Submission No 1

OPERATION OF THE LEGISLATION REVIEW ACT 1987

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Mr Michael Johnsen MP
Chair
Legislation Review Committee
Parliament House
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Sydney, NSW 2000

By email: Legislation.Review@parliament.nsw.gov.au

Dear Chair

Thank you for the opportunity to make a submission to the Legislation Review Committee with respect to its inquiry into the operation of the *Legislation Review Act 1987* (NSW) ('the Act'). This submission is written by academics and students at the Faculty of Law, University of New South Wales, including members of the Gilbert + Tobin Centre of Public Law. We are solely responsible for the views and content in this submission.

We start by acknowledging the high quality of the work that has been undertaken by the Committee in providing a scrutiny over bills since the expansion of its terms of reference in s 8A of the Act in 2003. It is our view that the members of that Committee and its supporting staff have worked diligently to meet its mandate, often under the pressures of a heavy workload and under short deadlines.

Despite the hard work of Committee members and the Committee's supporting staff, there are nonetheless significant shortfalls in the institutional design of the Committee, which has meant that often its work is ineffective in informing parliamentary debate with respect to human rights concerns. Unless changes are made to this design, the work of the Committee risks providing a veneer of human rights legitimacy to the government's legislative agenda.

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In this submission we assess the need for improvements to the review of bills by the Committee through three key criteria, which have been identified as underpinning similar legislative human rights scrutiny regimes.[1] These are:

1. the Committee's impact on the quality of parliamentary debate over the human rights implications of Bills ('deliberative impact');
2. the Committee's impact on improving the quality of legislation from a human rights perspective, including through securing amendments to Bills ('legislative impact'); and
3. its capacity to increase community awareness and knowledge of rights issues with respect to the government's legislative agenda ('public impact').

We make two key submissions:

1. The processes of the Committee and the Parliament in receiving the Committee's report need to be improved so that it can have greater deliberative, legislative and public impact.
2. More comprehensive institutional rights protection must be introduced, and specifically a role for the judiciary is required in the scrutiny of legislative action for compliance with fundamental human rights.

Submission 1: Improvement to Processes of the Committee and the Parliament

Provision of adequate time for Committee to report

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. Currently, under the Standing Orders of the Houses, debate on a Bill in the Legislative Assembly must be adjourned for five clear calendar days following its introduction,[2] and debate in the Legislative Council must be adjourned for five calendar days.[3] This is the position unless a Bill is declared urgent,[4] or standing orders have been suspended,[5] in which case the government may progress a Bill through both Houses of Parliament according to a timetable of its own devising.

We have a number of concerns about the current framework. Ordinarily, the five days adjournment allows the Committee to publish its *Digest* just in time for the recommencement of debate. The purpose of adjournment is to allow adequate time for the Committee to perform its scrutiny function and to give Members the opportunity to consider Bills. We are

1 Drawn from similar criteria that were established in George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash University Law Review* 469, 472.

2 Legislative Assembly Standing Orders, Order 188(10).

3 Legislative Council Standing Rules and Orders, Order 137.

4 Legislative Assembly Standing Orders, Order 189; Legislative Council Standing Rules and Orders, Order 138.

5 Legislative Assembly Standing Orders, Order 365; Legislative Council Standing Rules and Orders, Order 198.

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.

> **Recommendation 1:** The *Legislation Review Act* be amended to include a requirement that, unless a bill is declared urgent (see recommendation 2, below), debate on a Bill in the Legislative Assembly must be adjourned for 10 clear calendar days following its introduction, and debate in the Legislative Council must be adjourned for 10 calendar days.

Our other concern is that those Bills that are declared urgent and progressed apace through both Houses are often the most likely to impinge upon 'personal rights and liberties.' Take for example the passage of the *Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016* (NSW). As passed, it amends the *Terrorism (Police Powers) Act 2002* (NSW) to authorise the arrest, detention and questioning of terrorism suspects as young as 14 years of age without a warrant for a total maximum period of 14 days.[6] It also provides police with the power to monitor a suspect's contact with family members,[7] as well as the power to request that a Court make a prohibited contact direction to prevent the suspect from contacting third parties, including legal representatives, all with retrospective as well as prospective effect.[8] The Committee's *Digest* containing its review of the Bill was tabled in both Houses on 10 May 2016, the same day it was passed in the Legislative Assembly and introduced in the Legislative Council. 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,[9] the standing orders were suspended and the Bill was passed the following day. As a result, there was little if any time for Members to consider the Committee's findings and for them to have the desired deliberative and legislative impacts. This is borne out by a search of Hansard, which reveals that no mention was made of the *Digest* in the debate on the Bill in the Legislative Council before its passage into law.

It is common for the Parliament to use declarations of urgency, or suspension of standing orders so that a Bill is passed by Parliament before the Committee has had sufficient time to scrutinise it and publish its findings in the *Digest*. On those occasions, the Committee's scrutiny function is stripped of all import in the legislative process, both by depriving Members of the opportunity to engage in informed debate about the human rights implications of Bills before them, and also depriving Members of the corollary opportunity to secure amendments that will improve the quality of legislation from a human rights perspective. One such example is the recent passage of the *Sydney Public Reserves (Public Safety) Bill 2017* (NSW). This Bill was prompted by the Government's concerns over the Martin Place 'tent city,' which for a number of months was home to many of the city's homeless. As passed, it gives police officers the power to: give a direction to a person or

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6 *Terrorism (Police Powers) Act 2002* (NSW), ss 25E, 25F and 25H.

7 *Terrorism (Police Powers) Act 2002* (NSW), s 25L.

8 *Terrorism (Police Powers) Act 2002* (NSW), 25M and 25B(3).

9 New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest* (No. 18/56) (10 May 2016), 16-19 < https://www.parliament.nsw.gov.au/committees/DBAssets/CommitteesDigest/AddInformation/585/Digest%2018-%2010%20May%202016.pdf>

group of persons to move on from Martin Place Reserve and not return for as many as 6 hours,[10] and; seize and remove (and potentially dispose of) tents and other property to expedite the removal of a person or group of persons.[11] Moreover, the Bill makes it an offence to refuse to comply with such a direction or to obstruct a police officer from seizing and removing property.[12]

Evidently, a number of significant issues arose from the Bill in respect to its potential impacts on 'personal rights and liberties,' which the Committee highlighted in its *Digest* tabled in both Houses of Parliament on 12 September 2017. Among other things, the Committee was concerned that the Bill trespassed on the rights to: access and use public space; personal property, and; freedom of assembly and association.[13] However, after being introduced in the Legislative Assembly on 8 August 2017, it passed the following day and was introduced in the Legislative Council, whereupon standing orders were suspended which allowed the Bill to be passed by Parliament after minimal debate that same day. 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.

Under the *Legislation Review Act*, '[a] House of Parliament may pass a Bill whether or not the Committee has reported on the Bill,' although the Committee is not precluded from issuing a *Digest* after the passage of a Bill.[14] 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 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.

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10 *Sydney Public Reserves (Public Safety) Act 2017* (NSW), ss 7(1) and (3).

11 *Sydney Public Reserves (Public Safety) Act 2017* (NSW), ss 8(1) and (4).

12 *Sydney Public Reserves (Public Safety) Act 2017* (NSW), ss 7(4) and 8(3).

13 New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest* (No. 42/56) (12 September 2017), 28-31 < https://www.parliament.nsw.gov.au/committees/DBAssets/CommitteesDigest/AddInformation/609/Digest%20No.%2042%20-%2012%20September%202017.pdf>

14 *Legislation Review Act 1987* (NSW), s 8A(2).

Recommendation 2: The *Legislation Review Act* be amended to state that the government may only deem a Bill to be urgent, such that the Bill will receive the Committee's scrutiny after it is passed by Parliament, in exceptional circumstances. Where the government claims that a Bill is urgent, the relevant Minister should be required to table a statement of reasons in both Houses of Parliament:

- 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.

Parliamentary response to Committee's reports

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.[15]

Recommendation 3: That, unless a Bill is declared urgent (see recommendation 2, above), Standing Orders mandate that Ministers must address matters identified and referred by the Committee in their Second Reading Speech.

Articulating personal rights and liberties

Section 8A of the Act currently outlines the scrutiny function of the Committee with respect to all Bills introduced to Parliament. It relevantly provides that the Committee is to 'report to both Houses of Parliament as to whether any such Bill, by express words or otherwise … trespasses unduly on personal rights and liberties.'[16] The Act, however, does not define the scope of the phrase 'personal rights and liberties,' and does not provide any guidance as to the sources of rights and liberties to which the Committee should refer when it scrutinises Bills. In its 2010 Discussion Paper, *Public Interest and the Rule of Law*, the Committee noted that in the absence of any definition of 'personal rights and liberties' in the Act or the Constitution of NSW, it has regard to a range of sources in determining which rights and liberties a Bill infringes, including Australian and international law.[17] This lack of guidance means that, presented with myriad and voluminous domestic and international sources of human rights, the Committee's scrutiny of Bills has the potential to become a shallow, or even arbitrary, exercise lacking the depth and focus required in determining the limits of legitimate law-making.

We adopt the view which the Legislative Council Standing Committee on Law and Justice set out in its report following the 2001 inquiry into a NSW Bill of Rights, wherein it

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15 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.

16 *Legislation Review Act 1987* (NSW), s 8A(1)(b)(i).

17 New South Wales Parliament, Legislation Review Committee, *Public Interest and the Rule of Law* (May 2010), 2.

acknowledged that 'Parliament has a responsibility to protect human rights.'[18] To be able to effectively discharge this responsibility, the Standing Committee suggested that 'members of Parliament, as law-makers, become more familiar with the standards of human rights and apply these to their consideration of legislation.'[19]

> **Recommendation 4:** The human rights standards against which Bills are scrutinised should be made explicit in the Act, so as to effect a meaningful improvement in the deliberative and legislative impact of the NSW Parliament. This could be achieved, preferably, through the enumeration of those personal rights and liberties in the legislation so that parliamentarians and others have an express and limited reference point to identify the relevant standards of scrutiny. Alternatively, it could be achieved by reference to those rights recognised in the seven core international human rights treaties, to which Australia is a party, as defined in section 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Workload of the Committee

The Act currently tasks the Committee with the review of both legislation and regulations.[20] The Committee was established in its current form following the passage of the *Legislation Review Amendment Act 2002* (NSW), which amended the existing *Regulation Review Act 1987* (NSW), including by renaming it the *Legislation Review Act 1987* (NSW).[21] The 2002 Act embodied the then government's response to the recommendations of the Legislative Council Standing Committee on Law and Justice following its inquiry into whether NSW should adopt a bill of rights. In combining the functions of legislation and regulation review in the one committee, the government went against the recommendation of the Standing Committee on Law and Justice that a new joint committee be established, so as to create a separate committee for scrutiny of Bills and a separate committee for the scrutiny of regulations, to avoid placing too heavy a burden on the one committee.[22]

Given that the Legislation Review Committee no longer publishes annual reports, it is hard to locate statistics or other consolidated information regarding scrutiny of regulations by the NSW Parliament, although the Committee's digests do set out concerns the Committee has with regulations from time to time. According to the procedural statistics published by the Legislative Assembly on 22 June 2017, in the 2016-17 financial year there were 304 statutory rules and instruments tabled.[23] A search of Hansard suggests that there have been very few debates on disallowance motions in the current Parliament.

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18 New South Wales Parliament, Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights* (October 2001), 115.

19 Ibid.

20 *Legislation Review Act 1987* (NSW), Pt 3.

21 *Legislation Review Amendment Act 2002* (NSW), sch 1, cl 1.

22 New South Wales Parliament, Legislative Council Standing Committee on Law and Justice Report 17: *A NSW Bill of Rights* (October 2001), recommendation 1, 132.

23 New South Wales Parliament, Legislative Assembly, Procedural Statistics No. 8 (23 May-22 June 2017) <https://www.parliament.nsw.gov.au/la/papers/Documents/2017/22-june-2017-procedural-statistics/Procedural%20Statistics%202016%20-%20561%20-%2016-17%20fin%20year%20No.%208.pdf>

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.

> **Recommendation 5:** Provision should be made in the Act for a Regulation Review Committee. As was previously the case, the Regulation Review Committee should also be a joint committee.[24] It should be given adequate administrative support, including officers with expertise in policy and law to assist it in providing advice to Parliament regarding any instruments tabled before it.

Constitution of Committee

The Act currently requires the Committee to be comprised of 8 members, 3 from the Legislative Council and 5 from the Legislative Assembly.[25] No government has held a majority in the New South Wales Legislative Council since 1988. Given this, the upper house is generally regarded as a more effective chamber of review. While we note that there are arguments in favour of transferring the Committee to the Legislative Council, we consider it is preferable that it remain a joint committee. In support of this we draw upon the rationale of the Legislative Council Standing Committee on Law and Justice in recommending, following its 2001 inquiry into a NSW Bill of Rights, that the Committee be a joint committee, which is that 'the protection of rights and liberties [should be] the responsibility of the whole Parliament.'[26]

However, we consider that the current composition of the Committee, with 5 government members and 3 non-government members, leaves the processes of the Committee too open to executive domination, which is not conducive to effective scrutiny of Bills. Further, it may also hamper the capacity of the Committee to make a substantial contribution to Parliament's deliberation of matters of great importance to the NSW community.

> **Recommendation 6:** Section 5(2) of the Act, which currently leaves the appointment of members to the 'practice of Parliament' should be amended to require that the Committee be comprised of four government members and four non-government members. Section 5 should further specify that the committee chair be a government member who holds a casting vote in the event of disagreements as to content of digests or other Committee reports.

Deliberation and community participation

We note that aside from its general scrutiny function, the Committee rarely undertakes wider inquiries and, owing to time constraints and other pressures, does not take evidence from

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24 It is noted that the New South Wales Parliament Legislative Council Select Committee on the Legislative Council committee system recommended the establishment, on a trial basis, of a Legislative Council Regulation Committee 'to consider policy and other issues relating to delegated legislation' see Report of the Select Committee (November 2016), recommendation 3, 3-5.

25 *Legislation Review Act 1987* (NSW), s 5(1)(a) and (b).

26 New South Wales Parliament, Legislative Council Standing Committee on Law and Justice Report 17: *A NSW Bill of Rights* (October 2001), 132.

stakeholders or the community when reviewing Bills. Where the Committee considers that a Bill infringes a right or liberty, the Committee refers the matter to Parliament for its consideration. However, some Bills raise complex concerns and may require more considered scrutiny than is provided in ordinary parliamentary debates.

> **Recommendation 7:** The Act be amended to require the Committee, where it has identified significant human rights or wider policy concerns with a Bill, to also make a recommendation that the Bill be further considered by a relevant parliamentary committee. In keeping with the usual practice of Parliament, the members themselves can then consider whether to follow this recommendation by referring it to a further committee. This may help to facilitate participation by the wider community in the legislative process, as, if the recommendation is taken up, there will be a chance for the public to engage with the secondary inquiry through submissions and public hearings. The inclusion of such a change in the Act may assist to improve Parliament's deliberation of legislation that infringes rights or liberties or have other significant implications for the people of NSW.

Public engagement

The Committee performs a vital function in the operation of the New South Wales Parliament, but its work is largely invisible to the wider community. While we accept the existence of practical limitations, including those driven by budgetary restraints, there are a few simple and inexpensive ways that the Committee could better engage the public with its work.

> **Recommendation 8:** That the Committee issue brief media releases to notify of the publication of its digests. Digests could also be linked to on social media accounts, for instance via Twitter in a manner similar to the way the New South Wales Parliamentary Library Research Service uses this platform. The Committee should also resume its practice of publishing annual reports.

Submission 2: Introduction of more comprehensive institutional rights protection

At present under the *Legislation Review Act*, the Committee's rights scrutiny function operates in isolation from the other branches of government. This stands in noted contrast to the adoption in most other jurisdictions of a parliamentary-based rights protection model, including the Victorian *Charter of Rights and Responsibilities Act 2006* (Vic), the ACT's *Human Rights Act 2004* (ACT), the UK's *Human Rights Act 1998* (UK) and the New Zealand *Bill of Rights Act 1990* (NZ).

This lack of more comprehensive institutional rights protection undermines the capacity of the Committee to fulfil its functions. It undermines the quality of information that is available to the Committee to assist it in its scrutiny function. This could be remedied through the involvement of the executive, through the provision of a statement to the Parliament providing its view on the compliance of a Bill with the rights and liberties set out in the Act, together with any additional information that supports that view.

The other difficulty is that there are few incentives in the current regime for the government to comply with the regime and to protect human rights when introducing new legislation. As Daniel Reynolds and George Williams have argued: 'giving the judiciary a role to play, the responsibility of ensuring compliance with human rights would no longer fall exclusively on the branch of government most frequently charged with breaching those rights.'[27] This could be remedied through the introduction of a judicial interpretative role, as exists in Victoria, the Australian Capital Territory, the United Kingdom and New Zealand. While this would in some respects reflect the existing common law principle of legality through which the courts are already applying this legislative presumption, this change would mean there is greater clarity as to which rights and liberties are engaged by the presumption, and provide a more direct incentive for compliance with the regime.

Recommendation 9: The *Legislation Review Act* be amended so as to require the Attorney-General to table in both Houses of Parliament a Statement of Compatibility for every Government Bill introduced and for every regulation made. The Statement would explain why or why not the government believes that the Bill or regulation complies with the personal rights and liberties set out in the Act (see recommendation 4). The Statements should also be required to state the kinds of consultation with relevant stakeholders that has been undertaken in developing the policy behind the Bill or instrument in question. The Act should provide that, where the Committee forms the view that insufficient consultation has taken place, it has the power to call its own witnesses and hold a public inquiry in relation to the measure. Should a Regulation Committee be established, it is recommended that it be given the same power.

Recommendation 10: The *Legislation Review Act* articulate an obligation for courts in New South Wales to interpret legislation consistently with the personal rights and liberties set out in the Act (see recommendation 4) as far as possible consistent with the purpose of the legislative provision. If the Court is unable to interpret legislation consistently with the rights and liberties set out in the Act, the Court must issue a Statement of Inconsistency.

Recommendation 11: If a Statement of Inconsistency is issued by a court, the Minister responsible for the legislation must table a written response in both Houses of Parliament within 3 months of the issue of the judgment, which explains whether the legislation will be amended to be consistent with the rights and liberties set out in the *Legislation Review Act*, or the reasons why not.

[27] Daniel Reynolds and George Williams, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash University Law Review* 469, 507.

Yours sincerely

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