



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: MM:VK: 1306725

24 June 2010

Mr Allan Shearan MP  
The Chair  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Shearan,

**RE: Public Interest and the Rule of Law Discussion Paper**

The New South Wales Law Society's Human Rights Committee ("the Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation in respect of issues of human rights; and to advise the Law Society Council on any proposed changes.

The Committee welcomes the opportunity of responding to the *Public Interest and the Rule of Law Discussion Paper* (the "Discussion Paper") tabled by the Legislative Review Committee (the "Review Committee").

In doing so, the Committee notes that the Review Committee is "seeking comment in relation to the principles it should apply when considering bills that trespass on personal rights and liberties in the context of issues which involve the public interest".<sup>1</sup>

**1. Summary of the Committee's views**

The Committee's overall view is that the tension between the public interest and fundamental rights and liberties is best dealt with by the application of standards which Australia has committed to under international law. In particular, Australia has ratified the provisions of the *International Covenant on Civil and Political Rights*<sup>2</sup> ("ICCPR"), the main treaty on international human rights. The ICCPR itself provides the framework for dealing with any tension between the public interest and fundamental rights.

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<sup>1</sup> *Public Interest and the Rule of Law: Discussion Paper*, Legislative Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW]: The Committee, 2010 (hereinafter referred to as the "Discussion Paper") at p. v

<sup>2</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Australia's ratification had effect from 13 November 1980.

To this end, the Committee respectfully urges that the Review Committee recommend the NSW Parliament to either:

1. Introduce human rights legislation identical or similar to the Victorian Charter of Human Rights and Responsibilities<sup>3</sup> (the "Victorian Charter"), which is based almost wholly on the ICCPR. This action would also bring the NSW Parliament in line with its international law obligations; or
2. Replicate the measures set out in Australia's Human Rights Framework ("Framework") announced in April 2010 by the federal Attorney-General.

These recommendations are explained in further detail below.

## **2. Introduce human rights legislation**

The ICCPR has now been ratified by 167 countries. Under international law ratification of that treaty by Australia (and any other country) requires each level of government to observe the terms of that treaty. The Committee is aware of the contention that because Australia is a federation with legislative powers divided between Commonwealth and the States, the State Parliaments are not bound to observe international law in this respect, unlike the federal Parliament. However, under international law, this is not so. The obligations Australia takes on when it ratifies a treaty is unaffected by internal legal arrangements.<sup>4</sup>

As noted previously, the ICCPR itself provides the framework for dealing with any tension between the public interest and fundamental rights.

It is instructive to look at the ICCPR's history. The starting point was the adoption by the United Nations in 1948 of the *Universal Declaration of Human Rights*<sup>5</sup> ("UDHR").

The UDHR was a reaction of the world community including Australia to the atrocities of World War II, in which 50,000 Australians lost their lives. It is not therefore surprising that the Chifley government and in particular, the federal Attorney General at the time, Dr H V Evatt<sup>6</sup> had an important role in the drafting of UDHR.

In 1952 the UN decided to assist the implementation of the UDHR provisions into the laws of its member nations by drafting two separate treaties, the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*<sup>7</sup>. These treaties were finally released for signature in 1966 and were ratified in Australia by the end of 1980. It is notable that the ICCPR was ratified by the Fraser

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

<sup>4</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 27.

<sup>5</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

<sup>6</sup> The Committee notes that Dr Evatt was a former member of NSW Legislative Assembly.

<sup>7</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3



Liberal/National government with the support of the Labor opposition. From that time Australian governments have had an obligation under international law to legislate the terms of the ICCPR into our domestic law. This is usually done by introducing Bills or Charters of Rights or other human rights legislation.

Of the 167 countries that have ratified the ICCPR, 166 countries now have such legislation, either in constitutional or ordinary legislative form. Australia is the only ratifying country which currently has not enacted fundamental rights legislation in any form, except in Victoria and the ACT.<sup>8</sup> In each of the countries which has enacted human rights legislation, the legislation provides a framework that governs the questions which the Review Committee is considering.

Consequently, the Committee's view is that the way to resolve the questions which the Review Committee raises is for the NSW Parliament to adopt fundamental rights legislation as an ordinary act of Parliament. Such legislation has already proved to be a success in Victoria<sup>9</sup> and the ACT. The Committee recommends that because of the increasing respect which the Victorian variant is obtaining, the simplest solution for NSW would be to replicate the Victorian Charter, which is based almost wholly on the ICCPR.

The Discussion Paper implies that the rights contained in the ICCPR are vague and require clarification<sup>10</sup> but the Committee respectfully disagrees. The ICCPR forms the basis of most of the Bills or Charters of Rights which have either been implemented or amended over the last 40 years and there is now an extensive bank of precedents in the laws of the democratic countries which tell us what those rights mean, where there is any doubt.

In particular, one of the most influential Courts in the world today, the European Court of Human Rights, which oversees the application of the human rights laws of 47 countries, has already laid down the precedents which explain the meaning of those laws which, like the Victorian Charter originated in the principles set out in the UDHR. This bank of precedents is available as a guide to Australian Courts to the extent that any Australian human rights legislation needs interpretation.

The Committee supports the introduction of human rights legislation in NSW Parliament at the earliest opportunity. It is perhaps more important for State Parliaments to introduce such legislation than it is for the Commonwealth because State Parliaments administer most of the laws which impinge on personal liberty: in the areas of policing; prisons and mental health facilities which hold people in detention; and, of course, the Courts and the criminal justice system.

Any problems that might arise from the introduction of such a Charter could easily be addressed by legislative action given that the NSW Parliament could amend it at any time. In response to the argument that there is a transfer of power involved

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<sup>8</sup> The Committee notes that the only other independent polities in the world which do not have fundamental rights legislation in some form are the Sultanate of Brunei, Myanmar (Burma) and Thailand.

<sup>9</sup> Interestingly, the Victorian Parliament passed its Charter only three months before the 2006 State election in that State and the government which introduced the legislation was victorious at the election. Mr Hulls M.P., the Attorney General who sponsored that introduction, was promoted to Deputy Premier after the election.

<sup>10</sup> *Discussion Paper* note 1, at pp 2-3.

in such an ordinary act of Parliament; the Committee notes the fact that it is the Parliament that drafts the legislation in the first place. If the Parliament wishes to restrict the Courts' involvement, it has the power to do so. In the case of the Victorian Charter, the Victorian Parliament excluded abortion rights and indigenous self-determination from the Charter's purview and carefully confined the interpretation power to ensure that the interpretation is consistent with the intention of the other legislation with which it may conflict. As human rights legislation works in every other democratic country in the world, including Britain, Canada, New Zealand and the 47 countries of Europe, the Committee believes that it would function as least as well in NSW.

The Committee respectfully urges the Review Committee to recommend the NSW Parliament to enact human rights legislation in accordance with the NSW Parliament's obligations under international law. In doing so, the Committee refers the Review Committee to the comprehensive report of the National Human Rights Consultation<sup>11</sup> chaired by Professor Frank Brennan which reported to the federal Attorney General last year and took a similar view to the Committee.

### **3. Replicate the measures in Australia's Human Rights Framework**

Should the Review Committee not be persuaded to recommend the introduction of comprehensive human rights legislation similar to that in Victoria (or the similar legislation in Britain), the Committee recommends to the Review Committee a secondary position, which is that the NSW Parliament should replicate the measures set out in Australia's Human Rights Framework ("Framework") announced in April 2010 by the federal Attorney-General.

As the Review Committee may be aware, the Framework reaffirms the federal government's commitment to upholding Australia's obligations under the seven main international human rights treaties, recommends the establishment of a Federal Parliamentary Joint Committee on Human Rights, further recommends the production of human rights compatibility statements for all new federal legislation, increased funding for human rights education and proposed a review of all current federal legislation and federal government policies and practices in accordance with the treaty standards.

The Committee strongly supports the early introduction of those Framework measures tailored by the NSW Parliament for this State.

Once again, the Committee is grateful for the opportunity to put these views to the Review Committee and looks forward to considering the Review Committee's report in due course.

Yours sincerely,

  
Mary Macken  
President

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<sup>11</sup> National Human Rights Consultation Committee, Attorney-General's Department National Human Rights Consultation Secretariat, Parliament of Australia, *National Human Rights Consultation Report* (2009) online: <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report> [accessed 10 June 2010]