Submission No 5

OPERATION OF THE LEGISLATION REVIEW ACT 1987

Organisation: NSW Council for Civil Liberties (NSWCCL)

Name: Ms Therese Cochrane

Position: Secretary

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NSWCCL SUBMISSION

THE ROLE AND FUNCTION OF THE LEGISLATION REVIEW COMMITTEE

30 November 2017

Contact: Dr Martin Bibby

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

http://www.nswccl.org.au
office@nswccl.org.au
Street address: Suite 203, 105 Pitt St, Sydney, NSW 2000, Australia
Correspondence to: PO Box A1386, Sydney South, NSW 1235
Phone: 02 8090 2952
Fax: 02 8580 4633

The NSWCCL is grateful for the invitation to make a submission to the Joint Legislation Review Committee with respect to the operation of the Legislation Review Act 1987 (NSW). We would welcome the opportunity to appear before the Joint Legislation Review Committee to address these matters further, and to answer questions.

Summary

The Legislation Review Committee (LRC) was created as an alternative to the adoption of a Bill of Rights for New South Wales. It has not functioned well, and is no substitute for such a bill.

We have noted problems in relation to uneven performance, lack of time, "urgent" bills, lack of impact, lack of clear standards, poor argument, lack of expert input and lack of attention to delegated legislation. The problems are manifest on the LRC's own website—in its annual reports, its legislation review *Digests* and its *Information Paper*.

The roots of most of these problems lie in the lack of time provided for the LRC to do its job, and in the entrenched culture within the NSW Parliament of ignoring its views.

Recommendations

Recommendation 1.
The LRC should recommend to parliament that it enact a bill of rights.
This, we believe, is the only way that these problems can be fully met.

Recommendation 2.
In the event that the LRC declines to recommend the adoption of a bill of rights, its membership should be expanded to include a number of former judges of the NSW Supreme Court. These should constitute one third of the total membership of the Committee. These should be full members of the LRC, with voting rights, and the right to present minority reports.

Recommendation 3.
To provide time for the LRC to do its job, an act should be passed amending the Constitution Act 1902, and the Standing Orders altered accordingly, ensuring that except in cases of emergency, where there is genuine need to pass a law in haste,[1] a bill must be held for at least two weeks after it receives its first reading, before it proceeds through either House of Parliament.

Recommendation 4.
Where a bill is exempted from the two weeks' delay because of emergency, the proposed act and the Standing Orders should require that it include a sunset clause ensuring that it will expire in at most six months.

[1] And not for mere convenience.

Recommendation 5.
The Act should be amended to require the LRC to make its determinations about whether proposed provisions unduly trespass on rights and liberties on the basis of a set of criteria, inscribed in the Act. These should model the argumentation of the High Court, when considering whether a provision justifiably infringes the implied right to free speech in the Constitution.

Recommendation 6.
The LRC should be required to report whether or not it considers that a provision trespasses unduly on rights and liberties, rather than merely referring such trespasses to the Parliament for consideration.

Recommendation 7.
A separate committee should be set up to report on whether proposed and existing subordinate legislation unduly trespass on civil rights and liberties.

Argument

The Legislation Review Committee could be the most prestigious committee of the New South Wales Parliament. Its members could gain reputations as statesmen and women, as guardians of our democratic society, as law reformers. Instead, it allows its processes to be subverted. It needs reform of its composition, its practice and in the way it is treated.

Its practice may be compared with that of the Scrutiny of Bills Committee of the Australian Senate. If concerns are raised, the Scrutiny of Bills Committee writes to the Minister responsible for the bill inviting a response to its concerns, and sometimes suggests an amendment. The Minister's response may include a revised version of a section of legislation, a slight alteration to the legislation or explanatory memorandum, or the response may better explain why the bill has appeared in its current form. If these responses do not allay the Scrutiny of Bills Committee's concerns, it will say so, and will draw the provisions in question to the Senate's attention through its Report.

Criteria for evaluating the performance of the Legislation Review Committee

The Legislation Review Committee was established in 2001 through the Legislation Review Act 1987 (NSW) as a consequence of an inquiry into whether New South Wales should adopt a Bill of Rights. It was feared that a bill of rights might threaten the sovereignty of Parliament, and argued that a committee could provide equivalent protection to rights.[2]

The appropriate criterion for judging the performance of the LRC is thus whether it provides the protections a Bill of Rights would offer. It cannot be said to have done so. The NSWCCL accordingly maintains its view that civil liberties and human rights would be better protected by the passage of a Bill of Rights than they have been or are likely to be by the LRC.

[2] See below. The CCL does not accept that the introduction of a bill of rights on the Canadian model provides any threat whatsoever to the sovereignty of parliament.

The functions of a bill of rights

A bill of rights is a statement of universal standards, standards against which the polity and practice of any society should be judged. It should serve to protect our fundamental rights and liberties, and those subordinate rights that follow from them, against intrusion by any of the three branches of government. It should codify our rights and freedoms in an accessible and comprehensive manner. It should ensure that our existing laws conform to those rights and liberties.[3]

On the Canadian model, a constitutionally entrenched Charter of Rights and Freedoms enables the courts to find that a bill that has passed through the parliamentary process is incompatible with those rights, and to strike the legislation down. The supremacy of parliament is maintained, because the parliament can then pass the legislation again, explicitly overriding the bill of rights.

There are a number of benefits of this arrangement:

it slows down hasty legislation, allowing more time for mature consideration and for comment both by legislators and the public;
it provides an accessible and comprehensive set of rights against which proposed legislation is judged;
the prestige of the judges gives weight to the judgements that they make, putting pressure on the legislators to further justify their intrusions on rights;
the process of over-ruling the Bill of Rights is very public, meaning that lawmakers are reluctant to pursue rights intrusions
the legal acumen of the judges complements the practical knowledge of the politicians.

Australia is the only democratic country in the Western world that does not have a national bill of rights. Two Australian jurisdictions, Victoria and the ACT, each have one. In the absence of a national bill of rights, New South Wales should have its own.

The performance of the LRC

In the past, the members of the LRC laboured diligently but to very little effect, as the Committee itself reported.[4] The concerns it raised about proposed legislation were met by bland assertions (made without proof) that the legislation is balanced, or they were just ignored.

In 2010, CCL made a submission to the Legal and Constitutional Affairs Committee of the Federal Parliament concerning the Human Rights (Parliamentary Scrutiny) Bill 2010[5]. In summary, we argued that the LRC did not have sufficient time to examine legislation. In a

[3] It might also provide a basis for judging the legitimacy of values presented as "Australian".
[4] Legislation Review Committee, 'Public Interest and the Rule of Law: Discussion Paper', Discussion Paper No. 1, 10 May 2010
[5] New South Wales Council of Civil Liberties, 'Submission to the Legal and Constitutional Committee of the Australian Senate Concerning the Human Rights (Parliamentary scrutiny) Bill 2010).

great many cases, the LRC has had no more than a day or two to consider bills and make a report. (In the worst cases, bills have been passed before the Review Committee has finished its investigations.)[6] Because of this it does not have time to consult, or to allow public input. (It often barely had time to meet.)

It has—by the deliberate choice of its creators—no set of rights against which to judge. It was routinely ignored.[7]

After 2010, the situation deteriorated. The Chief Justice of New South Wales, His Honour Tom Bathurst QC, noted that this change followed alterations to the Legislation Review Committee since 2011. These have meant the membership has been almost halved with the lower house members now dominating.[8]

Whereas in its early days the LRC at least drew the attention of the Houses of Parliament to intrusions on human rights which might need to be corrected, it (or perhaps its majority) then appeared to see its role as providing excuses for those intrusions, or merely reiterating material from the relevant minister's second reading speech.[9]

Perhaps the worst example of this is seen in its comments on the Terrorism (Police Powers) Amendment Bill 2015. That bill (now an act) perpetuates the most egregious intrusion on rights and liberties in Australia's history—the power given to police to intern terrorist suspects without trial, on the basis of a mere reasonable suspicion that they might commit a "terrorist act"—a term given a dangerously extensive definition in the Criminal Code.

The LRC took 6 minutes to consider this bill and fourteen others.[10]

It is worth pursuing this case, as an example of how poorly the LRC functioned.

The LRC reported as follows:

'The Committee notes that the Bill extends the operation of a scheme for preventative detention orders. This impacts on the right to liberty by allowing people to be imprisoned by the State without charge and without trial. However, the Committee notes that a recent review of the *Terrorism (Police Powers) Act 2002* found that preventative detention orders remain necessary for police to deal with terrorist threats. Similarly, the preventative detention order provisions contain a number of safeguards to guard against abuse of these extraordinary powers. For example, questioning the imprisoned person is prohibited. Given the circumstances, the Committee makes no further comment.'[11]

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[6] The issue of time is dealt with further below.
[7] New South Wales Legislation Review Committee, Annual Report 2007-2008 pp. 3—8.
[8] Opening of the Law Term Address, 'The Nature of the Profession, the State of the Law, February 2016, paragraph 19.
[9] Ibid.
[10] *Unconfirmed Minutes*, Tuesday October 27, 2015. We recognise that there must have been some work done before the LRC met. There is no evidence, however, of informal discussions amongst the members preceding the production of the draft digests.
[11] Legislation Review Committee , *Digest* 99/56, 2015 p.2.

Since there is no reference to which review is meant, CCL presumes that it is the NSW Statutory Review, published in October 2015. That review, it is true, asserts that the preventative detention powers are a necessary tool for combating terrorism, *but the only reason given is that they are required for national consistency!*[12] By contrast, the then Independent National Security Legislation Monitor, Brett Walker SC, and the Council of Australian Governments Review of Counter Terrorism Laws had both argued that the preventative detention powers should be repealed.[13]

A competent report by the LRC, we believe, would have drawn the attention of the NSW Parliament to all three reports, summarised their arguments (which would have exposed the limitations of the NSW statutory review), would have noted that the provision had never been used, and would at least have recommended that the two Houses consider whether the continued invasion of liberties is justified.

A competent review, moreover, would have considered and countered the argument that terrorist actions are so terrible, any infringement whatever of civil liberties or other rights is justified. It would have applied criteria, such as the standard principles of balancing, in determining whether the bill trespassed unduly on personal rights and liberties.[14]

Justice Bathurst notes that a 2015 report from the Legal Intersections Research Centre at the University of Wollongong 'assessed what impact the Committee's recommendations had on criminal bills between 2010 to 2012. The commentators reported, that although "the Committee performs the valuable function of identifying, and bringing to Parliament's attention, aspects of proposed new laws... there is no evidence that the Committee has any impact on the outcomes of parliamentary decision- making processes on criminal law bills".

[12] 'The Review agrees with the need to maintain national consistency in counter terrorism legislation as far as possible, acknowledging that jurisdictions agreed to enact these extraordinary powers as part of a complementary scheme. The foundation of this cross-jurisdictional approach was a reference of powers to the Commonwealth to allow for the creation of comprehensive and consistent terrorism offences for Australia. As such the Review concludes that the PDO powers remain a necessary tool for police in combating terrorism, and should be retained.' NSW Department of Justice, Statutory Review of the Terrorism (Police Powers) Act 2002, p.5.

[13] Independent National Security Monitor *Annual Report 2012*, Chapter III.
Council of Australian Governments, *Review of Counter-Terrorism Laws 2013*, Recommendation 39 and paragraphs 248-276.

[14] A standard version of the principles of balancing norms is as follows:

i. Better reasons can be given for acting on the overriding norm than on the infringed norm.

ii. The moral objective justifying the infringement must have a realistic prospect of achievement.

iii. The infringement is necessary in that no morally preferable alternative actions can be substituted.

iv. The infringement must be the least possible infringement, commensurate with achieving the primary good of the action.

v. The agent must seek to minimize any negative effects of the infringement.

vi. The agent must act impartially in regard to all affected parties; that is, the agent's decision must not be influenced by morally irrelevant information about any party.

The report also identified an "entrenched culture" held by Parliament of "ignoring and deflecting the Committee's advice"'.[15]

The failures of the LRC may be contrasted with those of the Federal Parliament's Human Rights Committee. While the CCL does not consider the latter committee to be effective in protecting human rights, since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.[16]

After Justice Bathurst's comments, the LRC began issuing lengthier and in some cases more critical reports. It remains to be seen whether the parliament will take more notice of them—whether the Committee can be a partial substitute for a bill of rights.

This comparison raises the question: should the LRC take a more interactive approach in its evaluation of proposed legislation? Should it not be sending bills back to ministers, seeking amendments and explanations?
But it also raises the question: how is the LRC of the future to be discouraged from again becoming a mere mouthpiece of ministers?

Ongoing problems

1. Time. The fundamental problem.

The LRC still lacks the time to consider legislation properly. As Allan Shearan notes, the LRC can only scrutinise Bills 'after they are introduced into Parliament and [it] often works within a timeframe of five days (including weekends)' to conduct detailed research or seek expert opinion.[17] As such, the LRC is greatly limited in its operation of reporting to the Parliament.

That is, it has five days, including weekends and public holidays, between the time a bill is introduced into the NSW Parliament and its passage through both Houses. As the chair of the LRC, Michael Johnson MP, has argued, tight timeframes and other competing demands mean that the LRC is unable to inform its investigation by 'broader evidence, such as submissions from the community and evidence from public hearings', which cannot be readily obtained or adequately analysed.[18]

[15] Opening of the Law Term Address 2016, at 23. The Report he quotes is L. McNamara and J. Quilter 'Institutional Influences on the Parameters of Criminalisation: Parliamentary scrutiny of Criminal Law Bills in New South Wales' 2015 27(1) *Current issues in Criminal Justice* 21.
[16] Australian Law Reform Commission, 'Traditional Rights and Freedom-Encroachments by Commonwealth Laws', Report No. 129 (2015) at [3.69].
[17] Allan Shearan, 'The Role of the Legislation Review Digest in NSW' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Canberra, Australia, 6-8 July 2009).
[18] Ibid 14; Parliament of Australia, *Australian Parliaments and the Protection of Human Rights*, Parl Paper No 47 (2007).

When bills are declared urgent, the LRC can only comment after their passage. Repeated complaints about this have led to no changes to the Standing Orders.[19]

A very recent example is provided by a provision in the Electoral Bill 2017, which proposes to continue a provision in the existing Act which denies the right to vote to prisoners serving sentences of 12 months or more. The High Court held in 2007 that such a provision in relation to Commonwealth voting was invalid.[20] While the LRC drew attention to the proposed section, it did not have time to include a reference to the High Court decision in its Digest 17 of November 2017, nor to examine the issues involved.

The LRC Minutes for November 14, 2017 show that it took only 4 minutes to consider 10 bills including the Electoral Bill, and to deal with formal business. While the bulk of the work on its report must have been the done before its meeting, such a brief consideration in committee is an indication of the extent to which even its members consider its work important—or of the lack of time to give matters a proper consideration.[21]

The question then that demands to be answered, is: how is the LRC to be guaranteed the time to function properly?

2. Passing bills before the Committee has completed its consideration.

Currently, a House of Parliament may pass a bill regardless of whether the LRC has reported on it.[22] Parliamentary procedures do allow for the LRC to consider such a bill (for the first time) after it has become law, but once 'the Bill has been so passed or has become an Act',[23] such submissions would accomplish very little to effectuate amendments or parliamentary debates.[24]

By contrast, in Queensland a portfolio committee can have six months from the date a bill is referred to them, although, the House or the Committee of the Legislative Assembly may fix an alternative reporting date.[25]

In our view, legislation should only be able to be passed without review by the LRC in cases of genuine emergency, and such legislation should have sunset clauses which require it to be reconsidered with a short time—at most, within six months.

3. Lack of impact.

[19] See the Annual Reports of the LRC for 2007-8 and 2008-9. The relevant standing orders are No. 88 for the Legislative Assembly and No. 137 for the Legislative Council.

[20] *Roach v Electoral Commissioner* [2007] HCA 43. http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2007/43.html

[21] There is no indication in the minutes or the digest of who prepared the draft.

[22] *Legislation Review Act 1987* (NSW) s 8A(2); See, e.g., Crimes (Criminal Organisations Control) Bill 2012 (NSW).

[23] Ibid.

[24] Shearan, above n 8, [5].

[25] Legislative Assembly of Queensland, *Standing Rules And Orders Of The Legislative Assembly*, 16 June 2017, Standing Order 136.

Currently, even if the LRC has had an opportunity to inspect a Bill at length and report to both Houses of Parliament on matters of personal rights and liberties, its capability to influence law-making is greatly limited.

The problems here have been evident for some time:

'The LRC has very little impact. It sends letters to ministers, about half of which are given an answer. In the year to June 2008, it met 16 times, commented on 99 bills, referred 170 issues concerning 70 bills to the NSW Parliament, and was referred to in debates a total of 24 times, in relation to 17 bills.[26]

Chief Justice Bathurst has also doubted the extent to which the operation of scrutiny committees, such as the LRC, lead to 'practical boundaries being placed on the legislative encroachment of rights.'[27] Notably, his Honour commented that:

> [T]he number and strength of both types of scrutiny mechanisms within New South Wales, whether assessed independently or in comparison to Commonwealth counterparts, is not necessarily ideal. It is particularly questionable whether the theoretical potential of both formal and informal scrutiny mechanisms, is translating into an effective protection of fundamental common law rights.[28]

In the realm of criminal law, his Honour referred to the work of Luke McNamara and Julia Quilter,[29] restating that 'there is no evidence that the [Legislation Review] Committee has any impact on the outcomes of parliamentary decision-making processes on criminal law bills.'[30]

A striking example of the earlier failures of the LRC is the passage of the Crimes (Criminal Organisations Control) Act 2009 (NSW). The Act permits the Police Commissioner to apply to an eligible judge (where eligibility is determined by the NSW Attorney General) to have an organisation made a declared organisation. Members of that organisation are then prohibited, with a penalty of imprisonment, from associating with each other; and the notion of 'membership' is expanded to include anyone who is connected with the organisation. The Police Commissioner may prevent any member of the organisation being present when evidence which he (or she) declares to be criminal intelligence is presented.

This act, which, as McNamara and Quilter note, 'effected an unprecedented expansion of the parameters of criminalisation' in New South Wales,[31] was passed through both houses within a day of its introduction, and with very little notice to the public. When it finally was able to discuss it, the LRC expressed strong reservations—but its report was not completed

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[26] New South Wales Legislation Review Committee, *Annual Report 2007-2008* pp. 3—8.
[27] Chief Justice Tom Bathurst, 'The Nature of The Profession; The State of the Law' (Speech delivered at the Opening of Law Term, Art Gallery of New South Wales, 4 February 2016) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160204_speech.pdf>.

[28] Ibid [70].
[29] Ibid [23]; McNamara and Quilter, above n 2, 35.
[30] Ibid.
[31] McNamara and Quilter, above n 2, 31; Crimes (Criminal Organisations Control) Bill 2012 (NSW).

and published till a month later. The Parliament completely ignored the LRC's reservations regarding the Act, which was found to be constitutionally invalid by the High Court of Australia in Wainohu v New South Wales.[32] Subsequently, the Parliament introduced the Crimes (Criminal Organisations Control) Bill 2012 (NSW) to address flaws recognised by the High Court of Australia, again ignoring the concerns of the LRC.

The fact that the LRC's observations are given so little weight in Parliament to issues of personal rights and liberties – even in the above case of such a Bill, means that the LRC is not very effective. It appears that there is indeed an entrenched culture within the Parliament of New South Wales of disregarding the views of the LRC.[33]

Questions the LRC should answer in its review therefore include:

How can the LRC increase its gravitas, and thus its influence?
i. could changing its membership help?
ii. could changing the way it reports help?

4. The lack of standards.

Under its Act, the LRC is required to scrutinise Bills that are introduced into the Parliament of New South Wales and to report to both Houses of Parliament on any Bill that, in its opinion, trespasses unduly on 'personal rights and liberties' of the people of New South Wales.[34] But the LRC has no *mandated* set of rights and liberties against which it judges bills and acts. This was a matter of deliberate policy—the New South Wales Parliament appears to have been concerned that its own processes could threaten its sovereignty. 'The Parliament therefore decided not to define what rights and liberties people in New South Wales should enjoy, but rather to determine such issues within the context of each bill.'[35] Accordingly the LRC itself has collected a set of rights statements to guide its deliberations (when it has time to deliberate). According to its Information Paper, these include international human rights law, with special attention being paid to human rights treaties to which Australia is a party, the human rights laws of other countries (for example the United Kingdom, The United States, New Zealand, Canada and South Africa) and the range of rights recognised under Australian law, whether or not these are enforceable under existing law.[36] In practice, the LRC has also used the common law, New South Wales statute law, and the Australian Constitution, international human rights law – notably human rights treaties to which Australia is a party, and the law and jurisprudence of other jurisdictions.[37]

However, when it devises its Digests, the LRC does not refer to these documents—though it does specify the rights a provision infringes.

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[32] (2011) 243 CLR 181.
[33] Chief Justice Bathurst, above n 10, [23].
[34] *Legislation Review Act 1987* (NSW) s 8A(1)(b)(i).
[35] Legislation Review Committee, Information Paper, p. 3. 9
[36] Ibid. p. 6.
[37] Luke McNamara and Julia Quilter, 'Institutional influences on the parameters of criminalisation: parliamentary scrutiny of criminal law bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21, 24.

By comparison, at the federal level, the instruments to be relied upon by the Human Rights Committee to construe the phrase 'human rights' are specified in the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).[38]

More seriously still, the LRC does not engage in serious discussion of why it considers that infringements are justified. It applies no explicit set of criteria for when a right or a liberty is properly sacrificed and when it is not, not even a standard account of balancing.[39] As a result, as Michael Johnson argued, the LRC has difficulty in 'determining when it is reasonable to limit human rights.'[40]

Accordingly, from time to time, the LRC has supposed that the mere fact that a provision will serve an end—is *useful* in that limited sense—is sufficient to justify the infringement of important rights.

Two recent examples of very weak arguments follow. The LRC is to be congratulated for raising the issue in each case, but not for the way they are dealt with.

'The [Electoral] Bill [2017] provides that a person is not entitled to vote or be enrolled to vote if currently serving a sentence of 12 months imprisonment or more. This would impact on an ordinary citizen's right to vote and the denial of voting rights disenfranchises a segment of the electorate for public participation in the democratic process. However, the Committee is mindful that the nature of imprisonment may mean the forfeiture of many ordinary civil rights and liberties, amongst them the right to vote. The Committee makes no further comment.'[41]

There is no account here of why imprisonment should remove the right to vote. There is no account of why the parliament should take from the courts the task of sentencing prisoners. There is no account of why the fundamental principle of democracy should be overridden.

'Right to legal representation'

'A number of provisions in the [Environmental Planning and Assessment] Bill [2017] allow the regulations to prescribe whether parties to matters being determined by the IPC or local, district or regional planning panels can be represented by lawyers.
'In some circumstances, these consent authorities decide development applications of a substantial monetary value with potentially significant environmental impacts. Accordingly, the Committee notes that this section may be seen to trespass on the right to be legally represented, particularly in relation to complex planning matters, which may often involve

[38] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3. There are seven.
[39] It is far from alone in this. The human rights statements that are required to accompany bills in the Federal Parliament are notorious for mere assertions that a provision is necessary to achieve an end, and therefore very serious infringements on the right to a fair trial, to not being imprisoned without trial, or the right to privacy, are merely asserted to be justified by one or another important aim.
[40] Michael Johnson, 'Comparative approaches to legislative scrutiny' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Perth, Western Australia, 11-14 July 2016).
[41] *Digest 17 of 2017*, 2, electoral bill 2017.

mixed questions of fact and law. However, the Committee makes no further comment, including because similar provisions already exist in the current Act and noting the Bill's aim of increasing the efficiency of the approval process.'[42]

Here mere "efficiency" is taken to be more important than a person's ability to properly make a case of high importance for himself or herself or the environment. Why should such efficiency be taken to be more important than these things? Is there no other way of producing an efficient outcome, consistent with the maintenance of the right to legal support?[43]

In CCL's opinion, the LRC should be required to make its determinations on the basis of a set of criteria, inscribed in the Act. This should model the argumentation of the High Court, when considering whether a provision justifiably infringes the implied right to free speech in the Constitution.

Roughly, the High Court uses the following criteria:

Does the law effectively burden [in other words, limit or hamper] freedom of political communication?
Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?
Is the law *suitable*, in the sense that it has a rational connection to its purpose?
Is it *necessary*, in the sense that there is no obvious and reasonably practicable way of achieving the same purpose with a less restrictive effect on the freedom?
Is it *adequate in the balance* it strikes between the importance of its purpose and the extent of its restriction on the freedom?[44]

Translated to the New South Wales context, these could become:
Does the law effectively burden the rights and liberties of NSW residents?
Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of a free and democratic society?
Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of a free and democratic society?
Is the law *suitable*, in the sense that it has a rational connection to its purpose?
Is it *necessary*, in the sense that there is no obvious and reasonably practicable way of achieving the same purpose with a less restrictive effect on rights and liberties?
Is it *adequate in the balance* it strikes between the importance of its purpose and the extent of its infringement on rights and liberties?

5. The need for expert input.

[42] Ibid, 4, environmental planning and assessment bill 2017
[43] In any case, why is speed in obtaining planning approval considered efficient, and having plans informed by competent submissions is not?
[44] For a more detailed account, see Tony Blackshield, *Inside Story*, October 26, 2017.

The Chair of the LRC, Michael Johnson MP, has remarked that it 'relies on the technical advice of the committee members and staff who practice or have practised law.'[45] While that advice is apparent in the selection of issues on which the committee reports, it is neither apparent in the comprehensiveness of the list of issues, nor, as noted above, in the arguments that are included.

Most recently, for instance, the LRC reported on the Terrorist (High Risk Offenders) Bill 2017.[46] The *Digest* notes problems with retrospectivity, procedural fairness, standard of proof, privacy, deficiencies in administrative powers, the risk that persons not associated with terrorism might be caught because of the actions of their associates, and the people offending, but not involved in terrorism, during a political protest might be caught, and the right to liberty in relation to interim detention. Extraordinarily, however, *it does not comment on the fact that people who have committed no further offence while in jail can be detained for three years beyond the end of their sentence, and possibly a further three years or indefinitely.*

That problem, we believe can be best met by ensuring that some members of the LRC are vey highly skilled in the law, and in the law relating to rights and liberties in particular.

So what is to be done?

We have noted problems in relation to:

uneven performance;
lack of time;
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lack of impact;
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poor argument;
and lack of expert input.

Recommendation 1.
The LRC should recommend to parliament that it enact a bill of rights.
This, we believe, is the only way that these problems can be met.

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[45] Johnson, above n 5, 1.
[46] Digest 18 of 2017, 47/56, 21 November 2017.

This would, at a stroke deal with three of the problems we have outlined. The careful opinions of a group of former senior judges would not be treated lightly by the Parliament.[47] As custodians of the rights of citizens, and with their long experience in careful interpretation of the law, they would provide both expertise and excellence in argument concerning what can and what cannot be justified by way of trespass on personal rights and liberties. They would ensure that the performance of the LRC is consistently excellent.

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To provide time for the LRC to do its job, an act should be passed amending the Constitution Act 1902, and the Standing Orders altered accordingly, ensuring that except in cases of emergency where there is genuine need to pass a law in haste,[48] a bill must be held for at least two weeks after it receives its first reading, before it proceeds through either House of Parliament.

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The Act should be amended to require the LRC to make its determinations about whether proposed provisions unduly trespass on rights and liberties on the basis of a set of criteria, inscribed in the Act. These should model the argumentation of the High Court, when considering whether a provision justifiably infringes the implied right to free speech in the Constitution.

Recommendation 6.
The LRC should be required to report whether or not it considers that a provision trespasses unduly on rights and liberties, rather than merely referring such trespasses to the Parliament for consideration.

Functions With Respect To Regulations

Another function of the LRC is 'to consider all regulations [where 'regulations' includes statutory rules, by-laws, ordinances etc] while they are subject to disallowance by resolution of either or both Houses of Parliament',[49] and to draw the 'special attention of Parliament' to any such regulation that 'trespasses unduly on personal rights and liberties' of the people of New South Wales.[50]

Mr. Johnson notes that 'the Committee usually has a bit longer to consider such delegated legislation – fifteen sitting days.'

[47] Indeed, the opinions of judges of not infrequently quoted in parliamentary debates, and are treated with respect.
[48] And not for mere convenience.
[49] *Legislation Review Act 1987* (NSW) s 9(1)(a).
[50] Ibid s 9(1)(b)(i).

A recent independent inquiry into the operation of the Legislative Council committee system found that 'combining both functions in the one committee was ineffective',[51] and as a result the LRC's scrutiny of regulations has gradually diminished.[52] As Mr. Johnson observes, 'delegated legislation rarely attracts the same visibility and debate either in the Parliament itself or the broader community.'[53]

Separate parliamentary committees for the scrutiny of Bills and regulations exist at the federal level (the Senate Standing Committee for the Scrutiny of Bills, and the Senate Standing Committee on Regulations and Ordinances) and in Western Australia (the Legislation Committee, and the Joint Delegated Legislation Committee). [54]
CCL supports the idea that having a separate committee for evaluating delegated legislation will lead to better scrutiny of that material. Members of that committee could be expected to develop specialist expertise as a result.

Recommendation 7.
A separate committee should be set up to report on whether proposed and existing subordinate legislation unduly trespass on civil rights and liberties.

This submission was prepared by Dr Martin Bibby and Mr Sarfraz Khan on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Joint Legislation Review Committee.

Yours sincerely,

[redacted]

Therese Cochrane
Secretary
NSW Council for Civil Liberties
Mobile [redacted]

Contact in relation to this submission Dr Martin Bibby: [redacted]

[51] Regulatory Policy Framework Review Panel, Submission to the Minister for Innovation and Better Regulation, NSW Government, *Independent Review of the NSW Regulatory Policy Framework*, May 2017, 69-71.
[52] Legislative Council, NSW Parliament, *The Legislative Council committee system* (2016) 3-5.
[53] Johnson, above n 5, 5.
[54] Parliament of Australia, *Committees* (2017) <https://www.aph.gov.au/committees>; Parliament of Western Australia, *Current Parliamentary Committees* (2017) <http://www.parliament.wa.gov.au/parliament/commit.nsf/WCurrentCommitteesByName>.