

**Submission
No 2**

OPERATION OF THE LEGISLATION REVIEW ACT 1987

Organisation: NSW Council of Social Service
Name: Ms Tracy McLeod Howe
Position: Chief Executive Officer
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30 November 2017

Mr Michael Johnsen
Chair
The Legislation Review Committee
Parliament House
Macquarie St
Sydney NSW 2001

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

Re: Inquiry into the operation of the Legislation Review Act 1987

Dear Mr Johnsen,

Thank you for the opportunity to respond to this inquiry.

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities.

We are an organisation committed to promoting the understanding, engagement and protection of human rights in NSW with a focus on community sector organisations and people who experience disadvantage.

NCOSS acknowledges the important role of the Legislation Review Committee (the 'Committee') in highlighting and bringing to the attention of the NSW Parliament the impact laws may have on the human rights of people in NSW.

NCOSS limits its response to this inquiry to the first term of reference: whether the Act provides for sufficient review of Bills in relation to "personal rights and liberties". NCOSS seeks to provide the Committee with practical suggestions to improve its role and functions to promote human rights in NSW. To that end, NCOSS wishes to submit the following:

1. Enactment of a Charter of Human Rights

NCOSS believes the NSW Parliament should enact a statutory NSW charter of human rights similar to Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('the Charter'). The Charter requires public authorities, such as Victorian state and local government departments and agencies, to act consistently with human rights set out in the Charter. A charter similar to Victoria's would, *inter alia*, cover a range of basic human rights such as the right to be treated equally, to be safe from violence and abuse, to humane treatment, and to self-determination. The charter would be an essential adjunct to protections currently afforded under the common law. A charter would foster dialogue both within and between the arms of government, ensuring laws are consistently in alignment with civil and political rights. It has the potential to be a powerful educative tool, alerting people to their rights and the rights of others. Most relevant to this inquiry, the charter would provide a clear and comprehensive human rights framework for the Legislative Review Committee to analyse bills and regulations.

While Victoria's charter of human rights provides a possible and worthy model for the NSW Parliament to emulate, NCOSS strongly recommends that in developing a charter the Parliament undertake extensive consultation with the community and interest groups, in particular human rights experts, Aboriginal people, people with a disability and members of the LGBTI community. Ideally,

this consultation should occur in parallel with any proposed revisions to the Act. Alternatively, NCOSS recommends that a charter be developed within the first 12 months of the next parliament.

2. Expanded human rights scrutiny role

The current ability of the Committee to recommend legislative change and provide adequate protection of “personal rights and liberties” is limited in several aspects. The Act in its current form makes no mention of the human rights standards the Committee should be referring to when analysing Bills for their human rights implications, nor does it provide guidance as to how such an analysis should be conducted. As noted in the research undertaken by Andrew Byrnes¹ and Luke McNamara,² the Committee may be failing to identify a substantial proportion of civil, political and cultural rights issues because it lacks “a clear and comprehensive set of standards and framework for full human rights analysis...”.³ NCOSS submits that a statutory charter of human rights and guidance material on how the Committee should go about its scrutiny work would go part way to addressing this limitation.

It has been asserted by legal experts in this area that controversial legislation containing serious human rights concerns has been rushed through parliament with no opportunity for pre-enactment scrutiny, which has allowed Government to avoid the scrutiny of Parliament on the grounds of ‘urgency’.⁴ The Committee is therefore seen as lacking sufficient powers to ensure Parliament debate serious human rights matters referred to it by the Committee, or oblige the Minister to respond to questions raised. Concerns have also been raised about identifying the impact of the Committee’s scrutiny work.⁵

To address some of the limitations associated with the Act and the corresponding work of the Committee, NCOSS submits that either:

- 1) The Committee’s roles and responsibilities be expanded to expressly include the scrutiny of bills measured against an agreed set of human rights. The proposed NSW Charter of Human Rights and Responsibilities, as noted above, provides one possible reference source, as do the human rights treaties Australia is a signatory to and which the Commonwealth Parliamentary Joint Committee on Human Rights refers to when assessing human rights implications of newly developed laws; or
- 2) The Parliament 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.

Under either of these arrangements and structure, the Committee would be empowered to inquire into and report on bills giving rise to human rights concerns. This would include calling for submissions from the public, convening public hearings and examining witnesses. This is imperative if the Committee is to achieve the objectives of facilitating an increased level of community engagement with the parliament. It would also be empowered to consider statements of

¹ Byrnes, A (2009) 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, found at <http://www.austlii.edu.au/au/journals/UNSWLRS/2009/43.html>

² McNamara, L and Quilter, J (2015) Institutional influences on the parameters of criminalisation: Parliamentary scrutiny of criminal law bills in New South Wales, *Current Issues in Criminal Justice*, vol. 27, no. 1.

³ Ibid

⁴ Ibid. For instance, the Crimes (Criminal Organisations Control) Bill 2009 was rushed through both Houses of Parliament in one day (2 April 2009), while the NSW Committee was only able to deliver its critical report one month later.

⁵ Op. cit.

compatibility as well as conduct its own rigorous, evidence-based independent analysis to ensure effective scrutiny of Bills.

NCOSS believes implementing this reform would allow systematic and broader analysis of rights issues unlike the current approach which has been criticised for being ad hoc and focusing on a narrow set of civil liberty issues.

3. Strengthen scrutiny of legislation of the committee

There is a lot more that can be done to strengthen the capacity of the Committee in reviewing legislation to ensure greater compliance with NSW human rights obligations. One small change could be to replace 'personal rights and liberties' in Section 8A with 'human rights', and include the expressed objective that NSW legislation is consistent with the promotion and protection of human rights. The Victorian Charter provides a good definition of human rights and clear rules for human rights assessments. We strongly recommend that in the absence of a charter of rights, the Act make reference to the seven treaties to which Australia is a signatory.⁶

For the Committee to fulfil a broadened mandate of scrutinising Bills for human rights implications, it will need more resources, including appropriate expert advisers. The research in this area shows effective scrutiny requires time for analysis and deliberation. It also requires that the results of scrutiny be available to the Parliament for the substantive debate on the Bill.⁷

The accountability and capacity of the Committee in the scrutiny of Bills could be further strengthened by requiring Ministers to provide reasoned statement as to why their legislation is consistent with human rights or why any inconsistency is justified. Ministers in Victoria, the ACT, New Zealand and the UK are already required to give some such statements.

NCOSS endorses a robust parliamentary committee system responsible for the scrutiny of legislation and examining and reporting on human rights issues. The work, accountability and scrutiny function of the Committee can be strengthened by making changes to the relevant Act that would bring it in line with current best practice which we believe operates in the Victorian and Federal parliaments.

If you require further information in relation to response, please contact Ben Folino, Policy & Research Officer on [REDACTED]

Yours sincerely

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Tracy McLeod Howe
Chief Executive Officer

⁶ These are listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act https://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/ctte_info/human_rights_act_2011.pdf?la=en

⁷ Evans, S and Evans C (2007) Australian Parliaments and the Protection of Human Rights, Papers on Parliament No. 47