

## Submission to the Senate Scrutiny of Bills Committee concerning its inquiry into its future direction and role

*The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.*

*CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).*

*CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.*

We thank the Scrutiny of Bills Committee for the opportunity to contribute to this enquiry.

'Is it a committee that has done its job, and people have maintained it because of that recognition? Or is it a committee that is not upsetting anybody terribly much so that there is no need to get rid of it?'

---Dennis Pearce, *Opening Address* at the conference: Ten Years of Public Scrutiny

### **A. Introduction: The New South Wales Legislation Review Committee (LRC)**

In its review of its functions, the Scrutiny of Bills Committee (the Committee) is asked to take account of the functions and performance of similar committees in other jurisdictions. The CCL has had considerable experience of the LRC, and reports that that experience is overwhelmingly negative. Its problems are instructive, and make a useful starting point for this submission.

The LRC was set up after an inquiry into whether New South Wales should adopt a bill of rights. It was feared<sup>1</sup> that a bill of rights might threaten the sovereignty of Parliament, and argued that a committee could provide equivalent protection to rights. **The result is a manifest failure. This committee is no substitute for a bill of rights.**

The extent of that failure is manifest on the LRC's own website—in its annual reports, its legislation review digests and its *Information Paper*. It does not have sufficient time to examine legislation. It does not have time to

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<sup>1</sup> See below. The CCL does not accept that the introduction of a bill of rights on the Canadian model provides any threat whatsoever to the sovereignty of parliament. On the contrary, it will, perhaps paradoxically, add to its autonomy.



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consult, or to allow public input. (It often barely has time to meet.) It has—by the deliberate choice of its creators—no set of rights against which to judge. It is routinely ignored.

### **A.1. Time.**

The LRC has a mere five days, including weekends and public holidays, between the time a bill is introduced into the NSW Parliament and its passage through both Houses. When bills are declared urgent, it can only comment after their passage. Repeated complaints about this have led to no changes to the Standing Orders.<sup>2</sup> We note that the Scrutiny Committee often has little more time.

The LRC Minutes for March 8, 2010 show that it took only 35 minutes to consider 8 bills plus some regulations, and to deal with formal business. While the bulk of the work on its report would have been done before its meeting, such a brief consideration in committee is an indication of the extent to which even its members consider its work important—or of the lack of time to give matters a proper consideration. (It needed to report that same afternoon if its comments were to be considered before the bills were passed. This is its normal situation.)

### **A.2. Rights Standards.**

The LRC has no *mandated* set of rights against which it judges bills and acts. This is a matter of deliberate policy—the New South Wales Parliament appears to have been afraid that its own processes could threaten its sovereignty. “The Parliament therefore decided not to define what rights and liberties people in New South Wales should enjoy but rather to determine such issues within the context of each bill.”<sup>3</sup> Accordingly the LRC itself has collected a set of rights statements to guide its deliberations (when it has time to deliberate). According to its Information Paper, these include international human rights law, with special attention being paid to human rights treaties to which Australia is a party, the human rights laws of other countries (for example the United Kingdom, The United States, New Zealand, Canada and South Africa) and the range of rights recognised under Australian law, whether or not these are enforceable under existing law.<sup>4</sup> **That is, it has *in effect* adopted its own statement of personal rights and liberties.**

The LRC believes that this is not satisfactory. It notes that ‘neither statute nor common law was made in an attempt to define or protect general rights and liberties’, and that ‘both statute and common law have been the source of laws that are now seen as oppressive and contrary to human rights norms (e.g., denial of property rights to married women and the criminalizing of

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<sup>2</sup> See the Annual Reports of the LRC for 2007-8 and 2008-9. The relevant standing orders are No. 88 for the Legislative Assembly and No. 137 for the Legislative Council.

<sup>3</sup> Legislation Review Committee, Information Paper, p. 3.

<sup>4</sup> *Ibid.*, p. 6.

homosexual acts.)’.<sup>5</sup>

### **A.3. Lack of impact.**

The LRC has very little impact. It sends letters to ministers, about half of which are given an answer. In the year to June 2008, it met 16 times, commented on 99 bills, referred 170 issues concerning 70 bills to the NSW Parliament, and was referred to in debates a total of 24 times, in relation to 17 bills.<sup>6</sup>

A striking example of the failures of the LRC is the passage of the Crimes (Criminal Organisations Control) Act 2009 (NSW). The Act permits the Police Commissioner to apply to an eligible judge (where eligibility is determined by the NSW Attorney General) to have an organisation made a declared organisation. Members of that organisation are then prohibited, with a penalty of imprisonment, from associating with each other; and the notion of ‘membership’ is expanded to include anyone who is connected with the organisation. The Police Commissioner may prevent any member of the organisation being present when evidence which he (or she) declares to be criminal intelligence is presented.

This disgraceful act was passed through both houses within a day of its introduction, and with very little notice to the public. When it finally managed to discuss it, the LRC expressed strong reservations—but its report was not completed and published till a month later. Although subsequent amendments were made to the Act, they were concerned with ensuring that it was beyond legal challenge. The actions of the LRC had no effect whatsoever.

**Conclusion: if the Senate’s Scrutiny of Bills Committee is going to be effective, it must operate under a system that requires it to be taken seriously. It requires (as a start only) a clear statement of the human rights and liberties by which bills are judged. It requires parliamentary processes which ensure that it has time to consider bills properly. It requires parliamentary time for its reports to be considered seriously.**

## **B. The Scrutiny of Bills Committee’s functions.**

### **B.1. Trespass upon personal rights and liberties.**

The Scrutiny of Bills Committee is required to scrutinise bills which come before Parliament and to report whether they trespass unduly on personal rights and liberties.

The *Brennan Report* quotes the following criticisms:

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<sup>5</sup> *Ibid.*, p. 8.

<sup>6</sup> New South Wales Legislation Review Committee, Annual Report 2007-2008 pp. 3—8.

‘there is no clearly defined list of ‘rights and liberties’ that should not be ‘unduly trespassed’ upon; the Committee’s reporting function is limited and cannot take any stronger measures, such as declaring that a Bill is incompatible with human rights; the Committee’s timeframe does not allow adequate consideration or review of proposed laws, nor consideration of existing law; and the Committee’s work is not adequately publicised, nor is there a body of jurisprudence developed’.<sup>7</sup>

There is risk uncovered here that the Committee will become as irrelevant as the New South Wales LRC.

An agreed statement of rights and liberties against which proposed legislation is judged, would add status to the Committee’s findings. It would, moreover, have an educative effect.<sup>8</sup>

The statement of human rights and liberties should include all those rights and liberties which Australia is obliged to protect under the various international human rights treaties which Australia has signed, together with those guaranteed by the Constitution the common law and other legislation. Such a list would be less controversial than an attempt to list rights de novo.<sup>9</sup>

## **B.2. Undue trespass.**

There is no definition in Standing Order 24, and no account on the Committee’s website, of what counts as *undue* trespass on rights and liberties. As the notion of what is proper trespass is expanded, the notion of ‘trespass’ is at risk of being whittled away, until it dies the death of a thousand qualifications.<sup>10</sup>

Even a dire situation may not justify an intrusion.<sup>11</sup> The Committee should be able to report that a proposed piece of legislation is *incompatible* with human rights.

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<sup>7</sup> Commonwealth of Australia. Report of the National Human Rights Consultative Committee, September 2009,(the Brennan Report). Appendix D, p.4.

<sup>8</sup> The NSW LRC declares that there is an educative effect of its findings. That effect is hard to find—as the procedures during the passage of the Crimes (Criminal Organisations Control) Act 2009 illustrate.

<sup>9</sup> See the comments by Professor Michael Tate reported in the Brennan Report, p. 171. See however also the comments of the NSW LRC quoted above.

<sup>10</sup> With apologies to Anthony Flew.

<sup>11</sup> It will depend, for example, on what alternative actions are available. It is to be remembered that some human rights are included in international treaties in order to prevent dire situations from arising.

In *R v Momcilovic*, its first case dealing with the Victorian Charter of Human Rights and Responsibilities, The Victorian Court of Appeal in) quoted His Honour, Chief Justice Dickson:

[O]nce a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form of proportionality test’. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance’.

The Committee should adopt such an approach.

### **B.3. The other existing obligations.**

If administrative powers are insufficiently defined, it is hard to see how making rights, liberties or obligations dependent on them could be other than undue. The Committee should report all such cases; and if it does consider them justified in specific circumstances, should give its reasons.

Similarly, since non-reviewable decisions infringe at least the right to seek a review, the Committee should report on all instances where a bill seeks to create them.

The Committee should continue to report on whether bills inappropriately delegate legislative powers, or insufficiently subject the exercise of legislative power to parliamentary scrutiny.

## **C. The Committee’s ways of operating.**

### **C.1. The effect of a bill of rights.**

The passage of a bill of rights would substantially improve the Committee’s effectiveness, especially of its educative and publicity functions. A warning to parliament that a proposed piece of legislation conflicts with the bill would have to be taken seriously. A culture of respect for human rights would be engendered, which would add to the Committee’s effectiveness. But more importantly, a judgement by a court would create a climate of opinion in

which parliament would be less susceptible to media hysteria and pressure from police and security agencies.

## **C2. Inviting public input.**

The timetable to which the Committee operates precludes significant public input. The Committee should recommend that it be given more time between a bill's introduction and its consideration by Parliament<sup>12</sup>, to receive submissions concerning rights and liberties issues. The Committee should be able to hold public hearings and to seek advice from government departments and outside sources.

## **C.3. An examination of existing legislation, policies and practices.**

The Committee's work would be enhanced if it were informed by a detailed examination of the way legislation which trespasses on human rights has been implemented in practice and on the way pieces of legislation interact in ways which are incompatible with rights and liberties. *Inter alia*, that would help in the determination of what trespass is undue or excessive. The Brennan Report<sup>13</sup> proposes a comprehensive audit of existing legislation, to identify and repair gaps in existing legislation and repair gaps in human rights protection. Such an audit might be carried out under the leadership of the Committee, or under joint leadership with the Legal and Constitutional Affairs Committee.

In any case, the Committee should have the power to review existing legislation of its own initiative or following referral from either house of parliament. This is especially important when a bill has been passed with minimal debate, in an atmosphere of fear, or when, for whatever reason, the Committee has not had time to examine it properly. As the Public Interest Advocacy Centre argued to the Brennan Committee, the Committee failed to make substantive comment on some of the most restrictive elements of the Anti-Terrorism Bill 2005 (Cth) and the Anti-Terrorism Bill (No.2) 2005 (Cth).<sup>14</sup>

## **D. Recommendations to Parliament and Government.**

From its inception, the Committee endeavoured to keep politics at bay and to respect the role of Parliament by not expressing an opinion on intrusions on rights. It examines, also, all bills—though often in a very short space of time. Its role is thus contrasted with that of other Senate Committees, such as the Legal and Constitutional Committee, which has *inter alia* the roles of proposing amendments to bills referred to it and recommending their acceptance or rejection.

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<sup>12</sup> I.e., before the second reading stage.

<sup>13</sup> Pp. 155-162.

<sup>14</sup> Brennan Report p. 108

While this is the philosophy under which the Committee operates, it can never be a substitute for the close examination that would be encouraged by the passage of a bill of rights.

However, its present inquiry requires it to make recommendations. It should use the opportunity to propose changes in procedure that will help to change the culture and ensure that intrusions on rights and liberties are taken seriously.

#### **D.1. Statements of compatibility.**

The Committee should recommend to Parliament that statements of compatibility be required for all bills introduced into the Federal Parliament—setting out whether the bill is compatible with human rights and justifying any limitations on rights. They could also be required for all proposed amendments to legislation and for subordinate legislation.

The Brennan Committee reports<sup>15</sup> that submissions of the Victorian and ACT Governments described the positive impact of such statements on the human rights dialogue in their parliaments and in their public services. Other submissions argued that statements of compatibility would foster better informed debate inside and outside parliament, reduce the likelihood of rights being infringed inadvertently, and increase the transparency and accountability of government.

#### **D.2. Recommending changes**

There is special need at present for a strong voice in Parliament in support of rights. Ever since the attacks in the United States in September 2001, it has been tempting and possible for governments to pass legislation restricting rights by expanding the powers of police, ASIO and other agencies, using only the argument that the risk of death by terrorist activity is a greater threat to human rights than any government restriction.<sup>16</sup> Then, with the wedge inserted, emergency powers are extended to cover other crimes such as drug trafficking, new crimes such as associating with a person who is associated with a declared criminal organisation (the bikie laws), and even to being a nuisance to a religious celebration.

In the absence of a bill of rights, it falls to parliamentarians to call for changes in the law in defence of human rights. There is doubt whether the Scrutiny of Bills Committee can perform this role.

### **Recommendations**

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<sup>15</sup> Pp. 165-167.

<sup>16</sup> Many human rights exist to prevent worse threats than that of terrorism. It is in any case a poor argument whenever less intrusive powers would work as well.

- 1. Until a bill of rights is enacted, the Scrutiny of Bills Committee (the Committee) should develop a statement of the rights and liberties against which bills are to be judged, and submit that for parliamentary endorsement. The statement should include the rights and liberties which Australia is obliged to protect under the various international human rights treaties which Australia has signed, together with those guaranteed by the Constitution the common law and other legislation**
- 2. The Committee should seek changes to the Standing Order 24 of the Senate, to ensure that adequate time is provided for its own deliberations, and that parliamentary time is provided for debates upon its findings.**
- 3. The procedures of the Committee should effectively permit and require it to report on incompatibility with human rights and other trespasses on liberties.**

**Such reports may include:**

**whether a proposed measure appropriately balances competing rights;  
whether the measure is carefully designed to achieve the objective (being neither arbitrary, unfair nor based on irrational considerations;  
whether the effects of infringements on rights are no more than is reasonably proportional to deal with the problem the measure is intended to deal with;  
whether there are alternative measures which would be less intrusive while achieving the same results.**

**Where a measure fails these tests, it is incompatible with human rights.**

- 4. The Committee should take account of internationally available and accepted jurisprudence on the scope of the human rights in issue such as United Nations general comments, UN reports on Australia, jurisprudence of Courts including Supreme Court of the United Kingdom, European Court of Human Rights. The Committee should expressly report where it does not accept such jurisprudence.**
- 5. The Committee should aim to develop a consistent set of guidelines for Parliament to promote compatibility of legislation with human rights and other liberties.**
- 6. The Committee should report all cases where administrative powers are insufficiently defined, all cases where powers to make non-reviewable decision are created, and all cases where bills delegate powers affecting rights and liberties where there is no or insufficient parliamentary scrutiny.**
- 7. The Committee should recommend that it be given more time between a bill's introduction and its consideration by Parliament, to receive submissions that there are rights and liberties issues which should be given attention. The Committee should be able to hold public**

hearings and to seek advice from government departments and outside sources.

**8. The Committee should recommend that it be authorised to undertake a comprehensive ongoing audit of existing legislation, to identify and repair gaps in human rights protection. Such an audit might be carried out under the leadership of the Committee, or under joint leadership with the Legal and Constitutional Affairs Committee. It should determine how legislation which infringes on rights and liberties is implemented and expanded, and on the effects of interaction between different measures.**

**9. The Committee should seek the power to review existing legislation of its own initiative or following referral from either house of parliament.**

**10. The Committee should recommend to Parliament that statements of compatibility be required for all bills introduced into the Federal Parliament—setting out whether the bill is compatible with human rights and justifying any intrusions on rights. They should also be required for all proposed amendments to legislation and for subordinate legislation.**

### **Conclusion**

**The Parliament has had difficulty in protecting human rights and liberties adequately, especially when it has been faced with demands for strong and quick action and media hysteria. CCL does not believe that piecemeal improvement of the Scrutiny of Bills Committee, unaided by the passage of a Bill of Rights, can fix the problem. The passage of such a bill, however, will strengthen the hand of the Committee, and add to the autonomy of the Parliament.**

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