The New South Wales Bar Association

10/209

29 July 2010

Mr Alan Shearan MP
Chair
Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Shearan

Public Interest and the Rule of Law

I write concerning the Legislation Review Committee's recent Discussion Paper entitled "Public Interest and The Rule of Law". Thank you for providing the Association with the opportunity of making a submission in response to the Discussion Paper.

The Association's submission is attached.

Please feel free to contact the Association's Director, Law Reform and Public Affairs, Mr Alastair McConnachie, on 9229 1756 or at amcconnachie@nswbar.asn.au if you have any queries in relation to the detail of the Association's submission.

Yours sincerely

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Legislation Review Committee Discussion Paper:
PUBLIC INTEREST AND THE RULE OF LAW

Submission of the New South Wales Bar Association

1. Introduction and Overview

1.1. This submission of the New South Wales Bar Association ("**Bar Association**") is provided in response to a request from the Legislation Review Committee of the New South Wales Parliament ("**Committee**") for comment on its discussion paper entitled 'Public Interest and the Rule of Law' ("**Discussion Paper**") in relation to the principles it should apply when considering bills that trespass on personal rights and liberties in the context of issues which involve the public interest.

1.2. The Bar Association's submission addresses:

(a) Whether the principles in s 7(2) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) could be adapted as a guide to assist the Committee in its deliberations, where a right is proposed to be limited by legislation;

(b) What is the most appropriate model or approach when assessing the weight to be given to personal rights and liberties, where a right is proposed to be limited by legislation; and

(c) Ten questions posed in the Discussion Paper.

2. Use of the term 'public interest' in the Discussion Paper

2.1. The Committee's functions pursuant to ss 8A and 9 of the *Legislation Review Act* 1987 include to consider bills introduced to Parliament, or regulations (during the period in which such regulations are liable to be disallowed) and to report to Parliament as to whether *inter alia* these trespass 'unduly' on personal rights and liberties.

2.2. The Bar Association understands from the Introduction to the Discussion Paper that the primary purpose of the Discussion Paper is to elicit comment regarding the process and principles that should be utilised by the Committee when it is considering whether particular legislation or regulations trespass 'unduly' on personal rights or liberties.

2.3. The Committee in its Introduction notes that the term 'public interest' is quite broad; is undefined in the *Legislation Review Act* 1987 (NSW); and is not a term that is generally used in international human rights instruments. In its Introduction, the Committee states that the Discussion Paper will 'examine in detail a specific type of legislation to illustrate and discuss *public interest* in the context of *public order or safety*' (see para 8, page 2, Introduction). The Committee then goes on in Chapter Two to explore other possible meanings of the term 'public interest'.

2.4. The Bar Association considers the term 'public interest' to be a protean term and that particular care needs to be taken with its application in a context such as fulfilling the statutory functions set out in ss 8A and 9 of the *Legislation Review Act* 1987 (NSW).

2.5. Thus in *McKinnon v Treasury* (2006) 228 CLR 423, in the context of the public element of exemptions under the Federal FOI Act, Hayne J stated:

> *It may readily be accepted that most questions about what is in 'the public interest' will require consideration of a number of competing arguments about, or features or 'facets' of, the public interest. As was pointed out in O'Sullivan v Farrer:*
>
> > [T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.
>
> *That is why a question about 'the public interest' will seldom be properly seen as having only one dimension.*

2.6. The Bar Association contends that, on one view, all legislation is intended to reflect and to further the public interest. Whether or not it does so will depend upon individual perceptions of what the public interest demands in a particular case.

2.7. In particular, the Bar Association has two key concerns with the uses of the phrase "public interest" in the Discussion Paper.

2.8. First, it disagrees that the term 'public interest' is always and necessarily synonymous with the concept of 'public order or safety' (as is suggested in para 8, page 2 of the Discussion Paper). To posit 'public interest' as something which is inherently in opposition to personal rights and liberties is to set up a false dichotomy because, in the Bar Association's view, the observance and protection of personal rights and liberties is, by its very nature, something that is virtually always 'in the public interest'. Therefore, the Bar Association does not endorse any meaning of 'public interest' that centres upon 'public order or safety' (though in a particular case, the Bar Association

accepts that public safety might be relevant to a determination of whether legislation trespasses unduly upon a personal right or liberty).

2.9. Secondly, the Bar Association considers that no dichotomy should be established in which the rule of law is seen as a factor to be balanced against other competing facets of the public interest. Rather, in a democratic system, the rule of law must be accepted as furthering the public interest in virtually all cases. The competing facets of the public interest ought not to be balanced in a way which suggests that prima facie they have equal weight.

2.10. These concerns with the utility of the term should be borne in mind when reviewing the Bar Association's responses below to the issues raised for comment.

3. Whether the principles in s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) could be adapted as a guide to assist the Committee in its deliberations

3.1. The Bar Association considers that the answer to this question is "yes".

3.2. The Bar Association is of the opinion that improved scrutiny of legislation for consistency with Australia's human rights obligations is urgently needed in NSW. In NSW, there is no comprehensive instrument protecting human rights as is found in the Victorian *Charter of Human Rights and Responsibilities Act* 2006 (**Victorian Charter**). There are only ad hoc and limited protections available depending of the nature of the right and the classification of the person affected.

3.3. The Bar Association considers that parliamentary scrutiny committees can serve an important watchdog function in respect of legislation that may affect the enjoyment of individual rights and liberties. The principles in s 7(2) of the Victorian Charter are likely to be useful in the work of the Committee for the reasons that follow in this submission. The Bar Association considers that the use of those principles is likely to facilitate public scrutiny and debate of such legislation and to act as a check upon both the Legislature and the Executive.

3.4. Importantly, the principles in s 7(2) do not require the adoption of a 'public interest' test that conflates the term 'public interest' with 'public order or safety'. However, concerns regarding public order or safety can still be addressed where these are relevant by considering the importance of the purpose of the limitation (s 7(2)(b)); the relationship between the limitation and its purpose (s 7(2)(d)); and whether less restrictive means are reasonably available to achieve the desired purpose of the limitation (s 7(2)(e)).

4. The appropriate model or approach when assessing the weight to be given to personal rights and liberties

4.1. The Bar Association understands 'personal rights and liberties' to mean the rights referred to in paragraphs 9-13 of the Committee's 'Information Paper: "Rights and Liberties" considered by the Legislative Review Committee'. These are rights and liberties deriving not only from the key international instruments, being the Universal Declaration of Human Rights ("**UDHR**"), the International Covenant on Civil and Political Rights ("**ICCPR**"), and the International Covenant on Economic, Social and Cultural Rights; but also from the common law (such as the right to a fair trial), domestic legislation, and the limited rights conferred by the Constitution of the Commonwealth of Australia. The Bar Association agrees that those are the rights and liberties that should be considered by the Committee.

4.2. The Bar Association contends that the protection of the exercise of such 'personal rights and liberties' is fundamental to the proper operation of a democratic and plural society such as that in New South Wales.

4.3. The Bar Association notes the observations in Chapter 6 as to the different theoretical and doctrinal approaches to the restriction of human rights. The Bar Association contends that an appropriate approach to assessing whether legislation trespasses unduly on personal rights and liberties would be as follows:

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

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

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

(d) fourthly, in assessing whether the encroachment is 'undue', consideration of the matters in s 7(2)(e) of the Victorian Charter is also likely to be useful: ie, whether, there is any less restrictive means reasonably available to achieve the same purpose. [1]

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

5. Response to the ten questions posed

5.1. The Bar Association's response to the ten questions posed in the Discussion Paper is now set out .

Question One. **Are rights of freedom of association and that of lawful assembly core rights when considering public interest?**

Rights of freedom of association and of assembly are rights within the ICCPR, which was adopted by the United Nations General Assembly in 1966 and which came into force in 1976. Australia has been a party to this treaty since 1980.

The right of peaceful assembly as framed within the ICCPR is:

> ***Article 21.*** *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

The Bar Association notes that 'peaceful assembly', not 'lawful assembly', is the traditional formulation of the right and is the appropriate formulation. This is because while a legislature might legislate to render an assembly that was a peaceful assembly 'unlawful', such legislation would be an unwarranted infringement on the right as expressed within Article 21.

Rights of freedom of association and *peaceful* assembly are human rights of fundamental importance to the proper functioning of a healthy democratic state. While they may be derogated from, or limited, 'in the interests of national security or public safety, public order ... the protection of public health or morals or the protection of the rights and freedoms of others', their enjoyment is core to any plural democracy.

The Bar Association considers that the use of the term 'public interest' in the context of Question One adds little to, and indeed may confuse, the process of consideration to be undertaken where the exercise of those rights poses some risk to public safety concerns.

Rather, the Bar Association contends that the public interest requires that a manifest and compelling case should be made out before there is any trespass on the rights or liberties of individuals.

The Bar Association suggests that consideration of the matters in s 7(2) of the Victorian Charter is likely to assist the Committee both in determining whether a compelling case has been made out, and considering whether alternative means are available that involve less or no encroachment on the relevant rights or liberties. In the context of some future legislation that

affects exercise of freedom of peaceful assembly, public safety concerns may, or may not, depending upon the circumstances, form part of the factual matrix to be considered according to the matters in s 7(2).

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

In the Bar Association's view, the extent or degree of a trespass on a right is really a common sense question of fact to be answered, first by an examination of the legislative provision, and secondly by a consideration of the right that is the subject of the trespass, and how the exercise of the right is likely to be affected.

For example, in the context of covert search warrant powers (Chapter Three of the Discussion Paper) it is obvious that s 27 effectively denies any right to privacy in that it confers a power on an eligible judge to issue a warrant permitting the covert entry and search of private premises, including homes. The exercise of that power in relation to a person who is the subject of the warrant, is obviously entirely inconsistent with that person's enjoyment of his or her right to privacy.

Question Three. **What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are undue?**

As noted above, the Bar Association contends that the public interest requires that a manifest and compelling case should be made out before there is any trespass, by legislation or regulation, upon the rights or liberties of individuals.

As noted above, the Bar Association suggests that consideration of the matters in s 7(2)(a) to (d) of the Victorian Charter is likely to assist the Committee in determining whether a compelling case has been made out for *any* trespass upon the right or liberty. This process will direct attention to both the nature of the right, and the usual ways in which it is exercised, as well as the importance of the purpose of the proposed limitation.

The likelihood that the exercise of the relevant right or liberty would, in fact, frustrate the purpose of the proposed limitation is also a highly relevant consideration within this matrix. For example, the World Youth Day Regulation 2008 made it an offence 'to cause annoyance or inconvenience to a participant in World Youth Day', punishable by a fine of up to $5500: cl 7(1)(b).[2] 'Annoyance' and 'inconvenience' were undefined in the Regulation, but it is easy to

[2] On 15 July 2008, the Federal Court in *Evans v State of New South Wales* [2008] FCAFC 130 declared that 'cl 7 (1) (b) is invalid to the extent to which it is applied to conduct which causes annoyance to participants in World Youth Day events'.

conclude that one can be 'annoyed' by something that is said by another person, if it happens to be something that one does not agree with. If a purpose of the limitation in cl 7(1)(b) was, as can be assumed, to ensure the orderly conduct through city streets of a procession of a large number of participants in a public religious event, consideration by the Committee of that limitation would usefully be given to whether the exercise of rights to free speech, without violence, physical intervention or obstruction, would be likely or unlikely to prevent the orderly conduct of such a procession.

Likewise, subs 7(2)(e) of the Victorian Charter would then direct attention to whether alternative means are available that involve lesser or no encroachment on the right of free speech. In this respect, existing laws that cover the same subject matter or are directed to similar purposes, are relevant. In the example above, the generally applicable laws covering public order may well have been sufficient because these already proscribe (for example) offensive conduct, offensive language, and preventing the free passage of a person or vehicle in a public place: *Summary Offences Act 1988* (NSW), ss 4, 4A and 6.

In the World Youth Day example it is difficult to see how the type of assessment contemplated by subs 7(2)(a) to (e) of the Victorian Charter could have resulted in a determination other than that cl 7(1)(b) of the World Youth Day Regulation did trespass 'unduly' on personal rights and liberties.

The need to compare the importance of the right with the importance of the purpose of the limitation, may appear to intrude into the analysis that is undertaken by the Committee. As noted in section 4 above, however, the Bar Association contends that a 'weighing' approach which pits the achievement of personal rights and liberties against countervailing considerations which are given at the outset prima facie equal weight is generally an inappropriate way of assessing legislation. The problem with a 'weighing' approach (such as is required with respect to the implied freedom of communication on government and political matters) is evident in the decision of the Court of Appeal in *Padraic Gibson & Ors v Commissioner of Police & Ors* [2007] NSWCA 251, where the Court of Appeal considered the effect of the 'excluded persons list' and associated powers under ss 24(1)(g) and 26 of the *APEC (Police Powers) Act* 2007, which prevented 'excludable persons' from being present in particular defined zones for an eleven day period during which the APEC meeting was to be held in Sydney. The Court stated at [10]-[12]:

> *[T]he provisions under challenge here are appropriate to achieve the end of public safety and the safety of leaders of other countries and their accompanying parties who are present in Australia for the APEC meeting. It is relevant and significant that the legislation does not prohibit public protests by any person including persons on an 'excluded persons list'. Rather, it provides for the potential exclusion of persons on the 'excluded persons list' for a limited period in designated areas.*

The ability to engage in protests and any other form of political communication both before, during and after the APEC period in any other part of the city or indeed, any other part of the State of New South Wales, is unaffected.

We consider, therefore, that there is no disproportionate effect on any burden of communication as recognised in Lange and the recognition of achieving the legitimate ends of the APEC Act are compatible with the maintenance of the system of representative and responsible government. In this regard, we note that in Lange the formulation of reasonably appropriate and adapted legislation was equated with proportionality. We conclude, therefore, that the provisions under challenge do not offend the constitutional implication to which we have referred. It follows that the Court would refuse the making of the declaration as sought in the Summons.

Thus, because protests could take place elsewhere in Sydney away from the areas used by the APEC meeting and in which the media was also primarily concentrated, the Court concluded that there was no disproportionate burdening of political communication. (A similar trend is the trend in the United States to creating 'Free Speech Zones' at political meetings whose stated purpose is to protect the safety of those attending the political gathering or the safety of the protesters themselves, but whose effect is to silence protesters by keeping them out of the sight of the public, the media, and the participating dignitaries.)

It can be seen that the above approach may well have the effect of preventing the effective exercise of a particular right or liberty. Rather, the approach outlined in section 4.3 above permits a nuanced consideration of all relevant matters – including how pressing or important the purpose of the limitation is – without taking an oppositional approach in which the 'importance' of the limitation must be directly balanced against or compared with the 'importance' of the right or liberty.

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

First, it cannot always be assumed that the frustration or prevention of the exercise of personal rights and liberties will never be a direct objective of New South Wales government policy. Secondly, the consideration of personal rights and liberties, and whether these are trespassed on 'unduly' by particular legislation or regulations, are matters expressly within the Committee's statutory remit. Whether a trespass is 'undue' is a question of fact and degree and the considerations in s 7(2) of the Victorian Charter that assist in determining this question, do not require any assessment of underlying policy. Whether there are less restrictive means to achieve a particular purpose is, as with the question of the extent of trespass on a right, ultimately a commonsense factual question (see answer to question 2 above). The Bar Association considers that if analysis by the Committee is undertaken

according to the considerations in s 7(2) of the Victorian Charter, it appears unlikely to trespass into the evaluation of government policy.

Further, the concern that is implied by this question is similar to a concern that has been raised with respect to Human Rights Act: that it gives too much power to judges to make policy decisions, not judicial decisions. For example, former New South Wales Premier Bob Carr has argued that:

> *Most modern bills of rights include a clause recognising that rights may be subject to such reasonable limits 'as can be demonstrably justified in a free and democratic society'. This is clearly a policy decision not a judicial issue. If a bill of rights were enacted, it would then be up to a court to decide whether freedom of speech should be limited to pornography, tobacco advertising, solicitation for prostitution and the publication of instructions on how to make bombs.* [3]

The Bar Association submits that Lord Bingham's response to such criticism is persuasive:

> *But the judges are still making what are distinctively judicial decisions. They have to establish the facts, which are often crucial. They have a text, contained partly in the Act and partly in the Convention rights scheduled to the Act. They have principles of interpretation to apply, some of them deriving from domestic sources, some from Strasbourg and other international sources. They have a body of precedent to work on, some of it from Strasbourg, some domestic, some from other sources, some of it binding, some not. The task which the judges perform is not different in kind from their conventional role, and they have of course to give reasons, based on the text, the principles of interpretation and the authorities, for reaching whatever conclusion they do. They are not metamorphosed into legislators. Nor is any decision made by a judge which is not in the last resort made by a judge under the preexisting regime.*[4]

Likewise, the Committee, in considering personal rights and liberties and the manner of their exercise (and the situations in which some may be derogated from) has available to it, in considering whether a trespass is 'undue', assistance from the key international human rights instruments and principles of interpretation that may be found in domestic law or in international jurisprudence. In addition, however, the Committee is not a court and is not bound to apply precedent in the same way a court is. The Committee has considerable flexibility in fulfilling its statutory functions and giving consideration to the human rights implications of particular legislation (as it is bound to do) does not necessarily require an interrogation of government policy. That is not to say however that close consideration will not need to be given to the purpose of the relevant instrument under consideration.

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[3] The rights trap: How a bill of rights could undermine freedom" *Policy* Vol 17 No 2, (2001) p 19

[4] 'Dignity, Fairness and Good Government: The Role of a Human Rights Act', delivered at a forum hosted by the Supreme Court of New South Wales and the New South Wales Bar Association on 11 December 2008,

The Bar Association also considers that there is considerable scope for the Committee to take a greater role in suggesting ways in which what might otherwise be undue encroachments on human rights can be mitigated. A good example arises under the *Security Industry Act 1997* (NSW) and the clear adverse implications for procedural fairness and the right to a fair hearing created by sub-section 29(3) of that Act (which prevents disclosure in ADT review proceedings to the affected person or their legal representatives –or indeed anyone other than the ADT itself of the existence or content of any relevant criminal intelligence or law enforcement report unless the Police Commissioner approves). Even if it be assumed that a good case can be made out to support such a provision despite its direct adverse bearing on fundamental rights, that should not be the end of the matter. Consideration should also be given to appropriate ways in which those adverse impacts can be ameliorated. In this particular instance one such matter would be the appointment of a "special advocate" who could participate in the closed hearing and advance arguments to advance and protect the applicant's interests while not actually representing the applicant in the sense of revealing the sensitive information to that (or indeed any other person) or taking instructions in the traditional sense. Given the novelty and complexity of the issues involved in the role of such a "special advocate" it is considered that the matter better lends itself to a legislative, rather than a judicial, solution. The Committee could perform a valuable role in highlighting the need for government to address such matters and propose constructive solutions with a view to overcoming what otherwise could be characterized as undue impacts on fundamental rights.

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

In the context of criminal law and procedure, the right to a fair trial and to procedural fairness are rights within the UDHR which was adopted and proclaimed by the United Nations General Assembly on 10 December 1948. These rights are addressed in:

> ***Article 10.*** *Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*
>
> ***Article 11.*** *1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence...*

Article 14 of the ICCPR provides in some detail for those guarantees of fairness of such proceedings and of procedural fairness to be observed in their conduct.

In civil law and procedure, the fairness of contested hearings and the procedural fairness to be accorded to litigants at all stages are the subject of legislation, regulation, rules of court and common law.

The Bar Association considers that rights to fair trial and procedural fairness are core rights and essential to the proper functioning of a healthy democratic state under the just rule of law. It is always in the general public interest that such rights be protected and consequently any incursions into them that are contrary to the provisions and guarantees of the UDHR and the ICCPR could not be said to be in the public interest.

The Bar Association also repeats what it said above regarding legislation such as the *Security Industry Act* and the need for governments (and the Committee) to more actively consider ways in which procedural unfairness can be minimised.

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

The Bar Association considers that it is problematic that the Discussion Paper provides no clear definition of "fundamental principles and rights." The Bar Association recommends that consideration be given to the rights enshrined in the ICCPR as well as the rights that have been adopted in Part 2 of the Victorian Charter, which are largely based on the ICCPR (Explanatory Memorandum, Victorian Charter, page 8).

The Bar Association reiterates its concerns about using the concept of balance in a manner that indicates that fundamental principles and rights and the public interest are apposite concepts weighed against each other. Fundamental principles and rights form part of the public interest. Even if they are not conceptualised in this fashion, the Bar Association proposes that fundamental principles and rights and the public interest are important considerations rather than weights which should be balanced against each other.

The Bar Association recommends that in all cases fundamental principles and rights should be considered where they are affected by legislation and refers to the approach to assessing legislation it has proposed in section 4.3 of this submission as the approach that should be taken to considering matters of fundamental principles and rights.

It is not clear the extent to which the Committee is considering referral of these considerations to Parliament. In many instances the consideration of these matters is appropriate to the adoption and scrutiny of legislation. The Bar Association does not consider that it would be consistent with the separation of powers that any referral practice should operate so as to require judges to refer matters back to parliament and exclude appropriate judicial consideration of these matters in individual cases.

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

As noted above, the Bar Association recommends the approach that it sets out in section 4.3 of this submission. Comparisons can be drawn between that approach and the notion of "overbroadness" considered by the Canadian Courts and described in the Discussion Paper. This comparison has its limitations, particularly in the absence of a clearly defined bill of rights, like the Canadian Charter or the UK *Human Rights Act*. Further, the second limb of the test articulated in *R v Beauchamp* of 'balancing the State interest against the individual interest under section 1 of the [Canadian] Charter' should not be automatically equated with a balancing of the public interest and fundamental principles and rights.

The operation of the doctrine of separation of powers means that consideration should be given to whether tests that are considered useful to Courts, might not be useful to the legislature in the same way. The legislature does not operate under the same restrictions as the judiciary in many respects, for example it is not bound by the operation of precedent or court hierarchy. Consequently the way in which the High Court of Australia might consider the application of the law to the facts in the *Gypsy Jokers* and *K-Generation* cases might be quite different to the approach which might be used by a parliamentary committee to scrutinise a piece of legislation. Similarly a parliamentary committee is not restricted in the same way as courts are restricted in its considerations of international instruments to which Australia has become bound and may consider instruments such as the ICCPR with considerably more freedom than most Australian courts.

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

The Bar Association suggests that similar considerations apply to this question as to those expressed in the response to question seven and refers to that response, to the extent that it is relevant.

The Bar Association advocates the approach proposed in Part 4.3 of this submission. This approach could have been integrated into the approach taken by the Committee in relation to the assessment of legislation regarding adequate housing for registrable persons, in addition to the stated considerations of the right to adequate housing, retrospectivity, procedural fairness and the exclusion of judicial review. The Bar Association suggests that, if such an approach had been taken, a more rigorous consideration could have been given to consider whether or not a manifest and compelling case was made out in relation to the encroachments proposed by the amended legislation.

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

'Criminal intelligence' in its ordinary meaning is information coming to the attention of law enforcement agencies in their investigation of criminal offences. Such information may become admissible evidence in court proceedings, or it may not. The nature of such information may vary enormously - from direct observation by a law enforcement officer, to material items of various kinds, to reports from observers, informants and so on. In legal terms it may become direct evidence, even of a circumstantial kind. It may be hearsay or it may be second-hand, third-hand, fourth-hand, etc hearsay - or even speculation on someone's part that may or may not ultimately prove to be accurate. The weight it carries and the use to which it is put must be assessed by the investigators concerned as the investigation proceeds.

The right to procedural fairness and due process in the criminal law context typically includes: disclosure in advance of trial to a defendant of all relevant material known (whether it aids the prosecution or defence); the opportunity to test material relied upon by the prosecution, whether by cross-examination of witnesses, physical testing of material items, expert opinion evidence, etc; the opportunity to be heard in answer to allegations; and the other guarantees of Article 14 of the ICCPR. It also includes the opportunity to test the bona fides and propriety of the conduct of the prosecution and its supporters. The Bar Association adds that these issues arise not only in the context of criminal proceedings, but also in administrative review proceedings such as those in the ADT under the Security Industry Act.

The use of criminal intelligence in a confidential manner during the investigation phase may not breach the right to procedural fairness and due process and may be perfectly appropriate; but when a hearing is contemplated, those considerations necessarily arise. If a court is entitled to use criminal intelligence in a confidential manner, then:

(a) the case against the defendant will not be disclosed;
(b) the defendant will not be able to test the information - its provenance, its reliability, its weight, its place in the decision making process;
(c) the defendant will not be able to counter the information;
(d) the defendant will not be able to address the significance of the information;
(e) the court becomes partial - privy to information known to only one party and necessarily influenced by it;
(f) the trial becomes unfair (see Question 5 above);
(g) the trial becomes no longer a 'public trial', in that some information on which the court acts is hidden from view; and that may seriously erode public confidence in the judicial process.

As noted above in the discussion concerning the *Security Industry Act*, the Bar Association considers that the public interest would be far better served if constructive consideration were

given to ways in which the clearly adverse consequences of the confidential use of criminal intelligence in contested proceedings could be mitigated, including by the possible use of a special advocate procedure.

Question Ten. **Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principles of fundamental justice, including what should constitute as an undue trespass on personal rights and liberties.**

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

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

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

It is the position of the Bar Association that any encroachment in respect of fundamental principles should be strongly discouraged. Where encroachment is considered, the test proposed in Part 4.3 of this submission should be most rigorously applied.

29 July 2010