

**Submission
No 7**

OPERATION OF THE LEGISLATION REVIEW ACT 1987

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NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO THE LEGISLATION REVIEW COMMITTEE INQUIRY INTO THE OPERATION OF THE *LEGISLATION REVIEW ACT 1987*

Introduction

1. The New South Wales Bar Association welcomes the opportunity to make a submission to the **Inquiry into the operation of the *Legislation Review Act 1987***.
2. The Bar Association considers that the role of Parliament in the protection of fundamental human rights and freedoms is a particularly important one. It recognises the important work that the Legislation Review Committee has done in drawing attention to potential inconsistencies with human rights to which bills and subordinate legislation have given rise over many years. However, the Bar Association considers that it is timely to introduce changes to the mandate and procedures of the Legislation Review Committee in order to enhance its work scrutinising bills and subordinate legislation for compatibility with human rights, in particular international human rights obligations binding on Australia. The Bar Association considers that developments over the last decade or more in Australia show the way for improving the NSW Parliament's effective engagement with human rights standards in the legislative process.
3. The Bar Association is aware that the mandate of the Committee extends beyond human rights scrutiny of bills and subordinate legislation. However, this submission focuses on how the mandate and practice of the Committee might be enhanced so as to provide more detailed and explicit consideration of the compatibility of bills, and primary and subordinate legislation with human rights standards. This submission draws on previous submissions by the Bar Association in the context of discussion about the desirability of the adoption of an Australian Bill of Rights and a NSW Charter of Rights.¹
4. The Bar Association has previously expressed the view that the introduction of a statutory bill of rights at the Commonwealth and NSW levels would be desirable.² In each case it saw the enhancement of Parliamentary and Executive scrutiny of the human rights compatibility of proposed and existing primary

¹ NSW Bar Association, [Submission to the National Human Rights Consultation](#) (2009), [237]-[241]; NSW Bar Association Human Rights Committee, [Options Paper for a Charter of Human Rights for NSW](#) (2007), [140].

² NSW Bar Association, [Submission to the National Human Rights Consultation](#) (2009), [237]-[241]; NSW Bar Association Human Rights Committee. ('NSWBAHRC'), [Options Paper for a Charter of Human Rights for NSW](#) (2007), [140].

and secondary legislation as an essential component of such a legal regime. This submission reiterates and builds on those submissions to take into account the developments in Australia in the last decade or more.

5. The Bar Association considers that, even in the absence of a statutory bill of rights, the enhancement of the Parliamentary scrutiny process offers advantages. Accordingly, it recommends the changes to the *Legislation Review Act* and the practice of the Committee set out at paragraph 36 below.

The origins and current mandate of the Legislation Review Committee

6. The Legislation Review Committee was originally established as the Regulation Review Committee under the *Regulation Review Act 1985*. Section 9 of that Act conferred on the Committee the function of scrutinising subordinate legislation, including considering ‘whether the special attention of Parliament should be drawn to any [...] regulation ...’ on the ground that it ‘trespasses unduly on personal rights and liberties’.
7. The current mandate of the Legislation Review Committee (the Committee) in relation to bills has its origins in the inquiry of the Standing Committee on Law and Justice into a bill of rights for NSW that reported in 2001.³ The Standing Committee recommended against the introduction of a statutory bill of rights. However, it did recommend that a scrutiny of bills committee be established and that the *Interpretation Act 1987* be amended to allow a court to take relevant international treaties into account when interpreting an ambiguous statutory provision. The Government accepted only the first of these recommendations.
8. The *Legislation Review Amendment Act 2002* subsequently amended and renamed the *Regulation Review Act 1987* as the *Legislation Review Act 1987*, and also renamed the existing Regulation Review Committee as the Legislation Review Committee. A new section 8A conferred on the Committee the function of scrutinising bills, a function that was similar in a number of respects to the function it already possessed in relation to regulations:

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

(i) trespasses unduly on personal rights and liberties, or

³ NSW Parliament, *A NSW Bill of Rights: Report of the Standing Committee on Law and Justice* (October 2001).

- (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or*
- (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or*
- (iv) inappropriately delegates legislative powers, or*
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.*

This change meant that the NSW Parliament from then on had a process of Parliamentary scrutiny of bills and subordinate legislation similar to that of other jurisdictions, in particular that of the Commonwealth Parliament through the Senate's Scrutiny of Bills Committee and Scrutiny of Regulations and Ordinances Committee.

9. The Committee has a 'traditional common law scrutiny mandate', that is it assesses bills to identify whether they unduly trespass on personal rights and liberties. The original understanding of the term 'personal rights and liberties' has been narrowly construed and this has largely been reflected in the practice of traditional scrutiny committees, including the Legislation Review Committee. Nonetheless, this phrase can and has been construed more broadly. In 2004, for example the Committee stated that when carrying out its scrutiny functions it took into account:
 - the common law, as developed by the courts;
 - statutory rights, liberties and traditions;
 - international conventions ratified by Australia;
 - rights recognised in other jurisdictions;
 - academic and public debate; and
 - the Committee Members' views.⁴

10. Notwithstanding the reference to the taking into account of international conventions, the practice of the Committee shows that it rarely makes explicit reference to international human rights treaties, and almost never to treaties involving guarantees of economic, social and cultural rights.⁵ Given the extensive reference made to international human right standards and

⁴ New South Wales Legislation Review Committee, *Operation, issues and future directions September 2003 – June 2004*, Report no 1, Parliament of New South Wales, 24 June 2004, 3, cited in Michael Johnson MP, '[Comparative approaches to legislative scrutiny](#)', paper presented at the Australian-New Zealand Scrutiny of Legislation Conference, Perth, 11-14 July 2016, 7.

⁵ See Andrew Byrnes, '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' (October 25, 2009). UNSW Law Research Paper No. 2009-43, <https://ssrn.com/abstract=1497225>. The situation does not appear to have changed significant since 2009: for example, there appear to be no references to any of the principal UN human rights treaties in any of the Committee's digests published from the beginning of 2017 until 21 November 2017, although many bills raised issues under a range of treaties.

jurisprudence in the practice of those scrutiny committees with an express human rights mandate, it is hard to resist the conclusion that the express inclusion in a committee's mandate of specific human rights instruments significantly enhances the likelihood that the committee will undertake its scrutiny functions by express reference to those standards.

Australian developments since 2002: enhancing Parliamentary scrutiny of human rights

11. Since the expansion of the Committee's mandate in 2002, there have been significant developments in Australia and elsewhere in the nature and scope of Parliamentary scrutiny of bills, enacted laws, and subordinate legislation for consistency with human rights. These procedures and standards which have been introduced in a number of Australian Parliaments are more extensive than the current traditional common law scrutiny mandate of the Committee in relation to bills, existing legislation and subordinate legislation. The Bar Association is of the view that it is desirable that the NSW Parliament update the mandate and procedures of the Committee to reflect and build on these developments in other Australian jurisdictions.
12. Since the Standing Committee on Law and Justice reported in 2001, there have been a number of inquiries in Australian jurisdictions into the question of whether a statutory charter of rights should be adopted. These inquiries have generally supported the introduction of a statutory charter of rights accompanied by an enhanced process for Parliamentary scrutiny of bills and subordinate legislation which takes into account explicit human rights standards.
13. This has led to significant developments in the Australian Capital Territory (2004) and Victoria (2006), as well as at the Commonwealth level (2011). In the ACT and Victoria, the respective legislatures each enacted a statutory charter of rights, each of which embodies largely civil and political rights and required statutes to be interpreted in conformity with the guaranteed rights so far as reasonably possible. Both jurisdictions also now impose a duty on public authorities to act in conformity with human rights. In addition, the proponent of a bill is required to present to the legislature a statement of whether the bill is compatible with the human rights enumerated in the statutory charter. Finally, the mandates of the existing ACT and Victoria parliamentary scrutiny committees were expanded to require the committee to specifically address the compatibility of bills and regulations with the enumerated human rights and to report to the legislature. In each of those jurisdictions the respective scrutiny committees had previously examined bills and subordinate legislation through a traditional common law scrutiny lens; they now undertake both traditional scrutiny and explicit human rights scrutiny.

14. At the Commonwealth level, although the recommendation in the report of the National Consultation on Human Rights (the Brennan Committee) that the Commonwealth enact a statutory charter of rights was not accepted, the then government accepted the recommendation that parliamentary scrutiny of bills and subordinate legislation for human rights compatibility should be strengthened. The reform took the form of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*HR (PS) Act*).
15. The *HR(PS) Act* provided for the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR) with the following functions (s 7):
 - (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
 - (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
 - (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.
16. ‘Human rights’ are defined as meaning the ‘rights and freedoms recognised or declared’ by the seven principal United Nations human rights treaties to which Australia is party (s 3(1)).⁶
17. The *HR (PS) Act* also requires a member of Parliament who proposes to introduce a bill into the Parliament to provide a statement of compatibility for that bill assessing whether the bill is compatible with human rights. The PJCHR has now been in operation for just over five years.

The advantages offered by an explicit human rights framework

18. The process of scrutiny of bills and delegated subordinate legislation through a traditional common law scrutiny lens has been an important mechanism for identifying human rights and other concerns with legislation presented to Parliament. However, as the now substantial experience of evaluating the human rights compatibility of bills according to explicit human rights frameworks has shown, the traditional scrutiny model has its limitations.
19. The first such limitation is the reactive nature of the identification of potential ‘undue trespass’ on (certain) human rights. Under the human rights scrutiny models at the Commonwealth level and in Victoria, proponents of a bill are required to provide an analysis of the human rights impact of the bill,

⁶ International Convention on the Elimination of All Forms of Racial Discrimination 1965, the International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966; the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; the Convention on the Rights of the Child 1989 and the Convention on the Rights of Persons with Disabilities 2006.

identifying the rights that the bill promotes or restricts. In the case of a restriction on the enjoyment of a right, the analysis must demonstrate that the restriction is a permissible one according to a clear analytical framework identifying the legitimate purpose of the restriction and its necessity or proportionality. No such reasoned analysis is required under the current NSW procedure in assessing whether a trespass on rights is ‘undue’.

20. This means that those drafting a bill or subordinate legislation may not have explicitly turned their mind to the human rights implications of the legislation or have analysed it in a systematic manner to confirm that it is human rights-compatible. To the extent that any human rights assessment is undertaken, it may have been done intuitively.
21. Secondly, as noted above, the range of rights against which bills or subordinate legislation is assessed under a traditional common law scrutiny model is less extensive than the rights that Australia (and thus NSW) is obliged to protect and ensure under international law.
22. Thirdly, human rights frameworks provide the scrutiny committee with a clear and well-accepted analytical framework for evaluating whether bills or subordinate legislation engage human rights and whether any restriction on the enjoyment of those rights is permissible.⁷ While the Legislation Review Committee has formulated guidelines in relation to the right not to incriminate oneself and strict liability offences, it has otherwise not set out a clear framework for how it analyses ‘undue trespass’. By comparison, the Commonwealth Parliamentary Joint Committee on Human Rights has set out in detail the analytical framework it applies in assessing the human rights compatibility of bills and disallowable instruments.⁸ This framework gives a clear indication to the drafters and proponents of bills, as well as to the Committee, of the approach that will be taken to assessing compatibility. In the case of the Victorian Parliament, when scrutinising bills against the pursuant to the *Charter of Human Rights and Responsibilities 2006* (Vic) the Scrutiny of Acts and Regulations Committee (SARC) uses the framework set out in section 17 of the *Charter*.⁹ The Standing Committee on Justice and

⁷ Legislation Review Committee, *The Right to Silence*, Discussion Paper No 1, 21 September 2005; Legislation Review Committee, *Strict and Absolute Liability*, Discussion Paper No 2, 8 June 2006... See Byrnes, above n 3, 8.

⁸ PJCHR, *Guidance Note 1: Drafting statements of compatibility* (December 2014) (‘This note sets out the committee’s approach to human rights assessments and its requirements for statements of compatibility...’).

⁹ Section 7 of the *Charter* provides –

Human rights – what they are and when they may be limited –

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

Community Safety of the ACT Legislative Assembly likewise draws on the limitations provision in section 28 of the *Human Rights Act 2004* (ACT) when assessing the permissibility of limitations on rights.¹⁰

23. The difference that an explicit human rights analysis makes to the evaluation of a bill can be seen from the reports of the ACT and Victorian scrutiny committees. In each case the committee's reports address the issues raised by traditional common law scrutiny, followed by an examination of the issues raised under the Victorian *Charter* and the ACT *Human Rights Act*. In many cases, while there is overlap, the human rights scrutiny goes beyond the issues raised under the traditional scrutiny lens and follows a more systematic analytical framework. A similar pattern can be seen when comparing the reports of the two Senate scrutiny committees and the PJCHR, with the further difference in the case of the PJCHR that a significant number of additional rights are also considered.
24. The experience in the Commonwealth, Victorian and ACT Parliaments under explicit human rights scrutiny frameworks is that the existence of those frameworks and the requirement that a statement of compatibility accompany a bill has meant that systematic and principled human rights scrutiny of bills takes place, in which government is required to justify proposed restrictions on the enjoyment of human rights.

Relevance of international law

25. Australia has assumed binding obligations under international law by accession to or ratification of a number of international human rights treaties. These treaties are binding on Australia not only in respect of Commonwealth and Territory laws, acts and practices, but also in relation to those of the States. An inconsistency between NSW legislation, executive action or judicial decision and Australia's international legal obligations becomes the responsibility of Australia on the international level.
26. The international human rights treaties to which Australia is party cover a wide range of rights, including traditional civil and political rights, but also economic, social and cultural rights. The rights guaranteed by the human rights treaties are more extensive than the 'personal rights and liberties' referred to in

-
- (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

¹⁰ See ACT Legislative Assembly Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Guide to writing an explanatory statement*, March 2011, 4-7.

the Committee's mandate or encompassed by the 'common law bill of rights'¹¹ or 'traditional rights and freedoms'¹² though there is considerable overlap, particularly in relation to civil and political rights. Nonetheless, the rights which Australia (including the States and Territories) is obliged to respect and ensure, go beyond those regularly referred to by the Legislation Review Committee in its scrutiny of bills and regulations. Expanding the list of rights to be considered by the Committee in its scrutiny work would enhance the enjoyment of all rights guaranteed under the relevant international treaties and reduce the possibility that Australia would be placed in violation of its international obligations through a failure to explicitly take these rights into account.

27. Under the principal UN human rights treaties, Australia's record of implementation of and respect for the internationally guaranteed rights is regularly reviewed by treaty monitoring committees, whose membership comprises independent experts elected by the States parties. Following the examination of Australia's national report – which includes reports on State and Territory laws and practice – the relevant committee adopts concluding observations in which it assesses progress, identifies 'subjects of concern' and makes specific recommendations for action. In some cases these concluding observations indicate the committee's view that there is an inconsistency between the international standard and Australian law or practice. While not formally binding, the observations are the considered statement of an independent expert body with considerable experience in the interpretation and application of the relevant treaty and Australia is obliged to give them due consideration.
28. Under a number of the human rights treaties Australia has accepted the competence of the relevant committee to receive and consider individual complaints from individuals who consider that they are victims of a violation of the rights guaranteed by the treaty.¹³ Alleged violations may result from the operation of Commonwealth, or State or Territory law; a complaint must first exhaust available domestic remedies and satisfy other admissibility requirements. After a hearing on the papers, the committee will issue a decision on the merits (entitled 'Views'). Although non-binding, these views are considered to carry significant authority and State parties are obliged to give due consideration to implementing the recommendations.

¹¹ James Spigelman, 'The Common Law Bill of Rights', Chapter 1 in Spigelman, *Statutory Interpretation*, The McPherson Lecture Series, vol 3 (University of Queensland Press, 2008).

¹² See generally Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (December 2015).

¹³ See Commonwealth Attorney-General's Department, 'Human Rights Communications', <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/HumanRightsCommunications.aspx>.

29. In a number of instances human rights treaty bodies have made pronouncements on the laws of NSW, finding them inconsistent with international human rights standards. They have also made findings on Commonwealth laws and the laws of other States and Territories that may have implications for the consistency of NSW laws and practices with human rights standards. At present there appears to be no formal procedure for ensuring that the Parliament is informed of any of these pronouncements and decisions on the inconsistency of NSW laws and practice with human rights standards and given the opportunity to consider what response is appropriate.
30. A recent example of an individual complaint against Australia in relation to the operation of the law of NSW was the cases of *Beasley v Australia*.¹⁴ This was a complaint brought before the Committee on the Rights of Persons with Disabilities (CRPD) alleging that the refusal to provide her with Auslan interpreting to permit her to participate as a juror violated a number of provisions of the Convention on the Rights of Persons with Disabilities. This is an issue which has been explored in a number of reports in NSW and has been contentious, although the NSW Law Reform Commission recommended changes to the law in its 2006 report on the subject.¹⁵
31. The CRPD Committee concluded that the refusal to provide the complainant with Auslan interpretation and consequent exclusion from jury duty violated a number of articles of the Convention and recommended that Australia take a number of steps to provide a remedy and to prevent such violations in the future, including by:
- (i) Ensuring that every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of his/her request for adjustment is carried out and all reasonable accommodation is duly provided to enable his/her full participation;
 - (ii) Adopting the necessary amendments to the relevant laws, regulations, policies and programmes, in close consultation with persons with disabilities and their representative organizations....¹⁶
32. The Commonwealth responded to the CRPD Committee rejecting the Committee's findings and recommendations; its response included input from the NSW Government.¹⁷ It set out a number of improvements to facilities in

¹⁴ UN Doc CRPD/C/15/11/2013 (25 April 2016).

¹⁵ NSW Law Reform Commission, *Blind or Deaf Jurors*, Report No 114 (September 2006).

¹⁶ UN Doc CRPD/C/15/11/2013 (25 April 2016), [9].

¹⁷ *Response of Australia to the views of the Committee on the Rights of Persons with Disabilities in Communications No 11/2013* (G.B. v Australia) and 13/2013 (M.L. v Australia) (undated),

NSW court rooms¹⁸ and indicated that '[i]n relation to deaf jurors particularly, the NSW Government will continue to review its policies, taking into account the ongoing academic research in this area. The NSW Government will continue to monitor developments in disability aids, technologies and interpreter services to consider reform opportunities.'¹⁹

33. There does not appear to be any formal procedure for referring such decisions to the Parliament for consideration as to whether recommendations as to amendments or other changes to law and practice should be adopted. The only recent references to the issue that a search on the NSW Parliament website reveals is a question to the Attorney-General on 28 March 2017 that was answered on 2 May 2017.²⁰ Accordingly, it does not appear that the decision has been formally brought to the attention of the Legislation Review Committee.
34. The Bar Association considers that it would be desirable to provide for the regular referral to the Legislation Review Committee of decisions and conclusions adopted by international bodies involving the assessment of the compatibility with international human rights standards of NSW laws and practice (and analogous laws and practices in other Australian jurisdictions). This would include the UN human rights treaty bodies and the Universal Periodic Review, but would not be limited to those.

Conclusion and recommendations

35. The Bar Association has previously expressed the view that the introduction of a statutory bill of rights at the Commonwealth and NSW levels would be desirable. The Bar Association considers that, even in the absence of a statutory bill of rights, the enhancement of the Parliamentary scrutiny process offers advantages for the protection of human rights. While it recognises the important work that the Legislation Review Committee has done in drawing attention to many human rights issues to which bills and subordinate legislation have given rise, it considers that the role of the Committee could and should be strengthened.

<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/M-L-v-Australia-Australian-Government-Response.PDF>.

¹⁸ Ibid. [39].

¹⁹ Ibid. [40].

²⁰ Question No 5148 – Participation of deaf or blind persons on juries, Mr Paul Lynch MP to the Attorney General, to which the Attorney General replied that 'the former Labor Government determined that there would be no change to the legislative provisions that govern this area', https://www.parliament.nsw.gov.au/la/papers/Pages/qaprofiles/participation-of-deaf-or-blind-persons-o_235149.aspx. No reference is made to the CRPD decision.

36. Accordingly, the Bar Association recommends the following changes to the *Legislation Review Act* and the practice of the Committee
- (a) The mandate of the Committee should be expanded so as include the following functions/duties--
 - (i) to explicitly scrutinise bills and subordinate legislation for compatibility with:
 - a. the seven principal UN human rights treaties as well as other international human rights treaties to which Australia is party
 - b. the United Nations Declaration on the Rights of Indigenous Peoples
 - c. other international instruments as prescribed by the regulations.
 - (ii) to take up concerns about compatibility with the responsible Minister before drawing a matter to the attention of Parliament and to report to the Parliament the Minister's response to the concerns raised by the Committee;
 - (iii) to review the operation of existing legislation in light of human rights standards either on its own motion or when the Attorney-General refers such legislation to the Committee;
 - (iv) to consider any national or international decisions in which the court or other adjudicatory body has found that NSW laws or practices are inconsistent with international human rights standards and to make recommendations as appropriate on necessary changes to ensure compliance with international standards; and
 - (v) to consider any recommendations made by international human rights bodies on the consistency of NSW laws with relevant international standards.
 - (b) The proponent of a bill or piece of subordinate legislation should be required to prepare a human rights compatibility and impact analysis of the proposed legislation that contains a substantive reasoned assessment of its compatibility, for inclusion in the relevant explanatory note.

30 November 2017