



PARLIAMENT OF NEW SOUTH  
WALES

# Legislation Review Committee

## PUBLIC INTEREST AND THE RULE OF LAW

---

Report on Responses to the Discussion Paper

Report No. 2/54 – December 2010

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislation Review Committee.**

Public interest and the rule of law : draft -report on responses to the discussion paper / Legislation Review Committee, Legislative Assembly, Parliament NSW. [Sydney, N.S.W.] : the Committee, 2010. – [54] vii 41p. 30 cm. (Report No. 2/54)

Chair: Allan Shearan, MP.

ISBN 978-1-921686-38-2

"December 2010".

1. Separation of powers.
2. Rule of law.
  - I. Title.
  - II. Shearan, Allan.
- III. Series: New South Wales. Parliament. Legislation Review Committee. Report No. 2/54

DDC22 340

## Table of Contents

|   |           |
|---|-----------|
| Membership & Staff .....  | iii       |
| Functions of the Committee .....  | iv        |
| Chair's Foreword .....  | v         |
| Executive Summary .....   | vi        |
| <b>CHAPTER ONE - DISCUSSION PAPER: PUBLIC INTEREST AND THE RULE OF LAW .....</b>  | <b>1</b>  |
| Questions And Framework For Comment.....  | 1         |
| <b>CHAPTER TWO - ISSUES RAISED IN SUBMISSIONS.....</b>  | <b>3</b>  |
| Framework for limits on personal rights and for the assessment of undue trespasses on personal rights and liberties ..... | 3         |
| General Comments On The Term 'Public Interest' .....  | 5         |
| Other General Comments On Fundamental Rights And Principles .....   | 6         |
| Questions One To Ten.....   | 8         |
| Question One.....   | 9         |
| Question Two.....   | 9         |
| Question Three .....  | 10        |
| Question Four .....   | 10        |
| Question Five.....  | 11        |
| Question Six.....   | 12        |
| Question Seven .....  | 12        |
| Question Eight .....  | 13        |
| Question Nine .....   | 13        |
| Question Ten .....  | 13        |
| <b>CHAPTER THREE - CONCLUSION .....</b>   | <b>15</b> |
| 1. Principle for Consideration:.....  | 15        |
| 2. Principle for Consideration:.....  | 15        |
| 3. Principle for Consideration:.....  | 15        |
| 4. Principle for Consideration:.....  | 16        |
| 5. Principle for Consideration:.....  | 16        |
| 6. Principle for Consideration:.....  | 16        |
| Appendix 1: Submissions Received .....  | 17        |
| Appendix 2: Siracusa Principles .....   | 18        |



## Membership & Staff

|                 |   |
|-----------------|---|
| Chair           | Allan Shearan MP, Member for Londonderry  |
| Deputy Chair    | Paul Pearce MP, Member for Coogee   |
| Members         | Robert Furolo MP, Member for Lakemba (from 30 October 2008)   |
|                 | The Hon Amanda Fazio MLC (from 21 June 2007 until 3 December 2009)  |
|                 | The Hon Kayee Griffin MLC (from 3 December 2009)  |
|                 | Sylvia Hale MLC (from 11 November 2008 until 7 September 2010)  |
|                 | Noreen Hay MP, Member for Wollongong (from 24 September 2008 until 30 October 2008)                             |
|                 | Judy Hopwood MP, Member for Hornsby   |
|                 | The Hon Trevor Khan MLC (from 10 March 2010)  |
|                 | Lylea McMahan MP (from 21 June 2007 until 24 September 2008)  |
|                 | The Hon Robyn Parker MLC (from 21 June 2007 until 10 March 2010)  |
|                 | David Shoebridge MLC (from 9 September 2010)  |
|                 | The Hon Roy Smith MLC (from 21 June 2007 until 11 November 2008)  |
|                 | Russell Turner MP, Member for Orange  |
| Staff           | Catherine Watson, Committee Manager   |
|                 | Carrie Chan, Senior Committee Officer   |
|                 | Jason Arditi, Senior Committee Officer (from January 2010)  |
|                 | Kathryn Simon, Senior Committee Officer (until December 2009)   |
|                 | Leon Last, Committee Officer (from November 2009)   |
|                 | Victoria Maigre, Committee Officer (until November 2009)  |
|                 | Millie Yeoh, Assistant Committee Officer  |
| Contact Details | Legislation Review Committee<br>Legislative Assembly<br>Parliament House<br>Macquarie Street<br>Sydney NSW 2000 |
| Telephone       | 02 9230 2036  |
| Facsimile       | 02 9230 3052  |
| E-mail          | <a href="mailto:legislation.review@parliament.nsw.gov.au">legislation.review@parliament.nsw.gov.au</a>          |
| URL             | <a href="http://www.parliament.nsw.gov.au/legislationreview">www.parliament.nsw.gov.au/legislationreview</a>    |

# Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

## 8A Functions with respect to bills

- (1) The functions of the Committee with respect to bills are:
  - (a) to consider any bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

## 9 Functions with respect to regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

## Chair's Foreword

The Legislation Review Committee is aware that the term 'public interest' is quite broad and difficult to define. Sometimes, in its deliberation, rights and interests may compete. The Committee, in determining whether a trespass on a right is undue, may involve considering other relevant factors including different facets of the public interest. Given the broad scope of human rights and public interest, the Committee is seeking to develop a better understanding of the relevant issues for Parliament's consideration of bills. To better equip itself when considering bills, the Committee resolved to publish a Discussion Paper on Public Interest and the Rule of Law for public comment in May 2010.

The Discussion Paper canvassed what is public interest including definitions and conceptual approaches, judicial considerations, public interest and the rule of law, and its relationship to personal rights in the context of issues arising from the Committee's consideration of specific legislation. The Discussion Paper specifically asked those making submissions to comment on the framework for limits on personal rights and for the assessment of undue trespasses on personal rights and liberties, including what could be the most appropriate model or approach when trying to strike a balance in assessing the weight to be given to personal rights and liberties when there are strong public interest concerns, and how to ensure that the best alternative (or least restrictive means) to achieve the legislative objective that could leave the particular right intact. A list of ten questions for comment was also included in the Discussion Paper.

Having carefully considered the submissions received, the Committee has adopted 6 principles for consideration. This Report sets out those principles and the key points and issues made in the submissions received.

The Committee thanks all those who made submissions for their very useful comments, and those responses that did not make any comment.

As Chair, I would also like to thank all members of the Committee for their valuable contribution to the Discussion Paper and to this Final Report in response to the submissions.

Additionally, I would like to pass on my profound appreciation to the Committee Manager, Catherine Watson and her team, particularly Carrie Chan, for their dedication and professional manner in the preparation of this report.

Allan Shearan MP  
Chair

# Executive Summary

On 10 May 2010, the Legislation Review Committee tabled a Discussion Paper (*Public Interest And The Rule Of Law*) seeking comment in relation to the principles it should apply when considering bills that trespass on personal rights and liberties in the context of issues which involve the public interest. The Committee sought such comment to better equip itself when considering bills under section 8A of the *Legislation Review Act 1987* in determining whether a trespass on a right is undue in relation to the public interest.

The Committee advertised the Discussion Paper on the Parliament's website and wrote to all Ministers, Members of Parliament and over forty other relevant agencies and organisations seeking comment. The Committee received six submissions in response and three replies which did not make any comment or submission.

This is the Final Report on the responses to the Discussion Paper. Chapter Two presents the main issues raised in the submissions, including general comments on the term 'public interest' and other general comments on fundamental rights and principles.

Chapter Three provides the conclusion and principles based on the issues discussed in the submissions.

Six principles for consideration are proposed. They are:

## 1. Principle for Consideration:

To assist in determining whether a compelling case has been made out for any trespass on a personal right or liberty, the Committee takes into account all relevant factors including the following matters when scrutinising bills and regulations to consider whether a right may be subject under law to such reasonable limits as can be demonstrably justified:

- (a) The nature of the right; and
- (b) The importance of the purpose of the limitation; and
- (c) The nature and extent of the limitation; and
- (d) The relationship between the limitation and its purpose; and
- (e) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>1</sup>

## 2. Principle for Consideration:

The Committee supports that fundamental principles and rights and the public interest are important considerations rather than weights which should be balanced against each other.

## 3. Principle for Consideration:

The Committee recognises that fundamental principles and rights form part of the public interest.

---

<sup>1</sup> Derived from the Victorian *Charter of Human Rights and Responsibilities Act 2006* – section 7 (2).



**4. Principle for Consideration:**

The Committee supports the principle that the rule of law must be accepted as furthering the public interest in almost all cases, and that the competing facets of the public interest should not be balanced in a way which suggests that prima facie they have equal weight.

**5. Principle for Consideration:**

The Committee accepts that in a particular case, public safety might be relevant to a determination of whether legislation trespasses unduly on a personal right or liberty but does not endorse that it forms the only facet of 'public interest'.

**6. Principle for Consideration:**

The Committee may, where appropriate, refer to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights<sup>2</sup>, as one of the sources for use when considering whether limitation or encroachment on personal rights could result in 'undue' trespass on those rights.

---

<sup>2</sup> A copy of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) is attached in the Appendix 2.



## Chapter One - Discussion Paper: Public Interest And The Rule Of Law

- 1.1 On 10 May 2010, the Committee tabled a Discussion Paper seeking comment in relation to the principles it should apply when considering bills that trespass on personal rights and liberties in the context of issues which involve the public interest. The Committee sought such comment to better equip itself when considering bills under s 8A of the *Legislation Review Act 1987* in determining whether a trespass on a right is undue in relation to the public interest.
- 1.2 The Discussion Paper (*Public Interest And The Rule Of Law*) looked at what is public interest including definitions and conceptual approaches, some judicial considerations, public interest and the rule of law, public interest and its relationship to personal rights. Chapter Three of the Discussion Paper discussed specific examples of legislation such as the covert search warrant powers and housing for registrable persons, in order to illustrate the relationship between public interest and personal rights and liberties in the context of issues arising from the Committee's consideration of bills. Chapter Four of the Discussion Paper examined the case study of outlaw motorcycle groups or 'bikies' legislation in NSW and similar other legislation from relevant jurisdictions. Approaches in overseas jurisdictions were discussed in Chapter Five of the Paper. Finally, Chapter Six summarised the main tests or models in the assessment of the necessity of trespassing on personal rights in the context of the public interest.
- 1.3 The Committee advertised the Discussion Paper on the Parliament's website and wrote to all Ministers, Members of Parliament, and over forty other relevant agencies and organisations seeking comment. The Committee received six submissions in response and three replies which did not make any comment or submission. The Committee published the six submissions on the Parliament's website ([www.parliament.nsw.gov.au/legislationreview](http://www.parliament.nsw.gov.au/legislationreview)).

### Questions And Framework For Comment

- 1.4 The Discussion Paper sought comment on the following.

#### Questions 1 – 10

- |  |
|--|
| <ol style="list-style-type: none"><li>1. Are the rights of freedom of association and that of lawful assembly core rights when considering public interest?</li><li>2. What important sources or principles could provide guidance on evaluating the extent or degree of a trespass on a right?</li><li>3. What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are not undue?</li><li>4. What considerations or sources could assist in the assessment of whether there are less restrictive ways of achieving the intended legislative purpose without the Committee engaging in an evaluation of government policy?</li><li>5. Are the rights to fair trial and procedural fairness core rights when assessing public interest concerns?</li><li>6. Should matters of fundamental principles and rights be referred to Parliament for consideration over and above the weighing of the public interest?</li></ol> |
|--|

7. What are the key principles that could assist in asking the Parliament or the government to demonstrate why a particular right could be reasonably limited?
8. Just as personal rights are not absolute, what are the principles that could inform the assessment of the boundaries or limits of public interest?
9. What are some of the key considerations for addressing the relationship between the confidential use of criminal intelligence and the right to procedural fairness and due process?
10. Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principle of fundamental justice, including what should constitute as an undue trespass on personal rights and liberties?

#### Framework For Limits On Personal Rights And For The Assessment Of Undue Trespasses On Personal Rights And Liberties

Victoria and ACT contain provisions setting out the criteria for when a human right may be limited by law. The *Victorian Charter of Human Rights and Responsibilities Act 2006* provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The NSW Legislation Review Committee seeks comment on whether the above provisions could be adapted as a possible guide or framework to assist the Committee in its deliberations on whether a personal right or liberty may be limited by law, such as under (b): where the importance of the purpose of the limitation may involve public interest concerns.

The Committee also seeks comment on which could be the most appropriate model or approach (as summarised in Chapter Six), when trying to strike a balance in assessing the weight to be given on personal rights and liberties when there are strong public interest concerns for ensuring that the best alternative (or least restrictive means) to achieving the legislative objective that could leave the particular right intact:

The Committee seeks comment on whether the presumptive and re-weighting approach (see Chapter Six) could be more preferable than the balancing test, proportionality or necessity model, by assigning more weight to rights and less weight to public interest concerns, particularly if the principles of the rule of law may be undermined. Personal rights and liberties will presumptively, but not conclusively, be given more weight than public interest considerations.

## Chapter Two - Issues raised in submissions

Framework for limits on personal rights and for the assessment of undue trespasses on personal rights and liberties

**The Committee sought comment on whether the provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006* could be adapted as a possible guide or framework to assist the Committee in its deliberations on whether a personal right or liberty may be limited by law, such as under section 7 (2)(b): where the importance of the purpose of the limitation may involve public interest concerns.**

- 2.1 The NSW Bar Association considered that the principles in section 7 (2) of the Victorian Charter<sup>3</sup> could be adapted as a guide to assist the Committee in its deliberations.
- 2.2 The Bar Association is of the opinion that improved scrutiny of legislation for consistency with Australia's human rights obligations is urgently needed in NSW. According to their submission, in NSW, there is no comprehensive instrument protecting human rights as is found in the Victorian Charter. There are only ad hoc and limited protections available depending on the nature of the right and the classification of the person affected.
- 2.3 In their submission, the Bar Association stated that importantly, the principles in section 7 (2) of the Victorian Charter do not require the adoption of a 'public interest' test that conflates the term 'public interest' with 'public order or safety'. However, concerns regarding public order or safety can still be addressed where they are relevant by considering the importance of the purpose of the limitation (section 7 (2)(b)); the relationship between the limitation and its purpose (section 7 (2)(d)); and whether less restrictive means are reasonably available to achieve the desired purpose of the limitation (section 7 (2)(e)).
- 2.4 The NSW Public Defenders also agreed with the above in their submission.
- 2.5 The NSW Law Society's Human Rights Committee, in their submission, also urged that the Committee either recommend the NSW Parliament to:
  1. Introduce human rights legislation identical or similar to the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter), which is based almost wholly on the ICCPR. This action would also bring the NSW Parliament in line with its international law obligations; or
  2. Replicate the measures set out in Australia's Human Rights Framework announced in April 2010 by the Federal Attorney-General.
- 2.6 The NSW Law Society suggested that if the Committee is not persuaded to recommend the introduction of human rights legislation similar to that in Victoria (or the other similar legislation in Britain), they recommended a secondary position which is that the NSW Parliament should replicate the measures set out in the Australia's Human Rights Framework (Framework) announced by the Federal Attorney General in April 2010.

---

<sup>3</sup> *Charter of Human Rights and Responsibilities Act 2006* (Victoria)

- 2.7 The Framework reaffirms the Federal Government's commitment to upholding Australia's obligations under the 7 main international human rights treaties and recommends the establishment of a Federal Parliamentary Joint Committee on Human Rights, as well as the production of human rights compatibility statements for all new legislation and a review of all current Federal legislation and government policies in accordance with the treaty standards.
- 2.8 The Law Society called for the introduction of the Framework measures tailored by the NSW Parliament for NSW.

**The Committee also sought comment on which could be the most appropriate model or approach (as summarised in Chapter Six of the Discussion Paper), when trying to strike a balance in assessing the weight to be given on personal rights and liberties when there are strong public interest concerns for ensuring that the best alternative (or least restrictive means) to achieving the legislative objective that could leave the particular right intact.**

**The Committee sought comment on whether the presumptive and re-weighting approach (see Chapter Six in the Discussion Paper) could be more preferable than the balancing test, proportionality or necessity model, by assigning more weight to rights and less weight to public interest concerns, particularly if the principles of the rule of law may be undermined. Personal rights and liberties will presumptively, but not conclusively, be given more weight than public interest considerations.**

- 2.9 The NSW Police Force's submission responded to this aspect by referring to Chapter Six of the Discussion Paper. They stated that Chapter Six contains four possible models or tests which may be used in the assessment of the necessity of trespassing on personal rights to achieve the public interest or legislative objectives. They suggested that the adoption of any one model to be applied to all bills before Parliament is unnecessarily restrictive and may fail to consider the myriad combinations of rights, public interest and circumstances to be addressed by the proposed legislation.
- 2.10 In the NSW Bar Association's submission, they noted the observations in Chapter Six of the Discussion Paper with regard to the different theoretical and doctrinal approaches to the restriction of human rights. They contended that an appropriate approach to assessing whether legislation trespasses unduly on personal rights and liberties would be as follows:
- (a) firstly, there should be a strong presumption against *any* encroachment on personal rights or liberties;
  - (b) secondly, a manifest and compelling case must be made out before there is *any* encroachment on personal rights or liberties;
  - (c) thirdly, in assessing whether a manifest and compelling case is made out, consideration of the matters in section 7 (2)(a) to (d) of the Victorian Charter is likely to be useful;

(d) fourthly, in assessing whether the encroachment is 'undue', consideration of the matters in section 7 (2)(e) of the Victorian Charter is also likely to be useful: ie, whether, there is any less restrictive means reasonably available to achieve the same purpose.<sup>4</sup>

- 2.11 The NSW Public Defenders also supported the NSW Bar Association's suggestion above.

## General Comments On The Term 'Public Interest'

- 2.12 The NSW Police Force's submission referred to Chapter Two of the Discussion Paper which examined the concept of public interest. From the perspective of the NSW Police Force, attempts to define public interest should be approached with great caution as the public interest can change dramatically due to emerging events and issues, and may depend on whether a circumstance is viewed in the short or the longer term.
- 2.13 The NSW Police Force used the example of applications for public interest immunity. They have found that decisions with respect to public interest immunity and what constitutes the public interest, are determined on a case by case basis with reflection on the circumstances giving rise to the application. Consequently, they suggested that the Committee retain a degree of flexibility to allow for developing notions of what the public interest may include, and to avoid a standard definition or standard list of inclusions.
- 2.14 In the submission from the NSW Bar Association, they observed that in the Discussion Paper's Introduction, the term 'public interest' was noted to be quite broad and that it is undefined in the NSW *Legislation Review Act 1987*. It is not a term that is generally used in international human rights instruments.
- 2.15 The Bar Association considered the term 'public interest' to be a protean term and that particular care needs to be taken with its application in a context such as fulfilling the statutory functions set out in sections 8A and 9 of the NSW *Legislation Review Act 1987*.
- 2.16 Therefore, the Bar Association pointed out that in *McKinnon v Treasury* (2006) 228 CLR 423, in the context of the public element of exemptions under the Federal *Freedom of Information Act*, Hayne J stated:

It may readily be accepted that most questions about what is in 'the public interest' will require consideration of a number of competing arguments about, or features or 'facets' of, the public interest. As was pointed out in *O'Sullivan v Farrer*:

[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.

That is why a question about 'the public interest' will seldom be properly seen as having only one dimension.

---

<sup>4</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), may also provide a useful source for considering whether limitation of or encroachment upon personal rights results in 'undue' trespass on those rights.

- 2.17 The Bar Association contended that all legislation is intended to reflect and to further the public interest. Whether or not it does will depend on individual perceptions of what the public interest demands in a particular case.
- 2.18 The Bar Association expressed 2 main concerns with the uses of the phrase 'public interest' in the Discussion Paper.
- 2.19 First, it disagreed that the term 'public interest' is always and necessarily synonymous with the concept of 'public order or safety' (as is suggested in paragraph 8, page 2 of the Discussion Paper). The Bar Association suggested that to put 'public interest' as something which is inherently in opposition to personal rights and liberties is to set up a false dichotomy because in their view, the observance and protection of personal rights and liberties is, by its very nature, something that is almost always 'in the public interest'. Therefore, the Bar Association did not endorse any meaning of 'public interest' that centres on 'public order or safety' (though in a particular case, the Bar Association accepted that public safety might be relevant to a determination of whether legislation trespasses unduly on a personal right or liberty).
- 2.20 Second, the Bar Association considered that no dichotomy should be established in which the rule of law is seen as a factor to be balanced against other competing facets of the public interest. Rather, they contended, that in a democratic system, the rule of law must be accepted as furthering the public interest in almost all cases. The competing facets of the public interest ought not to be balanced in a way which suggests that prima facie they have equal weight.

## Other General Comments On Fundamental Rights And Principles

- 2.21 The NSW Law Society's overall view is that the tension between the public interest and fundamental rights and liberties is best dealt with by the application of standards which Australia has committed to under international law. In particular, Australia has ratified the provisions of the *International Covenant on Civil and Political Rights* (ICCPR), and the ICCPR itself provides the framework for dealing with any tension between the public interest and fundamental rights.
- 2.22 The NSW Law Society noted that the Discussion Paper implied that the rights contained in the ICCPR are vague and require clarification (note 1 at pages 2 to 3) but the Law Society disagreed with this. The Law Society submitted that ICCPR formed the basis of most of the Bills or Charters of Rights which have been either implemented or amended over the last 40 years, so there is now an extensive bank of precedents in the laws of the democratic countries which tell what those rights mean. In particular, the European Court of Human Rights, has laid down the precedents which explain the meaning of those laws, which could guide Australian Courts to the extent that any Australian human rights legislation needs interpretation.
- 2.23 Similarly, the NSW Public Defenders pointed out that a statement of the rights to a fair trial and procedural fairness appears in Articles 10 and 11 of the Universal Declaration of Human Rights; and Articles 9, 10, 14 and 15 of the ICCPR. Articles 5 and 6 of the European Convention of Human Rights (ECHR), in their submission, are mentioned as being similar in terms to provisions of the ICCPR and as the ECHR founds the jurisdiction of the European Court of Human Rights. The judgments of the European Court of Human Rights, particularly as they relate to appeals from the common law jurisdiction of England and Wales, may also be valuable material in



understanding how these principles have been applied to particular fact situations and member-state legislative provisions.

- 2.24 The Queensland's Scrutiny of Legislation Committee enclosed a copy of their submission made to a select committee of the Queensland Parliament which is reviewing the committee system in Queensland. They referred, in particular, to their discussion on pages 12 to 13 under the heading 'Consistency with fundamental legislative principles' in their own submission made to their select committee.
- 2.25 The Queensland's Scrutiny of Legislation Committee (Queensland committee) interpreted the requirement in section 4 of their Queensland *Legislative Standards Act* that legislation have 'sufficient regard' to fundamental legislative principles to mean that consistency with fundamental legislative principles is not mandatory. According to the Queensland committee, any potential inconsistency of legislation with fundamental legislative principles is examined by the committee, including the sufficiency of any explanation or justification. In addition, the Queensland committee examined the second reading speech and explanatory notes for information regarding any inconsistency.
- 2.26 This is a similar approach taken by the NSW Legislation Review Committee.
- 2.27 The Queensland committee has always adopted the approach that it is for parliament to determine whether the legislation has 'sufficient regard' to fundamental legislative principles and where it does not, whether sufficient justification exists for the enactment of the legislation. In carrying out its legislative scrutiny function, the Queensland committee does not say definitely whether an interference with a fundamental legislative principle is justified. Based on its understanding of the principles underlying a parliamentary democracy based on the rule of law, the Queensland committee draws the attention of the Parliament to issues in respect of whether the proposed legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.
- 2.28 The Queensland committee's examination is informed by legal and administrative principles derived from a variety of domestic and international legal sources, including human rights principles recognised in law. This approach is similarly applied by the NSW Legislation Review Committee.
- 2.29 The Queensland committee's approach requires that Parliament be clear about the effect of legislative measures to which it is giving its consent on behalf of the community. They referred to *Evans v NSW* [2008] FCAFC 130, where the Full Federal Court pointed out the following description of the 'principle of legality' in the judgment of Lord Hoffman in *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115:
- The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.
- 2.30 The Queensland committee noted the main differences in the responsibilities of their committee and the NSW Committee, that arise from the contrast between their responsibility to **consider** the application of 'the principles relating to legislation which underlie a parliamentary democracy based on the rule of law' and NSW Committee's

responsibility to **report** on whether legislation 'trespasses unduly on personal rights and liberties'.

2.31 The *Queenslanders' Basic Rights* publication and the *Human Rights Handbook for Parliamentarians* (2005) published by the Inter-Parliamentary Union Office of the United Nations High Commissioner for Human Rights also assist the Queensland committee's consideration of the application of fundamental legislative principles.

2.32 As stated in their submission, in the context of the Queensland committee's legislative framework, the Queensland's Scrutiny of Legislation Committee have adopted the approach that it is for parliament to determine whether legislation has 'sufficient regard' to fundamental legislative principles and where it does not, whether sufficient justification exists for the enactment of the legislation. This approach is consistent with statements regarding the role of fundamental legislative principles in the parliamentary process in *Bell & Anor v Beattie & Ors* [2003] QSC 333, at [23]-[28], where Mackenzie J stated at [23]-[24]:

Section 4 (1) of the *Legislative Standards Act* states that for the purposes of the Act fundamental legislative principles are those relating to legislation that underlie a parliamentary democracy based on the rule of law. Section 4 (2) states that the principles include requiring that legislation has sufficient regard to

(b) rights and liberties of individuals; and

(c) the institution of Parliament.

Section 4 (3) sets out a number of examples of criteria for determining whether legislation has sufficient regard to rights and liberties of individuals. While the various criteria are said only to be examples, none relates directly to the principles expressed by the first applicant. However, since they are only examples, the categories are not closed.

Two things may be said about the Act. One is that it is not an entrenched piece of legislation. Legislation inconsistent with it may therefore, as a matter of ordinary principle, be passed by Parliament. The second is that s 23 (1)(f) of the Act clearly implies that Parliament is not prohibited from considering a Bill inconsistent with fundamental legislative principles. All that is required is a statement in an Explanatory Note for the Bill explaining the reason for the inconsistency with fundamental legislative principles. In other words, if there is a departure from fundamental legislative principles, the Minister who presents the Bill to the Legislative Assembly must bring that fact to the notice of the House. The way prescribed for doing that is in the Explanatory Note.

2.33 The NSW Minister for Local Government considered that the subject of the Discussion Paper did not raise any significant concerns in regard to local government legislation within her portfolio responsibilities.

## Questions One To Ten

2.34 In order to assist the Committee to assess whether a bill or its provisions contain an undue trespass on individual rights and liberties, the Discussion Paper posed the following ten questions for comment.

2.35 The New South Wales Bar Association's submission was the only submission that addressed in detail each of the questions individually for comment.

## Question One

### **Are the rights of freedom of association and that of lawful assembly core rights when considering public interest?**

- 2.36 The Bar Association noted that 'peaceful assembly', not 'lawful assembly', is the traditional and appropriate formulation of the right. Peaceful assembly is expressed within Article 21 of the *International Covenant on Civil and Political Rights* (ICCPR).
- 2.37 The NSW Bar Association submitted that rights of freedom of association and peaceful assembly are human rights of fundamental importance to the proper functioning of a health democratic state. While they may be derogated from, or limited, 'in the interests of national security or public safety, public order...the protection of public health or morals or the protection of the rights and freedoms of others', their enjoyment is core to any plural democracy.
- 2.38 In their submission, the Bar Association considered that the use of the term 'public interest' in the context of Question One adds little to, and may confuse, the process of consideration to be undertaken where the exercise of those rights poses some risk to public safety concerns. They contended that the public interest requires that a manifest and compelling case should be made out before there is any trespass on the rights or liberties of individuals.
- 2.39 The NSW Bar Association suggested that consideration of the matters in section 7 (2) of the Victorian Charter<sup>5</sup> may assist the Committee in determining whether a compelling case has been made out, and considering whether alternative means are available that involve less or no encroachment on the relevant rights or liberties. In the context of some future legislation that affects the exercise of freedom of peaceful assembly, public safety concerns may or may not, form part of the factual matrix to be considered according to the matters in section 7 (2) of the Victorian Charter.

## Question Two

### **What important sources or principles could provide guidance on evaluating the extent or degree of a trespass on a right?**

- 2.40 The NSW Bar Association is of the view that the extent or degree of a trespass on a right is a common sense question of fact to be answered. Firstly, by an examination of the legislative provision. Secondly, by a consideration of the right that is the subject of the trespass and how the exercise of the right is likely to be affected.

---

<sup>5</sup> *Charter of Human Rights and Responsibilities Act 2006* (Victoria) – Section 7 (2): A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

## Question Three

**What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are not undue?**

- 2.41 The NSW Bar Association contended that the public interest requires that a manifest and compelling case should be made out before there is any trespass on individual rights or liberties, by legislation or regulation.
- 2.42 They suggested that consideration of the matters in section 7 (2) (a) to (d) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* will likely assist the Committee in determining whether a compelling case has been made out for *any* trespass on the right or liberty. This process will then direct attention to both the nature of the right and the usual ways in which it is exercised as well as the importance of the purpose of the proposed limitations.
- 2.43 The likelihood that the exercise of the relevant right or liberty would frustrate the purpose of the proposed limitation is a highly relevant consideration. The Bar Association referred to the example of the *World Youth Day Regulation 2008*.
- 2.44 The Bar Association commented that the need to compare the importance of the right with the importance of the purpose of the limitation may intrude into the Committee's analysis. They contended that a 'weighing' approach that "pits the achievement of personal rights and liberties against countervailing considerations which are given at the outset prima facie equal weight is generally an inappropriate way of assessing legislation". The problem with a weighing approach such as with respect to the implied freedom of communication on government and political matters, is shown in the decision of the Court of Appeal in *Padraic Gibson & Ors v Commissioner of Police & Ors* [2007] NSWCA 251, where the Court of Appeal considered the effect of the 'excluded persons list' which prevented 'excludable persons' from being present in defined zones for an 11 day period during APEC.
- 2.45 The Bar Association, instead, suggested consideration of all relevant matters, including how pressing or important the purpose of the limitation is, but without taking an oppositional approach in which the 'importance' of the limitation must be directly balanced against or compared with the 'importance' of the right or liberty.
- 2.46 In relation to question three, the NSW Public Defenders suggested that a statement of the rights to a fair trial and procedural fairness appears in Articles 10 and 11 of the *Universal Declaration of Human Rights* (UDHR) and Articles 9, 10, 14 and 15 of the *International Covenant on Civil and Political Rights* (ICCPR). Articles 5 and 6 of the *European Convention of Human Rights* (ECHR) are in similar terms. The jurisdiction of the European Court of Human Rights, its judgments as they relate to appeals from the common law jurisdiction of England and Wales, can also be valuable material in understanding how these principles have been applied to particular fact situations and member-state legislative provisions.

## Question Four

**What considerations or sources could assist in the assessment of whether there are less restrictive ways of achieving the intended legislative purpose without the Committee engaging in an evaluation of government policy?**

- 2.47 The NSW Bar Association commented that whether a trespass is 'undue' is a question of fact and degree and the considerations in section 7 (2) of the Victorian Charter that may assist in determining this question, do not require any assessment of underlying policy. The Bar Association contended that whether there are less restrictive means to achieve a particular purpose is a common sense factual question. They considered that if analysis by the Committee is undertaken according to the considerations in section 7 (2) of the Victorian Charter, it is unlikely to trespass into the evaluation of government policy.
- 2.48 In considering personal rights and liberties, the manner of their exercise and the situations in which some may be derogated from, and whether a trespass is 'undue', key international human rights instruments and principles of interpretation in domestic law or in international jurisprudence may assist. The NSW Bar Association suggested that the Committee is not a court and so is not bound to apply precedent in the same way as a court is. The Committee, accordingly, has flexibility in fulfilling its statutory functions and by giving consideration to the human rights implications of particular legislation, does not necessarily require an evaluation of government policy. However, this is not to say that close examination will not need to be given to the purpose of the relevant instrument under consideration.
- 2.49 The Bar Association is also of the view that there is considerable scope for the Committee to take a greater role in suggesting ways to mitigate any undue encroachments on human rights. They used the example of the *Security Industry Act 1997* and the adverse implications for procedural fairness and the right to a fair hearing that arose under section 29 (3), which prevented disclosure in the ADT review proceedings to affected person or their legal representatives, of the existence or content of any relevant criminal intelligence or law enforcement report unless with the approval of the Commissioner of Police. Consideration could then be given to appropriate ways in which those adverse impacts may be ameliorated such as with the legislative provision for the appointment of a 'special advocate' who could participate in the closed hearing to advance and protect the applicant's interests while not representing the applicant and not revealing the sensitive information to that applicant.

## Question Five

### **Are the rights to fair trial and procedural fairness core rights when assessing public interest concerns?**

- 2.50 In the submission by the NSW Bar Association, it considered rights to fair trial and procedural fairness are core rights and essential to the proper functioning of a healthy democratic state under the just rule of law. They contended that it is always in the general public interest that such rights be protected and consequently any incursions into them are contrary to the provisions and guarantees of the UDHR and the ICCPR and would not be in the public interest.
- 2.51 In relation to this question, the NSW Public Defenders submitted that a statement of the rights to a fair trial and procedural fairness appears in Articles 10 and 11 of the *Universal Declaration of Human Rights* (UDHR) and Articles 9, 10, 14 and 15 of the ICCPR. Articles 5 and 6 of the *European Convention of Human Rights* (ECHR) are also in similar terms. As mentioned before, the jurisdiction of the European Court of Human Rights, its judgments as they relate to appeals from the common law

jurisdictions, can also be valuable material in understanding how these principles have been applied to particular fact situations and member-state legislative provisions.

## Question Six

### **Should matters of fundamental principles and rights be referred to Parliament for consideration over and above the weighing of the public interest?**

- 2.52 The Bar Association considered it problematic that the Discussion Paper provided no clear definition of 'fundamental principles and rights'. They recommended that consideration be given to the rights enshrined in the ICCPR as well as the rights that have been adopted in Part 2 of the Victorian Charter, which are largely based on the ICCPR (Explanatory Memorandum, Victorian Charter, page 8).
- 2.53 They repeated their concerns about using the concept of balance in a manner that indicates that fundamental principles and rights and the public interest are apposite concepts weighed against each other. They considered that fundamental principles and rights form part of the public interest. Even if they are not conceptualised in this way, the Bar Association proposed that fundamental principles and rights and the public interest are important considerations rather than weights which should be balanced against each other.

## Question Seven

### **What are the key principles that could assist in asking the Parliament or the government to demonstrate why a particular right could be reasonably limited?**

- 2.54 In their submission, the NSW Bar Association recommended the following approach to assess whether a bill trespasses unduly on personal rights and liberties:
- (a) first, there should be a strong presumption against any encroachment on personal rights or liberties;
  - (b) second, a manifest and compelling case must be made out before there is any encroachment on personal rights or liberties;
  - (c) third, in assessing whether a manifest and compelling case is made out, consideration of the matters in section 7 (2) (a) to (d) of the Victorian Charter is likely to be useful;
  - (d) fourth, in assessing whether the encroachment is 'undue', consideration of the matters in section 7 (2) (e) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* is also likely to be useful, eg whether there is any less restrictive means reasonably available to achieve the same purpose.<sup>6</sup>
- 2.55 They contended that comparisons can be made between the above approach and the notion of 'overbreadth' considered by the Canadian Courts. However, the Bar Association submitted that this kind of comparison has its limitations in the absence of a defined bill of rights like the Canadian Charter or the UK *Human Rights Act*. The

---

<sup>6</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), may also provide a useful source for considering whether limitation of or encroachment on personal rights results in 'undue' trespass on those rights. From the NSW Bar Association's submission.

second limb of the test in *R v Beauchamp* of 'balancing the State interest against the individual interest under section 1 of the [Canadian] Charter' should not be equated with a balancing of the public interest and fundamental principles and rights.

- 2.56 They re-emphasised that a parliamentary committee is not restricted in the same way as courts are restricted in its consideration of international instruments to which Australia has become bound and may consider instruments such as the ICCPR with more freedom than the Australian courts. Similarly, the legislature does not operate under the same restrictions as the judiciary as it is not bound by the operation of precedent or court hierarchy.

## Question Eight

**Just as personal rights are not absolute, what are the principles that could inform the assessment of the boundaries or limits of public interest?**

- 2.57 The Bar Association suggested that similar considerations apply to this question as to that expressed in response to question seven.

## Question Nine

**What are some of the key considerations for addressing the relationship between the confidential use of criminal intelligence and the right to procedural fairness and due process?**

- 2.58 The NSW Bar Association submitted that if a court uses criminal intelligence in a confidential manner, then:
- (a) the case against the defendant will not be disclosed;
  - (b) the defendant will not be able to test the information – its provenance, its reliability, its weight, its place in the decision making process;
  - (c) the defendant will not be able to counter the information;
  - (d) the defendant will not be able to address the significance of the information;
  - (e) the court becomes partial – privy to information known to only one party and necessarily influenced by it;
  - (f) the trial becomes unfair;
  - (g) the trial becomes no longer a 'public trial', in that some information on which the court acts is hidden from view; and that may seriously erode public confidence in the judicial process.
- 2.59 The Bar Association added that these issues arise not only in the context of criminal proceedings but also in administrative review proceedings such as in the ADT under the *Security Industry Act*.

## Question Ten

**Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principle of fundamental justice,**

**including what should constitute as an undue trespass on personal rights and liberties?**

2.60 The NSW Bar Association explained that the principles of fundamental justice are rights which are closely limited to the right to a fair hearing, which is enshrined in Article 14 of the ICCPR. Section 24 of the Victorian Charter reflects Article 14 (1) of the ICCPR (Explanatory Memorandum, page 18). Bell J considered the close relationship between natural justice and the right to a fair trial in *Tomasevic v Travaglini* [2007] VSC 337. This was again considered by Bell J in *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, in which Bell J stated:

The vindication of the rights of someone whose human rights under the Charter have been breached may, I think, be equated with the vindication of someone whose reputation has been damaged by a breach of the rules of natural justice.

2.61 The Bar Association expressed the following:

... is concerned by any legislative approach which proposes to undermine a principle of fundamental justice... These principles are fundamental tools which allow the judiciary to preserve its own integrity and ensure that the rule of law is upheld. These principles should not be interfered with by the legislature. Application of these principles furthers, rather than balances, the public interest.

2.62 Where encroachment is considered, the Bar Association proposed that the following test already referred to in their submission should be rigorously applied when assessing whether a bill trespasses unduly on personal rights and liberties:

(a) first, there should be a strong presumption against any encroachment on personal rights or liberties;

(b) second, a manifest and compelling case must be made out before there is any encroachment on personal rights or liberties;

(c) third, in assessing whether a manifest and compelling case is made out, consideration of the matters in section 7 (2) (a) to (d) of the Victorian Charter is likely to be useful;

(d) fourth, in assessing whether the encroachment is 'undue', consideration of the matters in section 7 (2) (e) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* is also likely to be useful, eg whether there is any less restrictive means reasonably available to achieve the same purpose.



## Chapter Three - Conclusion

3.1 The NSW Bar Association submitted that the principles in section 7 (2) of the Victorian Charter do not require the adoption of a 'public interest' test that conflates the term 'public interest' with 'public order or safety'. They suggested that concerns regarding public order or safety can still be addressed where they are relevant by considering the importance of the purpose of the limitation (section 7 (2)(b)); the relationship between the limitation and its purpose (section 7 (2)(d)); and whether less restrictive means are reasonably available to achieve the desired purpose of the limitation (section 7 (2)(e)).

### 1. Principle for Consideration:

To assist in determining whether a compelling case has been made out for any trespass on a personal right or liberty, the Committee takes into account all relevant factors including the following matters when scrutinising bills and regulations to consider whether a right may be subject under law to such reasonable limits as can be demonstrably justified:

- (f) The nature of the right; and
- (g) The importance of the purpose of the limitation; and
- (h) The nature and extent of the limitation; and
- (i) The relationship between the limitation and its purpose; and
- (j) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>7</sup>

3.2 The NSW Bar Association repeated their concerns about using the concept of balance in a manner that indicates that fundamental principles and rights and the public interest are apposite concepts weighed against each other. They suggested that fundamental principles and rights form part of the public interest.

3.3 They submitted that the need to compare the importance of the right with the importance of the purpose of the limitation may intrude into the Committee's analysis. They considered that a 'weighing' approach that "pits the achievement of personal rights and liberties against countervailing considerations which are given at the outset prima facie equal weight is generally an inappropriate way of assessing legislation".

3.4 Instead, they proposed that consideration of all relevant matters, including how pressing or important the purpose of the limitation is, but without taking an oppositional approach in which the 'importance' of the limitation must be directly balanced against or compared with the 'importance' of the right or liberty.

### 2. Principle for Consideration:

The Committee supports that fundamental principles and rights and the public interest are important considerations rather than weights which should be balanced against each other.

### 3. Principle for Consideration:

The Committee recognises that fundamental principles and rights form part of the public interest.

<sup>7</sup> Derived from the Victorian *Charter of Human Rights and Responsibilities Act 2006* – section 7 (2).

- 3.5 Both of the submissions from the Public Defenders and from the Bar Association of NSW suggested that the principles of the Victorian Charter do not require the adoption of a 'public interest' test that conflates the term 'public interest' with 'public order or safety'. They stated that the term 'public interest' should not always and necessarily be synonymous with the concept of 'public order or safety'. They further suggested that it is a false dichotomy to put 'public interest' as something which is in opposition to personal rights and liberties because the protection of personal rights and liberties is, by its nature, almost always 'in the public interest'.
- 3.6 The Bar Association observed that the term 'public interest' is not defined in the NSW *Legislation Review Act 1987* and that it is not a term that is generally used in international human rights instruments.
- 3.7 Most of the submissions stated that attempts to define 'public interest' should be taken with great caution. The submission from the NSW Police Force suggested that the public interest can change dramatically due to emerging events and issues. The NSW Bar Association stated that particular care needs to be taken with the term 'public interest' in its application in a context of fulfilling the statutory functions set out in sections 8A and 9 of the NSW *Legislation Review Act 1987*.

#### 4. Principle for Consideration:

The Committee supports the principle that the rule of law must be accepted as furthering the public interest in almost all cases, and that the competing facets of the public interest should not be balanced in a way which suggests that prima facie they have equal weight.

#### 5. Principle for Consideration:

The Committee accepts that in a particular case, public safety might be relevant to a determination of whether legislation trespasses unduly on a personal right or liberty but does not endorse that it forms the only facet of 'public interest'.

#### 6. Principle for Consideration:

The Committee may, where appropriate, refer to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights<sup>8</sup>, as one of the sources for use when considering whether limitation or encroachment on personal rights could result in 'undue' trespass on those rights.

- 3.8 In concluding, the submissions, including from the Queensland's Scrutiny of Legislation Committee, reinforce what the Committee has been currently doing when examining provisions of bills and regulations for assessing any undue trespasses on personal rights and liberties by referring to international human rights instruments and judgments from relevant court jurisdictions. The Committee then draws the attention of Parliament to consider whether there are undue trespasses on personal rights and liberties concerning the proposed legislation.

---

<sup>8</sup> A copy of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) is attached in the Appendix 2.

## Appendix 1: Submissions Received

- 1) NSW Police Force
- 2) Minister for Local Government
- 3) Law Society of NSW
- 4) NSW Bar Association
- 5) Public Defenders of NSW
- 6) Queensland Scrutiny of Legislation Committee

## Appendix 2: Siracusa Principles

Copy of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985)

UNITED NATIONS  
ECONOMIC  
AND  
SOCIAL COUNCIL



Distr.  
GENERAL  
E/CN.4/1985/4  
28 September 1984  
Original: ENGLISH

---

COMMISSION ON HUMAN RIGHTS  
Forty-first session  
Item 18 of the provisional agenda

STATUS OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Note verbale dated 24 August 1984 from the Permanent Representative  
of the Netherlands to the United Nations Office at Geneva addressed  
to the Secretary-General

As is well known, the Commission on Human Rights has attached, and is continuing to attach, the highest importance to the implementation of the International Covenant on Civil and Political Rights, particularly to its provisions from which no derogation is permissible. The Commission has, inter alia, examined an important study of the implications for human rights of recent developments concerning situations known as states of seige and emergency, prepared by Mrs. Nicole Questiaux (E/CN.4/Sub.2/1982/15) and has requested that the Sub-Commission pursue its consideration of this matter (Commission decision 1984/104).

The interpretation and application of the limitation and restriction clauses of the Covenants have also become matters of great concern and the Human Rights Committee, in its individual views adopted under the Optional Protocol, as well as in its general comments, has sought to ensure that those clauses of the International Covenant on Civil and Political Rights are interpreted and applied in a manner consistent with the objects and purposes of the Covenant.

The importance of the above-mentioned issue led a number of non-governmental organizations to sponsor a high-level international conference on the limitation and derogation provisions of the International Covenant on Civil and Political Rights.

The Conference was held at Siracues (Italy) from 30 April to 4 May 1984. It was sponsored by the following organizations: the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the international Institute of Higher Studies in Criminal Sciences.

The participants at the Conference included professors, practitioners and other experts in human rights from all regions of the world. The Conference resulted in the adoption of a series of pertinent principles entitled

"The Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights".

GE .84-1827 3

In the view of the Government of the Netherlands it would be extremely useful if the members of the Commission on Human Rights, as well as the members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Committee were acquainted with these principles and could examine them more closely, if they so wish. Accordingly, the Government of the Netherlands requests that the "Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights" be circulated as an official document of the forty-first session of the Commission on Human Rights under the agenda item pertaining to the International Covenants on Human Rights.

Annex

THE SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS  
IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

CONTENTS

|  | <u>Paragraphs</u> |
|--|-------------------|
| Introduction   | i - vi            |
| <br>   |                   |
| PART I. THE LIMITATION CLAUSES <sup>1</sup> 4 THE COVENANT   |                   |
| <br>   |                   |
| A. General Interpretative principles relating to the<br>justification of limitations   | 1 - 14            |
| <br>   |                   |
| B. Interpretative principles relating to specific<br>limitation clauses  |                   |
| "Prescribed by law"  | 15 - 18           |
| "In a democratic society"  | 19 - 21           |
| "Public order (ordre public)"  | 22 - 24           |
| "Public health"  | 25 - 26           |
| "Public morals"  | 27 - 28           |
| "National security"  | 29 - 32           |
| "Public safety"  | 33 - 34           |
| "Rights and freedoms of others", or  |                   |
| "Rights and reputations of others"   | 35 - 37           |
| Restrictions on public trial   | 38                |
| <br>   |                   |
| PART II. DEROGATIONS IN A PUBLIC EMERGENCY   |                   |
| <br>   |                   |
| A. Public emergency which threatens the<br>life of the nation  | 39 - 41           |
| <br>   |                   |
| B. Proclamation, notification and termination<br>of a public emergency   | 42 - 50           |
| <br>   |                   |
| C. "Strictly required by the exigencies<br>of the situation"   | 51 - 57           |
| <br>   |                   |
| D. Non-derogable rights  | 58 - 60           |
| <br>   |                   |
| E. Some general principles on the<br>introduction and application of a<br>public emergency and consequent<br>derogation measures | 61 - 70           |
| <br>   |                   |
| F. Recommendations concerning the functions<br>and duties of the Human Rights Committee<br>and United Nations bodies             | 71 - 76           |



E/CN.4/1985/4

Annex

page 2

Introduction

(i) A group of 31 distinguished experts in international law, convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Sicily, in April and May 1984

to consider the limitation and derogation provisions of the International Covenant

on Civil and Political Rights. The participants came from Brazil, Canada, Chile, Egypt, France, Greece, Hungary, India, Ireland, Kuwait, the Netherlands, Norway, Poland, Switzerland, Turkey, the United Kingdom, the United States of America,

the United Nations Centre for Human Rights, the International Labour Organisation (ILO) and the sponsoring organizations.

(ii) The participants were agreed upon the need for a close examination of the conditions and grounds for permissible limitations and derogations enunciated in the Covenant in order to achieve an effective implementation of the rule of law. As frequently emphasized by the General Assembly of the United Nations, a uniform interpretation of limitations on rights in the Covenant is of great importance.

(iii) In examining these limitations and derogations the participants sought to identify:

    Their legitimate objectives,

    The general principles of interpretation which govern their imposition and application, and

    Some of the main features of the grounds for limitation or derogation.

(iv) It was recognized that other criteria determined the scope of rights in the Covenant, e.g. the concept of arbitrariness, but time was not available to examine

them. It was hoped that it might be possible to examine these other limits on some future occasion.

(v) The participants were agreed that:

    (a) There is a close relationship between respect for human rights and the maintenance of international peace and security; indeed the systematic violation of human rights undermines national security and public order and may constitute a threat to international peace;

    (b) Notwithstanding the different stages of economic development reached in different States, the implementation of human rights is an essential requirement for development in the broadest sense.

(vi) These principles are considered by the participants to reflect the present

state of international law, with the exception of certain recommendations indicated by the use of the verb "should" instead of "shall".

PART I. THE LIMITATION CLAUSES IN THE COVENANT

A. General interpretative principles relating to the justification limitations

\*/

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognized by the Covenant shall discriminate contrary to article 2, paragraph I.
10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:
  - (a) Is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
  - (b) Responds to a pressing public or social need,
  - (c) Pursues a legitimate aim, and
  - (d) Is proportionate to that aim.Any assessment as to the necessity of a limitation shall be made on objective considerations.
11. In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12. The burden of justifying a limitation upon a right guaranteed under the

Covenant lies with the State.

13. The requirement expressed in article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.

---

\*/ The term "limitations" in these principles includes the term "restrictions" as used in the Covenant.

E/CN.4/1935/4

Annex

page 4

14. The limitation clauses of ' the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding on the State.

B . Interpretative principles relating to specific limitation clauses

"Prescribed by law"

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

"In a democratic society"

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.

20. The burden is upon a State imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.

21. While there is no single model of a democratic society, a society which recognizes, respects and protects the human rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights may be viewed as meeting this definition.

"Public order(ordre public)"

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts or other competent independent bodies.

"Public health"

25. Public health may be invoked as a ground for limiting certain rights in order to

allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the International Health Regulations of the World Health Organization.

"Public morals"

27. Since public morality varies over time and from one culture to another, a State which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to States does not apply to the rule of non-discrimination as defined in the Covenant.

"National security"

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

"Public safety"

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

"Rights and freedoms of others" or the "Rights and reputations of others"

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in

the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant.



E/CN.4/1985/4

Annex

page 6

37. A limitation to a human right based upon the reputation of others shall not be used to protect the State and its officials from public opinion or criticism.

Restrictions on public trial

38. All trials shall be public unless the Court determines in accordance with law that:

The press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or

The exclusion is strictly necessary to avoid publicity (a) prejudicial to the fairness of the trial or (b) endangering public morals, public order (ordre public) or national security in a democratic society.

PART II. DEROGATIONS IN A PUBLIC EMERGENCY

A. "Public emergency which threatens the life of the nation"

39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.

A threat to the life of the nation is one that:

(a) Affects the whole of the population and either the whole or part of the territory of the State, and

(b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under article 4.

41. Economic difficulties per se cannot justify derogation measures.

B. Proclamation, notification and termination of a public emergency

42. A State party derogating from its obligations under the Covenant shall make an official proclamation of the existence of a public emergency threatening the life of the nation.

43. Procedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the- emergency.

44. A State party derogating from its obligations under the Covenant shall immediately notify the other States parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated.

45. The notification shall contain sufficient information to permit the States parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:

(a) The provisions of the Covenant from which it has derogated;

(b) A copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the States parties to appreciate the scope of the derogation;

(c) The effective date of the imposition of the state of emergency and the

period for which it has been proclaimed;

(d) An explanation of the reasons which actuated the Government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency;

(e) A brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.

46. States parties may require that further information necessary to enable them to carry out their role under the Covenant be provided through the intermediary of the Secretary-General.

47. A State party which falls to make an immediate notification in due form of its derogation is in breach of its obligations to other States parties and may be deprived of the defences otherwise available to it in procedures under the Covenant.

48. A State party availing itself of the right of derogation pursuant to article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation.

49. The State party shall, on the date on which it terminates such derogation, inform the other States parties, through the intermediary of the Secretary-General of the United Nations, of the fact of the termination.

50. On the termination of a derogation pursuant to article 4, all rights and freedoms protected by the Covenant shall be restored in full. A review of the continuing consequences of derogation measures shall be made as soon as possible. Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.

C. "Strictly required by the exigencies of the situation"

51. The severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

52. The competent national authorities shall have a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitation clauses of the Covenant would be adequate to deal with the threat to the life of the nation.

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger.

55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.

56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation, the judgement of the national authorities cannot be accepted as conclusive.

D. Non-derogable rights

58. No State party shall, even in time of emergency threatening the life of' the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

59. States parties to the Covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (article 3, paragraph I), and to adopt measures to secure an effective remedy for violations (article 2, paragraph 3), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of' arbitrary and extrajudicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

60. The ordinary courts should maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

E. Some general principles on the introduction and application of a public emergency and consequent derogation measures.

61. Derogation from rights recognized under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum. It is authorized by law and as such it is subject to several legal principles of general application.

62. A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation. A proclamation of a public emergency, and consequent derogations from Covenant obligations that are not made in good faith, are violations of international law.

63. The provisions of the Covenant allowing for certain derogations in a public emergency are to be interpreted restrictively.

64. In a public emergency the rule of law shall still prevail. Derogation is an authorized and limited prerogative to respond adequately to a threat to the life of the nation. The derogating State shall have the burden of justifying its actions under law.

65. The Covenant subordinates all procedures to the basic objectives of human rights, Article 5, paragraph I, of the Covenant sets definite limits to actions taken under the Covenant:

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms

recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

E/CN.4/198 5/4

Annex

page 10

Article 29, paragraph 2, of the Universal Declaration of Human Rights sets out the ultimate purpose of law:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

These provisions apply with full force to claims that a situation constitutes a threat to the life of a nation and hence enables authorities to derogate.

66. A bona fide proclamation of a public emergency permits derogation from specified obligations in the Covenant, but does not authorize a general departure from international obligations. The Covenant in articles 4, paragraph 1 and 5, paragraph 2, expressly prohibits derogations which are inconsistent with other obligations under international law. In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and ILO Conventions.

67. In a situation of a non-international armed conflict, a State party to the 1949 Geneva Conventions for the protection of war victims may not under any circumstances suspend the right to a trial by a court offering the essential guarantees of independence and impartiality (article 3 common to the 1949 Conventions). Under the 1977 additional Protocol II the following rights with respect to penal prosecution shall be respected under all circumstances by States parties to the Protocol:

(a) The duty to give notice of charges without delay and to grant the necessary rights and means of defence;

(b) Conviction only on the basis of individual penal responsibility;

(c) The right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation;

(d) Presumption of innocence;

(e) Trial in the presence of the accused;

(f) No obligation on the accused to testify against himself or to confess guilt;

(g) Duty to advise the convicted person on judicial and other remedies.

68. The ILO basic human rights conventions contain a number of rights dealing with such matters as forced labour, freedom of association, equality in employment and trade-union and workers' rights which are additional to those in the Covenant. Some of these are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary to meet the exigencies of the situation.

69. No State, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency:

The right to life;

Freedom from torture or cruel, inhuman or degrading treatment or punishment

and from medical or scientific experimentation;



The right not to be held in slavery or involuntary servitude; and

The right not to be subjected to retroactive criminal penalties as defined in the Covenant.

Customary international law prohibits in all circumstances the denial of such fundamental rights,

70. Although protections against arbitrary arrest and detention (article 9) and the right to a fair and public hearing in the determination of a criminal charge (article 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights

and to provide an effective remedy against their violation. In particular:

(a) All arrests and detention and the place of detention shall be recorded, if possible centrally, and made available to the public without delay;

(b) No person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;

(c) No person shall be held in isolation without communication with his family, friend or lawyer for longer than a few days, e.g. three to seven days;

(d) Where persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal;

(e) Any person charged with an offence shall be entitled to a fair trial by a competent, independent and impartial court established by law;

(f) Civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority;

(g) Any person charged with a criminal offence shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial:

The right to be informed of the charges promptly, in detail and in a language he understands,

The right to have adequate time and facilities to prepare the defence including the right to communicate confidentially with his lawyer,

The right to a lawyer of his choice, with free legal assistance if he does not have the means to pay for it and to be informed of this right,

The right to be present at the trial,

The right not to be compelled to testify against himself or to make a confession,

The right to obtain the attendance and examination of defence witnesses,

The right to be tried in public save where the court orders otherwise on grounds of ' security with adequate safeguards to prevent abuse,

The right to appeal to a higher court;

(h) An adequate record of the proceedings shall be kept in all cases;

(i) No person shall be tried or punished again for an offence for which he has already been convicted or acquitted.

F. Recommendations concerning the functions and duties of the Human Rights Committee and United Nations bodies

71. In the exercise of its power to study, report and make general comments on States parties' reports under article 40 of the Covenant, the Human Rights Committee may and should examine the compliance of States parties with the provisions of article 4. Likewise it may and should do so when exercising its powers in relevant cases under article 41 and the Optional Protocol relating, respectively, to inter-State and individual communications.

72. In order to determine whether the requirements of article 4, paragraphs 1 and 2 have been met and for the purpose of supplementing information in States parties' reports, members of the Human Rights Committee, as persons of recognized competence in the field of human rights, may and should have regard to information they consider to be reliable provided by other intergovernmental bodies, non-governmental organizations and communications by individuals.

73. The Human Rights Committee should develop a procedure for requesting additional reports under article 40, paragraph 1 (b) , from States parties which have given notification of derogation under article 4, paragraph 3, or which are reasonably believed by the Committee to have imposed emergency measures subject to the constraints of article 4. Such additional reports should relate to questions concerning the emergency in so far as it affects the implementation of the Covenant and should be dealt with by the Committee at the earliest possible date.

74. In order to enable the Human Rights Committee to perform its fact-finding functions more effectively it should develop its procedures for the consideration of communications under the Optional Protocol in order to permit the hearing of oral submissions and evidence and visits to States parties alleged to be in violation of the Covenant. If necessary, the States parties to the Optional Protocol should consider amending it to this effect.

75. The United Nations Commission on Human Rights should request its Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare an annual list of States, whether parties to the Covenant or not, that proclaim, maintain or terminate a public emergency together with:

- In the case of a State party, the proclamation and notification; and
- In the case of other States, any available and apparently reliable information concerning the proclamation, threat to the life of the nation, derogation measures and their proportionality, non-discrimination and respect for non-derogable rights.

76. The United Nations Commission on Human Rights and its Sub-Commission should

continue to utilize the technique of appointment of special rapporteurs and investigatory and fact-finding bodies in relation to prolonged public emergencies.

\*\*\*\*\*