

# Democratic Scrutiny of COVID-19 Laws

## Are Parliamentary Committees Up to the Job?\*

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### Abstract

*In response to the complex and potentially devastating threat posed by COVID-19, parliaments around the world have transferred unprecedented powers to executive governments and their agencies (Edgar, 'Law-making in a Crisis', 2020), often with the full support of the communities they represent. These laws were passed within days, sometimes hours, with limited safeguards and a heavy reliance on sunset provisions, some of which are dependent on the pandemic being officially called to an end. While parliaments themselves have suspended or reduced sitting days (Twomey, 'A Virtual Australian Parliament is Possible', 2020), parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.*

*This article aims to evaluate the capacity of parliamentary committees established within the Australian, New Zealand (NZ) and United Kingdom (UK) parliaments to effectively scrutinize and review governments' responses to COVID-19. It does this by comparing the legal framework underpinning the relevant committees in each jurisdiction and examining the work of these committees with a view to offering some preliminary views as to their impact on the shape of the laws made in response to COVID-19 in those jurisdictions. The article concludes by offering some preliminary observations about the scrutiny capacity of the parliamentary committee systems in Australia, NZ and the UK in the context of emergency lawmaking and flags areas for further research, evaluation and reform.*

**Keywords:** parliament, scrutiny, committees, COVID-19, rights, legislation, Australia, New Zealand, United Kingdom.

### A Part 1: Introduction

In response to the complex and potentially devastating threat posed by COVID-19, parliaments around the world have transferred unprecedented powers to executive

\* This article is based on a presentation delivered to the Westminster Foundation of Democracy and the Institute of Advanced Legal Studies Digital Conference - Are emergency measures in response to COVID-19 a threat to democracy? Held online on 10 September 2020.

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governments and their agencies,<sup>1</sup> often with the full support of the communities they represent. This includes imposing travel bans preventing citizens from leaving the country, empowering health officials to direct and detain people, providing police with unprecedented discretion to implement and enforce fines and authorizing ministers to make significant changes to existing laws and services without requiring parliamentary approval.<sup>2</sup> By any measure, this constitutes an extraordinary transfer of power away from parliament towards the executive with clear impacts on individual rights and representative democracy. These laws were passed within days, sometimes hours, with limited safeguards and a heavy reliance on sunset provisions, some of which are dependent on the pandemic being officially called to an end.<sup>3</sup> From within this rush of emergency lawmaking and institutional power transfer, parliamentary committees emerged as a focal point for democratic scrutiny of governments' legal responses to COVID-19, particularly in Westminster-inspired parliaments, including those in Australia, NZ and the UK.<sup>4</sup>

This article aims to evaluate the capacity of parliamentary committees and, in particular, the special 'select' committees established within the Australian, NZ and UK parliaments, to effectively scrutinize and review governments' responses to COVID-19. It does this by comparing the legal framework underpinning the relevant committees in each jurisdiction and offering some preliminary observations about the scrutiny capacity of these committee systems in the context of emergency lawmaking. It is hoped that this material might then offer useful, practical insights into the options for future improvements and investments in the parliamentary committee system to improve the efficiency, effectiveness and quality of scrutiny being undertaken.

## I Methodology

The methodology employed in this study is primarily comparative in nature and aims to identify and evaluate key aspects of three different Westminster-based par-

- 1 Edgar, A. (2020). 'Law-making in a Crisis: Commonwealth and NSW Coronavirus Regulations', on AUSPUBLAW (30 March 2020), <https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/> (accessed 16 June 2021).
- 2 Moulds, S. (2020). 'Scrutinising COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees', *Alternative Law Journal Online First*, <https://journals.sagepub.com/home/alj> (Moulds 2020a); Cormacain, R. (2020). 'Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation', *Theory and Practice of Legislation* (Oxford, England), pp. 1-21.
- 3 See e.g. Cormacain, R. (2020), 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', Vol 8 Issue 3 *Theory and Practice of Legislation* (Oxford, England), pp. 1-21; Gross, O. (2020). 'Emergency Powers in the Time of Coronavirus ... and Beyond' (Just Security, 8 May 2020) (accessed 17 June 2020).
- 4 Twomey, A. (2020). 'A Virtual Australian Parliament is Possible – And May be Needed – During the Coronavirus Pandemic', *The Conversation* (online) 25 March 2020; Lilly, A. (2020). 'The UK Parliament and Coronavirus', Explainers, Institute for Government (London, UK) 3 April 2020, [www.instituteforgovernment.org.uk/explainers/uk-parliament-coronavirus](http://www.instituteforgovernment.org.uk/explainers/uk-parliament-coronavirus) (accessed 27 August 2020); Dreaver, C. (2020). 'Special Committee Set Up as Parliament is Adjourned', *Radio New Zealand* (online 24 March 2020), [www.rnz.co.nz/news/political/412520/special-committee-set-up-as-parliament-is-adjourned](http://www.rnz.co.nz/news/political/412520/special-committee-set-up-as-parliament-is-adjourned) (accessed 27 August 2020).

liamentary systems.<sup>5</sup> These include: (a) consideration of the legal structure, powers and mandates of the parliamentary committees involved in scrutinizing COVID-19 legislative response; and (b) identification of specific examples of the impact of this scrutiny on the shape of the laws themselves and on the public and parliamentary debate on the legislative response to COVID-19. This methodology draws on a tiered evaluation framework developed in the context of evaluating the role and impact of parliamentary committees in other emergency lawmaking contexts.<sup>6</sup>

The three case study jurisdictions (Australian, NZ and UK) differ in many respects: variations include federal and unitary structures, bicameral and unicameral parliaments, and codified and ad hoc approaches to rights scrutiny.<sup>7</sup> However, it remains possible to compare the committee systems in these parliaments because of their common features. For example, each of the three systems is based on the Westminster traditions of representative and responsible government<sup>8</sup> and active parliamentary scrutiny of executive action, including the use of standing and select committees,<sup>9</sup> and each jurisdiction has employed these common features in the context of their respective legislative response to COVID-19.<sup>10</sup>

## B Part 2: Key Features of the Parliamentary Committees Tasked with Scrutinizing COVID-19 Laws

In Westminster-inspired parliaments, parliamentary committees can undertake a number of specific functions,<sup>11</sup> ranging from scrutinizing government expenditure (such as the senate estimates process undertaken within the Australian parliament), reviewing procedural rules and practices (such as the House of Commons standing orders committee in the UK parliament) or conducting thematic inquiries into significant public policy issues referred to them by parliament (such as the abortion committee in the NZ parliament).

This article focuses on the *legislative scrutiny* role of parliamentary committees – which is the task of reviewing an existing or proposed law (sometimes against prescribed criteria) and reporting back to parliament with findings or recommendations. In this legislative scrutiny role, parliamentary committees analyse proposed laws and policies and produce vital, independent information about their purpose and effectiveness and provide a forum for experts and members of the

5 See, e.g., Bovend'Eert, P. (2020). 'Public Office and Public Trust: Standards of Conduct in Parliament: A Comparative Analysis of Rules of Conduct in Three Parliaments', *Parliamentary Affairs*, vol. 73, no. 2, pp. 296-322.

6 Moulds, S. (2020). *Committees of Influence* (Springer), Chapter 2.

7 See, e.g., Stephenson, S. (2016). *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, Sydney).

8 German, P. (2006). 'Separation of Powers: Contrasting the British and Australian Experiences', *E Law: Murdoch University Electronic Journal of Law*, vol. 13, no. 1, pp. 141-149.

9 Monk, D. (2010). 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments', *The Journal of Legislative Studies*, vol. 16, no. 1, pp. 1-13.

10 See e.g. Twomey, 2020; Lilly, 2020; Dreaver, 2020.

11 See, e.g., Monk, 2010; Grenfell, L. (2015). 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"', *Public Law Review*, vol. 26, no. 1, pp. 19-38, <https://ssrn.com/abstract=3395591>.

community to share their views on a proposed law. Thereby, parliamentary committees have both *deliberative* attributes (such as facilitating forums for the public to engage in the lawmaking process) and *authoritative* attributes (such as the power to recommend reforms to proposed laws or policies).<sup>12</sup> As the following discussion documents, these attributes can be present within individual committees, and across the committee system, and help explain the challenges and opportunities presented by parliamentary committees undertaking a legislative scrutiny role.

### *I Australia*

Australia is a federation of states and territories, each with its own parliaments and constitutional framework, and each represented in different ways within the national, bicameral Australian parliament. For example, in the federal parliament the six Australian states enjoy equal representation by 12 senators each, along with two senators for each of the territories. The lawmaking powers of each parliament are prescribed by the Australia Constitution, which enshrines Westminster concepts of responsible and representative government, as well as the doctrine of separation of powers, but does not contain a bill of rights. Within each Australian parliament exists a system of parliamentary committees, the most sophisticated and powerful of which can be found in the senate – sometimes described as ‘the House of Review’ – whose political make-up is often different to that of the House of Representatives owing to proportionate representation of the states.<sup>13</sup>

Within the Australian senate, a range of standing and select committees interact with each other when scrutinizing proposed or existing laws. The select committees inquire into issues referred to them by their originating resolution<sup>14</sup> but are rarely required to undertake a detailed rights analysis of proposed legislation. Flexible in mandate, time frame and outputs, it is this form of ‘select’ or ‘inquiry-based’ committee that has been employed to undertake the COVID-19 oversight role in a number of Australian jurisdictions.<sup>15</sup>

On 8 April 2020, the Australian senate resolved to establish a select committee on COVID-19 to inquire into the federal government’s response to the COVID-19 pandemic.<sup>16</sup> The terms of reference of this special committee include ‘the Australian Government’s response to the COVID-19 pandemic’ and ‘any related matters’.<sup>17</sup>

12 Moulds, 2020.

13 Debeljak, J. and Grenfell, L. (2020). ‘Diverse Australian Landscapes of Law-Making and Human Rights: Contextualising Law-Making and Human Rights’, in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, Sydney), pp. 1, 17.

14 Parliament of Australia (2019). Senate Standing Orders 34-38 (last accessed 17 October 2019), [www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/standingorders/b00/b05](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00/b05).

15 For example, special select COVID-19 committees have been established in South Australia: South Australia, *Parliamentary Debates*, Legislative Council, 8 April 2020, 476, (Kyam Maher) and the ACT: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 April 2020, 758 (Andrew Wall).

16 The senate has given the COVID-19 committee a long lead time to report, with a deadline of 30 June 2022; however the committee called for submissions from the public by 28 May 2020 in what appears to be a rolling approach to public engagement. Parliament of Australia (2020). Senate Journal No 8, ‘10 COVID-19—Select Committee—Appointment’ (8 April 2020) 1408.

17 Parliament of Australia, Senate Journals, 2020, at p. 1408.

The senate COVID-19 committee has a majority of non-government senators and is chaired by Senator Katy Gallagher, Labour Party senator from the Australian Capital Territory. Other senators can be part of the work of the COVID-19 committee as ‘participating’ members but cannot formally vote on committee resolutions.

The breadth of the COVID-19 committee’s mandate is deliberately wide, designed to provide a forum for a broader discussion of the impacts and effectiveness of the government’s COVID-19 response. On the one hand, this broad mandate suggests that the committee may be well placed to respond to the dynamic features of the government’s COVID-19 response and question and test a wide range of policy and legislative measures.<sup>18</sup> On the other hand, it gives rise to genuine questions as to whether the committee has the capacity to undertake a detailed or holistic analysis of the government’s response or whether key components of the laws and policies made in this area will slip through without adequate scrutiny.<sup>19</sup>

While it is clear that the COVID-19 committee does not have a ‘technical scrutiny’ role, this does not exclude or limit the committee from reviewing the extent to which any laws made or proposed to be made in response to the pandemic impact or infringe on individual rights. In fact, research into parliamentary rights scrutiny of counterterrorism lawmaking suggests that the work of broadly mandated inquiry-based committees played an important rights-enhancing role and provide a key forum for rights issues to be explored in a public way.<sup>20</sup>

The COVID-19 committee works alongside other committees in the Australian federal system, including the older, pre-existing ‘standing’ committees such as the Scrutiny of Bills Committee or the Standing Committee for Delegated Legislation (and the Parliamentary Joint Committee on Human Rights, which focus on technical scrutiny’ of proposed laws against certain rights-based criteria, rather than evaluating policy merits.<sup>21</sup> These committees continued to meet by teleconference throughout the early stages of the COVID-19 pandemic, despite the initial exodus of parliamentarians from Canberra. The Human Rights Committee has produced a number of detailed reports on the human rights compatibility of primary and delegated legislation relating to the COVID-19 pandemic.<sup>22</sup> The Delegated Legislation Committee has also ‘sounded the alarm’ on the concerning trend towards exempting key parts of the government’s COVID-19 response from the scope of its scrutiny through the process of exempting certain forms of delegated legislation (such as directives or determinations) from the operation of the standard disallowance process.<sup>23</sup>

This technical scrutiny’ work has been integrated with the more thematic, policy-scrutiny approach of the COVID-19 committee, with a number of written sub-

18 Moulds, 2020a.

19 Joseph, S. (2020). ‘COVID-19, Risk and Rights: The ‘Wicked Balancing Act for Governments’, *The Conversation* (online), <https://theconversation.com/covid-19-risk-and-rights-the-wicked-balancing-act-for-governments-146014> (accessed 16 September 2020).

20 Moulds, 2020, Chapters 3-5.

21 Debeljak and Grenfell, 2020, at pp. 1, 8-11.

22 Parliament of Australia, Parliamentary Joint Committee on Human Rights (2020). ‘Scrutiny Report No 5 of 2020: Human Rights Scrutiny of COVID-19 Legislation’ (29 April 2020).

23 Parliament of Australia, Senate Standing Committee on Delegated Legislation (2020). ‘Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight’ (30 April 2020).

missions making reference to the work of the Scrutiny of Bills Committee, the Delegated Legislation Committee and the Human Rights Committee,<sup>24</sup> and many more submissions utilizing the scrutiny framework applied by these committees in their own analysis of the rights-related impacts of the government's response to COVID-19.<sup>25</sup>

## II New Zealand

Unlike the federal, bicameral Australian parliament, the NZ parliament is a unicameral system that exists under a constitutional structure that delineates power between different branches of government and includes specific protection for individual rights, including the requirement that the attorney general “report to parliament on any provision in a bill that appears to be inconsistent with any of the rights and freedoms” contained in the New Zealand *Bill of Rights Act 1990*.<sup>26</sup> The NZ parliament relies heavily on a series of select committees that form a central component of the legislative process and collectively scrutinize almost every law that makes its way through parliament. Unlike the Australian and UK parliaments, the NZ parliament has no specialist committee dedicated to the ‘technical scrutiny’ of bills. Instead, subject select committees are expected to consider all aspects of bills, both policy and technical, when examining a bill.<sup>27</sup>

The powers, functions and mandates of these committees are set out in the standing orders of the House of Representatives. Some committees are ‘subject select committees’ and are automatically established at the beginning of each parliament (NZ Parliament Standing Order No 188). The House is also empowered to establish other select committees to inquire into specific matters, and this power was used to set up the Epidemic Response Committee on 25 March 2020 (the Hon Chris Hopkins, Notice of Motion – establishing the Epidemic Response Committee, 25 March 2020). The Epidemic Response Committee’s terms of reference were broad, including “any matter relating to the Government’s management of the COVID-19 epidemic”. The committee, which was chaired by the leader of the oppo-

24 See, e.g., Public Law and Policy Unit Submission No 183 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020), Justice & Society Unit of the University of South Australia Submission No 193 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020); Human Rights Law Centre Joint Submission No 79 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020).

25 Institute of Public Affairs Submission No 246 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020); Dr Kate Galloway Submission No 74 Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020); Equality Rights Alliance Submission No 88 Community and Public Sector Union Submission No 142 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020); Public Interest Advocacy Centre Submission No 150 to Parliament of Australia, Senate Select Committee on COVID-19, *Inquiry into the Government’s response to COVID-19* (28 May 2020).

26 Rodgers, C. (2017). ‘A Comparative Analysis of Rights Scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand Lagging Behind Its Peers?’, *Australasian Parliamentary Review*, [www.aspg.org.au/wp-content/uploads/2017/09/2shRodgers.pdf](http://www.aspg.org.au/wp-content/uploads/2017/09/2shRodgers.pdf).

27 Rodgers, 2017.

sition and had a majority of non-government members, was also given powers to hold public inquiries and call for witnesses and documents.

The Epidemic Response Committee examined many COVID-19 laws, including the COVID-19 Response (Urgent Management Measures) Legislation Bill, the COVID-19 Response (Further Management Measures) Legislation Bill and the Immigration (COVID-19 Response) Amendment Bill, which together amended over 45 statutes affecting immigration and migration, businesses, organizations and local governments. Together, these laws gave effect to NZ's decision to go into an 'early lockdown' and effective international isolation at the beginning stages of the pandemic, despite having only a relatively small number of active COVID-19 cases. The 'early lockdown' approach included suspending parliament from March 2020 until 26 May 2020. During this period, the Epidemic Response Committee continued to meet remotely, using Zoom and other technology to undertake its scrutiny function, providing the only direct forum for democratic scrutiny of executive law-making in NZ. The committee's meetings were generally publicly broadcast, and ministers and key public officials who played critical roles in the COVID-19 response appeared before the committee and answered questions.

By May 2020, the 'lockdown' conditions in NZ had eased considerably, and the virus was considered to be effectively eradicated from the NZ population. As a result, the NZ parliament resumed sitting in person, and a government motion (vehemently opposed by the non-government members) was passed to have the Epidemic Response Committee 'disestablished'. The government members advancing the motion said that the committee 'had come to the end of its time', because parliament was back to 'doing its job'. The scrutiny of the NZ's legislative and policy response to COVID-19 subsequently fell to the pre-existing select committees such as the Economic Development, Science and Innovation Committee, the Education and Workforce Committee, the Finance and Expenditure Committee, the Health Committee and the Social Services and Community Committee. Under the NZ parliament's standing orders (SO189) each of these committees has the power to receive briefings on, or initiate inquiries into, matters related to their respective subject areas.<sup>28</sup>

### III United Kingdom

The parliamentary committee system within the UK parliament is particularly sophisticated and complex, involving far more individual committees than the Australian and NZ parliaments combined. As in the case of Australia, the UK parliamentary committee system includes 'technical scrutiny' committees akin to the Australian scrutiny of bills and delegated legislation committees and hosts a joint committee on human rights that has specific prescribed functions under the *Human Rights Act 1998* (UK) and scrutinizes every government bill for its compatibility with a range of internationally protected human rights, as well as common law

28 Standing Order 252 requires the NZ government to respond to a report tabled by one of the select committees within 60 working days, and any recommendations of the committee that are contained therein – although this time frame does not apply to scrutiny of bills.

fundamental rights and liberties.<sup>29</sup> This scrutiny of bills also includes consideration of whether the bill presents an opportunity to *enhance* human rights in the UK. In addition to scrutinizing COVID-19 legislation, the Human Rights Committee is also in the process of conducting a special inquiry into the human rights implications of the Government's response to COVID-19, with a particular focus on right to life, the right to liberty and the right to respect for family life. The UK parliament also has a Delegated Powers and Regulatory Reform Committee that is tasked with scrutinizing proposals in bills to delegate legislative power from parliament to another body. This Committee has been actively reviewing delegated legislation made in response to the COVID-19 pandemic and examined the Coronavirus Bill (UK) in some detail despite facing very tight time frames set for doing so (discussed below). The UK parliament also has a Regulations Review Committee which initiated a briefing to review secondary legislation made in response to the pandemic.

In addition to these technical scrutiny' committees, more than 25 separate Standing and Select Committees from within the House of Lords and House of Commons have been involved in scrutinizing aspects of the UK's COVID-19 legislative response. These include the Home Affairs Committee, inquiring into Home Office preparedness for COVID-19; the Digital, Culture, Media and Sport Committee inquiring into how and why misinformation about the pandemic was allowed to spread across social media, the commons' justice committee, inquiring into the impact of the pandemic on prison, probation and court systems, the women and equalities committee, inquiring into the unequal impact of the COVID-19 pandemic on 'people with protected characteristics' under the Equality Act, and the lords economic affairs committee, inquiring into the effects of the pandemic on the labour market. In addition, a special House of Lords select committee on COVID-19 was established to consider "the long-term implications of the COVID-19 pandemic on the economic and social wellbeing of the United Kingdom". This special select committee is designed to be a deliberative committee, seeking out community contributions and responses to the question of what the pandemic means for social, cultural and economic life in the UK.

### **C Part 3: Impact of the Parliamentary Committees Tasked with Scrutinizing COVID-19 Laws**

Having considered the legal structure, powers and functions of the parliamentary committees involved in scrutinizing COVID-19 legislative response in Australia, NZ and the UK, the next section of the article aims to identify some of the specific

29 Tolley, M. (2002). 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights', *Australian Journal of Political Science*, vol. 44, pp. 41, 53, [www.austlii.edu.au/nz/journals/VUWLawRw/2002/1.html#Heading20](http://www.austlii.edu.au/nz/journals/VUWLawRw/2002/1.html#Heading20).



examples of the impact of this scrutiny on the shape of the laws and themes and on the public and parliamentary debate on the legislative response to COVID-19.<sup>30</sup>

### *I Australia*

So far, the senate select committee on COVID-19 has been a particularly strong performer in the provision of robust scrutiny of the federal Australian government's legislative response to COVID-19 and when holding members of the executive to account for their decision-making. From its inception in March 2020, the committee has used its inquiry-related functions to rigorously examine government officials and other experts and has been active in sharing its work with the community through various means, including social media platforms, helping to generate sustained media and public interest in its work.<sup>31</sup> By September 2020, the opposition-chaired, non-government-controlled committee has received 463 written submissions, held 35 public hearings (conducted in person and via video link and other related technologies), and handled hundreds of questions taken on notice by government agencies. Even before issuing a written report, the COVID-19 committee influenced the shape of key legislation (for example, the legislation providing the legal framework for the COVIDSafeApp, and the JobKeeper and JobSeeker support programmes) and played a central role in the public debate on the efficacy of key government response to the pandemic.<sup>32</sup>

As of March 2021, the COVID-19 Committee has issued two interim reports, with a final report due in June 2022.<sup>33</sup> In the Committee's First Interim Report it recommended "that the Australian Government commission an independent review into expenditure on, and design of, the COVIDSafe app".<sup>34</sup> The Committee also sought further information from relevant government Ministers as to the way personal information and data obtained by the COVIDSafeApp was being shared and stored,<sup>35</sup> as well as reiterating questions to the Minister for Senior Australians

30 The dynamic and complex policy environment generated by the COVID-19 pandemic means that the ensuing examples are likely to be incomplete and in need of more detailed research and analysis; however, it is hoped that they serve as a preliminary snapshot of the potential impact of the scrutiny work undertaken by parliamentary committees.

31 Moulds, 2020a.

32 For example, evidence provided to the COVID committee revealed that the COVIDSafeApp had detected only one case of infection not otherwise detected by human contact tracers and that as of August 2020 no payments had been approved as part of the Australian government's \$ 680-million HomeBuilder scheme was intended to spark a 'trade-led recovery' of the Australian economy but no payments had been approved as of early August 2020 despite 247 applications (Manning, P. (2020). 'Hearing Impaired', *The Saturday Paper* (National) 5-11 September 2020, Issue No. 317, p. 3.).

33 Senate Select Committee on COVID-19, First Interim Report, Parliament of Australia, December 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Interim_Report) and its Second Interim Report in February 2021 (Senate Select Committee on COVID-19, First Interim Report, Parliament of Australia, February 2021, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Second\\_Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Second_Interim_Report)).

34 Senate Select Committee on COVID-19, First Interim Report, Parliament of Australia, February 2021, Recommendation 2, [3.62].

35 Senate Select Committee on COVID-19, Second Interim Report, Parliament of Australia, December 2021, Recommendation 1, [1.30].

and Aged Care Services about the support provided to aged care services during the pandemic.<sup>36</sup>

The COVID-19 committee's approach to legislative scrutiny is relatively ad hoc and includes a heavy reliance on the written submissions of key legal academics and organizations (such as the Law Council of Australia) and the work of the 'technical scrutiny' committees. This can be seen in the context of the COVIDSafeApp implemented by the Australian government with the objective of enhancing pre-existing contact tracing techniques designed to limit the spread of the COVID-19 virus. The COVIDSafeApp was initially introduced without a legislative framework and was instead supported by a declaration by the minister for health that set out some limits on the use and sharing of information collected via the app (*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020* (Cth)).

The lack of legislative framework was recognized by many legal experts<sup>37</sup> as a shortcoming in the design and implementation of the app and was the subject of questioning by the COVID-19 committee. Although not tasked with applying a prescribed human rights analysis to this issue, the COVID-19 committee provided a forum for legal and technical experts and the community, more broadly, to consider whether the COVIDSafeApp is *necessary* in light of the nature of the threat posed by COVID-19 and the impact of the app on personal privacy and whether the app constitutes a *proportionate* way to respond to the COVID-19 virus. These questions demanded consideration of the scientific evidence relating to the prevalence of the COVID-19 virus within the Australian community, effectiveness and efficiencies of pre-existing contract tracing mechanisms and the effectiveness and efficiency of the app itself. Consideration was also given to the impact of the app on the rights of vulnerable members of the community, such as women experiencing domestic violence, for whom a breach of privacy could have devastating consequences for themselves and their families.<sup>38</sup>

The COVID-19 committee provided a forum for generating and testing legislative and policy alternatives to the COVIDSafeApp that refine and recalibrate impacts on personal privacy,<sup>39</sup> such as apps developed in Germany that avoid a government-controlled central location for information to be stored, significantly reducing the risk of misuse or overuse of personal information by government

36 Senate Select Committee on COVID-19, Second Interim Report, Parliament of Australia, December 2021, Recommendation 6, [1.70].

37 Galloway, K. and Castan, M. (2020). 'COVIDSafe and Identity: Governance Beyond Privacy', on AUSPUBLAW, <https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy> (accessed 11 May 2020).

38 These issues formed part of the senate select committee's public inquiry hearings in April and May 2020, which drew from the analysis contained in the following two reports from the human rights committee (*Report 5 of 2020: Human rights scrutiny of COVID-19 legislation; Report 6 of 2020 (see Chapter 1)*).

39 Lomas, N. (2020). 'Germany Ditches Centralized Approach to App for COVID-19 Contacts Tracing', TechCrunch (online), <https://techcrunch.com/2020/04/27/germany-ditches-centralized-approach-to-app-for-covid-19-contacts-tracing/> (27 April 2020).

agencies.<sup>40</sup> These models were put to government officials by the senate select committee during its April and May 2020 hearings, and the efficacy of the COVIDSafeApp, as well as the way COVIDSafeApp status is treated in the community, has continued to feature in the questions posed by the COVID-19 committee. The work of the COVID-19 committee, and the Parliamentary Joint Committee on Human Rights (PJCHR) and Scrutiny of Bills Committee, provided the political foundation for the introduction of legislative provisions addressing the use, sharing and storage of information obtained via the app in the form of the Privacy Amendment (Public Health Contact Information) Bill 2020 and is an example of the benefits of Australia's 'ad hoc', multicommittee approach to human rights scrutiny.

However, this ad hoc approach to rights scrutiny of executive action can also give rise to significant shortcomings in the provision of robust rights protection, as can be seen by the Australian government's heavy use<sup>41</sup> of delegated powers conferred on it by pre-existing public health emergency legislation that has been largely exempted from parliamentary committee scrutiny. For example, legislative instruments made under section 475 of the *Biosecurity Act 2015* (Cth) ('the Act') trigger sweeping powers (some powers are referred to as 'special emergency powers') for the health minister to determine any requirements necessary to prevent or control the 'emergence, establishment or spread' of COVID-19 within, or in a part of, Australian territory, or to another country. These powers have included a ban on overseas travel, restrictions on retail trade at airports, the COVIDSafeApp, and restrictions placed on remote communities populated by aboriginal and Torres Strait Islander communities. In addition, several 'human health response zones' have also been declared that provide for the detention and treatment of people within a designated area who have entered Australia during the emergency period.

The determinations are exempted from the usual parliamentary based oversight of legislative instruments, despite concerns about this increasingly widespread practice raised by the Senate Standing Committee on Delegated Legislation in its 2019 Report. Under s 477(2) of the Act the determinations are not disallowable by parliament. As a consequence, the determinations have not been placed before the Senate Scrutiny of Delegated Legislation Committee, nor has the health minister provided a statement of compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) on their proportionate compliance with international human rights standards. Even more significantly, the Act makes provision for the determinations to prevail over 'any other Australian law' in a 'Henry VIII' clause that elevates the determinations as primary law that overrides enactments of the Commonwealth and state parliaments.

The lack of full parliamentary oversight of these determinations combined with the relatively low standard by which the health minister is to determine the necessity of issuing the determinations, significantly reduces the capacity to pro-

40 Compton, C. (2020). 'Trust, COVIDSafe and the Role of Government', on AUPUBLAW, <https://auspublaw.org/2020/05/trust,-covid-safe,-and-the-role-of-government> (accessed 11 May 2020); Lomas, 2020.

41 For example, on its web page, the senate standing committee on delegated legislation has sought to list all delegated legislation registered on the federal register of legislation on or before 20 May 2020 relating to COVID-19. This list contains some 148 legislative instruments.

vide oversight of, and test the limits of, these executive powers, including by way of utilizing the new powers to scrutinize legislative instruments on constitutional grounds granted to the delegated legislation committee. The fact that the determinations override all other Australian laws and, significantly, are enforced by criminal penalties means these determinations constitute exorbitant exercises of power.

These provisions also attracted the attention of the Scrutiny of Bills Committee in its first *Scrutiny Digest* (No 5 of 2020) concerning the Australian government's Coronavirus Economic Response Package Omnibus Bill 2020, calling on the proponents to provide advice regarding the 'Henry VIII clauses' (at p. 13). The Scrutiny of Bills committee also sought advice concerning why "it is necessary and appropriate to provide the minister with broad discretionary powers to alter or extend the operation of supplement payments in the *Social Security Act 1991*" (at p. 15) and queried "what criteria ministers will consider before determining whether it is appropriate to defer the sunseting of Acts and legislative instruments" (at p. 16). As is often the case when it comes to scrutiny of emergency lawmaking, this Scrutiny Digest report came weeks after the Coronavirus Economic Response Package Omnibus Bill 2020 (Cth) had been enacted into law, too late to give rise to any direct legislative amendments.

This example highlights the clear limits of the Australian ad hoc approach to scrutinizing the rights impacts of proposed laws, that relies heavily on a system of committees being empowered to work together to scrutinize key aspects of executive lawmaking. However, as discussed further ahead, research into other forms of urgent or emergency lawmaking shows<sup>42</sup> that publicly documenting the rights-abrogating features of proposed laws can have a rights-*enhancing* impact on future iterations of these laws, even if this comes too late for immediate amendments to be made and even if the impact is far from completely remedial from a rights perspective.<sup>43</sup>

## II New Zealand

The NZ experience of establishing and then disestablishing a special (non-government dominated and proportionately represented) select committee (the Epidemic Response Committee) to review the government's response to the COVID-19 pandemic holds important lessons for parliamentary scrutiny within NZ's unicameral system and for other Westminster parliaments. The value of the Epidemic Response Committee as both a forum of democratic scrutiny of NZ's 'tough lockdown' approach to the pandemic and a mechanism for maintaining citizen's connections with their parliamentarians during the early stages of the pandemic has been passionately noted by some NZ parliamentarians, including David Seymour MP, who said:

42 Grenfell, L. and Moulds, S. (2018). 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia', *University of New South Wales Law Journal*, vol. 41, no. 1, p. 40; cf. Rajanayagam, S. (2020). 'Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act', in Laura Grenfell and Julie Debeljak (eds), *Law-Making and Human Rights* (Thompson Reuters, Sydney), p. 647.

43 Grenfell and Moulds, 2018.

I think it's fair to say that the committee had an outsize and positive impact on the way that our country navigated – what many people say, and it's hackneyed, but it is true – an unprecedented crisis. The committee had the help of some expert witnesses and some very brave members of the public who told their story. The telling of stories and the injection of alternative perspectives on what was going on was very much needed as this country sought to navigate the crisis (26 May 2020)

These sentiments were echoed by other members of the NZ parliament, who praised the work of the Epidemic Response Committee and said that it should continue albeit in a less intensive form:

there is a very strong case for keeping the committee going – not three times a week, as we have in the past, but, I would have thought, on a weekly basis – so that that different, extra layer of transparency is retained at a time when Parliament is not operating as normal and these momentous decisions are being made, which will affect the lives of New Zealanders not only now but for many years to come as we pay off the debt. So my plea to the Government is that they reconsider this and that they do act magnanimously and allow themselves to be exposed to extra scrutiny at a critical time in our history, and I would think they would do well to reflect on that.

Some called for the committee to continue its work on the grounds that

this crisis is far from over and that a Government will continue to attempt to manage the crisis with a clear eye on September 19, and that is the reason why – just as the Epidemic Response Committee was able to bring so many useful perspectives to national attention, which drove the questions that journalists asked members of the Government in the early afternoon and, ultimately, drove the stories that New Zealanders were watching at 6 p.m. – we need to continue this committee throughout the remainder of this crisis so that we can have democracy, so people can see their representatives putting forward alternative suggestions and solutions and questioning the responses that the Government puts in place. If it was important before, in a way it's even more important now.

However, a number of government members pointed to the fact that since the lockdown restrictions had been eased in NZ, the pre-existing standing committees were able to continue their 'regular' scrutiny work, which included a focus on legislative response to COVID-19 within specific thematic areas.

As discussed further ahead, the political composition of the Epidemic Response Committee (and, in particular, its non-government majority) undoubtedly influenced the capacity of the committee to undertake robust scrutiny of the government's COVID-19 response and explains the committee's early disbandment. For some in NZ, the committee's non-membership and broad terms of reference have provided an 'opportunity to learn something' about the role of select com-

mittees within NZ's unicameral landscape, which can often see government-controlled standing committees 'rush through' legislation that has significant rights impacts or other implications for key sections of the NZ community (Seymour, 26 May 2020).

It is also important to note that the scrutiny work of the Epidemic Response Committee and the other parliamentary committees within the NZ parliament has been assisted by the human rights analysis of the NZ legislative response to the pandemic provided in the 'Section 7' reports prepared by the attorney general pursuant to section 2 of the *Bill of Rights Act 1990* (NZ). These reports include a statement of consistency with human rights that involves, first, identifying whether a protected right or freedom appears to be limited by a provision in a bill and, second, making an assessment of whether the limit is justifiable under the Act.<sup>44</sup> Early 'vetting' analysis of rights compatibility of proposed laws is done by the ministry of justice and the crown law office. Where the bill is considered to be inconsistent with the bill of rights, a section 7 report in the name of the attorney general is presented to the House with the bill when it is introduced. In some cases, a statement will also be provided where the bill has been found to be 'consistent' with human rights, which occurred with respect to a number of COVID-19 laws.<sup>45</sup> At other times, the findings as to rights compatibility may not be so clear. For example, on 11 May 2020 Hon Andrew Little, the acting attorney general, issued a statement that the COVID-19 Public Health Response Bill 'appears to be consistent' with the rights and freedoms but noted the wide range of rights potentially impacted, including the right to refuse to undergo medical treatment, freedom of peaceful assembly, freedom of association, freedom of movement, right to be free from unreasonable search and seizure, liberty of the person and rights to justice in civil proceedings with the crown. These Section 7 reports provide important signals and checklists for submission makers to other select and standing committees within the NZ parliamentary committee system, confirming the preliminary observations deriving from the Australian experience (above) that it is the *system* of parliamentary committees working together – rather than any one individual parliamentary committee – that is most capable of delivering meaningful scrutiny outcomes in the context of emergency lawmaking.

### III United Kingdom

The experience of parliamentary committee scrutiny of COVID-19 laws in the early stages of the pandemic in the UK demonstrates the acute challenges faced by parliaments that were forced to 'shut down' at short notice while continuing to provide the legislative framework necessary to enable the executive government to

44 Rodgers, 2017.

45 For example, on 9 June 2020 the Hon David Parker, Attorney General provided a statement attesting to the 'Consistency with the New Zealand Bill of Rights Act 1990' of the COVID-19 Recovery (Fast-track Consenting) Bill. This Bill set out the framework for NZ's economic recovery from the COVID-19 pandemic 'by providing employment opportunities and certainty for ongoing investment while applying appropriate environmental safeguards'. A similar statement was issued with respect to the COVID-19 Response (Further Management Measures) Legislation Bill – which amends over 40 acts in order to make legislative changes that are necessary to respond effectively to the COVID-19 pandemic, including the *Epidemic Preparedness Act 2006*.

respond to an unfolding and severe health crisis. In the UK, this led to the emergency coronavirus bill being ‘fast-tracked’ through all stages and passed into law without meaningful scrutiny by any parliamentary committees. This bill (enacted as the *Coronavirus Act 2020*) changed existing laws to rapidly expand the available health and social care workforce in the UK and also facilitated drastic measures to contain and slow the spread of the virus, for example by reducing unnecessary social contacts and strengthening the quarantine powers of police and immigration officers.

As the pandemic progressed, the UK experience also demonstrates the potential for parliamentary committees to capitalize on communication technologies to continue to perform their important scrutiny function. For example, by April 2020, significant technical and procedural work had been undertaken by parliamentary staff to allow the UK parliament’s work to continue in ‘hybrid’ and ‘virtual’ formats, involving the use of video conferencing technologies, including a bespoke Zoom videoconference platform approved for use by the UK parliament’s security and IT experts. This was supported by relevant changes to the standing orders and other procedures to allow hybrid and virtual sitting of the House of Commons, including for Question time. On 22 April, the House of Commons issued temporary orders to put in place a remote voting system based on the existing MemberHub platform, used for the remote tabling of questions and motions by MPs and accredited staff.

These technologies’ features helped to ensure that the UK parliament could continue to introduce and debate legislation despite the ‘lockdown’ conditions and helped to facilitate ongoing parliamentary committee work. However, it did little to assuage the serious concerns associated with the speed at which the initial legislative response to the COVID-19 pandemic moved through the UK parliament – placing immense pressure on the system of parliamentary committees so heavily relied on to review and scrutinize proposed laws. For example, when the secondary legislation committee attempted to examine the large amount of delegated legislation enacted under the original coronavirus bill (321 pages, consisting of 87 clauses and 27 Schedules) it pointed out that it “made fewer definitive recommendations than would normally have been the case for such a very substantial Bill”. The committee explained that its “overriding concern is with the sunset provision”, which lasted for two years, with the possibility of extension. The committee explained that “this sunset provision is the principal safeguard in the face of such significant powers being conferred on Ministers and, as a result, should be reduced to one year, without a power to extend.” The committee also drew attention to ‘Henry VIII powers’ within the bill and the fact that extraordinary executive powers were expressed in general terms and not explicitly linked to the COVID-19 pandemic. The committee said that it anticipated that the parliament would “look to the Minister to provide an ironclad assurance that the powers contained in the bill would only be exercised in connection to the COVID-19 pandemic and in no other circumstances”.

The UK parliament also has a regulations review committee that initiated a briefing to review secondary legislation made in response to the outbreak of COVID-19 in April 2020 (Briefing to review secondary legislation made in response to

COVID-19 (Final report, 7 August 2020)). The purpose of the briefing was for the committee to report on our scrutiny of COVID-19 secondary legislation. This briefing was considered necessary to ensure that secondary legislation enacted to address the effects of the outbreak of COVID-19 and the powers to make that secondary legislation were carefully balanced against a range of factors, including the rights and duties of individuals affected by those schemes, the fundamental constitutional principles for the design of secondary legislation, the uncertainty about how long the emergency circumstances would last; and the desire to create the least amount of disruption.

The committee found that while in the majority of cases, the COVID-19 secondary legislation appeared to have successfully balanced these matters, in some cases, the constitutional principles for secondary legislation were not observed, particularly in the early stages after the epidemic and national state of emergency were declared. Two specific concerns were consistently raised, relating to unclear drafting and subdelegation of the power to make law, without specific authority for that subdelegation in the empowering Act. The committee highlighted the need to ensure any draft COVID-19 secondary legislation was referred to it in order to obtain prompt feedback and ensure that any secondary legislation is being developed in consultation with “people with expertise on the constitutional principles underpinning the design of secondary legislation”.

The work of these ‘technical scrutiny’ committees has proven an essential supplement to the more recent select committee inquiries into different aspects of the COVID-19 pandemic and the laws made in response. Many of these inquiries have been established in response to public concern about the impact of lockdown conditions on vulnerable members of the community. For example, specific inquiries have been established into how social distancing and lockdown conditions will create new vulnerabilities for women and children living in abusive circumstances and for people with protected characteristics, including people with disabilities. As noted previously, a significant inquiry was also launched by the joint committee on human rights into the human rights implications of the government’s overall response to the coronavirus crisis. This scrutiny focus on the rights implications of lockdowns has extended to include robust scrutiny of government expenditure in response to the pandemic, as well as consideration of issues relating to access to COVID19 vaccines.<sup>46</sup> For example, by March 2021 the Public Accounts Committee had established an inquiry into specific aspects of the UK government’s ‘test and trace’ regime as a follow up to past scrutiny of the economic costs of the government’s response to the pandemic.<sup>47</sup>

The scrutiny experience in the UK – which began with sustained parliamentary committee focus on the legal frameworks authorizing the use of lawmaking power

46 See eg. UK Parliament, House of Commons Website, ‘Committee to take evidence from Michael Gove, Premier League and medical experts on Covid 19 vaccine certification’, online, 21 May 2021, <https://committees.parliament.uk/committee/327/public-administration-and-constitutional-affairs-committee/news/155393/committee-to-take-evidence-from-michael-gove-premier-league-and-medical-experts-on-covid-19-vaccine-certification/> (accessed 16 June 2021).

47 UK Parliament, House of Commons, Public Accounts Committee, ‘Test and Trace 2’, establish March 2021, <https://committees.parliament.uk/work/1299/test-and-trace-2/> (accessed 16 June 2021).



by the executive and evolved to include a wide range of thematic inquiries into the different policy implications of key components of the Executive's response to COVID-19 – has strong parallels with the experiences in Australia and NZ, described previously. Taken together, these experiences suggest that the quality and impact of parliamentary committees' scrutiny of emergency lawmaking by the executive often depends on the pre-existing system of committees established within the particular jurisdiction, rather than the work of any individual committee alone.

#### D Part 4: Are Parliamentary Committees Up to the Job?

This article has aimed to provide a broad outline of the legal structure, powers and functions of the parliamentary committees involved in scrutinizing the COVID-19 legislative response in Australia, NZ and the UK. It has also identified several specific examples of the influence these committees can have on the shape of the legislative response to COVID-19 and the way these laws are debated in parliament and in the broader community.

The outline provided above suggests that there is a degree of commonality when it comes to the factors that may be determinative of the capacity of a parliamentary committee to effectively scrutinize emergency lawmaking by the executive, including laws made in response to the COVID-19 pandemic. These common factors include:

- The deliberative capacity of the committee<sup>48</sup> – such as the extent to which it is able to engage meaningfully with experts, community organizations and individuals, as well as its potential to provide a 'safe space' for members to change their mind in the face of compelling evidence.
- The political characteristics of the committee<sup>49</sup> – such as whether it has a government or non-government majority, the political seniority of its members and expertise of its secretariat staff, whether it comprises members from both houses, or whether its mandate is considered to be highly politicized.
- The relationship between the committee and relevant executive agencies<sup>50</sup> – including the committee's access to relevant government information or capacity to hold 'private briefings' or to 'test' practical alternatives with government before recommending changes publicly.
- Whether the committee is tasked with a 'policy-scrutiny' or 'technical-scrutiny' function<sup>51</sup> – such as undertaking compliance-related activity by assessing

48 Dalla-Pozza, D. (2008). 'Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws', *Australasian Parliamentary Review*, vol. 23, no. 1, p. 39.

49 Holland, I. (2009). 'Senate Committees and the Legislative Process' (Parliamentary Studies Paper No 7, 2009), [www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07\\_Holland.ashx](http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07_Holland.ashx) (accessed 7 January 2020); Horri-gan, B. (2012). 'Reforming Rights-Based Scrutiny and Interpretation of Legislation', *Alternative Law Journal*, vol. 37, p. 228.

50 Moulds, S. (2019). 'Forum of Choice? The Legislative Impact of the Parliamentary Joint Committee of Intelligence and Security', *Public Law Review*, vol. 29, no. 4, p. 285.

51 Kinley, D. and Ernst, C. (2012). 'Exile on Main Street: Australia's Legislative Agenda for Human Rights', *European Human Rights Law Review*, vol. 1, p. 58.

proposals against a prescribed list of criteria – or whether the committee is given broad scope to examine the policy merits of the law or consider its impacts on a key thematic area or social group.

- Whether the committee exists within a sophisticated system of committees or operates on an ad hoc basis.<sup>52</sup>
- Timing of the issue of committee reports and recommendations<sup>53</sup> – including whether its reports, recommendations or findings are able to be tabled or published *prior to* the enactment of the proposed law or before the cessation of any relevant disallowance period or sunset provision.

When these factors are applied to the specialist COVID-19 committees (Australia and UK) or epidemic committees (NZ), an interesting image emerges. Some factors point towards these committees having some influence on improving the rights compliance of the laws enacted in response to COVID-19 or providing a meaningful check on executive power. For example, the politically diverse membership of these committees have enabled them to attract input from a wide range of experts, community organizations and individuals, despite the practical challenges associated with ‘online’ or ‘virtual’ public engagement.<sup>54</sup> While the limitations on holding ‘face-to-face’ public inquiries (that particularly affected the UK committee and, to a lesser extent, the NZ and Australian committees) necessarily alter the optics of committee scrutiny, these specialist committees were particularly adept at attracting media attention and generating external political pressure to highlight the most critical findings associated with their scrutiny of COVID-19 laws. The senate’s COVID-19 committee, for example, has been particularly skilled at utilizing social media (including Facebook and Twitter) to publicize its public hearings and has attracted a staggering number of submissions during its rolling, video-based public inquiries.

An interesting political shift away from entrenched ideological positions in favour of a pragmatic approach to responding to the health crisis posed by COVID-19 was evident in the early hearings of these specialist COVID-19 committees, which also appeared to provide a ‘safe space’ for members to change their minds in the face of compelling evidence. However, these early glimpses of bipartisan pragmatism have appeared to wane considerably over time, with the non-government dominated NZ Epidemic Response Committee being disbanded in May 2020 and the COVID-19 committees in the UK and Australia now more closely resembling ‘politics as usual’, with non-government members now engaged in more nuanced

52 Grenfell, 2015, at pp. 23-25.

53 Dalla-Pozza, D. (2016). ‘Refining the Australian Counter-terrorism Legislative Framework: How Deliberative has Parliament Been?’, *Public Law Review*, vol. 24, no. 4, p. 271.

54 Hendriks, C. and Kay, A. (2017). ‘From “Opening Up” to Democratic Renewal: Deepening Public Engagement in Legislative Committees’, *Government and Opposition*, 7 August 2017, pp. 20-21.

political positioning.<sup>55</sup> Over time this could give way to a politicization of the inquiry function of these specialist COVID-19 committees, distracting members from engaging in detailed legislative or policy analysis. This suggests that the parliamentary committee system may face important limitations when it comes to providing a suitable forum for developing practical responses to national emergencies – particularly if it becomes the *only forum* for political perspectives to be robustly expressed (for example when regular parliamentary sittings are postponed). On the other hand, a diversified spread of policy positions in response to the COVID-19 pandemic could lead to the identification of less rights-intrusive policy or legislative options, particularly if developed alongside expert advice or following engagement with other statutory review bodies such as the ombudsmen, human rights bodies, employment commissioners and privacy commissioners. Certainly, this type of positive engagement between parliamentary committees and with other review bodies or statutory agencies has proven to hold clear benefits for rights protection and improved oversight and transparency in other emergency contexts.<sup>56</sup>

The relationships that these special select committees forge with key government agencies (including health authorities, police, social security agencies) and relevant bureaucracies could also be determinative of their overall success. Research into the role of the specialist select committees in other contexts (such as counterterrorism) suggests that establishing strong relationships of trust with key government agencies provides committee members with the opportunity to ‘workshop’ legislative and regulatory alternatives ‘behind closed doors’ and generate consensus views across the political divide.<sup>57</sup> This research also suggests that when committees work closely with executive agencies they can also have significant rights-enhancing impacts on the final shape of the law as they move to identify less rights-intrusive ways to achieve the same shared policy goals.<sup>58</sup> This type of trajectory could occur in the context of COVID-19 if the specialist COVID-19 committees are able to develop and maintain these close relationships with key agencies (which may in turn depend on the politicization of such committees, as noted previously).

As already noted, in Australian, NZ and the UK, these special select COVID-19 or epidemic committees exist within sophisticated systems of parliamentary committees, some of which also actively scrutinize the COVID-19 laws and delegated legislation. This includes technical scrutiny’ committees – such as the delegated legislation committees and the human rights committees – which have the potential to furnish a range of key stakeholders with important, detailed information about the extent to which these laws adhere to rights principles. The use of techni-

55 See, e.g., Grattan, M. (2020). ‘Free Childcare Ends July 12, with Sector Losing JobKeeper but Receiving Temporary Payment’, *The Conversation*, online 8 June 2020, <https://theconversation.com/free-childcare-ends-july-12-with-sector-losing-jobkeeper-but-receiving-temporary-payment-140253>; Shanahan 2020. Shanahan, D. (2020) ‘Albanese goes all in with high-stakes gamble over JobKeeper’, *The Australian* online, 16 May 2020 <https://www.theaustralian.com.au/inquirer/albanese-goes-all-in-with-highstakes-gamble-over-jobkeeper/news-story/22c2a55cd8ee9c731b450ef7d2538fab>.

56 See e.g. Moulds, 2019, 2020.

57 *Ibid.*

58 *Ibid.*

cal scrutiny reports by MPs, journalists and high-profile submission makers to other committees within the system provides an integral 'link in the chain' when it comes to drawing public and parliamentary attention to concerning aspects of the government's legislative response to COVID-19 and provides an important supplement to the work of the special select COVID-19 committees.

The benefits of this form of technical scrutiny' could be further enhanced by ensuring that these committees' rights-scrutiny criteria include or facilitate an explicit focus on the principles developed by the Inter-Parliamentary Union in 2020<sup>59</sup> to assist parliaments around the world to adhere to international human rights standards when legislating in response to emergencies. These principles are:

- *proclamation* – requiring not just for an emergency to be declared by the executive but also the active involvement of the parliament in the ratification, proclamation or extension of a state of emergency
- *communication* – including explaining to the community the nature of the powers being invested in executive agencies and publicly reporting on their use and their effectiveness in countering the threat posed by the emergency
- *temporality* – demanding that parliament acknowledge the exceptional nature of the declaration of a state of emergency and its necessarily limited duration, for example by including sunset clauses or mandating periodic, independent review
- *exceptional threat* – requiring an ongoing assessment of the nature of the crisis to ensure that emergency powers are invoked only in response to a real and imminent danger to the community

Reporting on these aspects of proposed legislative responses to COVID-19 is critical to equipping parliamentarians and the broader community with the type of objective analysis necessary to assess the merits of the proposed law. It is also consistent with the Commonwealth Parliamentary Association's 'toolkit'<sup>60</sup> for Commonwealth parliaments, containing various measures and recommendations that can be adopted by both parliaments and parliamentarians in order to continue to effectively scrutinize legislation during a global pandemic.

While some of these key principles have already featured in the work of the parliamentary committees discussed previously, it is too early to accurately guess the full impact of parliamentary committees on providing robust scrutiny of legislative responses to the COVID-19 pandemic. It may take years to evaluate their role and influence, particularly if one considers the long reporting time frames. It may be that the sceptics of the parliamentary committee system (see, e.g., Burton and Williams) are proved right and that without more direct parliamentary oversight (for example in the form of sunset clauses or disallowance motions) or judicial oversight, there is little prospect of ensuring adequate scrutiny of these exception-

59 Interparliamentary Union (2020). 'Human Rights and COVID-19: A Guidance Note for Parliaments', [www.ipu.org/human-rights-and-covid-19-guidance-note-parliaments](http://www.ipu.org/human-rights-and-covid-19-guidance-note-parliaments).

60 Commonwealth Parliamentary Association (2020). 'COVID-19 Delivering Democracy: Toolkit for Commonwealth Parliaments', [https://issuu.com/theparliamentarian/docs/cpa\\_toolkit\\_covid-19\\_coronavirus\\_e-version\\_single](https://issuu.com/theparliamentarian/docs/cpa_toolkit_covid-19_coronavirus_e-version_single). See also Council of Europe (2020). 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States' (Council of Europe 2020) <https://www.coe.int/en/web/congress/covid-19-toolkits>.

al, emergency laws. However, this preliminary glimpse at the work of the specialist COVID-19 committees and their engagement with other parliamentary committees within the Australian, NZ and UK parliaments suggests reasons for hope. In particular, the preceding outline suggests that by (a) investing in the attributes listed earlier and (b) working together as part of a broader system, these committees may well be ‘up to the job’ when it comes to scrutinizing governments’ response to COVID-19 – and when it comes to improving the quality of lawmaking in Australia, NZ and the UK in the future.