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Inquiry into the operation of the *Legislation Review Act 1987*

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Chair's foreword

I am pleased to present the Joint Legislation Review Committee's report on the operation of the *Legislation Review Act 1987*. This report contains the Committee's comments and recommendations on strengthening rights scrutiny in New South Wales.

The Legislation Review Committee, with its current function of considering bills and regulations, has been operating under the provisions of the *Legislation Review Act 1987* for over 15 years. In that time the Act has remained unchanged. This inquiry represented an opportunity to seek feedback on the operation of the Act and the Committee's role in examining legislation.

The Committee performs an important role within the Parliament, scrutinising all bills introduced to Parliament and all regulations subject to disallowance. This examination focuses on whether any bill adversely affects personal rights or liberties, or enables the inappropriate use of government or legislative power. The Committee seeks to introduce transparency and accountability measures to the Parliament's law making functions, while educating and informing Members and the broader community about the potential impacts on personal rights and liberties.

Feedback from participants in the inquiry supported the importance of the Committee's role. In reviewing the contributions made by experts in submissions and at the public hearing, the Committee has made one finding and four recommendations aimed at addressing some of the issues raised. Presently, the Act doesn't define the phrase personal rights and liberties. Instead, the Committee determines the rights and liberties it will examine bills and regulations against. To provide clarity and transparency around how the Committee interprets this phrase, the Committee has found that it would assist the scrutiny process for the Committee to publish these determined rights and liberties. This will assist in informing agencies, the NSW Government and the wider public about the rights and liberties the Committee will be using to assess bills and regulations.

To improve the consideration of the rights issues identified by the Committee during the debate on the bills, the Committee has recommended that the Houses give consideration to amending their respective Standing Orders to require that the Member with carriage of a bill address any matters identified by the Committee during the Second Reading Debate. The goal of this recommendation is to elevate the discussion and consideration of personal rights and liberties during debate on bills and provide a more timely mechanism for Members to respond to any issues the Committee raises. In the event that this recommendation is not adopted by the Houses, the Committee has recommended that the NSW Government implement a practice of requiring Ministers with carriage of a bill to address any issues identified by the Committee in the Second Reading Debate.

In the case of bills that are to proceed without the five day adjournment period between the Second Reading Speech and the resumption of the Second Reading Debate, the Committee rarely has the opportunity to review a bill before it is debated by the Houses. In these cases, and in the interests of preserving a level of legislative scrutiny, the Committee has recommended that the NSW Government implement a practice of outlining in the Second Reading Speech the bill's impact on the personal rights and liberties as determined by the Committee.

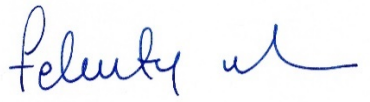
During the inquiry, the current workload of the Committee to review both bills and regulations was raised and the impact this has on the amount of scrutiny applied to both bills and, in particular, regulations. Subsequently, the Committee has recommended that the NSW Government consider amending the *Legislation Review Act 1987* to establish a joint Committee to examine subordinate legislation taking into account the recent practice of the NSW Legislative Council Regulation Committee.

I acknowledge that a number of inquiry participants recommended broader changes to the Act. The Committee considered the submissions and evidence of participants and I am confident that the measures recommended in this report will aid the scrutiny of bills and regulations in New South Wales while also respecting parliamentary processes.

On behalf of the Committee, I would like to thank each of the organisations that made submissions to this inquiry and gave evidence at the Committee's public hearing.

I would also like to thank my committee colleagues, Mr Lee Evans MP, Mr Michael Johnsen MP, Ms Melanie Gibbons MP, the Hon. Natasha Maclaren-Jones MLC, Mr David Mehan MP, the Hon. Shaoquett Moselmane MLC and Mr David Shoebridge MLC. In particular, I would also like to thank the former Chairs of the Committee, Mr Michael Johnsen MP for launching this inquiry and Mr James Griffin MP for chairing the Committee during its public hearing.

Finally, I would like to thank the Committee staff, Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley, Ze Nan Ma and Mohini Mehta for supporting the Committee in its ongoing work and throughout this inquiry.



Felicity Wilson MP
Chair

Findings and recommendations

The Committee considers that it would assist the scrutiny process for the Committee to determine the rights and liberties it will review bills and regulations against and inform the Parliament of these at the start of each Session.

The Committee recommends that the Houses give consideration to amending their respective Standing Orders to require the Member with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

The Committee recommends, in the event Recommendation 1 is not adopted by the Houses, that the NSW Government implement a practice of requiring Ministers with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

The Committee recommends that, for bills where the Houses determine to proceed without the five day adjournment period, the NSW Government implement a practice of outlining in the Second Reading Speech the bill's impact on personal rights and liberties with reference to the rights and liberties determined by the Committee.

The Committee recommends that the NSW Government consider amending the *Legislation Review Act 1987* to establish a joint Committee to examine subordinate legislation, taking into account the recent practice of the NSW Legislative Council Regulation Committee.

Chapter One – The *Legislation Review Act 1987* and objectives of scrutiny committees

1.1 This Chapter provides an overview of the origins of the *Legislation Review Act 1987* (the LR Act) and outlines the role of scrutiny committees like the Legislation Review Committee (the Committee).

Origins of the *Legislation Review Act 1987* and the Committee

1.2 Prior to the Legislation Review Committee, the *Regulation Review Act 1987* provided for the establishment of a joint Regulation Review Committee with its main function being to consider all regulations against a set of criteria listed in the *Regulation Review Act 1987*.

1.3 In 2001, the NSW Legislative Council Standing Committee on Law and Justice (the Law and Justice Committee) commenced an inquiry into whether New South Wales should enact a Bill of Rights. [1] The Law and Justice Committee found that it was not in the public interest for the NSW Government to enact a statutory Bill of Rights. However, it did recommend that the NSW Parliament establish a joint scrutiny of legislation committee separate from the joint Regulation Review Committee that was operating at the time.

1.4 In coming to this recommendation, the Law and Justice Committee detailed the benefits of scrutiny committees and their potential to bring a systematic process to the review of bills for any trespasses on rights and liberties, and improve and assist the focus of debates on legislation.[2]

1.5 The *Legislation Review Amendment Act 2002* was subsequently introduced and passed renaming the *Regulation Review Act 1987* the *Legislation Review Act 1987* and expanding the role of the then Regulation Review Committee to include a scrutiny of bills function. The Regulation Review Committee was subsequently retitled the Legislation Review Committee.

Objectives of scrutiny committees

1.6 Parliamentary committees that scrutinise legislation, either bills or regulations or a combination of both, are in every Australian jurisdiction.

1.7 Most legislative scrutiny committees have similar roles and terms of reference. Many contain scrutiny principles aimed at assisting the parliament to consider legislation against a set of standards including the legislation's impact on personal rights and liberties, the rule of law and parliamentary scrutiny.

[1] NSW Legislative Council, Standing Committee on Law and Justice, A NSW Bill of Rights, Report 17, October 2001

[2] NSW Legislative Council, Standing Committee on Law and Justice, A NSW Bill of Rights, Report 17, October 2001 at p 129

1.8 The origins of parliamentary scrutiny date to the first Australian scrutiny of bills committee in the Australian Senate which was established in 1981.[3] Some common principles of scrutiny include whether any bill, by express words or otherwise:

- trespasses unduly on personal rights and liberties;
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; and
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

1.9 Scrutiny committees generally do not comment on the policy aspects of legislation and restrict comments to issues related to legal principles and the inappropriate use of government or legislative power.

Scrutiny committees with an expanded human rights focus

1.10 In addition to the scrutiny principles outlined above, some committees have an expanded human rights focus such as the Victorian Scrutiny of Acts and Regulations Committee and the Commonwealth Parliamentary Joint Committee on Human Rights.

1.11 The Commonwealth Parliamentary Joint Committee on Human Rights has a specific function of examining all bills and legislative instruments for compatibility with international human rights, and reports to the Commonwealth Parliament on its findings. Similarly, the Victorian Scrutiny of Acts and Regulations Committee also has a specific human rights scrutiny function which involves examining bills and regulations for compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (VIC).

1.12 In the Australian Capital Territory, the Standing Committee on Justice and Community Safety has a traditional scrutiny role in addition to a requirement under the *Human Rights Act 2004* (ACT) to report to the Legislative Assembly on human rights issues raised by bills. Recently, a *Human Rights Bill 2018* was introduced in the Queensland Parliament.

1.13 A table outlining the different scrutiny committees operating in each Australian jurisdiction is at Appendix Three.

Functions of the Legislation Review Committee

1.14 The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the LR Act. Section 8A requires the Committee to consider all bills

[3] See: Parliament of Victoria, Scrutiny of Acts and Regulations, Overview viewed at https://www.parliament.vic.gov.au/sarc/ on 15 October 2018

introduced into Parliament while section 9 requires the Committee to consider all regulations.

Functions with respect to bills

1.15 The Committee's functions with respect to bills are as follows:

Section 8A of the LR Act

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 and 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.

1.16 The Committee does not make specific recommendations on bills and does not generally comment on government policy. The practice of the Committee has been to note issues of concern identified in a bill and either make no further comment beyond noting the issue or refer the issue to Parliament for it to consider the issue further.

1.17 Under section 8A(2) of the LR Act, the NSW Parliament may pass a bill whether or not the Committee has reported on the bill. However, this does not prevent the Committee from reporting on any passed or enacted bill.

Functions with respect to regulations

1.18 The Committee's functions with respect to regulations are as follows:

Section 9 of the LR Act

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.

1.19 It is noted that the LR Act defines 'regulation' to include a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament. A 'statutory rule' may include a by-law, rule or ordinance.[4]

1.20 Unlike bill reports, the Committee only reports on those regulations where issues under section 9 have been identified.

1.21 The Committee may report on regulations that are subject to disallowance, which occurs 15 days after the regulations has been tabled in Parliament.[5] However, the Committee can still report on a regulation after the 15 sitting day disallowance period if it first resolved during the disallowance period that it may report on that regulation at a later date.

[4] *Legislation Review Act 1987 (NSW)*, section 3

[5] *Interpretation Act 1987* (NSW), section 41

Further functions with respect to regulations

Initiate a review and inquiry into regulations

1.22 Section 9(2)(a) of the LR Act provides that the Committee may, from time to time, initiate a systemic review of regulations based on the staged repeal of regulations and to report to both Houses in relation to that review.

1.23 Section 9(2)(b) of the LR Act provides that the Committee may also inquire into and report to both Houses on any question in connection with regulations that is referred to it by the Minister.

1.24 With regard to the Committee's functions with respect to regulations, section 9(3) provides that the functions do not include an examination of government policy except where an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred by a Minister.

Principal Regulations

1.25 The Committee also has further responsibilities under the *Subordinate Legislation Act 1989* (SL Act) regarding principal regulations.[6]

1.26 Under section 5(4) of the SL Act, all principal regulations either being made or remade must be forwarded to the Committee within 14 days of their publication. The responsible Minister must also forward to the Committee any regulatory impact statements made regarding the regulation, and any public submissions that were made to the regulatory impact statement.

Postponement of the Repeal of Regulations

1.27 As regulations are drafted with sunset clauses, they repeal automatically on a prescribed date. However, the Governor may postpone the repeal of a regulation before its expected expiry.

1.28 There are some limits under the SL Act in postponing the repeal of a statutory rule. In particular, under section 11(4), a statutory rule cannot be postponed for the third, fourth or fifth time without the responsible Minister first notifying the Committee. This notification must be done at least one month before the expected date of the regulation's lapsing.

1.29 The Committee can report to the Minister or House if it has concerns with the postponement, or is of the opinion that the postponement should not occur.

[6] *Subordinate Legislation Act 1989* (NSW), sections 5(4), 11

Chapter Two – Strengthening rights scrutiny

2.1 This Chapter will focus on the Legislation Review Committee's (the Committee) core function of scrutinising whether bills and regulations impact on personal rights and liberties.

2.2 It will explore options aimed at strengthening the Committee's scrutiny function and the protection of rights in New South Wales.

Current rights scrutiny process

2.3 The Committee reviews all bills introduced into the NSW Parliament, and all regulations that are disallowable by the NSW Parliament. The Committee reviews these bills and regulations pursuant to section 8A (for bills) and section 9 (for regulations) of the *Legislation Review Act 1987* (the LR Act).

2.4 The criteria against which bills and regulations are reviewed can generally be divided into two categories: personal rights and liberties, and inappropriate use of government or legislative power.

2.5 Although the criteria in sections 8A and 9 are different, both sections require the Committee to assess whether bills or regulations 'trespass unduly on personal rights and liberties'. In relation to bills, the Committee also considers 'rights, liberties or obligations' in the context of the impact of insufficiently defined administrative powers or non-reviewable decisions. The provisions of sections 8A and 9 where personal rights and liberties are referred to are as follows:

Section 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

      iv. ….

      [our emphasis added]

Section 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**, …

[our emphasis added]

2.6 The phrases 'personal rights and liberties' and 'rights, liberties or obligations' are not defined in the LR Act.

2.7 As mentioned in Chapter One, the table at Appendix Three provides a summary of the remit of the different scrutiny committees across Australia.

Rationale for strengthening rights scrutiny of legislation

2.8 The Committee heard that rights scrutiny in New South Wales should be improved, and that improving this scrutiny would result in better policymaking in New South Wales. Professor Andrew Byrnes, Member of the New South Wales Bar Association (the Bar Association) commented:

> Why does the Bar Association, and indeed other submitters, make these proposals and how would they improve the parliamentary process for the protection of rights in New South Wales? ... The short answer is that they would improve the quality of the lawmaking process by promoting a rigorous, principled and systematic evaluation by the executive and the Parliament of all laws and regulations by reference to a clear and comprehensive list of internationally recognised human rights, which Australia has embraced. This in turn will lead to improved policymaking and a better impact on the people affected by these laws. At the moment that does not happen consistently or systematically in this State.[7]

2.9 Professor George Williams AO, Dean of UNSW Law and Foundation Director, Gilbert and Tobin Centre of Public Law (the Centre of Public Law), also gave evidence about the benefits flowing from the reforms to the rights scrutiny scheme in Victoria, including the introduction of a charter of human rights and the requirement for a compatibility statement. He suggested that as a result there is now better legislation, improved policymaking and a higher quality of parliamentary debate:

> I would say that at the most basic level it is driving a set of outcomes in Victoria – and Queensland will go down this path because it has seen those outcomes – that are improving the lives of people in the community. It is doing that in a number of ways. One is that it is leading to legislation which is better drafted to take into account often the dignity and respect people need to be afforded. A good example is how Victoria has had to deal with the treatment of children with disabilities in schools.
>
> It has led to a much more sensitive, appropriate outcome in that jurisdiction by having the benefit of clear standards against which to debate, and often debates are

[7] Professor Andrew Byrnes, Member, New South Wales Bar Association, Transcript of evidence, 21 May 2018, pp 17 - 18

> quite lengthy as a result. Often where it has the greatest impact is not even the legislative area; it is within the application of policy by departments.[8]

2.10 Ms Melanie Fernandez, Deputy Chief Executive Officer at NSW Council of Social Service (NCOSS) also commented on the experiences in Victoria as a result of the enactment of a charter of human rights in 2006:

> What we have seen in other jurisdictions – particularly in Victoria – which has had a charter of human rights since 2006 – is that that has led to public authorities becoming more responsive to the needs of vulnerable people, particularly the population groups we work with. It has also empowered those vulnerable people to learn more about their own rights and to ensure they are enforced.[9]

2.11 When speaking to the importance of human rights generally, the President of the NSW Council for Civil Liberties (NSW CCL) submitted that international human rights law was an authoritative source of law that had developed over 70 years to enable common global problems to be assessed and addressed against uniform standards:

> … when you look at the way in which human rights law has developed internationally over the last 70 years, the whole world, every jurisdiction around the world is dealing with the same set of problems, whether it be counterterrorism or whether it be protests or whatever. There is a standard in the human rights treaties—the rights of Indigenous; there are so many issues common around the world—there is an international standard for dealing with all of these issues, which has led to a body of jurisprudence and discussion of various solutions come up with by various individual jurisdiction, enabling comparison and enabling assessment by reference to standards. That is the really important thing the idea of human rights is.[10]

Rights framework

2.12 During the course of the inquiry, the Committee heard options to strengthen rights scrutiny in New South Wales. Options which were explored included:

- determining the rights and liberties that bills and regulations will be assessed against;
- improving the accountability of decision making by requiring Ministers and members who introduce bills into the NSW Parliament to respond to the Committee's comments;
- requiring Ministers to address personal rights and liberties in the second reading speech for those bills where the Houses determine to proceed without the five day adjournment period; and
- fostering rights awareness throughout government by statements of compatibility.

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[8] Professor George Williams AO, Dean of UNSW Law and Foundation Director, Gilbert and Tobin Centre of Public Law, Transcript of evidence, 21 May 2018, p 7

[9] Ms Melanie Fernandez, Deputy Chief Executive Officer, NSW Council of Social Service, Transcript of evidence, 21 May 2018, p 40

[10] Mr Stephen Blanks, President, NSW Council for Civil Liberties, Transcript of evidence, 21 May 2018, p 28

Defining 'personal rights and liberties'

2.13 During this inquiry, stakeholders expressed concern that the phrase 'personal rights and liberties' was not defined in the LR Act and that there was no guidance in the Act about how it should be interpreted by the Committee.

2.14 To strengthen the scrutiny of rights and the quality of reviews, inquiry participants suggested that this phrase should be further defined and expanded in the LR Act in one of three main ways:

1. by listing in the LR Act the specific rights and liberties that bills and regulations will be examined against;
2. by defining rights and liberties by reference to the seven core international human rights treaties that Australia is a party to;
3. a combination of the above.

2.15 Another option would be to retain the current wording in the LR Act which allows for the Committee to determine the rights and liberties it will consider bills and regulations against.

2.16 Some inquiry participants also argued that New South Wales should adopt a charter of human rights similar to that of Victoria and the Australian Capital Territory (the ACT). This proposal will be examined separately later in this Chapter.

Option one: refer to an express list of rights for New South Wales

2.17 One option proposed and discussed by inquiry participants is to amend the LR Act to expressly identify the rights that bills and regulations will be examined against.[11]

2.18 In recommending that specific rights be articulated in the LR Act, Professor Williams highlighted the vagueness of the phrase 'personal rights and liberties':

> At the moment, the standard the Committee must apply is vague and unarticulated. As someone who has worked for decades in this area, I am unable to provide a concrete answer as to exactly which rights and liberties the Committee should be assessing against. That is a fundamental problem, not only for the Committee but also for Parliament generally, in understanding whether it might trespass against those rights and liberties. It is also a problem for the community in being able to better understand the standards against which this process operates. I think it is also particularly important that we move from this vague standard to a more articulated set of standards for educative reasons. The community would benefit from a clearer set of guidelines on human rights and the like to understand what standards the Parliament is seeking to apply.[12]

[11] Submission 1, UNSW Gilbert + Tobin Centre of Public Law, p 6; Submission 4, The Law Society of New South Wales, pp 2, 6; Mr Doug Humphreys, President of The Law Society of New South Wales, Transcript of evidence, 21 May 2018, p 10

[12] Professor Williams, Transcript of evidence, 21 May 2018, p 2

2.19 Professor Williams submitted that one of the advantages of having a clear set of rights was improving the quality of debate in the parliament, and, importantly, within policy teams in departments.[13]

2.20 He suggested that the lack of a clear set of standards made it difficult to encourage a culture of rights protection across government:

> That is where it is possible to point to a long list of examples of where people's lives have been improved because often the service delivery end has been improved by virtue of a clear set of standards ... Whereas in New South Wales we do not have standards, we do not have consequences, and people do not even know about the process – it does not have the visibility required to drive behaviour.[14]

2.21 Mr Doug Humphreys, President of the Law Society of New South Wales (the Law Society), also spoke to the importance of articulating rights in the LR Act. He suggested that without expressly identifying rights it may be difficult to have a debate as to whether a particular trespass on rights and liberties is justified:

> As I said, it might well be that there are good reasons [for a trespass on rights and liberties], but I simply want to have them articulated and have a debate about whether or not those reasons actually stand up to scrutiny and whether or not the harm that we are doing to the right to go peacefully about our business without interference is actually outweighed by the necessity.[15]

2.22 Professor Williams suggested that a set of community-endorsed human rights standards would be more meaningful than referring to international treaties, which may be more abstract:

> The Committee could either follow the path of simply referring to international standards, as does the Federal Parliament and as do some of the submissions. However, our primary submission is instead that those rights and liberties should be articulated as the standard, particularly for New South Wales. It is something that has clear community support—a clear buy-in from the Parliament and the people themselves—and not the more abstract at an international level. The Committee could look to Victoria and the Australian Capital Territory—and Queensland will have its own instrument, perhaps by the end of this year—which have state-based sets of liberties and human rights that could be used for educative and parliamentary processes.[16]

2.23 In their submission, the NSW CCL recommended that the LR Act should be amended to require the Committee to make its determinations against a set of criteria inscribed in the Act.[17] The NSW CCL submitted that the Committee has no 'mandated set of rights and liberties against which it judges bills.'[18]

2.24 When discussing what particular rights should be articulated in the LR Act, Professor Williams submitted that there is a core set of civil and political rights

[13] Professor Williams, Transcript of evidence, 21 May 2018, p 7
[14] Professor Williams, Transcript of evidence, 21 May 2018, p 8
[15] Mr Doug Humphreys, President, Law Society of New South Wales, Transcript of evidence, 21 May 2018, p 11
[16] Professor Williams, Transcript of evidence, 21 May 2018, p 3
[17] Submission 5, New South Wales Council for Civil Liberties, p 4
[18] Submission 5, New South Wales Council for Civil Liberties, p 11

that are well accepted and he suggested that the Committee could also incorporate economic, social and cultural rights in its review process, such as the right to housing.[19] The President of the Law Society described the twenty civil and political rights contained in the Victorian Charter as a 'good starting point'.[20]

2.25 Similarly, in answers to questions taken on notice, the NSW CCL contended that the rights recognised in the International Covenant on Civil and Political Rights (ICCPR) and other international human rights treaties to which Australia is a party are an appropriate starting point for articulating a set of rights in the LR Act.[21]

2.26 The President of the Law Society also emphasised that any list of rights should be inclusive rather than exhaustive, to afford the flexibility to reflect changes in the law and community expectations.[22] The Bar Association agreed that any amended provision should continue to allow the Committee to refer to a wide variety of rights and liberties, including those which may not be contained in international treaties.[23]

Option two: refer to international human rights treaties Australia is party to

2.27 Some inquiry participants suggested that the LR Act could be amended to define personal rights and liberties by reference to international human rights treaties to which Australia is a party, similar to the Commonwealth Parliamentary Joint Committee on Human Rights (the PJCHR). [24]

2.28 The PJCHR scrutinises bills, Acts, and legislative instruments in the Commonwealth Parliament by reference to the seven core human rights treaties identified in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[25] The seven core human rights treaties include:

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination against Women
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[19] Professor Williams, Transcript of evidence, 21 May 2018, p 4

[20] Mr Humphreys, Transcript of evidence, 21 May 2018, p 16

[21] NSW Council of Civil Liberties, Answers to questions taken on notice, 12 June 2018, p 1

[22] Mr Humphreys, Transcript of evidence, 21 May 2018, p 16

[23] Professor Byrnes and Mr Richard Lancaster, Member, New South Wales Bar Association, Transcript of evidence, 21 May 2018, p 23

[24] Submission 7, New South Wales Bar Association, p 11; Submission 8, Public Interest Advocacy Centre, p 4; Submission 4, The Law Society of New South Wales, pp 2, 6; Mr Lewis Hamilton, President of NSW Labor Lawyers, Transcript of evidence, p 31; Submission 10, Australian Human Rights Commission, p 2; Submission 3, The NSW Young Lawyers, p 8

[25] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 3, 7

6. Convention on the Rights of the Child

7. Convention on the Rights of Persons with Disabilities

2.29 The New South Wales Parliamentary Friends of Reconciliation[26] submitted that the LR Act should be amended so that the Committee must consider Australia's treaty obligations generally when assessing bills or regulations.[27]

2.30 Although the international treaties may not form part of Australia's domestic law,[28] Mr Richard Lancaster SC, Member of the Bar Association, highlighted that all States in Australia still had a 'responsibility to the federation to ensure that Australia is, to the extent it possibly can be, not in breach of its international obligations.'[29]

2.31 In support of amending the LR Act to refer to the seven core international human rights treaties, the President of the Australian Human Rights Commission (the AHRC) suggested that the language of 'rights and liberties' adopted in the LR Act was somewhat outdated, and should be updated to refer expressly to international treaties:

> The language of rights and liberties is beautiful language, but it is early twentieth century language, which is distinct from language post World War II and the signing up to conventions. There is an opportunity to take that language into the post World War II arena by expressly linking to the treaties. Rights and liberties should encompass those things. The "human" adjective that came in post World War II simply put a different label on what we might say were already the rights and liberties that were embraced by the Commonwealth.[30]

2.32 In their submission, the AHRC noted that of all the parliamentary scrutiny committees operating at a federal level, the PJCHR is the only committee that expressly considers Australia's international human rights obligations and as such represents an 'important extension of existing parliamentary rights review mechanisms.'[31]

2.33 The AHRC acknowledged that there are some challenges facing the PJCHR and the federal approach to human rights scrutiny of legislation. For example, the AHRC noted that parliamentarians do not always consider the views of the PJCHR and it is possible a bill will pass before the PJCHR has released its view on the bill's compliance with human rights.[32] However, despite these challenges the AHRC commented that 'they do not undermine the overarching value of

[26] It is noted that two members of the Legislation Review Committee, Mr David Shoebridge MLC and The Hon. Shaoquett Moselmane MLC, were signatories to this submission.

[27] Submission 9, New South Wales Parliamentary Friends of Reconciliation, p 6

[28] Mr Humphreys, Transcript of evidence, 21 May 2018, p 15

[29] Mr Lancaster, Transcript of evidence, 21 May 2018, p 21

[30] Professor Rosalind Croucher, President, Australian Human Rights Commission, Transcript of evidence, 21 May 2018, p 50

[31] Submission 10, Australian Human Rights Commission, p 2

[32] Submission 10, Australian Human Rights Commission, p 2

considering Australia's international human rights obligations in the course of legislative review.'[33]

2.34 While the primary proposals of some inquiry participants were for either the adoption of a charter of human rights or the articulation of a set of rights in the LR Act, inquiry participants indicated that, in the alternative to their primary proposal, the LR Act should be amended to define rights and liberties with reference to the seven core human rights treaties.[34]

2.35 In addition, to strengthen the Committee's focus on human rights, some inquiry participants considered that the phrase 'personal rights and liberties' should be replaced with 'human rights.'[35] For example, the Public Interest Advocacy Centre (PIAC) noted that the phrase personal rights and liberties may lead some to interpret that terminology to only refer to civil and political rights as opposed to a broader range of rights. The Deputy Chief Executive Officer of NCOSS similarly commented:

> It is not necessarily just those fundamental political and civil rights that would be covered in some of the remit at the moment. That is why we encourage an expansion of language around human rights that covers those broader accesses to the fundamentals of safe, secure and affordable housing, safety and the broader elements around that and particularly some of the fundamental rights that we see in international jurisdictions and in some of the international frameworks that we work around—the right to sanitation, infrastructure and clean water.[36]

Option three: a hybrid model to refer to specific rights and international treaties

2.36 Some inquiry participants suggested that the LR Act could be amended to incorporate reference to international treaties, as well as other sources of rights.

2.37 The President of the Law Society suggested that the LR Act should identify particularly important rights and liberties as well as the seven core international human rights treaties:

> The biggest thing that we believe is that this Committee needs to review the bill against the traditional common law rights, including presumption of innocence, legal professional privilege and the privilege against self-incrimination, as well as reviewing the bill against the seven core human rights treaties to which Australia is defined[37]

2.38 PIAC proposed that the term 'personal rights and liberties' be replaced with 'human rights', and that human rights be specifically defined to include:

- Australian law, especially the common law, NSW statute law and the Commonwealth Constitution;

[33] Submission 10, Australian Human Rights Commission, p 2

[34] Submission 1, UNSW and Gilbert & Tobin Centre of Public Law, p 6; Submission 2, NSW Council of Social Service, p 9

[35] Submission 2, NSW Council of Social Service, p 3; Submission 8, Public Interest Advocacy Centre, p 4

[36] Ms Fernandez, Transcript of evidence, 21 May 2018, p 41

[37] Mr Humphreys, Transcript of evidence, 21 May 2018, p 10

- International human rights law, especially human rights treaties to which Australia is a party to; and
- the law and jurisprudence of other jurisdictions.[38]

2.39 In response to a question which noted that the Committee was not currently limited in relation to what rights and liberties it referred to, Professor Byrnes of the Bar Association made it clear that the Committee should be able to refer to international treaties, as well as other rights:

> … if this Committee retained its existing mandate, which I think it should – undue trespass on personal rights and liberties – that is an elastic one which can evolve. We are certainly not saying that it should just be the international human rights instruments, as I think we said earlier. Common law rights, where there is some overlap, specific Federal constitutional rights or State constitutional rights about freedom of political communication, those sorts of things would fall within that. I think there is sufficient flexibility for that to happen. The issue with Victoria and the ACT is that they confine themselves to look almost overwhelmingly to civil and political rights, which is something that this Committee does not. I think it is important to have the whole gamut of rights.[39]

2.40 Mr Lancaster also commented that any legislative amendment to the LR Act should include 'language broad enough to include current rights and liberties that this Committee addresses but also Australia's international obligations.'[40]

Option four: retain the current wording

2.41 Another option is to retain the current wording of section 8A(1)(b)(i) and section 9(1)(b)(i) of the LR Act.

2.42 Although all witnesses supported amending the LR Act to clarify the rights or sources of rights to which the Committee should refer, some witnesses also acknowledged that the existing wording is broad and does not operate to restrict the Committee's ability to refer to a wide variety of rights and liberties, including those enshrined in international law.[41] For example, in response to a question as to whether the LR Act restricted the Committee's ability to refer to international human rights, the President of the New South Wales Labor Lawyers commented:

> No. In the sense that it provides a broad statement in relation to personal rights and liberties. So it is within the Committee's discretion to consider that broadly or to consider it narrowly. We accept that. I suppose the other jurisdictions we are referring to have more prescriptive requirements for what must be considered in their legislation … So there is more of an obligation I suppose for the relevant committees in those State to consider in a more prescriptive way individual rights. We would accept that under the current Legislation Review Act it is open to the

[38] Submission 8, Public Interest Advocacy Centre, p 5

[39] Professor Byrnes, Transcript of evidence, 21 May 2018, p 23

[40] Mr Richard Lancaster, Transcript of evidence, 21 May 2018, p 23

[41] Mr Lewis Hamilton, President, New South Wales Labor Lawyers, Transcript of evidence, 21 May 2018, pp 33 - 34; Professor Byrnes, Transcript of evidence, 21 May 2018, p 23

> Committee to consider generally personal rights and liberties, but we think that it should be more prescriptive in the legislation.[42]

2.43 While they recommended that the LR Act be amended to refer to a specific set of rights, the NSW CCL noted that the Committee has, in practice, used the common law, New South Wales statute law, the Constitution, international human rights law and the law and jurisprudence of other jurisdictions to guide its deliberations. The NSW CCL further noted that the Committee does not refer to these documents but does specify the rights which are being infringed.[43]

2.44 PIAC in their submission also noted that the Committee itself has adopted a wide definition of rights which has included reference to Australian law, international human rights law and jurisprudence in other jurisdictions.[44] PIAC further indicated that while the current definition may permit the Committee to adopt a wide definition of rights, it also does not preclude a future committee from narrowing its focus.[45] However, as stated above, PIAC recommended that the LR Act be amended to refer to 'human rights' and the different sources of those rights in international law, Australian law, and the jurisprudence of other jurisdictions. At the hearing, PIAC also gave evidence that, at least, the LR Act should be amended to refer to the seven core international human rights treaties to which Australia is a party.[46]

2.45 The Committee notes that in previous parliaments the Committee has stated that in the absence of a definition of 'rights and liberties' in the LR Act and any other legislative statement as to the content of rights and liberties, the Committee has taken into account:

- rights protected under the common law, for example the right to silence, as developed by the courts;
- rights protected under New South Wales and Commonwealth statute law, for example the *Anti-Discrimination Act 1977* (NSW) and the *Racial Discrimination Act 1975* (Cth);
- rights protected under the Commonwealth Constitution;
- rights protected under international law, especially as set out in international human rights treaties ratified by Australia;
- the decisions and comments of the principal international bodies monitoring international human rights treaties;
- rights recognised in other comparable jurisdictions; and

[42] Mr Hamilton, Transcript of evidence, 21 May 2018, pp 33 – 34; However, it is noted that the New South Wales Labor Lawyers supported a model which referred to the seven core human rights treaties.

[43] Submission 5, NSW Council for Civil Liberties, p 11

[44] Submission 8, Public Interest Advocacy Centre, pp 4-5. In noting this PIAC referenced a paper by Andrew Byrnes titled, *The protection of Human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament's Legislation Review Committee*.

[45] Submission 8, Public Interest Advocacy Centre, p 5

[46] Mr Lawrie, Transcript of evidence, 21 May 2018, p 37

- academic and public debate on the content of 'rights'.[47]

2.46 Should the current wording of sections 8A and 9 be retained, it would assist the scrutiny process if the Committee determines the list of personal rights and liberties it will consider when examining bills and regulations.

Committee comment

2.47 The Committee notes the proposals that the LR Act should be amended to contain express reference to either specific rights, or the seven core international human rights treaties to which Australia is a party, or a combination of both.

2.48 The Committee considers that the existing wording of sections 8A(1)(b)(i) and 9(1)(b)(i) of the LR Act are sufficiently broad to allow the Committee to refer to a wide range of rights and liberties, including those derived from international law. The Act, as currently drafted, does not operate to constrain the Committee and provides the Committee flexibility to consider changes in the law. This approach has been the consistent practice of the Committee and the Committee considers there is value in continuing with this approach. As such, the Committee is of the view that the current wording of the Act should be retained.

2.49 The Committee considers there would be benefit to the scrutiny process if the Committee determines the rights and liberties it will review bills and regulations against.

2.50 The Committee considers it will further assist the scrutiny process for the Committee to publish the rights and liberties it determines to review bills and regulations against. The Committee should inform the Government of the rights and liberties that the Committee will be reviewing bills and regulations against.

2.51 The above practice would assist in the educative role for agencies and Government; and inform the wider community.

Finding 1

The Committee considers that it would assist the scrutiny process for the Committee to determine the rights and liberties it will review bills and regulations against and inform the Parliament of these at the start of each Session.

Accountability - response to Legislation Review Committee's report in second reading debate

2.52 The Committee received evidence from inquiry participants asserting that parliamentary scrutiny could be improved by requiring the Minister or member responsible for a bill to respond to the Committee's comments referred to the NSW Parliament in the bill's second reading debate.

[47] See: Legislation Review Committee, Annual Review 2007/2008, p 3; Legislation Review Committee, Annual Review 2006/2007, p 3; Legislation Review Committee, Annual Review 2005/2006, p 4; Legislation Review Committee, Annual Review 2004/2005, pp3-4

2.53 It was argued that requiring a response to the issues raised by the Committee would elevate the discussion and consideration of personal rights and liberties, in debates about bills and in the drafting of legislation.

2.54 The UNSW and Gilbert + Tobin Centre of Public Law (the Centre of Public Law) recommended that, unless a bill is declared urgent, Standing Orders should require the member responsible for the bill to address matters identified and referred by the Committee during the parliamentary debate.[48] The Centre of Public Law reasoned that such measures would prevent the work of the Committee from being undermined:

> The current work of the Committee is severely undermined not just by the limited timeframe that is provided for it to report on Bills and for Members to consider those reports, but by the lack of any legislative requirement mandating the Parliament to debate matters identified in the Committee's report as requiring parliamentary attention. This, as Luke McNamara and Julia Quilter have observed, limits the Committee's potential to make a positive influence on legislation-making.[49]

2.55 Mr Aaron Taverniti from the Centre of Public Law noted that the lack of references to the Committee's reports during parliamentary debate severely diminished their utility:

> We think it also follows that it is incumbent on the proponent of the bill to respond to and address these concerns during the second reading debate. The utility of reports is severely diminished if they remain unread and unremarked upon in debate.[50]

2.56 Professor George Williams AO, Dean of UNSW Law and Foundation Director of the Centre of Public Law, emphasised that the profile of the Committee's work needed to be elevated in order for it to lead to broader education and debate about the Committee's work:

> …we would look to things like references in Hansard: How often is this body referred to? How often does it lead to amendments on the floor of either House? How often does the Executive pre-vet legislation prior to its production in order to anticipate the findings of this Committee? How often is the public aware of this body? How often does it lead to broader education and debate about these matters to build confidence in Parliament and to improve the community's understanding of the role of lawmakers? On those measures, we would say there is more that could be done to improve the work of these processes.[51]

2.57 PIAC also recommended that the Minister or member responsible for the bill speak to issues raised by the Committee during the second reading debate. PIAC

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[48] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 5

[49] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 5, referring to Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27 *Current Issues in Criminal Justice* 21.

[50] Mr Aaron Taverniti, Social Justice Intern (former), UNSW and Gilbert + Tobin Centre of Public Law, Transcript of evidence, 21 May 2018, p 4

[51] Professor George Williams AO, UNSW and Gilbert + Tobin Centre of Public Law, Transcript of evidence, 21 May 2018, p 2

noted that this would address the issue of a lack of dialogue between legislative scrutiny committees and the parliament:

> Another major weakness of legislative scrutiny schemes is the failure of human rights issues raised in Committee reports to be addressed by the parliament during its debate.
>
> …This failure to even address the potentially serious findings of the Legislation Review Committee during subsequent parliamentary debate is a serious limitation on the effectiveness of the 'dialogue' model. In this instance, there can be no dialogue between the Committee and the parliament where one of the participants refuses to engage.[52]

2.58 PIAC noted arguments by Luke McNamara and Julia Quilter (2015), who analysed the effectiveness of parliamentary scrutiny of criminal law bills in NSW and the lack of debate on issues raised by the Committee:

> Of the 40 criminal law bills in relation to which one or more 'rights and liberties' issues was referred to Parliament by the Committee, the Committee's comments were expressly referred to in only 14 bill debates. In relation to a further eight bills, reference was made to a rights and liberties issue, without reference to the Committee. There was no reference to the Committee or its concerns in 18 of the 40 criminal law bills examined … for 45 per cent of the bills for which the Committee deemed the potential 'rights and liberties' infringement to be sufficiently serious to warrant a referral to Parliament, no Member of Parliament mentioned the Committee's concerns.[53]

2.59 Mr Alastair Lawrie, Senior Policy Officer, PIAC, highlighted the challenge of engaging the NSW Parliament with the issues raised in the Committee's reports:

> The second challenge is related, and that is one of engagement. Even where the Legislation Review Committee produces a substantive report in time for it to be considered by the Parliament, it does not have substantive impact if it is not directly engaged with by the relevant Chamber during debate. One way of addressing this issue is to amend standing orders to require that the Minister, member of the Legislative Council [MLC] or member of the Legislative Assembly [MLA] who introduces legislation should respond to any issues raised by the Legislation Review Committee in the second reading debate. This would then increase the dialogue between the Committee and the Parliament about the protection of human rights.[54]

2.60 Mr Lawrie further noted that requiring the relevant Minister to respond to the Committee's reports would make its findings more prominent:

> That is one of the recommendations in our submission. The Minister in the Legislative Assembly or Legislative Council who proposes legislation would be obliged to respond to the issues raised in the committee's reports, potentially in the

[52] Submission 8, Public Interest Advocacy Centre, p 12-13

[53] Submission 8, Public Interest Advocacy Centre, p 12 citing Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in NSW' (2015) CICrimJust 9, 27(1).

[54] Mr Alastair Lawrie, Senior Policy Officer, PIAC, Transcript of evidence, 21 May 2018, p 36

> second reading speech, or at least at some point during the second reading debate. We think that would give more importance to the Committee's findings.[55]

2.61 However, Mr Lawrie acknowledged that more substantive change to the way rights and liberties are considered by law-makers and parliamentarians would likely be achieved through human rights legislation:

> I think there are limitations of the approach. I think we have been explicit about that in our submission. These would be incremental changes. We conclude our submission by noting that longer-term and more substantive change would probably be achieved via the introduction of a charter of human rights or a human rights Act in New South Wales, but—noting that that might not be possible in the short term or that it may not be passed—we still see benefit in making the incremental changes now.[56]

Statements of compatibility

2.62 To improve the protection of rights and liberties, inquiry participants commented that rights scrutiny needs to begin much sooner than when a bill is introduced into the NSW Parliament or a regulation is published.

2.63 Many inquiry participants gave evidence that to achieve this reforms should be made so that Members who introduce a bill must also provide a statement of compatibility.[57] A statement of compatibility outlines whether the bill complies with rights and liberties, and in some jurisdictions also outlines reasons why or why not the bill complies.

2.64 Some inquiry participants also stated that statements of compatibility should be prepared for both bills and regulations.[58] Statements of compatibility are prepared for both bills and regulations at the Commonwealth level and in Victoria.

2.65 Although the NSW Young Lawyers recommended that statements of compatibility be prepared for both bills and regulations, it suggested that such statements should only be prepared in respect of 'urgent' legislation, being legislation that, if not dealt with immediately, would result in a 'significant, unacceptable or disproportionate impact on the New South Wales community.'[59]

2.66 Statements of compatibility were generally viewed by witnesses as a valuable part of the scrutiny process. For example, the Committee received evidence that statements of compatibility assisted in promoting a culture of compliance with rights within the Executive. Professor Williams said:

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[55] Mr Lawrie, Transcript of evidence, 21 May 2018, p 39

[56] Mr Lawrie, Transcript of evidence, 21 May 2018, p 39

[57] Submission 1, UNSW and Gilbert and Tobin Centre of Public Law, p 9; Submission 2, NSW Council of Social Service, p 3; Submission 7, NSW Bar Association, p 11; Submission 8, Public Interest Advocacy Centre, p 6; Mr Hamilton, Transcript of evidence, 21 May 2018, p 31; Mr Lawrie, Transcript of evidence, 21 May 2018, p 36

[58] Mr Lancaster, Transcript of evidence, 21 May 2018, p 17; Mr Sam Murray, Executive Councillor, NSW Young Lawyers, Transcript of evidence, 21 May 2018, p 45

[59] Mr Murray, Transcript of evidence, 21 May 2018, p 47

> For me, often the greatest gains are at the preventative end before you even get into Parliament. That is why I would urge changes that actually require the Executive up-front to consider its position through statements of compatibility. The experience in Victoria and elsewhere is that people who draft legislation have a high tendency to want to comply with the rights in legislation and so will draft things up-front in ways that have a high level of compliance.[60]

2.67 PIAC agreed that statements of compatibility were an important proposed change to the New South Wales scrutiny regime because they would foster a culture of human rights within the Executive and departments.[61] The AHRC also recommended that statements of compatibility could support the work of the Committee[62] and also assist in engendering a culture of respect for human rights, or as Professor Croucher later described, 'rights mindedness'.[63]

2.68 Professor Williams suggested that another advantage of statements of compatibility was that human rights were more likely to be protected in the drafting stage, before a bill was introduced to parliament. Due to the comparatively quick passage of bills through the parliament, and the political realities of a government majority, amendments to protect human rights were more likely to be made as a bill was being drafted:

> …often we are dealing with legislation that might have been within the midst of drafters and departments for several months. It can often take that long. But then it gets into Parliament and it might pass in a matter of a few days. That is why often the key period is that period of a month of more during the drafting and policy internal debate procedure within government. As you know, once it is in Parliament governments are not usually for turning unless the numbers are there in the upper House. What I would say is the experience in Victoria, the ACT and other jurisdictions: if you are pragmatic and want to drive the greatest outcomes, you need to make the best use of that pre-enactment period.[64]

2.69 Mr Lancaster of the Bar Association agreed that statements of compatibility compelled policymakers to carefully consider the impact of proposed legislation on human rights. When speaking of the scrutiny frameworks in the Commonwealth, Victoria, and the ACT, which all require statements of compatibility, Mr Lancaster said:

> These frameworks require government and the public service to have explicitly thought through these issues before a bill is formulated and presented, and to have marshalled relevant evidence to demonstrate the justifiability of restrictions in the statement of compatibility, rather than relying on simple assertion.[65]

2.70 Professor Williams assisted in drafting the Victorian *Charter of Human Rights and Responsibilities*.[66] He gave evidence to the Committee that in Victoria the statement of compatibility is submitted to Cabinet. In his view, this encourages

[60] Professor Williams, Transcript of evidence, 21 May 2018, p 4
[61] Mr Lawrie, Transcript of evidence, 21 May 2018, p 38
[62] Submission 10, Australian Human Rights Commission, p 2
[63] Professor Croucher, Transcript of evidence, 21 May 2018, p 51
[64] Professor Williams, Transcript of evidence, 21 May 2018, pp 5 - 6
[65] Mr Lancaster, Transcript of evidence, p 18
[66] Professor Williams, Transcript of evidence, 21 May 2018, p 3

drafters to ensure that the bill does not breach the prescribed human rights standards. He acknowledged that it was open to Cabinet to decide that the human rights standards should be breached in a particular instance.[67]

2.71 The Committee also heard from the Bar Association that encouraging consideration of human rights earlier in the drafting process encourages a more systematic, considered approach to rights as opposed to a generalised approach. It also may lead to identifying any impacts on human rights at an earlier stage:

> By requiring the identification of any impact of effect on human rights at an earlier stage and raising that with the relevant Minister, our expectation is it would be more effective in avoiding either accidental impacts on human rights, simply because they have not been considered – which can be redressed – or else making any interference with human rights that might be perceived to be a conscious one and one that is justified by reference to other considerations.[68]

2.72 In addition to promoting 'rights-mindedness' within the Executive and departments, and making it more likely that human rights would be protected in the drafting stage, it was suggested that statements of compatibility would also enhance the quality of parliamentary scrutiny. For example, Mr Lancaster submitted that a statement of compatibility assists scrutiny committees to 'carry out a focused, rigorous and transparent human rights analysis, generally involving a dialogue with the relevant Minister.' He continued:

> Sometimes restrictions on rights are modified or dropped as a result of this dialogue. In other cases the basis for the restriction is clearly and objectively justified on the public record. Either outcome enhances the quality of the legislative process and the final product.[69]

2.73 The Law Society also supported the preparation of a statement of compatibility in respect of bills on the basis that it would assist the Committee in undertaking its reviews.[70] The President of the Law Society described the preparation of a statement of compatibility as a 'small requirement' given the extensive drafting process to which bills are subject.[71]

Committee comment

2.74 The Committee notes the arguments by inquiry participants that the role of the Committee is diminished if the Committee's work is not responded to in a timely manner. If a Minister, or member introducing a bill does not respond to the Committee's comments in the course of debate on the bill, the NSW Parliament is denied the opportunity to hear any justification in relation to the issues identified in the legislation. It also does not allow these issues to become part of the wider debate surrounding the passage of legislation.

2.75 Currently, it is the practice of the Committee to write to the Minister or member responsible for a bill or regulation advising them of the Committee's comments

[67] Professor Williams, Transcript of evidence, 21 May 2018, p 6
[68] Mr Lancaster, Transcript of evidence, 21 May 2018, p 19
[69] Mr Lancaster, Transcript of evidence, 21 May 2018, p 18
[70] Submission 4, Law Society of New South Wales, p 2
[71] Mr Humprheys, Transcript of evidence, 21 May 2018, p 14

following the publication of the Digest. However, this process is not a timely one and there is no requirement placed upon members to respond. Moreover, a contemporaneous and oral response from the relevant member or Minister will more meaningfully assist the Parliament in evaluating the impact on personal rights and liberties of a bill.

2.76 It is encouraging to note that since the commencement of this inquiry, references to the Committee's digest have increased.[72] However, the issues raised in the Committee's digest have not been in the past consistently raised or deliberated on.

2.77 The Committee considers that it is appropriate that issues identified by the Committee are responded to by the relevant member responsible for a bill. We consider that this change would enhance the scrutiny function of the Committee and bring greater transparency into the NSW Parliament on issues affecting personal rights and liberties.

2.78 The Committee emphasises that in some circumstances a bill may be justifiably incompatible with certain rights. The public interest can sometimes demand that one right is valued more highly than another in a given instance. Requiring the relevant member to respond to concerns raised by the Committee provides that member a further opportunity to explain the reasons for any incursions on personal rights and liberties presented by the bill. This may assist in improving the overall quality of parliamentary scrutiny of human rights – of which the Committee is only one part.

2.79 Ministers are already required to provide responses to Committee reports under the Standing Orders of the Legislative Assembly and the Legislative Council. Standing Order 303A in the Legislative Assembly and Standing Order 233 in the Legislative Council provide that the relevant Minister must respond to each recommendation in a committee's report within 6 months of that report being tabled. The response to the House must detail what action, if any, the Government proposes to take in relation to each recommendation of the committee.[73] Requiring a Minister or member with carriage of a bill to respond orally to the Committee's comments during or at the conclusion of the second reading debate is a similar requirement to what already exists in relation to reports of other committees.

2.80 For these reasons, the Committee recommends that the Houses consider amending their respective Standing Orders to require members with carriage of a bill to respond to the Legislation Review Committee's comments in the second reading debate.

2.81 In the event that the Standing Orders of both Houses are not amended, the Committee recommends that the NSW Government implement a practice of

[72] See: New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 August 2018, 10 - 12 (Ron Hoenig MP); New South Wales, *Parliamentary Debates*, Legislative Council, 20 June 2018, 66 - 67 (Mick Veitch MLC); New South Wales, *Parliamentary Debates*, Legislative Council, 6 June 2018, 15 - 18 (David Shoebridge MLC).

[73] New South Wales Parliament, Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House, 56th Parliament, November 2017*

requiring Ministers with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

2.82 With regard to statements of compatibility, the Committee notes the evidence received about the benefits of a statement of compatibility, especially the value of having personal rights and liberties considered at the policy development and drafting stage of bills.

2.83 However, the Committee is of the view that requiring a Minister or member to respond to any issues raised by the Committee during debate on the bill will improve the quality of parliamentary rights scrutiny. In addition, the Committee notes the evidence that statements of compatibility are generally linked to rights scrutiny models that also have a Charter or Bill of Rights. For these reasons, the Committee has not recommended that statements of compatibility be required at this time.

Recommendation 1

The Committee recommends that the Houses give consideration to amending their respective Standing Orders to require the Member with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

Recommendation 2

The Committee recommends, in the event Recommendation 1 is not adopted by the Houses, that the NSW Government implement a practice of requiring Ministers with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

2.84 For obvious reasons, Members would not be able to comply with the above process for those bills that pass through the Parliament before the Committee has been able to provide comment through the bill either being declared urgent or a House suspends the Standing Orders requiring a five day adjournment of the debate after the Second Reading Speech of the bill. This is discussed further below.

Urgent passage of bills

2.85 There are some bills introduced into Parliament that the Government seeks to have passed by both Houses without the usual five day adjournment between the Second Reading Speech of the bill and the resumption of the Second Reading Debate. The impact is that a bill passes through both Houses before the Committee has had time to review and report on the bill. Submitters and witnesses have used the term 'urgent bills' to refer to these bills and for convenience that term is used in the report.

2.86 Inquiry participants highlighted that urgent bills that progress quickly through parliament are often bills that may impinge on personal rights and liberties, and thus warrant particular scrutiny.

2.87 In their submission, the Law Society noted that urgent bills allows parliamentary debate to proceed without the usual five day adjournment period and that 'there

is no obligation on either House to stop consideration of a Bill simply because the Committee has not yet reported on the Bill'.[74] The Law Society argued that this was a problem because 'urgent Bills are frequently those that raise the most pressing human rights issues and are therefore those which are the most in need of careful consideration by the Committee'.[75]

2.88 In their submission the Centre of Public Law referred to the urgent passage of the *Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016,* which was tabled and passed in both Houses on 10 May 2016, as an example of controversial legislation that passed without the Committee's report on the Bill being available to the Parliament:

> While the Committee highlighted its concern with many aspects of the Bill which could impact 'personal rights and liberties,' including arrest and detention without charge or warrant, retrospectivity, the rights of minors and the right to legal representation, the standing orders were suspended and the Bill was passed the following day. [76]

2.89 The Centre of Public Law also referred to the *Sydney Public Reserves (Public Safety) Bill 2017* as an example of an urgent bill that the Committee did not report on before the bill passed both Houses. The Centre of Public Law cited issues identified by the Committee that potentially trespassed on personal rights and liberties, including the rights to access and use public space, personal property, and freedom of assembly and association. The Centre of Public Law argued that the ability for bills with a number of potential issues to pass without the Committee's scrutiny indicates that the adjournment period is unsuitable:

> Of course, this is an extraordinary example of government's desire to rush through proposed legislation and circumvent usual legislative procedure. But it is exactly these moments of extreme government haste in which the most pernicious, rights-abrogating Bills are at issue. The effect is that Bills such as the *Sydney Public Reserves (Public Safety) Bill 2017* (NSW) do not receive the scrutiny, debate and amendment they warrant, which serves as a stark reminder of the unsuitability of the current timeframe within which the Committee has to perform its scrutiny function.[77]

2.90 The Centre of Public Law further argued that the ability of the NSW Parliament to pass legislation without the scrutiny of the Committee undermined the Committee's function and did not adequately protect personal rights and liberties:

> The possibility for legislation to be enacted prior to receiving sufficient scrutiny from the Committee undermines its purpose, which is to provide Members with advice concerning the rights-compatibility of Bills, which in turn has a deleterious impact on the ability of Members to discharge their responsibility to protect human rights. While we recognise the sovereignty of Parliament and government's prerogative that its legislative program not be hampered by the Committee process, we believe that the government of the day should only be able to declare a Bill urgent in exceptional circumstances, and should account for the circumvention of the ordinary

[74] Submission 4, The Law Society of NSW, p 4

[75] Submission 4, The Law Society of NSW, p, 5

[76] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 3

[77] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 3-4

> legislative process. In this respect, we consider that the protection of 'personal rights and liberties,' and the public interest in transparent government, would be furthered if the Act required the government to provide a public explanation of the exceptional circumstances under which a Bill is determined to be urgent.[78]

2.91 To address this, the Centre of Public Law recommended new procedures for the passage of urgent Bills in exceptional circumstances, including that the relevant Minister be required to table a statement of reasons in both Houses setting out the exceptional circumstances that justify the claim that the bill is urgent, and explaining what the consequences would be if the passage of the bill is delayed.[79]

2.92 Other inquiry participants also suggested similar reforms so that bills should only be declared urgent in exceptional circumstances. The Law Society noted their appreciation that 'it is necessary that urgent government business is not unnecessarily delayed by the Committee process', however proposed that the LR Act be amended to require Ministers to provide reasons why a bill is urgent to ensure they are treated consistently over time:

> We propose that in cases where the government wishes a Bill to bypass the Committee on the grounds that it is urgent, the Minister should be required to:
>
> - Provide reasons as to why the Bill is urgent, with reference to the criteria to be built into the Act;
> - Set out what the consequences would be if the passage of the Bill is delayed; and
> - Provide a brief statement stating how the bill affects the issues that would normally be considered by the Committee

2.93 NSW Young Lawyers argued that urgent bills often trespass on the rights of individuals and that steps should be taken to inform the parliament, and by extension the public, about the impact of the bill on personal rights and liberties.[80] It recommended that the LR Act be amended to provide for a procedure that a Minister responsible for a bill is required to provide written reasons why the bill is urgent and cannot be delayed and produce an Impact Statement detailing how the bill impacts the issues normally considered by the Committee.[81]

2.94 The Executive Councillor of the NSW Young Lawyers explained that their recommendation does not seek to formally define what 'urgent' would mean, but identified that urgent bills have some key characteristics:

> While we do not think there should be a formal definition, what we considered should be a factor that goes into the idea of urgency—and this is at page 6 of our submission—is that a bill should be considered urgent if there would be a significant, unacceptable or disproportionate impact on the New South Wales community if the bill is not dealt with immediately. In the context of that kind of legislation, we think

[78] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 4
[79] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 5
[80] Submission 3, NSW Young Lawyers, p 6
[81] Submission 3, NSW Young Lawyers, p 3

> that in addition to providing the impact statement, a written explanation should be provided for why the bill is urgent; not merely say that it is urgent.[82]

2.95 In their submission, PIAC acknowledged that there does need to be a process to allow urgent bills in certain exceptional circumstances. In these circumstances, PIAC suggested that the Committee may be able to provide interim reports or advice to inform parliamentary debate of potential issues under the LR Act.[83] PIAC recommended:

> Where absolutely necessary, urgent legislation can be considered by the Parliament, in the absence of a report by the Legislation Review Committee, following an explicit procedural vote of that particular chamber. However, consideration should be given to allowing the Legislation Review Committee to provide an interim report to inform urgent debate, including identification of possible human rights issues even if consideration of these issues has not yet been concluded.[84]

2.96 Mr Richard Lancaster SC, Member of the Bar Association, argued that parliament would be better placed to deal with urgent bills if there were a process that required the consideration of rights through a compatibility statement or impact assessment. It was acknowledged that this process does not need to halt the passage of legislation, but emphasise the consideration of rights in the policy-making process:

> … Parliament, through this Committee, will be better placed to deal with urgent legislation of that sort if there is a procedure in place for dealing with the compatibility of the statement that comes in if there is some process, be it formal or informal, for consultation with the relevant Minister. That procedure will be in place as well.
>
> … That will not necessarily be a brake on action from the Executive's perspective, but the Executive will come to expect that it is there and the Committee will be in a position to point to the procedures of Parliament to require that certain steps be taken. As Professor Byrnes said, that does not necessarily mean a negative one way or the other about the final form of the legislation. It is just to avoid thoughtlessness and intuition and to replace it with a systematic consideration of rights before even the most urgent bill is passed. [85]

Committee comment

2.97 The Committee acknowledges the concerns raised by stakeholders that the urgent passage of legislation, that does not allow time for the Committee's scrutiny, does not assist the function of the Committee to inform the NSW Parliament of issues relating to personal rights and liberties.

2.98 In acknowledging this, the Committee also notes that Governments will need to urgently pass legislation on occasion and that the Committee is only one part of the Parliament's role in scrutinising and debating bills.

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[82] Mr Murray, Transcript of evidence, 21 May 2018, p 47

[83] Submission 8, Public Interest Advocacy Centre, p 10

[84] Submission 8, Public Interest Advocacy Centre, p 10

[85] Mr Richard Lancaster SC, Member, New South Wales Bar Association, Transcript of evidence, 21 May 2018, p 21

2.99 However, given that the passage of bills without the five day adjournment period limits the time available to review a bill, the Committee considers that for these bills the Government should implement a practice of outlining in the Second Reading Speech the bill's impact on personal rights and liberties. In doing so, the Minister with carriage of the bill should refer to the personal rights and liberties as determined by the Committee as discussed in Finding 1.

Recommendation 3

The Committee recommends that, for bills where the Houses determine to proceed without the five day adjournment period, the NSW Government implement a practice of outlining in the Second Reading Speech the bill's impact on personal rights and liberties with reference to the rights and liberties determined by the Committee.

Review of regulations

2.100 The LR Act requires the Committee to examine both bills and regulations. Regulations in the LR Act are defined to include statutory rules, proclamations and orders that are subject to disallowance by either or both Houses of Parliament.[86] Given the number of bills introduced and regulations that are tabled in parliament, inquiry participants submitted that one committee cannot adequately scrutinise both.

2.101 The UNSW and Gilbert and Tobin Centre of Public Law (Centre of Public Law) noted the high number of regulations that the Committee is required to review. For instance, the Centre of Public Law cites procedural statistics of the NSW Legislative Assembly for the 2016-17 financial year that indicated that 304 statutory rules and instruments were tabled. However, the Centre of Public Law remarked that there were very few debates on disallowance motions in comparison.[87]

2.102 In their submission, the Law Society of New South Wales (the Law Society) noted concerns that the Committee may not have sufficient resources to adequately review subordinate legislation:

> The number of statutory rules and regulations disallowed by Parliament is very small For example, data published by the Legislative Council shows that the 55th Parliament (2011-2014) thirteen disallowance motions were moved in respect of statutory rules and regulations and only three were agreed to. While this may be attributable to a number of factors, it does little to alleviate concerns that the Committee may not have sufficient time or resources to thoroughly review proposed statutory rules and regulations.[88]

2.103 Inquiry participants also commented that regulations can have more detail in them than principal legislation and often have more impact on the rights and liberties of individuals. The Law Society stated:

[86] *Legislation Review Act 1987*, section 3

[87] Submission 1, UNSW and Gilbert + Tobin Centre for Public Law, p 6

[88] Submission 4, The Law Society of New South Wales, p 7

> The Law Society has previously submitted that greater attention should be given to the scrutiny of regulations, noting that the detail of how legislation will operate is frequently contained in regulations. In practice, regulations may have more impact on the rights and liberties of individuals than the legislation to which they are subordinate.[89]

2.104 There was support from inquiry participants for a separate committee to be established to review subordinate legislation.

2.105 The Centre of Public Law recommended that the LR Act be amended to provide for a separate Regulation Review Committee.[90] In its submission, it was noted that in 2001 the Legislative Council Standing Committee on Law and Justice recommended the creation of a separate committee each for scrutiny of bills and the scrutiny of regulations 'to avoid placing too heavy a burden on the one committee'.[91] The Centre argued:

> Given their complexity, volume and important role in contemporary government, regulations require a Committee dedicated to their scrutiny that stands separate to the Legislation Review Committee. One committee cannot be expected to adequately perform both scrutiny functions.[92]

2.106 The Law Society stated that consideration should be given to either:

a. Reviving a separate Regulation Review Committee or, at a minimum, forming a Regulation Review subcommittee within the existing Committee to ensure that regulations receive proper scrutiny; or

b. Providing for two separate Independent Legal Officers for the Committee, with one to focus on assisting the Committee in relation to the review of Bills and the other to focus on assisting the Committee in relation to the review of delegated legislation subject to disallowance.[93]

2.107 The Committee notes that these stakeholders have recommended a structure similar to committees in other jurisdictions.

2.108 The NSW Council of Social Service (NCOSS) recommended that in the absence of a NSW Charter of Human Rights, the NSW Parliament should 'establish under the Act a separate bipartisan committee similar in structure and mandate to the Commonwealth Parliamentary Joint Human Rights Committee with roles to include the examination of all Bills and subordinate legislation for compatibility with agreed human rights standards'.[94]

2.109 It is noted that the structure of committees in other jurisdictions is mixed. In the Australian Capital Territory (ACT) and Victoria, their scrutiny committee examines

[89] Submission 4, The Law Society of New South Wales, p 7
[90] Submission 1, UNSW and Gilbert + Tobin Centre for Public Law, p 7
[91] Submission 1, UNSW and Gilbert + Tobin Centre for Public Law, p 6
[92] Submission 1, UNSW and Gilbert + Tobin Centre for Public Law, p 7
[93] Submission 4, The Law Society of New South Wales, pp 2, 6-7
[94] Submission 2, NSW Council of Social Services, p 2

both bills and subordinate legislation – the same structure as this Committee.[95] In contrast, the Commonwealth Parliament has three separate committees to review bills and legislation, including the Senate Standing Committee on Regulations and Ordinances.[96]

Committee comment

2.110 The Committee notes the arguments by inquiry participants for a separate committee to review subordinate legislation.

2.111 The volume of regulations subject to disallowance is greater than the number of bills introduced into the NSW Parliament, both of which the Committee is required to review and report on under section 8A (bills) and section 9 (regulations). However, as noted by the Centre for Public Law and the Law Society, regulations are not featured as prominently in the Committee's Legislation Review Digest.

2.112 The Committee acknowledges that having a separate statutory scrutiny committee for subordinate legislation would permit the Committees to have a greater focus on both bills and regulations, particularly given the tight reporting timeframes under which the Committee operates.

2.113 The Committee notes the establishment, on a trial basis, of the NSW Legislative Council Regulation Committee which affords some scrutiny of regulations in the NSW Parliament. The Committee notes however that the Legislative Council Regulation Committee has a different function with regard to regulations than that of the Legislation Review Committee, which has specific functions under the LR Act.

2.114 The Committee proposes the Government give further consideration to whether a separate committee to review subordinate legislation be established, taking into account the operations of the NSW Legislative Council Regulation Committee.

Recommendation 4

The Committee recommends that the NSW Government consider amending the *Legislation Review Act 1987* to establish a joint Committee to examine subordinate legislation, taking into account the recent practice of the NSW Legislative Council Regulation Committee.

[95] ACT Legislative Assembly, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role ; Parliament of Victoria, Joint Investigatory Scrutiny of Acts and Regulations Committee, https://www.parliament.vic.gov.au/sarc/

[96] Parliament of Australia, Commonwealth Legislative Scrutiny Unit: https://www.aph.gov.au/Parliamentary_Business/Committees/Legislative_Scrutiny_Unit

Chapter Three – Other issues

3.1 This chapter acknowledges and addresses other issues raised by submission makers and by witnesses during the inquiry related to the operation of the *Legislation Review Act 1987* (LR Act) and human rights.

Charter of human rights

3.1 Many inquiry participants advocated for New South Wales to follow the lead of Victoria and the ACT and establish a statutory charter of human rights, sometimes referred to as a bill of rights.[97] Queensland has also recently introduced a bill for a Human Rights Act containing 23 rights.[98]

3.2 The Bar Association supported adopting a statutory charter of rights at both the Commonwealth and State levels:

> In the case of the ACT and Victoria, that has been within a framework of a statutory charter of rights, an approach that it seems Queensland is soon to follow. The NSW Bar Association has previously supported the adoption of a statutory charter of rights at both the Commonwealth and State levels, including a rule of statutory interpretation requiring human rights consistent interpretation of laws where reasonably possible. It considers that while the six changes just mentioned can themselves improve the protection of human rights, the adoption of a statutory rights framework would further enhance that overall protection.[99]

3.3 Professor Byrnes of the Bar Association spoke in further detail about the different models for a charter, as well as the benefits of having a charter. He suggested that a charter would work best in conjunction with a statement of compatibility and a greater role for the courts:

> Within Australia, the ACT and Victoria are the only two with a statutory charter of rights. The Commonwealth is done by means of an Act and an order of the Parliament. The Northern Territory is done by sessional orders of the Northern Territory Legislative Assembly. Has it made a difference? I join with my colleague George Williams in this, that the role that this Committee plays is as one component of a broader system. It contributes to it but is obviously not going to be a panacea.
>
> I think the other aspect is it is part of a feedback loop which goes back into the public service. Combining the statement of compatibility which has to be compiled and the possibility of judicial review, particularly if there is an obligation on public authorities to comply with the charter or the Human Rights Act, does in fact lead to changes and a better quality of analysis. A lot of it is [an] iceberg I think. We do not see a lot of thinking in the public service that does takes place. Some empirical research that Hilary Charlesworth, Gabrielle McKinnon and I did on the ACT Act showed that following the adoption of that charter and education of public servants, it was very clear that in a significant number of cases the existence of that Act and the

[97] Mr Lancaster, Transcript of evidence, 21 May 2018, p 17; Mr Lawrie, Transcript of evidence, 21 May 2018, p 36; Ms Fernandez, Transcript of evidence, 21 May 2018, p 40; Mr Blanks, Transcript of evidence, 21 May 2018, p 29

[98] On 31 October 2018, the Human Rights Bill 2018 was introduced in the Queensland Parliament.

[99] Mr Lancaster, Transcript of evidence, 21 May 2018, p 17

> legislative process had led to changes in the way that policy options were shifted and framed to better accord with human rights guarantees.[100]

3.4 The New South Wales Labor Lawyers also supported a charter of rights:

> The Queensland Attorney-General has recently announced that the Victorian Charter is likely to be replicated in that State within the next few months. ... Our view is that following this inquiry into the New South Wales Act, the Committee should recommend the path followed by Victoria, the Australian Capital Territory, and now Queensland.[101]

3.5 Most of the evidence received related to the Victorian *Charter of Human Rights and Responsibilities Act 2006.* Again, it is noted that Professor Williams chaired the community process that recommended the Victorian Charter.[102]

3.6 The Committee heard that the Victorian Charter was similar to the *Human Rights Act 1998* (UK).[103] Like the British Charter, the Victorian Charter does not remove power from the parliament:

> The way that legislation in Britain and Victoria works, it does not involve any derogation of parliamentary power to the courts. All the courts in Victoria can do is to look at the Charter and say, "This legislation is inconsistent with the Charter". It calls for the Parliament to do something about it, but under the legislation the Parliament can either do something about it or do nothing. It cannot ultimately involve any derogation of parliamentary power. In any event, the Victorian charter, just like the British Human Rights Act, is an ordinary Act of Parliament and can be changed at any time.[104]

3.7 At the hearing, Professor Williams explained how the Victorian Charter was not designed for the courts, but was intended to improve the daily lives of people in the community:

> When I ran that Victoria process the thing that really struck me is that if you want to make a difference to people's lives it is at the service delivery end, and also it is in ensuring that laws and practices are developed up-front to prevent the problems occurring in the first place. The Victorian charter is quite unusual. It is not designed for the courts—very few court cases. It is designed for exactly those things. For example, when the charter came into force and when they set down their standards, one of the first things the Department of Health and Human Services did was appoint charter champions whose job was to work with people delivering government services to improve the consistency of delivery and to ensure that it did so in a way that respected the standards in that legislation. And that has driven change. Again I can point to kids with disabilities. There is a long list of them.
>
> Another key one is in public housing where there was a range of arbitrary practices that were leading to people being rendered homeless, including with children, in ways that did not need to happen but the policy was leading to those outcomes.

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[100] Professor Byrnes, Transcript of evidence, 21 May 2018, p 18

[101] Mr Hamilton, Transcript of evidence, 21 May 2018, p 32

[102] Parliament of Australia, *George Williams "Victoria's Charter of Human Rights and Responsibilities: Lessons for the National Debate"*, Papers on Parliament No. 46, December 2006, viewed 19 September 2018.

[103] Mr McKenzie, Transcript of evidence, 21 May 2018, p 33

[104] Mr McKenzie, Transcript of evidence, 21 May 2018, p 33

> Those things changed. That is where it is possible to point to a long list of examples of where people's lives have been improved because often the service delivery end has been improved by virtue of a clear set of standards and knowledge that if you do not comply with those standards there are consequences.[105]

3.8 NCOSS also supported the enactment of a NSW charter of human rights similar to the Victoria model. NCOSS commented:

> The charter would be an essential adjunct to protections currently afforded under the common law. A charter would foster dialogue both within and between arms of government, ensuring laws are consistently in alignment with civil and political rights. It has the power to be a powerful educative tool, alerting people to their rights and the rights of others.[106]

3.9 NCOSS also emphasised that any charter should be developed following a rigorous community consultation process.[107]

3.10 In relation to what model would be preferred, most inquiry participants who favoured a charter of rights preferred the Victorian model. For example, Mr Blanks commented:

> Again, I heard the Bar Association's answer to that question and I would agree with the reasons that they gave. I agree that the Victorian model is preferable [rather than the ACT model], but either of them would be an improvement on what we have now.[108]
>
> [our emphasis]

3.11 New South Wales Labor Lawyers also described the Victorian Charter as a success, noting that it was based on ICCPR. Mr McKenzie noted that the ICCPR 'is not a radical document' and 'was adopted with the support of the Coalition Government at the time' which enshrined English common law rights that date back centuries and which in New South Wales are 'almost beyond argument'.[109]

3.12 PIAC supported a charter based on the Victorian model, but later noted that even if a charter was not introduced there was still merit in making 'incremental' changes to the scrutiny regime in New South Wales.[110]

Role of the courts

3.13 At the hearing, some inquiry participants suggested that the courts should have a greater role to play in the human rights scrutiny regime in New South Wales. In particular, it was suggested that the LR Act be amended to require courts to interpret legislation consistently with personal rights and liberties set out in the LR Act.

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[105] Professor Williams, Transcript of evidence, 21 May 2018, p 7

[106] Submission 2, NSW Council of Social Services, p 2

[107] Ms Fernandez, Transcript of evidence, 21 May 2018, p 43

[108] Mr Blanks, Transcript of evidence, 21 May 2018, p 29

[109] Mr McKenzie, Transcript of evidence, 21 May 2018, p 33

[110] Mr Lawrie, Transcript of evidence, 21 May 2018, pp 36 and 39

3.14 Professor Byrnes of the Bar Association agreed with Professor Williams that the courts play an important role in ensuring there is a robust system of scrutiny and protection of human rights:

> I join with my colleague George Williams in this, that the role that this Committee plays is as one component of a broader system. It contributes to it but is obviously not going to be a panacea. I think it is very true that the prospect of judicial review under a statutory charter, even though the courts cannot strike down legislation just at best send it back to Parliament for another look, is one mechanism which makes proponents of legislation look carefully at it. [111]

3.15 In particular, Professor Byrnes spoke to the importance of having a statement of compatibility and judicial review in order to close the 'feedback loop':

> Combining the statement of compatibility which has to be compiled and the possibility of judicial review, particularly if there is an obligation on public authorities to comply with the charter or the Human Rights Act, does in fact lead to changes and a better quality of analysis.

Committee comment

3.16 The Committee notes the evidence from inquiry participants supporting the enactment of a NSW charter of human rights and the related issue of the role of the courts. However, the Committee considers that this is a much greater issue than this current review of the operation of the LR Act and one that needs to involve wider debate and community process.

3.17 The Committee also notes that the issue of enacting a Bill of Rights was the subject of inquiry by the NSW Legislative Council Standing Committee. That Committee recommended against enacting a Bill of Rights and recommended the establishment of a scrutiny of legislation committee.

3.18 While the enactment of a charter of rights was a primary proposal for some inquiry participants, they also acknowledged that in its absence, a number of other reforms could be made to enhance existing scrutiny mechanisms. The Committee considers that the recommendations contained in this report will enhance rights scrutiny in New South Wales.

The impact of legislation on Aboriginal and Torres Strait Islander people

3.19 A related issue to defining the phrase 'personal rights and liberties' is the option of including reference to the impact of bills and regulations on Aboriginal and Torres Strait Islander People.

3.20 The Committee received evidence from the New South Wales Parliamentary Friends of Reconciliation (the Friendship Group) that the LR Act should be amended to require the Committee to assess the impact of bills and regulations on Aboriginal and Torres Strait Islander People as follows:

> Insert after s 8A(1)(b):

(c) to report to both Houses of Parliament as to what impact any such Bill has on Aboriginal and Torres Strait Islander People, having regard to:

(i) any negative or detrimental impact the Bill may have, or

(ii) any positive or advancing impact the Bill may have, or

(iii) any other matters the Committee sees fit to relevantly consider

…

Insert after s 9(1)(b):

(c) consider the impact any such regulation has on Aboriginal and Torres Strait Islander People, having regard to:

(i) any negative or detrimental impact the regulation may have, or

(ii) any positive or advancing impact the regulation may have, or

(iii) any other matters the Committee sees fit to relevantly consider.

…[112]

3.21 The Friendship Group submitted that the above amendments would 'bring exposure to Aboriginal disadvantage and the role legislation and regulations play in the disadvantage…'and that it is 'firmly within the ambit of the Committee to consider such matters.'[113] The Friendship Group submitted:

> Specifically, we refer to the: poor health outcomes, high suicide rates, high number of Aboriginal children in care, poor educational outcomes, high levels of arrest and incarceration rates of juvenile and adults, all commonly experienced by Aboriginal and Torres Strait islander people.
>
> All these indicators point to the need for legislators to consider the impact of any new laws upon this country's First Peoples.[114]

3.22 The Friendship Group's submission was endorsed by the Jumbunna Institute for Indigenous Education and Research at the University of Technology, Sydney (the Jumbunna Institute). In reference to the Friendship Group's recommendation that the Committee consider the impact of bills and regulations on Australia's treaty obligations, the Jumbunna Institute drew the Committee's attention to the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration). It submitted that the UN Declaration provides a 'comprehensive framework for the protection of the rights of Indigenous peoples'.[115]

3.23 When questioned at the hearing, many witnesses supported the LR Act being amended to refer to the impact of bills and regulations on Aboriginal and Torres

[112] Submission 9, New South Wales Parliamentary Friends of Reconciliation, p 5
[113] Submission 9, New South Wales Parliamentary Friends of Reconciliation, p 5
[114] Submission 9, New South Wales Parliamentary Friends of Reconciliation, p 5
[115] Submission 11, Jumbunna Institute for Indigenous Education and Research, p 1

Strait Islander people.[116] In particular, the Bar Association expressed the view that the LR Act should 'at least' refer to the UN Declaration,[117] a suggestion which was endorsed by NSW Young Lawyers.[118] NCOSS and PIAC also supported a reference to the UN Declaration.[119]

3.24 The AHRC also gave evidence that it has recommended that Commonwealth scrutiny legislation refer to the UN Declaration, in addition to the seven core human rights treaties:

> The Commission has consistently recommended that the Federal scheme also include the United Nations Declaration on the Rights of Indigenous Peoples. The declaration does not create new rights or additional rights beyond what are already in the seven treaties, but it is a much more explicit way of showing how it applies to Aboriginal people and Torres Strait Islander people. We certainly support that that instrument be included. We think we have provided much greater clarity for Parliament as well.[120]

3.25 Mr Darren Dick, Senior Policy Executive, Human Rights and Strategy at the AHRC provided an example of how reference to the UN Declaration would be useful:

> As an example, the Federal Parliament at the moment has a bill before it about the selection of a nuclear waste dump site. It is looking into the consent procedures that ought to be in place for that. I think Article 28 of the Declaration on the Rights of Indigenous Peoples says that if there is to be a nuclear waste dump built on the site of Aboriginals peoples land, there must be pre, prior and former consent. That is a very specific articulation of the standard that exists in the ICCPR in article 1 and article 27, and in the ICERD in article 2 and article 5, et cetera, but you still have to discern it a little bit when you are applying it to Aboriginal people whereas if you go direct to the declaration you get a much more specific articulation of what it actually means.[121]

3.26 For this reason, the AHRC also recommended that the UN Declaration be referred to in addition to the seven core human rights treaties in any amendments to the LR Act.[122]

Committee comment

3.27 The Committee notes the proposal to amend the LR Act so that the Committee considers, among other things, the positive and negative impacts of a bill or regulation on Aboriginal and Torres Strait Islander peoples.

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[116] Mr Humphreys, Transcript of evidence, 21 May 2018, p 15; Mr Lancaster and Professor Byrnes, Transcript of evidence, 21 May 2018, pp 22 – 23; Mr Kirk McKenzie, New South Wales Labor Lawyers, Transcript of evidence, 21 May 2018, p 34

[117] Mr Lancaster, Transcript of evidence, 21 May 2018, p 22

[118] Mr David Turner, President, NSW Young Lawyers, Transcript of evidence, 21 May 2018, p 46

[119] Mr Alistair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre (PIAC), Transcript of evidence, 21 May 2018, pp 37 – 38; Ms Fernandez, Transcript of evidence, 21 May 2018, p 41. PIAC provided 'in principle' support to reference to the UN Declaration.

[120] Mr Darren Dick, Senior Policy Executive, Human Rights and Strategy, Australian Human Rights Commission, Transcript of evidence, 21 May 2018, pp 52 - 53

[121] Mr Dick, Transcript of evidence, 21 May 2018, p 53

[122] Mr Dick, Transcript of evidence, 21 May 2018, p 53

3.28 The Committee considers this proposed function is broader than its current role of examining the impact of legislation on rights and liberties without reference to a specific group. To be performed well, such a function would likely need to be informed by experience of the impact of legislation on Aboriginal and Torres Strait Islander communities.

3.29 The Committee notes the evidence and considers that it would be open to a Committee to include reference to rights relevant to Aboriginal and Torres Strait Islander peoples when it is determining the rights and liberties it will review bills and regulations against. For example, the Committee could refer to the UN Declaration of the Rights of Indigenous Peoples.

3.30 For these reasons, the Committee has not recommended that the LR Act be amended to expressly refer to the positive or negative impacts of a bill or regulation on Aboriginal and Torres Strait Islander people, or to the UN Declaration of the Rights of Indigenous Peoples.

Increased adjournment of debate period

3.31 The Committee received evidence that the five day adjournment period between the introduction of a bill and resumption of debate does not give the Committee sufficient time to consider a bill.

3.32 It was submitted by inquiry participants that the five day adjournment period does not give the Committee adequate time to scrutinise a bill effectively and prepare a report for the benefit of members of the NSW Parliament.[123]

3.33 The Law Society argued that the short timeframes pose a practical challenge for the Committee to carry out its functions:

> We understand that one of the key practical problems for the Committee is carrying out its work in very short timeframes.
>
> … we consider that the Committee's work, and the utility of its reports, could be assisted by addressing the current timeframes for review of Bills, and requiring that both Houses adjourn debate on Bills pending the reports of the Committee for a longer period of time. The Law Society notes that the NSW Parliament has legislative responsibility for many areas of law that materially affect the lives of individuals, including criminal justice, planning, transport and infrastructure, the delivery of housing and homelessness, education and health. Ensuring that the Committee has appropriate time to consider these Bills is essential.[124]

3.34 The President of the Law Society noted that there should be adequate time given to perform scrutiny of matters, particularly matters before the NSW Legislative Council:

> We are certainly concerned as to the time frames that are currently running. My previous roles were in the Federal Parliament, and, indeed, where matters were adjourned they could take some considerable period of time to enable the bills to be considered by the committees. There would be upper House committees in the

[123] Legislative Assembly Standing Order 188(10); Legislative Council Standing Order 137

[124] Submission 4, The Law Society of New South Wales, p 4

> Senate and there may even be public hearings in relation to committees—I have appeared before many committees in relation to bills that have been before the upper House Senate where there has been a considerable time frame. The reports of the committees have, in fact, substantially resulted in changes to the bill because the Government, of its own volition, has been, as a result of the evidence and the determination of the committees, able to introduce amendments to a bill that has even passed the lower House.
>
> So, in my view, there needs to be an adequate timeframe to ensure that there is adequate and proper scrutiny of matters coming before the upper House. If it is to be a House of review it has to have a proper basis upon which you can conduct a review, and a meaningful review.[125]

3.35 The President also noted that the tight timeframe may infringe on the Committee's ability to properly scrutinise regulations.[126]

3.36 Dr Martin Bibby, Member of the NSW Council for Civil Liberties (NSW CCL), commented on the lack of time as a problem for the Committee:

> The Committee is subject to a number of significant problems. Apart from the lack of impact, there is the lack of time. The process of producing a bill one week and passing it by the end of the next leaves the Committee with five days, including a weekend generally, to look at legislation. That is when matters are not even declared urgent. There is a lack of clear standards.[127]

3.37 Mr Lewis Hamilton, President, NSW Society of Labor Lawyers noted that the Legislation Review Committee was a time-poor committee:

> …unlike other Parliaments, it does not require submission of a statement of human rights compatibility when a bill is introduced. Instead, it leaves all scrutiny functions to a time-poor committee which, of course, is not going to be able to comprehensively report on each and every piece of legislation.[128]

3.38 Similarly, the Centre of Public Law submitted that the reporting timeframe of five clear days posed a challenge for the Committee:

> One of the challenges that continues to detract from the effective functioning of the Committee is the timeframe within which it has to scrutinise Bills.
>
> …We are of the view that this is too limited a timeframe, especially if the Bill in question is particularly complex, or if multiple Bills have been introduced in the same week.[129]

3.39 To counter this, the Centre of Public Law recommended that the LR Act be amended to include a requirement that, unless a bill is declared urgent, debate

[125] Mr Humphreys, Transcript of evidence, 21 May 2018, p 10
[126] Mr Humphreys, Transcript of evidence, 21 May 2018, p 13
[127] Dr Bibby, Transcript of evidence, 21 May 2018, p 25
[128] Mr Lewis Hamilton, President, NSW Society of Labor Lawyers, Transcript of evidence, 21 May 2018, p 31
[129] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, pp 2-3

on a bill must be adjourned for 10 clear calendar days following its introduction.[130]

3.40 Mr Taverniti expanded on how the Committee's timeframes affects its ability to make an impact on parliamentary debates:

> The Committee's biggest challenge is the time frame within which it is expected to perform its scrutiny function. Ordinarily, debate in either House must be adjourned for five days, allowing time both for the Committee to scrutinise a bill and for members to have an opportunity to consider a bill in its terms. However, this affords members inadequate time to consider the Committee's report before debate resumes. To bring this issue of timing into sharp relief, from a quick review of the Committee's outlook so far this year, of the 32 bills it considered, it commented on 21, pointing to no less than 38 discrete rights issues which were brought to the attention of Parliament. Despite these many and often serious concerns being raised, on two occasions these bills passed both Houses before the publication of the Committee's report. On nine occasions, the bill passed either House the day after publication; and on six occasions the bill passed either House on the same day's publication. In regard to these 21 bills, I was unable to find recorded in Hansard a single reference to the Committee's reports or the concerns the Committee raised.
>
> …The utility of reports is severely diminished if they remain unread and unremarked upon in debate.[131]

3.41 Mr Taverniti suggested that adjourning debate would allow parliamentarians extra time to consider the reports of the Committee:

> At least giving the Committee double the time—it would still publish its reports as it does now, usually after five days or so—would give parliamentarians an extra business week to read the report and try to have a contribution in Parliament about it. Because at the moment bills are passed the day after and the Hansard bears that out, with no references this year so far to bills that the Committee has reported on that have been problematic in regards to rights.[132]

3.42 The Public Interest Advocacy Centre (PIAC) noted that the timing of the Committee's reports presented a challenge to the Committee:

> The first challenge is one of timing, and in particular of ensuring that reports of the Legislation Review Committee are produced prior to debate of the relevant legislation with sufficient time for its findings to be adequately considered by parliamentarians in that debate.
>
> …we are also attracted to the proposals to increase the period of time for adjournment of debate from five days to 10 days, as put forward by the University of New South Wales and the Gilbert + Tobin Centre of Public Law, among others in their submissions.[133]

[130] Submission 1, UNSW and Gilbert + Tobin Centre of Public Law, p 3

[131] Mr Taverniti, Transcript of evidence, 21 May 2018, pp 3-4

[132] Mr Taverniti, Transcript of evidence, 21 May 2018, p 8

[133] Mr Lawrie, Transcript of evidence, 21 May 2018, p 36

3.43 PIAC also noted that a change to the Committee's timeframes would benefit parliamentarians by providing more time to consider the issues raised in its reports before the second reading debate:

> I think one of the easiest—or most straightforward, anyway—would be the proposal in other submissions to increase the time frame from five days to 10 days to at least allow time for the Committee's reports to be considered prior to debate rather than the day before.[134]

Committee comment

3.44 The Committee notes the concerns that the Committee's reporting timeframe potentially constrains its ability to scrutinise bills and regulations. In the Committee's experience, the five-day adjournment period can be challenging. However, in practice, excluding urgent bills, the Committee's report has been tabled before the second reading debate in the House has concluded, which does give members the opportunity to be informed by the Committee's digest.

3.45 The Committee also considers that the Recommendations and Finding in this Report will improve rights scrutiny and address the concerns raised.

Committee resources and training

3.46 The Committee heard from stakeholders that acknowledged the workload of the Committee and the specialist nature of the work, and commented on the need for the Committee to be adequately resourced to perform its scrutiny function.

3.47 The Law Society noted that it is important that the Committee should be adequately resourced so that the Committee can publish its reports within a reasonable timeframe, following proper scrutiny.[135]

3.48 The President of the Law Society further stated in evidence:

> It is about the capacity to look at it. It is about the capacity to turn around and say, "Yes, I get this part", or, "What is this? Why are we do doing that? Is it a proper response? Is there an alternative?" That requires resources and it requires time.[136]

3.49 NSW Young Lawyers argued that the current reporting timeframes restrain the work of the Committee:

> The Public Law and Government Committee understands that one of the key restraints on the work of the Legislation Review Committee, and its review of Bills before they are passed by Parliament, is that it is often given limited and in some cases, arguably inadequate, time to carry out its work.[137]

3.50 To address this, NSW Young Lawyers recommended that 'consideration should be given to the provision of additional resources to the Committee to allow for two

[134] Mr Lawrie, Transcript of evidence, 21 May 2018, p 38

[135] Submission 4, Law Society of New South Wales, p 5

[136] Mr Humphreys, Law Society of NSW, Transcript of evidence, 21 May 2018, p 13

[137] Submission 3, NSW Young Lawyers, p 5

separate Independent Legal Officers – one for Bills and one for subordinate legislation'.[138]

3.51 PIAC recommended, in the event that the Committee's functions are expanded following the inquiry, that 'Parliament allocate increased funding and resources, including expanded access to human rights specialists'.[139]

3.52 Similarly, NCOSS argued that expert advisors were important for the proper scrutiny of bills:

> For the Committee to fulfil a broadened mandate of scrutinising Bills for human rights implications, it will need more resources, including appropriate expert advisers.[140]

3.53 In their submission, NSW CCL noted 'lack of expert input' as a key problem. The Council further recommended that a panel of former senior judges be consulted to offer their expertise to the Committee.[141]

3.54 Inquiry participants also made suggestions that members of the Committee receive relevant and ongoing training.

3.55 The President of the Law Society suggested that it may be beneficial to have expertise in relation to reviewing subordinate legislation.[142] In his opening statement, Mr Humphreys stated:

> We believe that it is important for committee members to receive initial training in the role and requirements of the committee and, indeed, the basis of law upon which you are being asked to make a ruling. I am not suggesting in any way that you are not informed. In fact, my general view is that members of Parliament are very, very well informed. But it is always good in going into a new role to be in a position whereby there is a baseline of knowledge that you are just reminding yourself of.[143]

3.56 Professor Brynes compared the training available to the Commonwealth scrutiny committee but also acknowledged the busy schedules of parliamentarians:

> That is obviously a matter for the Parliament, but in the initial stages of the Commonwealth Committee all members of the committee volunteered for training and capacity-building sessions so that they could build on their existing human rights knowledge within the international framework with which not all of them were necessarily familiar. I think that has continued. Yes, there is a role for that, but parliamentarians are very busy people.[144]

Committee comment

3.57 The Committee acknowledges the large workload involved in examining every bill and regulation that is tabled in the NSW Parliament. The Committee recognises

[138] Submission 3, NSW Young Lawyers, p 3
[139] Submission 8, Public Interest Advocacy Centre, p 11
[140] Submission 2, NSW Council of Social Service, p 3
[141] Submission 5, NSW Council for Civil Liberties, pp 13-14
[142] Mr Humphreys, Transcript of evidence, 21 May 2018, p 13
[143] Mr Humphreys, Transcript of evidence, 21 May 2018, p 10
[144] Professor Byrnes, Transcript of evidence, 21 May 2018, p 22

that it is important that the Committee is adequately resourced for the effective scrutiny of bills and regulations.

3.58 In the past the Committee has had access to an independent panel of experts that would advise on potential issues contained in bills and regulations. However, this is currently not the practice of the Committee.

3.59 The Committee recognises that an understanding of legal principles concerning rights and liberties is important when scrutinising legislation and regulations for infringements and acknowledges the comments and recommendations concerning resources and the provision of training to members of the Committee. The Committee considers these issues are matters for the Committee and the NSW Parliament to manage internally.

Appendix One – Terms of reference

That the Legislation Review Committee inquires into and reports on:

1) Whether the *Legislation Review Act 1987* ('the Act') provides for the sufficient review of bill with respect to:

    i. personal rights and liberties;
    ii. administrative law principles; and
    iii. parliamentary propriety;

2) Measure and procedures which could improve the review of bills under the Act;

3) The review processes of bills in comparable jurisdictions; and

4) Any other related matter

Appendix Two – Conduct of inquiry

Terms of reference

On 20 June2017, the Committee resolved to conduct an inquiry into the operation of the *Legislation Review Act 1987* and adopted the inquiry's terms of reference (Appendix One).

Submissions

The Committee advertised the inquiry by media release and wrote to key stakeholders inviting them to make a submission. The closing date for submission was 30 November 2017.

The inquiry received 11 submissions and the list of submissions is available at Appendix Four.

Hearing

On 21 May 2018, the Committee conducted a public hearing at Parliament House and heard from a range of stakeholders who provided a submission. A list of witnesses is available at Appendix Five.

The Committee thanks all inquiry participants for their contribution to the inquiry.

Appendix Three – Scrutiny committees in Australian jurisdictions

Jurisdiction	Relevant legislation	Method of scrutinising rights
Federal – Joint Committee on Human Rights	*Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)	Assesses bills, Acts and regulations against rights in seven human rights treaties.
Federal – Senate Standing Scrutiny of Bills Committee	None	Assesses bills as to whether they, for example, trespass unduly on personal rights and liberties, make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or make rights, liberties or obligations unduly dependent upon non-reviewable decisions.[145] 'Personal rights and liberties' is not defined.
Federal – Senate Standing Committee on Regulations and Ordinances	None	Assesses legislative instruments as to whether they trespass unduly on personal rights and liberties or unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal[146]
New South Wales – Legislation Review Committee	*Legislation Review Act 1987*	Assesses bills as to whether they, for example: trespass unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; or make rights, liberties or obligations unduly dependent upon non-reviewable decisions.[147] Assesses regulations as to whether they, for example: trespass unduly on personal rights and liberties; that the regulation may have an adverse impact on the business community; that the regulation may not have been within the general objects of the legislation under which it was made; that the regulation may not accord with the spirit of the legislation under which it was made, even though

[145] Senate Standing Orders, order no. 24: Scrutiny of Bills

[146] Senate Standing Orders, order no.23: Regulations and Ordinances

[147] Legislation Review Act 1987, section 8A

Jurisdiction	Relevant legislation	Method of scrutinising rights
		it may have been legally made; that the objective of the regulation could have been achieved by alternative and more effective means; and that the regulation duplicates, overlaps or conflicts with any other regulation or Act. 'Personal rights and liberties' is not defined.
New South Wales – Legislative Council Selection of Bills Committee	None	The Legislative Council Selection of Bills Committee was appointed, on a trial basis, to commence on the first sitting day in 2018 and will conclude on the last sitting day in November 2018. The Committee is to report on whether and bill should be referred to either the LC Standing Committee on Law and Justice, the LC Standing Committee on Social Issues or the LC Standing Committee on State Development for inquiry and report.
New South Wales – Legislative Council Regulation Committee	None	The Legislative Council Regulation Committee was appointed, on a trial basis, to commence on the first sitting day in 2018 and will conclude on the last sitting day in November 2018. The committee may inquire and report on any regulation, including the policy or substantive content of a regulation, and trends or issues that relate to regulations.
Queensland – eight separate portfolio committees with legislative scrutiny functions	*Parliament of Queensland Act 2001* (Qld); *Legislative Standards Act 1992* (Qld); *Statutory Instruments Act 1992* (Qld)	Each portfolio committee is responsible for examining each bill and item of subordinate legislation to consider the application of 'fundamental legislative principles', among other things. In relation to bills, 'fundamental legislative principles' include that legislation has sufficient regard to 'rights and liberties of individuals'. Although 'rights and liberties' is not defined, a relevant consideration is whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without appropriate justification; confers power to enter premises or search/seize documents only with a warrant; provides for the compulsory acquisition of property only with fair compensation; and has sufficient regard to Aboriginal tradition and Island custom.[148] The criteria for examining subordinate legislation from a human rights perspective is not as extensive and is limited to 'its lawfulness'.[149]

[148] *Parliament of Queensland Act 2001* (Qld), section 93; *Legislative Standards Act 1992* (Qld), section 4

[149] *Parliament of Queensland Act 2001* (Qld), section 93

Jurisdiction	Relevant legislation	Method of scrutinising rights
		At the hearing, the Committee received evidence that Queensland is investigating a bill of rights.[150]
Victoria – Joint Scrutiny of Acts and Regulations Committee	*Charter of Human Rights and Responsibilities Act 2006* (Vic); *Parliamentary Committees Act 2003* (Vic); *Subordinate Legislation Act 1994* (Vic)	Assesses bills as to whether they, for example: are incompatible with 20 civil and political human rights set out in the Charter; [151] trespass unduly upon rights or freedoms; make rights, freedoms or obligations dependent upon insufficiently defined administrative powers or make rights, freedoms or obligations dependent upon non-reviewable administrative decisions; and unduly trespass on matters relating to specific rights, such as adverse effects on personal privacy or the privacy of health information.[152] Assesses regulations as to whether they, for example: are incompatible with human rights set out in the Charter; unduly trespass on rights and liberties previously established by law; make rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions; and unduly trespass on matters relating to specific rights, such as adverse effects on personal privacy or the privacy of health information.[153] While the Charter sets out 20 civil and political human rights, the phrase 'rights and liberties' is not defined under the *Parliamentary Committees Act 2003* for the purposes of the Committee's functions under that Act.
South Australia – Joint Legislative Review Committee	*Parliamentary Committees Act 1991* (SA)	No express reference to rights or liberties in Act. However, Committee scrutinises subordinate legislation with reference to a number of principles published on its website, including whether the regulations unduly trespass on rights previously established by law…or make rights, liberties or obligations dependent on non-reviewable decisions[154]
Western Australia – Joint Delegated	None	Examines whether delegated legislation has any unintended effect on any person's existing rights or interests. [155] 'Rights or interests' are not defined.

[150] Mr Richard Lancaster, Member, New South Wales Bar Association, Transcript of evidence, 21 May 2018, p 17

[151] *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 30

[152] *Parliamentary Committees Act 2003* (Vic), section 17

[153] *Subordinate Legislation Act 1994* (Vic), section 21

[154] Legislative Review Committee, Parliament of South Australia, *Overview*, p 2, viewed 13 September 2018

[155] Legislative Council Standing Orders, Schedule 1, standing order 10.6

Jurisdiction	Relevant legislation	Method of scrutinising rights
Legislation Committee		
Northern Territory – Social Policy Scrutiny Committee and Economic Policy Scrutiny Committee	None	Assesses bills as to whether they have sufficient regard to the rights and liberties of individuals, including whether the bill makes rights and liberties or obligations dependent on administrative power only if power is sufficiently defined and subject to appropriate review; and other specified matters such as whether the bill reverses the onus of proof, provides appropriate protection against self-incrimination, confers powers to enter premises or search/seize documents or property only with a warrant, and whether it adversely affects rights and liberties retrospectively.[156] 'Rights and liberties' are not defined.
Northern Territory – Public Accounts Committee	None	Assesses instruments of a legislative or administrative character as to whether the instrument has sufficient regard to the rights or liberties of individuals, including whether the instrument makes rights and liberties or obligations dependent on administrative power only if power is sufficiently defined and subject to appropriate review; and other specified matters such as whether the bill reverses the onus of proof, provides appropriate protection against self-incrimination, confers powers to enter premises or search/seize documents or property only with a warrant, and whether it adversely affects rights and liberties retrospectively[157]
ACT - Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)	*Human Rights Act 2004* (ACT)	Examines bills and subordinate legislation by reference to standards in resolution of appointment, including whether it unduly trespasses on rights previously established by law or makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. Bills are also assessed as to whether they make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Committee also reports about human rights issues raised by bills pursuant to section 38 of the *Human Rights Act 2004* (ACT).[158] These include civil and political rights, and economic, social and cultural rights, but are not exhaustive.[159]

[156] Social Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Terms of Reference*, viewed 14 September 2018; Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Terms of Reference*, viewed 14 September 2018

[157] Public Accounts Committee, Legislative Assembly of the Northern Territory, *Terms of Reference*, viewed 12 October 2018

[158] Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), ACT Legislative Assembly, *Role and Resolution of Appointment*, viewed 13 September 2018

[159] *Human Rights Act 2004* (ACT), sections 5 and 7

Jurisdiction	Relevant legislation	Method of scrutinising rights
Tasmania – Standing Committee on Subordinate Legislation	*Subordinate Legislation Committee Act 1969* (Tas)	Assesses whether subordinate legislation unduly trespasses on personal rights and liberties or unduly makes rights dependent on administrative decisions and not on judicial decisions.[160] 'Rights and liberties' are not defined.

[160] *Subordinate Legislation Committee Act 1969* (Tas), section 8

Appendix Four – Submissions

1	UNSW and Gilbert + Tobin Centre of Public Law
2	NSW Council of Social Service
3	NSW Young Lawyers
4	The Law Society of New South Wales
5	NSW Council for Civil Liberties
6	New South Wales Society of Labor Lawyers
7	New South Wales Bar Association
8	Public Interest Advocacy Centre
9	New South Wales Parliamentary Friends of Reconciliation
10	Australian Human Rights Commission
11	Jumbunna Institute for Indigenous Education and Research

Appendix Five – Witnesses

21 May 2018
Preston-Stanley Room, Sydney, NSW

Witness	Position and Organisation
Mr Aaron Taverniti	Social Justice Intern (former), UNSW and Gilbert and Tobin Centre of Public Law
Professor George Williams AO	Dean, UNSW and Gilbert and Tobin Centre of Public Law
Mr Doug Humphreys OAM	President, Law Society of New South Wales
Mr Richard Lancaster SC	Member, NSW Bar Association
Professor Andrew Byrnes	Member, NSW Bar Association
Dr Martin Bibby	Member, NSW Council for Civil Liberties
Mr Stephen Blanks	President, NSW Council for Civil Liberties
Mr Kirk McKenzie	Committee Member, NSW Society of Labor Lawyers
Mr Lewis Hamilton	President, New South Wales Society of Labor Lawyers
Mr Alastair Lawrie	Senior Policy Officer, Public Interest Advocacy Centre
Ms Melanie Fernandez	Deputy Chief Executive Officer, NSW Council of Social Service
Mr Darren Dick	Senior Policy Executive – Human Rights & Strategy, Australian Human Rights Commission
Mr Rohan Nanthakumar	Research & Policy Officer, Australian Human Rights Commission
Emeritus Professor Rosalind Croucher AM	President, Australian Human Rights Commission (AHRC)
Mr David Turner	President, NSW Young Lawyers
Mr Sam Murray	Executive Councillor , NSW Young Lawyers

Appendix Six – Extracts from minutes

MINUTES OF MEETING NO 40
1.00pm, Tuesday 20 June 2017
Room 814 – 815

Members present
Mr Johnsen (Chair), Mr Evans, Ms Gibbons, Mr Griffin, Mr Mehan, Mr Moselmane, Mr Pearce and Mr Shoebridge.

Staff present
Jason Arditi, Emma Matthews, Caroline Hopley, Stephanie Mulvey, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes
Resolved, on the motion of Mr Mehan: That the minutes of the meeting of 30 May 2017 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. Mr Shoebridge's proposition
'That a review of this Committee's work over the past two parliamentary terms confirms it is not an adequate substitute for a bill of rights.'
The Committee considered the terms of reference as circulated.

Mr Mehan moved: That point 3 of the terms of reference be omitted and the following be inserted instead:
'Alternative structures for protecting persona l rights and liberties in comparable jurisdictions including the review processes of bills in comparable jurisdictions; and'
Question put and negatived.

Resolved, on the motion of Mr Mehan that the Committee adopt the following terms of reference for an inquiry into the operation of the Legislation Review Act 1987:

'That the Legislation Review Committee inquiries into and reports on:

(1) Whether the *Legislation Review Act 1987* ('the Act') provides for the sufficient review of bills with respect to:

(i) personal rights and liberties;

(ii) administrative law principles; and

(iii) parliamentary propriety;

(2) Measures and procedures which could improve the review of bills under the Act;

(3) The review processes of bills in comparable jurisdictions; and

(4) Any other related matter.'

Resolved, on the motion of Mr Pearce : That the Committee write to stakeholders inviting them to make submissions, with a closing date of 30 November 2017.

The Chair advised that he would issue a media release.

7. ***

8. ***

The meeting adjourned at 1:15pm until 1:00pm on 1 August 2017 in room 814-815.

MINUTES of Meeting No 41
1.01pm, Thursday 3 August 2017
Room 814 – 815

Members present
Mr Johnsen (Chair), Mr Evans, Mr Pearce, Mr Griffin, Mr Mehan, Mr Moselmane, and Mr Shoebridge.

Apologies
Ms Gibbons.

Staff present
Jason Arditi, Caroline Hopley, Stephanie Mulvey, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes
Resolved, on the motion of Mr Pearce: That the minutes of the meeting of 20 June 2017 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. Other business

***

Mr Moselmane inquired about the status of the Inquiry into the Operation of the Legislation Review Act 1987.

Discussion ensued.
It was confirmed that submissions close on 30 November 2017.

The meeting adjourned at 1:07pm until 1.00pm on Tuesday, 8 August 2017 in room 814-15.

MINUTES OF MEETING NO 45
1.00pm, Tuesday 10 October 2017
Room 814 – 815

Members present
Mr Johnsen (Chair), Mr Evans, Mr Mehan, Ms Gibbons, Mr Shoebridge, Mr Moselmane and Mr Pearce.

Apologies
Mr Griffin

Staff present
Jason Arditi, Caroline Hopley, Stephanie Mulvey, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes

Resolved, on the motion of Mr Evans, seconded by Mr Mehan: That the minutes of the meeting of 19 September 2017 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. ***

8. Other business

Members requested that the secretariat circulate a copy of the Terms or Reference and the stakeholders list for the Committee's *Inquiry into the Operation of the Legislation Review Act 1987.*

9. Date and time of next meeting

The Committee next meeting at 1.04pm on Tuesday, 17 October 2017 in room 814-15.

MINUTES OF MEETING No 49
4:15pm, Thursday 23 November 2017
Room 1043

Members present
Mr Johnsen (Chair), Mr Evans (Deputy Chair), Mr Griffin, Ms Gibbons and Ms Maclaren-Jones.

Apologies
Mr Mehan, Mr Shoebridge and Mr Moselmane.

Staff present
Jason Arditi, Stephanie Mulvey, Caroline Hopley and Ze Nan Ma.

1. Committee membership

Ms Maclaren-Jones replaces Mr Pearce, resigned (Legislative Council Minutes Thursday, 23 November 2017, Notice Paper No. 136). The Committee welcomed Ms Maclaren-Jones.

Mr Johnsen notified the Committee of his resignation as Committee Chair with immediate effect.

2. Election of Chair

The Deputy Chair sought nominations for the election of a new Chair.

Resolved, on the motion of Ms Gibbons, seconded by Mr Johnsen: That Mr Griffin be elected as Committee Chair.

The Committee congratulated the new Chair.

3. Confirmation of minutes

Resolved, on the motion of Ms Gibbons: That the minutes of the meeting of 21 November 2017 be confirmed.

4. Date and time of next meeting

The meeting adjourned at 4:17pm on Thursday 23 November 2017. The Committee next meets on 6 February at 1:00pm in Room 814-15.

MINUTES OF MEETING NO 50
1.00pm, Tuesday 6 February 2018
Room 814 – 815

Members present
Mr Griffin (Chair), Mr Evans, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones, and Mr Shoebridge.

Apologies
Mr Mehan and Mr Moselmane

Staff present
Elaine Schofield, Emma Wood, Caroline Hopley, Stephanie Mulvey and Mohini Mehta.

1. ***

2. Confirmation of minutes
Resolved, on the motion of Mr Johnsen, seconded Mr Evans: That the minutes of the meeting of 23 November 2017 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

3. ***

4. ***

5. ***

6. ***

7. ***

8. ***

9. Inquiry into the operation of the *Legislation Review Act 1987*

a) Submission publication
Resolved, on the motion of Mr Johnsen, seconded Ms Maclaren-Jones: That the Committee authorise the publication of submissions 1 – 10 and that the submissions be placed on the Committee's website.

b) Inquiry timeline
The Committee noted the indicative inquiry timeline.

10. ***

11. Date and time of next meeting
The meeting adjourned at 1.11pm until 1.00pm on Tuesday, 13 February 2018 in room 814-15.

MINUTES OF MEETING NO 52
1.02pm, Tuesday 6 March 2018
Room 814 – 815

Members present

Mr Griffin (Chair), Mr Johnsen, Mr Mehan, Mr Moselmane, Ms Maclaren-Jones and Mr Shoebridge.

Apologies

Ms Gibbons and Mr Evans.

Staff present

Elaine Schofield, Emma Wood, Caroline Hopley, Stephanie Mulvey and Ze Nan Ma.

1. Confirmation of minutes

Resolved, on the motion of Mr Johnsen, seconded Ms Maclaren-Jones: That the minutes of the meeting of 13 February 2018 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. Other business

***

The Secretariat will circulate a proposed list of witnesses for the upcoming Inquiry hearing. Committee members are to send details of any other proposed witnesses to Secretariat.

8. Date and time of next meeting

The meeting adjourned at 1.06pm until 1.00pm on Tuesday, 13 March 2018 in room 814-15.

MINUTES OF MEETING NO 53

1.00pm, Tuesday 13 March 2018
Room 814 – 815

Members present

Mr Griffin (Chair), Mr Evans, Mr Mehan, Mr Moselmane, Ms Maclaren-Jones and Mr Shoebridge.

Apologies

Ms Gibbons and Mr Johnsen.

Staff present

Elaine Schofield, Emma Wood, Caroline Hopley, Stephanie Mulvey and Ze Nan Ma.

1. Confirmation of minutes

Resolved, on the motion of Mr Evans, seconded Ms Maclaren-Jones: That the minutes of the meeting of 6 March 2018 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. Inquiry into the operation of the *Legislation Review Act 1987*

Resolved, on the motion of Ms Maclaren-Jones, seconded Mr Shoebridge: That the Committee hold a public hearing on Monday 21 May 2018 at Parliament House and hear from relevant witnesses.

7. Date and time of next meeting

The meeting adjourned at 1.03pm until 1.00pm on Tuesday, 10 April 2018 in room 814-15.

MINUTES OF MEETING NO 54
1.00pm, Tuesday 10 April 2018
Room 814 – 815

Members present
Mr Griffin (Chair), Mr Evans, Mr Mehan, Ms Gibbons, Mr Johnsen, Ms Maclaren-Jones and Mr Shoebridge.

Apologies
Mr Moselmane.

Staff present
Elaine Schofield, Emma Wood, Caroline Hopley, Stephanie Mulvey and Ze Nan Ma.

1. Confirmation of minutes

Resolved, on the motion of Ms Maclaren-Jones, seconded Mr Johnsen: That the minutes of the meeting of 13 March 2018 be confirmed and tabled, and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. ***

8. Inquiry into the operation of the Legislation Review Act 1987
Resolved, on the motion of Mr Shoebridge, seconded Mr Mehan: That the Committee accept the submission from the Jumbunna Institute for Indigenous Education and Research and authorise its publication on the Committee's website.

9. Date and time of next meeting
The meeting adjourned at 1.03pm until 1.00pm on Tuesday, 1 May 2018 in room 814-15.

MINUTES OF MEETING No 56
1.01pm, Tuesday 15 May 2018
Room 814 – 815

Members present
Mr Griffin (Chair), Mr Evans, Ms Gibbons, Mr Johnsen, Ms Maclaren-Jones, Mr Mehan, and Mr Moselmane.

Apologies
Mr Shoebridge.

Staff present
Elaine Schofield, Stephanie Mulvey, Caroline Hopley and Mohini Mehta.

1. Confirmation of minutes
Resolved, on the motion of Mr Evans, seconded by Mr Johnsen: That the minutes of the meeting of 1 May 2018 be confirmed and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. ***

8. Inquiry into the operation of the *Legislation Review Act 1987*
Notice of Hearing for the public hearing on Monday 21 May and other papers circulated to members.

9. Date and time of next meeting
The meeting adjourned at 1:04pm until Monday 21 May 2018 at 9:00am in the Preston Stanley Room.

MINUTES OF MEETING No 57
9.00am, Monday 21 May 2018
Preston Stanley Room

Members present
Mr Griffin (Chair), Mr Evans, Ms Gibbons, Mr Johnsen, Mr Shoebridge, Mr Mehan, and Mr Moselmane.

Apologies
Ms Maclaren-Jones.

Staff present
Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley and Abegail Turingan.

1. Confirmation of minutes

Resolved, on the motion of Mr Evans, seconded by Mr Johnsen: That the minutes of the meeting of 15 May 2018 be confirmed.

2. Inquiry into operation of the *Legislation Review Act 1987*

2.1 Media orders

Resolved, on the motion of Mr Mehan, seconded Mr Moselmane: That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 21 May 2018, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for committees administered by the Legislative Assembly.

2.2 Answers to questions taken on notice

Resolved, on the motion of Mr Moselmane, seconded Mr Evans: That witnesses be requested to return answers to questions taken on notice within 14 days of the date on which the questions are forwarded to witnesses.

2.3 Publication orders

Resolved, on the motion of Mr Evans, seconded Mr Johnsen: That the corrected transcript of public evidence given today be authorised for publication and uploaded on the Committee's website.

2.4 Additional questions

Resolved, on the motion of Mr Johnsen, seconded Mr Moselmane: That the Committee adopts the following process for sending additional questions to witnesses:

1. Members submit additional questions to the Secretariat by close of business two full working days after the transcript is distributed to members.
2. The proposed additional questions will be circulated to all members.
3. Members may express concerns or objections to additional questions within 2 working days of distribution of the questions from the secretariat, any

objections that cannot be resolved will be deferred until a deliberative meeting of the Committee.

3. Public hearing - Inquiry into the operation of the *Legislation Review Act 1987*

Witnesses and the public were admitted. The public hearing opened at 9.15am.

Mr Griffin, Chair, made a short opening statement.

Professor George Williams AO and Mr Aaron Taverniti were affirmed and both made an opening statement.

The Committee commenced questioning the witnesses.

Evidence concluded and the witnesses withdrew.

Mr Doug Humphreys, President of the Law Society of New South Wales, was sworn in and made an opening statement.

The Committee commenced questioning the witness.

Evidence concluded and the witness withdrew. The hearing adjourned at 10.34am until 10.59am.

Mr Richard Lancaster SC, Member, Human Rights Committee, NSW Bar Association, and Professor Andrew Byrnes, Member, Human Rights Committee, NSW Bar Association were affirmed and both made an opening statement.

The Committee commenced questioning the witnesses.

Ms Gibbons entered the room at 11.09am.

Evidence concluded and the witnesses withdrew.

Mr Stephen Blanks, President, NSW Council for Civil Liberties, and Dr Martin Bibby, Member, NSW Council for Civil Liberties, were affirmed. Dr Bibby made an opening statement.
The Committee commenced questioning the witnesses.

Evidence concluded and the witnesses withdrew.
Mr Lewis Hamilton, President, NSW Society of Labor Lawyers, and Mr Kirk McKenzie, Committee Member, NSW Society of Labor Lawyers, were affirmed.

Mr Hamilton and Mr McKenzie both made an opening statement.

The Committee commenced questioning the witnesses.

Evidence concluded and the witnesses withdrew.

The public hearing adjourned at 12.49pm until 2.04pm.

Mr Alistair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre, was affirmed and made an opening statement.

The Committee commenced questioning the witness.

Evidence concluded, the witness withdrew.
Mr Melanie Fernandez, Deputy Chief Executive Officer, NSW Council of Social Service, was affirmed and made an opening statement.

The public hearing adjourned at 3.04pm until 3.27pm.

Mr David Turner, President, NSW Young Lawyers, was affirmed. Mr Samuel Murray, Executive Councillor, NSW Young Lawyers, was sworn.

The Committee commenced questioning the witnesses.

Evidence concluded and the witnesses withdrew.

Emeritus Professor Rosalind Croucher AM, President, Australian Human Rights Commission, was sworn.

Mr Darren Dick, Senior Policy Executive – Human Rights and Strategy, Australian Human Rights Commission; and Mr Rohan Nanthakumar, Research and Policy Officer, Australian Human Rights Commission, were affirmed.

Professor Croucher made some preliminary comments and provided a written opening statement to the Committee.

The Committee commenced questioning the witnesses.

Evidence concluded, the witnesses withdrew.

The public hearing concluded at 4.27pm and the public withdrew.

4. Post-hearing deliberative

4.1 Documents provided during the hearing

The Committee noted the following public documents provided by the Australian Human Rights Commission during their evidence:

- Commonwealth Attorney General's Department, *Flowchart for assessing the Human Rights Compatibility of Bills and Legislative Instruments*
- Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility*
- Commonwealth Attorney General's Department, *List of guidance sheets and policy triggers*

4.2 Other business

Resolved, on the motion of Mr Shoebridge, seconded Mr Moselmane: That the Committee hold a second hearing in order to receive evidence from the Jumbunna Institute for Indigenous Research and Education.

4.3 Date and time of next meeting

The meeting adjourned at 4.30pm until Tuesday, 22 May 2018 at 1.00pm in Room 814-815.

MINUTES OF MEETING No 58
1.01pm, Tuesday 22 May 2018
Room 814 – 815

Members present
Mr Griffin (Chair), Mr Evans, Mr Johnsen, Ms Maclaren-Jones, Mr Mehan, Mr Moselmane and Mr Shoebridge.

Apologies
Ms Gibbons.

Staff present
Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes

Resolved, on the motion of Mr Johnsen, seconded by Ms Maclaren-Jones: That the minutes of the meeting of 21 May 2018 be confirmed and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. Inquiry into the operation of the *Legislation Review Act 1987*

Resolved, on the motion of Mr Shoebridge, seconded Mr Mehan: That the Committee accept the document titled *Opening statement* of Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission and authorise its publication on the Committee's website.

7. Date and time of next meeting

The meeting adjourned at 1:16pm until Tuesday 5 June 2018 at 1:00pm in the Room 814/5.

MINUTES OF MEETING No 60
1.00pm, Tuesday 19 June 2018
Room 814 – 815

Members present
Mr Griffin (Chair), Mr Evans (Deputy Chair), Mr Johnsen, Ms Maclaren-Jones, Mr Mehan, Mr Moselmane, Mr Shoebridge.

Apologies
Ms Gibbons.

Staff present
Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley and Ze Nan Ma.

1. Confirmation of minutes
Resolved, on the motion of Ms Maclaren-Jones, seconded Mr Johnsen: That the minutes of the meeting of 5 June 2018 be confirmed and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. Inquiry into operation of the *Legislation Review Act 1987*
The Committee noted the following responses to questions taken on notice (circulated to members):

- NSW Council of Civil Liberties, dated 6 June 2018
- NSW Council Of Social Service, dated 12 June 2018
- Public Interest Advocacy Centre, dated 13 June 2018

Resolved, on the motion of Mr Mehan, seconded Mr Evans: That the answers received from the NSW Council of Civil Liberties, NSW Council of Social Service and Public Interest Advocacy Centre to the questions taken on notice be published on the Committee's website.

7. ***

8. Date and time of next meeting
The meeting adjourned at 1:05pm until Tuesday 7 August 2018 at 1:00pm in Room 814-15

MINUTES OF MEETING No 65
1.00pm, Tuesday 16 October 2018
Room 814 – 815

Members present
Ms Wilson (Chair), Mr Evans (Deputy Chair), Ms Gibbons, Mr Johnsen, Mr Mehan, Mr Moselmane, Mr Shoebridge and Ms Maclaren-Jones.

Staff present
Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes
Resolved, on the motion of Ms Maclaren-Jones, seconded Mr Evans: That the minutes of the meeting of 25 September 2018 be confirmed and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. ***

7. ***

8. Other business
The Committee discussed suitable times for a meeting to adopt the Chair's draft report.

9. Date and time of next meeting
The Committee adjourned at 1.13pm. The next meeting will be on 23 October 2018 at 1.00pm in Room 814-815.

MINUTES OF MEETING No 66
1.03pm, Tuesday 23 October 2018
Room 814 – 815

Members present
Ms Wilson (Chair), Mr Evans (Deputy Chair), Mr Johnsen, Mr Mehan, Mr Moselmane, Mr Shoebridge and Ms Maclaren-Jones.

Apologies
Ms Gibbons.

Staff present
Elaine Schofield, Emma Wood, Stephanie Mulvey, Caroline Hopley, Ze Nan Ma and Mohini Mehta.

1. Confirmation of minutes
Resolved, on the motion of Mr Evans, seconded Mr Johnsen: That the minutes of the meeting of 16 October 2018 be confirmed and that appropriate minute extracts of this meeting be published on the Committee's webpage.

2. ***

3. ***

4. ***

5. ***

6. Other business
The Committee agreed to meet on Tuesday 20 November 2018 and Wednesday 21 November 2018 to deliberate on the draft report for the *Inquiry into the operation of the Legislation Review Act 1987*.

7. Date and time of next meeting
The Committee adjourned at 1.17pm. The next meeting will be on 13 November 2018 at 1.00pm in Room 814-815.

UNCONFIRMED MINUTES OF MEETING No 69
1.26pm, Tuesday 21 November 2018
Room 1136

Members present
Ms Wilson (Chair), Ms Gibbons, Mr Johnsen, Mr Mehan, Mr Moselmane, Mr Shoebridge and Ms Maclaren-Jones

Apologies
Mr Evans

Staff present
Catherine Watson, Elaine Schofield, Emma Wood, Stephanie Mulvey, Ze Nan Ma and Mohini Mehta

1. Confirmation of minutes
Resolved, on the motion of Mr Johnsen, seconded Ms Maclaren-Jones: That the minutes of the meeting of 20 November 2018 be confirmed.

2. Inquiry into the operation of the *Legislation Review Act 1987*

Resolved, on the motion of Ms Gibbons: That the Committee consider the report chapter by chapter.

Chapter 1

Resolved, on the motion of Ms Maclaren-Jones, seconded Ms Gibbons: That Chapter One stand part of the report.

Chapter 2

Mr Mehan moved together, seconded Mr Moselmane:

- That paragraph 2.48 of the report be amended by omitting the last two sentences of the paragraph and that the following words be inserted instead:

  'However, the Committee is persuaded by the suggestion that replacing the term 'personal rights' with 'human rights' provides a better emphasis of the broad range of rights and liberties which the Committee will have regard to and will recommend this small amendment to the Act.'

- That a new recommendation 1 be inserted into the report which reads:

  'The Legislation Review Act be amended to replace 'personal rights and liberties' with 'human rights and liberties' at 8A(1)(b)(1) and 9(1)(b)(i).

Question put.

The Committee divided.

Ayes: Mr Mehan, Mr Moselmane, Mr Shoebridge.

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones.

Question resolved in the negative.

Mr Shoebridge moved together, seconded Mr Mehan:

- That the following new paragraph be inserted after 2.50:

  'The clearest way for this to occur is to have the Parliament set out clearly what the rights and obligations are that the Committee should have regard to. It is not appropriate for the Committee to simply proceed with its own idiosyncratic view that may change from time to time as the committee membership changes. To that extent the most appropriate course would be to enunciate in the Act the list of human rights considerations set out in paragraph 2.45 above.'

- That Finding 1 be omitted and replaced with:

  'Recommendation 1

That the Legislation Review Act be amended to clearly state the list of human rights considerations the Committee is to have regard to including:

- rights protected under the common law, for example the right to silence, as developed by the courts;
- rights protected under New South Wales and Commonwealth statute law, for example the *Anti-Discrimination Act 1977* (NSW) and the *Racial Discrimination Act 1975* (Cth);
- rights protected under the Commonwealth Constitution;
- rights protected under international law, especially as set out in international human rights treaties ratified by Australia;
- the decisions and comments of the principal international bodies monitoring international human rights treaties;
- rights recognised in other comparable jurisdictions; and
- academic and public debate on the content of 'rights'.'

Question put.

The Committee divided.

Ayes: Mr Mehan, Mr Moselmane, Mr Shoebridge

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones.

Question resolved in the negative.

Resolved, on the motion of Mr Mehan, seconded Mr Moselmane: That Finding 1 be amended by adding the words 'and inform the Parliament of these at the start of each Session'.

Mr Shoebridge moved: That paragraph 2.83 be omitted and that the following paragraph be inserted instead:

'2.83 In the absence of a statutory human rights framework as exists in the ACT and Victoria it could be considered the bare minimum for those with the carriage of bills in the Parliament to respond to the concerns and comments raised by this committee during the debate on the bill. We therefore will be recommending that each House consider amending their standing orders to require this.'

Question put.

The Committee divided.

Ayes: Mr Mehan, Mr Moselmane, Mr Shoebridge

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph and recommendation be inserted after paragraph 2.83:

> 'To assist both this committee's work and to provide a more human rights focused legislative drafting process, this committee sees real merit in requiring that bills are accompanied by a compatibility certificate. We are persuaded by the views of multiple informed stakeholders that this would produce a culture that is more respectful of human rights within both the executive and the legislature.
>
> Recommendation X
>
> That the Parliament require bills to be accompanied by a statement of compatibility with human right protections and standards.'

Question put.

The Committee divided.

Ayes: Mr Mehan, Mr Moselmane, Mr Shoebridge

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones.

Question resolved in the negative.

Resolved, on the motion of Ms Maclaren-Jones, that paragraph 2.112 be omitted and the following paragraphs be inserted instead:

2.112 'The Committee acknowledges that having a separate statutory scrutiny committee for subordinate legislation would permit the Committees to have a greater focus on both bills and regulations, particularly given the tight reporting timeframes under which the Committee operates.

2.113 The Committee notes the establishment, on a trial basis, of the NSW Legislative Council Regulation Committee which affords some scrutiny of regulations in the NSW Parliament. The Committee notes however that the Legislative Council Regulation Committee has a different function with regard to regulations than that of the Legislation Review Committee which has specific functions under the LR Act.

2.114 The Committee proposes the Government give further consideration to whether a separate committee to review subordinate legislation be established, taking into account the operations of the NSW Legislative Council Regulation Committee.

Recommendation 4

> The Committee recommends that the NSW Government consider amending the *Legislation Review Act 1987* to establish a joint Committee to examine subordinate legislation, taking into account the recent practice of the NSW Legislative Council Regulation Committee.'

Resolved, on the motion of Ms Maclaren-Jones, seconded Mr Moselmane: That Chapter Two, as amended, stand part of the report.

Chapter Three

Mr Shoebridge moved: That paragraph 3.18 be omitted and the following paragraph and recommendation be inserted:

> 'The committee acknowledges that NSW is one of only a handful of jurisdictions in the democratic world that does not have a comprehensive legislative or constitutional human rights framework. This committee has proven not to be *anywhere* near an adequate replacement for such protections. Therefore we recommend that, in addition to the modest changes proposed to this committee's structure and legislative and procedural framework, that NSW join with the ACT and Victoria and introduce a state-based Human Rights Act.
>
> Recommendation X
>
> That NSW join with the ACT and Victoria and introduce a state-based Human Rights Act.'

Question put.

The Committee divided.

Ayes: Mr Shoebridge

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones, Mr Mehan, Mr Moselmane.

Question resolved in the negative.

Mr Shoebridge moved: That paragraphs 3.28 and paragraph 3.30 be omitted, and the following paragraph be inserted after 3.29:

> 'Clearly this Parliament has a long history of passing legislation that negatively impacts on Aboriginal people in this state. Whether it is laws affecting land tenure, criminal justice or child protection these laws often have a direct and disproportionate negative impact on Aboriginal people. Not recognising this and not acknowledging this would be a real collective failure of this committee and the Parliament more generally.
>
> Therefore we believe it is important for the role of this committee to be expressly broadened to incorporate the impact, either positive or negative, that legislation will have on Aboriginal people in NSW."
>
> Recommendation X

That the Legislation Review Act be amended to expressly include consideration of the impact, either positive or negative, that legislation will have on Aboriginal people in NSW.'

Question put.

The Committee divided.

Ayes: Mr Shoebridge

Noes: Ms Wilson, Mr Johnsen, Ms Gibbons, Ms Maclaren-Jones, Mr Mehan, Mr Moselmane.

Question resolved in the negative.

Resolved, on the motion of Ms Maclaren-Jones, seconded Ms Gibbons: That Chapter Three stand part of the report.

Committee report

Resolved, on the motion of Ms Maclaren-Jones:

1. That the draft report, as amended, be the report of the Committee, and that it be signed by the Chair and presented to the Houses.
2. That the Chair and committee staff be permitted to correct stylistic, typographical and grammatical errors.
3. That, once tabled, the report be posted on the Committee's website.

3. ***

4. Date and time of next meeting

The Committee adjourned at 1.44pm. The next meeting will be a date to be determined.