poor SOC quality is not an issue confined to one side of politics. In addition, SOC's produced by independent or third-party Members of Parliament have been among some of the poorest examples of SOC's studied.²⁴⁷

Thirdly, the lack of improvement in SOC quality is noteworthy particularly because there are a number of straightforward changes that could be made to SOC's which would lead to significant improvements (for example, using more evidence to support arguments, including more detailed descriptions of Bills, or using human rights analysis for offence provisions). These issues are well documented and have been known for some time as evidenced by the earlier academic reviews and reports of the PJCHR. Further, there is significant information available on drafting SOC's and support available from the Attorney-General's Department.²⁴⁸ In this context, the lack of improvement suggests an ongoing lack of political will and interest in the Parliamentary Scrutiny regime by successive Australian governments. This is consistent with comments by public servants responsible for drafting SOC's interviewed by Fletcher, who suggested that SOC's are simply not a priority.²⁴⁹

Combined, these observations suggest a state of affairs where SOC's have become an accepted yet formulaic and marginal element of the legislative development process. This is far from the robust human rights dialogue that seemed to be envisioned when the *Scrutiny Act* was introduced.²⁵⁰

²⁴³ *Annual Report 2018* (n 237) 36–7 [3.64]–[3.67].

²⁴⁴ Williams and Burton (n 59) 80.

²⁴⁵ Rajanayagam (n 68) 1062–4, 1067.

²⁴⁶ Fletcher (n 22) 95.

²⁴⁷ See above Part IV; *ibid* 104.

²⁴⁸ Parliamentary Joint Committee on Human Rights, 'Guidance Notes and resources', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>; Attorney-General's Department, 'Statements of Compatibility' (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>>.

²⁴⁹ Fletcher (n 22) 113–4.

²⁵⁰ McClelland (n 36) 271.

A. *Effectiveness of the Broader Scrutiny Act*

The above conclusion on SOC's supports existing assessments of the effectiveness of the *Scrutiny Act* as a whole. For example, noting the passage of human rights restrictive legislation, lack of attention to SOC's, and apparent disdain within government towards the scrutiny process, Fletcher concluded that, though there were some promising signs:

...the weight of evidence to date — in particular from the [PJCHR]'s own reports — demonstrates that the incorporation of human rights into the legislative development process has so far failed to effect a significant improvement in the consistency of new laws with Australia's international human rights obligations.²⁵¹

Further, after assessing the *Scrutiny Act* against a number of criteria such as impact on parliamentary deliberations and ability to provoke legislative amendment, Reynolds, Hall and Williams concluded that:

...at a federal level, there remains little evidence that the human rights scrutiny regime is having a real impact in protecting and enhancing human rights. Our analysis has demonstrated the continued existence of significant shortcomings in both the design and practice of the scrutiny regime, and that it is having a limited impact by way of achieving its goals.²⁵²

These conclusions demonstrate there are serious issues with the effectiveness of the scrutiny regime. Further, while these reviews were based on assessments of SOC's produced prior to 2016,²⁵³ the assessment of more recent examples in this article does nothing to contradict these conclusions.

B. *Reflecting on the Scrutiny Act*

The *Scrutiny Act* is the most recent federal effort to promote and protect human rights in Australia. It was also somewhat experimental, relying on an exclusively parliamentary, dialogue-based model. However, based on the conclusions above, it appears this approach has failed to substantively promote and protect human rights in Australia. While successful in institutionalising human rights scrutiny of legislation, this has not led to a culture of human rights discussion and deliberation in Parliament, or to more human rights-compatible laws.²⁵⁴

When the government responded to the National Human Rights Consultation, it decided against adopting the recommendation for a National Human Rights Act, and instead opted for a more circumspect approach. However, a decade later, the *Scrutiny Act* has proven relatively ineffective and the rest of the National Human Rights

²⁵¹ Fletcher (n 22) 216.

²⁵² Reynolds, Hall and Williams (n 21) 297.

²⁵³ See, eg, *ibid* 261–2.

²⁵⁴ *Ibid* 270–9.

Framework has all but disappeared. Meanwhile, beyond the introduction of a Human Rights Act in Queensland, little has changed in the patchwork and limited human rights protection identified by the Consultation.²⁵⁵ The Consultation noted that this lack of protection disproportionately harmed those who are marginalised or vulnerable²⁵⁶ which helped provide a basis for its calls for significant human rights reform.

Perhaps now it is time to re-visit the Consultation's recommendations, in particular the recommendation to enact a National Human Rights Act.²⁵⁷ While there has been significant concern about this option in the past, it is the most direct method for addressing the lack of recognition and protection of human rights in Australia. It is also far from a radical reform as similar acts have been adopted in Queensland, Victoria, the Australian Capital Territory, and in every other developed democracy around the world. Not only could this help promote and protect human rights, it may also support a sense of belonging and trust in government that is required to improve social cohesion in Australia.

X Conclusion

The Australian government has highlighted the importance of social cohesion in addressing contemporary challenges. While social cohesion in Australia is generally strong, improving trust in the government and better protecting individuals and communities experiencing disadvantage and discrimination are two ways in which social cohesion can be further strengthened.

Though the legal protection of human rights may be one means of strengthening social cohesion in this way, in Australia this protection remains fragmented and incomplete. An assessment of the most recent federal initiative in this area — the *Scrutiny Act* — shows that it has been relatively ineffective. SOC's created under the Act demonstrated a basic level of competency, though were generally poor, and assessments of the broader scrutiny regime suggest the Act has led to few tangible human rights benefits. This is an area in which reform is needed.

The most straightforward and logical reform option would be to follow the advice of the National Human Rights Consultation and enact a National Human Rights Act. This could not only have important benefits in terms of protecting the human rights of Australians, but could also strengthen social cohesion.

²⁵⁵ *Consultation* (n 33) 127–8.

²⁵⁶ *Ibid* 127.

²⁵⁷ *Ibid* xxxiv.

Research for the National Human Rights Consultation found that Australians believe human rights are important.²⁵⁸ It also suggested most Australians do not experience their rights as being infringed.²⁵⁹ Likewise, research by the Scanlon Foundation has found that the level of social cohesion in Australia is generally high.²⁶⁰ These are positive findings and to the credit of Australia's democratic system of government, with its commitments to transparency, accountability, and the rule of law.

However, the legal protection of human rights is often not particularly important for the majority in a growing, affluent society. The true value of these protections is often best recognised by those who are disadvantaged or marginalised, or by those experiencing upheaval, crisis, or disaster. In this context, human rights can provide a corrective mechanism, pulling governments away from actions that are harsh, disproportionate, unjust, or discriminatory, and provide a legal incentive to keep in mind the human consequences of government policies and decisions. Through a combination of luck and sound management, Australia has become a broadly successful, affluent, and multicultural society. However, in a world struggling with a pandemic, anthropogenic climate change, and a crisis of faith in democracy, the supportive effects of the legal protection of human rights may be more valuable than ever.

²⁵⁸ Ibid app B 17

²⁵⁹ Ibid app B 20.

²⁶⁰ Markus (n 9) 16.

Appendix

Table 5 below includes information on the Bills analysed in this article. For references to the explanatory memorandum for a Bill, the acronym is the same as in the table, but with ‘EM’ inserted at the start and the word ‘Bill’ removed. For example, the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 is abbreviated to ‘TEO Bill’ and the explanatory memorandum referenced as ‘EM TEO’.

Table 5
Information on Analysed Bills

Bill title	Assigned acronym	Bill origin	Categorisation of SOC quality
Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Related to Terrorism Offences) Bill 2019	ASIOA Bill	Government	Adequate
Counter-Terrorism (Temporary Exclusion Orders) Bill 2019	TEO Bill	Government	Inadequate
Crimes Legislation Amendment (Police Powers at Airports) Bill 2019	CLA(PPA) Bill	Government	Good
Criminal Code Amendment (Agricultural Protection) Bill 2019	CCA(AP) Bill	Government	Inadequate
Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019	FWA Bill	Government	Adequate
Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019	FWLA Bill	Government	Inadequate
Migration Amendment (Repairing Medical Transfers) Bill 2019	MA(RMT) Bill	Government	Inadequate
Migration Amendment (Streamlining Visa Processing) Bill 2019	MA(SVP) Bill	Government	Adequate
Migration Amendment (Strengthening the Character Test) Bill 2019	MA(SCT) Bill	Government	Adequate
Migration Legislation Amendment (Regional Processing Cohort) Bill 2019	MLA(RPC) Bill	Government	Inadequate
National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019	NDISA Bill	Government	Good

Bill title	Assigned acronym	Bill origin	Categorisation of SOC quality
Aged Care Quality and Safety Commission Amendment (Worker Screening Database) Bill 2019	ACQSCA Bill	Non-government	Perfunctory
Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019	AF Bill	Non-government	Perfunctory
Treasury Laws Amendment (Consumer Data Right) Bill 2019	TLA(CDR) Bill	Government	Inadequate
Appropriation (Parliamentary Departments) Bill (No 1) 2019–2020	A(PD) Bill	Government	Perfunctory
Appropriation Bill (No 1) 2019–2020	A (No 1) Bill	Government	Perfunctory
Appropriation Bill (No 2) 2019–2020	A (No 2) Bill	Government	Perfunctory
Australian Passports Amendment (Identity-matching Services) Bill 2019	APA Bill	Government	Inadequate
Identity-matching Services Bill 2019	IS Bill	Government	Good
Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019	CTLA Bill	Government	Inadequate
National Integrity Commission Bill 2019	NIC Bill	Non-government	Inadequate
Social Services Legislation Amendment (Payment Integrity) Bill 2019	SSLA(PI) Bill	Government	Adequate
Social Services Legislation Amendment (Drug Testing Trial) Bill 2019	SSLA(DTT) Bill	Government	Adequate
Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019	SS(A)A Bill	Government	Adequate
Product Stewardship Amendment (Packaging and Plastics) Bill 2019	PSA Bill	Non-government	Inadequate
Emergency Response Fund (Consequential Amendments) Bill 2019	ERF Bill	Government	Inadequate
Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019	CLA(SCAC) Bill	Government	Adequate

Bill title	Assigned acronym	Bill origin	Categorisation of SOC quality
Family Law (Self-Assessment) Bill 2019	FL Bill	Non-government	Inadequate
National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019	NCCPA Bill	Non-government	Perfunctory
Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019	CEA Bill	Non-government	Perfunctory
Australian Bill of Rights Bill 2019	ABR Bill	Non-government	Perfunctory
Treasury Laws Amendment (International Tax Agreements) Bill 2019	TLA(ITA) Bill	Government	Adequate
Currency (Restrictions on the Use of Cash) Bill 2019	C(RUC) Bill	Government	Adequate
Australian Citizenship Amendment (Citizenship Cessation) Bill 2019	ACA Bill	Government	Adequate
Native Title Legislation Amendment Bill 2019	NTLA Bill	Government	Good
National Integrity (Parliamentary Standards) Bill 2019	NI Bill	Non-government	Inadequate
Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019	ASADA(SIA) Bill	Government	Inadequate
Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019	ASADAA Bill	Government	Adequate
Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019	AML Bill	Government	Adequate
Transport Security Amendment (Serious Crime) Bill 2019	TSA Bill	Government	Inadequate
Health Legislation Amendment (Data-matching and Other Matters) Bill 2019	HLA Bill	Government	Adequate
National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No 2)	NCCPA (No 2) Bill	Non-government	Perfunctory

Bill title	Assigned acronym	Bill origin	Categorisation of SOC quality
Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019	TLA(RM) Bill	Government	Adequate
Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019	TEQSA Bill	Government	Inadequate
Student Identifiers Amendment (Higher Education) Bill 2019	SIA Bill	Government	Adequate
Fair Work (Registered Organisations) Amendment (Ensuring Integrity No 2) Bill 2019	FWA(No 2) Bill	Government	Adequate