



INFORMATION PAPER

“Rights and Liberties” considered by the Legislation Review Committee

The meaning of “personal rights and liberties”

1. The *Legislation Review Act 1987* (LRA) requires the Legislation Review Committee to consider the impact of bills and regulations on “personal rights and liberties”. However, the Act does not define “personal rights and liberties” nor give any guidance as to the meaning the Committee is to ascribe to the term. This paper sets out the Committee’s understanding of the meaning and content of “personal rights and liberties” in the LRA.
2. The Committee’s understanding of the term “personal rights and liberties” is informed by the history of section 8A of the LRA and the stated reason the Committee was given the function of reviewing bills introduced into Parliament.
3. Section 8A was introduced as the Government’s response to the Legislative Council’s Law and Justice Committee’s inquiry into whether NSW should have a bill of rights. The Committee recommended that a Parliamentary scrutiny of bills committee be established instead of a bill of rights. The Government agreed with this recommendation, stating that it considered that “A bill of rights would undermine parliamentary sovereignty and the independence and quality of the judiciary.” 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. For this reason, the Committee was given the function of commenting on whether it considers any proposed legislation trespasses unduly on “personal rights and liberties” and reporting its views to the Parliament. Under this approach, it is the Parliament that decides whether it agrees with the Committee’s assessment of the impact of the proposed legislation and whether it should become law in NSW notwithstanding any concerns the Committee may raise.
4. In the absence of any defined set of personal rights and liberties applicable under the law or constitution of New South Wales, the Committee, in the discharge of its functions, has regard to a range of sources in determining which rights and liberties proposed legislation might impact upon.
5. In particular, the Committee considers Australian law and international law, which recognise a wide range of personal rights. These rights have been set

out in a range of statutes and instruments and defined and explained in specific contexts by national and regional courts and by other bodies whose views are highly persuasive (eg, UN Human Rights Committee).

6. Although an extensive range of rights is recognised under Australian law, a significant number of these rights are not directly enforceable. However, the Committee has regard to recognised rights whether or not they are enforceable under existing law.
7. The Committee is mindful that it is not sufficient for it merely to consider what rights are already protected by New South Wales law as:
 - neither statute or common law was made in an attempt to define or protect general rights and liberties but only to address particular behaviours or situations (eg, there is no general “right to free speech” in NSW law, just an assumption that speech is not restricted except as otherwise provided by law¹); and
 - both statute and common law have been the source of laws that are now seen as oppressive and contrary to human rights norms (eg, denial of property rights to married women and the criminalising of homosexual acts).
8. In light of this, the Committee looks to a number of sources in identifying any rights or liberties that a bill may trespass. These include, but are not limited to, Australian law. Principally, the Committee considers:
 - Australian law, especially the common law, NSW statute law and the Commonwealth Constitution;
 - international human rights law, especially human rights treaties to which Australia is a party; and
 - the law and jurisprudence of other jurisdictions.

Sources of “personal rights and liberties”

Common law rights

9. Common law recognises a range of personal rights, including rights of accused persons (eg, habeas corpus) and administrative law rights (eg, natural justice). These rights can be taken away by statute, although Parliament’s intention to abrogate from these rights must be clear. This is because Australian courts presume that Parliament would not wish to trespass on common law rights. This presumption may be expressed as follows:

¹ Including the Commonwealth Constitution, which impliedly protects the right of free speech in certain limited circumstances. See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

10. It is a well recognised rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.²
11. Some recent examples in which Australian courts have recognised common law rights include *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (High Court recognised that property rights, “native title”, held by indigenous people are capable of protection under the common law of Australia) and *Dietrich v R* (1992) 177 CLR 292 (no common law right to counsel at public expense, but right to a fair trial which may be infringed if an indigent accused is forced to undergo a trial for a serious offence without legal representation).

Rights provided for in statutes

12. Under NSW statute law, rights are ascribed to individuals directly (eg, *Anti Discrimination Act 1977*) or indirectly (eg, *Criminal Procedure Act 1986* - a defendant can call witnesses in his or her defence). Further, the Commonwealth Constitution recognises and protects certain, albeit few, rights, both express (eg, freedom of religion; the right to a trial 'on indictment' by jury) and implied (eg, right to political communication).

Rights under international law

13. The third category of rights recognised in Australia are those set out in international treaties to which Australia is a party. Many of the rights set out in these treaties can also be found under customary international law.³ The rights recognised under international law and accepted by Australia as rights enjoyed by every person are far more numerous than those recognised under Australian law, although there is some overlap (eg, freedom from discrimination on certain grounds).
14. As a party to the principal international human rights conventions, Australia has accepted the existence of the rights set out in those instruments, notwithstanding the fact that many of those rights are not enforceable under Australian law. Further, having agreed to be bound by these treaties, Australia is under a legal obligation to comply with them and to respect the rights contained therein. This obligation binds the States and Territories as well. Therefore, if NSW legislation purports to remove or restrict a right provided for in a treaty to which Australia is a party, it could be placing Australia in breach

² O'Connor J in *Sargood Bros v Commonwealth* (1910) 11 CLR 258 and 279, quoted in DC Pearce, *Statutory Interpretation in Australia*, 2nd Ed, at para 116. See also *Coco v Crown* (1994) CLR 427, and *Plaintiff S157 12002 v The Commonwealth* (2003) 211 CLR 476.

³ Article 38 of the Statute of the International Court of Justice states that the “Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. *international custom, as evidence of a general practice accepted as law*;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (emphasis added).

of its treaty obligations. As such, it is important that the Committee draw Parliament's attention to any such legislation.

Primary Sources of International Rights

15. The primary sources of human or personal rights under international law on which the Committee draws are as follows.

The "International Bill of Rights":

- Universal Declaration of Human Rights 1948;
- International Covenant on Civil and Political Rights 1966;
- International Covenant on Economic, Social and Cultural Rights 1966;

Other principal international human rights treaties:

- Convention on the Elimination of all Forms of Racial Discrimination 1965;
- Convention on the Elimination of all Forms of Discrimination against Women 1979;
- Convention against Torture & other Cruel, Inhuman & Degrading Treatment 1984;
- Convention on the Rights of the Child 1989;
- International Labour Organisation treaties to which Australia is a party.⁴

Comments interpreting these treaties by their respective supervisory bodies, namely:

- UN Committee on Human Rights;
- UN Committee on Economic, Social & Cultural Rights;
- UN Committee on the Elimination of all forms of Racial Discrimination;
- UN Committee on the Elimination of all forms of Discrimination against Women;
- UN Committee on the Rights of the Child;
- UN Torture Committee;
- International Labour Organisation.

Other law as a source of "rights"

16. Another rich resource for the Committee in assessing what rights may be impacted upon or trespassed by a bill are the human rights laws of other countries and human rights jurisdictions. In this regard, the decisions of the European Court of Human Rights and the domestic courts of countries such as the UK, New Zealand, Canada, South Africa and the United States can give

⁴ A list can be found on the Internet at <http://www.ilo.org/ilolex/english/index.htm>.

the Committee insight into, and helpful analysis of, the application of commonly accepted rights.

Other Parliamentary scrutiny committees

17. None of the other Australian scrutiny committees, or their constituent Acts, have defined the phrase “rights and liberties”. However, the Chair of the ACT Standing Committee on Legal Affairs, stated in a speech to the 2003 *Australasian & Pacific Conference on the Scrutiny of Bills*, that in considering when a Bill unduly trespasses on personal rights and liberties, the ACT Committee (like the NSW Committee) draws on the common law, relevant ACT laws, the Commonwealth Constitution, international human rights law, especially the treaties to which Australia is a party, and the law and jurisprudence of other jurisdictions (eg, US).

Main human rights recognised under international human rights law

The main human rights and liberties provided for in the international human rights instruments referred to in this paper include:

- The right to life
- The right to self-determination
- Freedom from discrimination
- Equal rights of men and women
- Freedom from torture and cruel, inhuman or degrading treatment
- No arbitrary arrest or detention
- Fair trial guarantees, including the right:
 - to be informed of the charges;
 - to be brought before a court ASAP;
 - to be presumed innocent until proved guilty;
 - to be able to properly prepare a defence, call witnesses and have legal representation of own choosing;
 - not to be compelled to incriminate oneself;
 - not to be tried twice for the same offence;
- Separation of juveniles from adults in detention;
- Separation of accused and convicted persons in detention;
- Liberty of movement;
- Equality before the law;
- The right to privacy;
- The right to freedom of thought, religion;
- The right to peaceful assembly;
- The right to work in safe conditions and be paid fair remuneration;
- The right to form trade unions and to strike in conformity with the law;
- The right to social security;
- The right to an adequate standard of living, including food, clothing & housing;
- The right to the enjoyment of the highest attainable standard of physical and mental health;
- The right to education, including free primary education; and

- The right to take part in cultural life, to enjoy the benefits of scientific progress and its applications; and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.