REPORT ON PROCEEDINGS BEFORE

LEGISLATION REVIEW COMMITTEE

OPERATION OF THE LEGISLATION REVIEW ACT 1987

At Sydney on Monday 21 May 2018

The Committee met at 9.15 a.m.

PRESENT

Mr James Griffin (Chair)

Mr Lee Evans
Ms Melanie Gibbons
Mr Michael Johnsen
Mr David Mehan
The Hon. Shaoquet Moselmane
Mr David Shoebridge

GEORGE JOHN WILLIAMS, AO, Dean, UNSW Law, and Foundation Director, Tobin Centre of Public Law, affirmed and examined

AARON FRANCIS TAVERNITI, former Social Justice Intern, UNSW Law and Gilbert and Tobin Centre of Public Law, affirmed and examined

The CHAIR: I declare the hearing open. Thank you for attending this public hearing of the Legislation Review Committee. Today the Committee will be taking evidence in relation to its inquiry into the Operation of the *Legislation Review Act 1987*. This inquiry will focus on the operation of the Act and consider measures that would improve the Committee's review functions under it. My name is James Griffin. I am the Chair of the Committee and the member for Manly. I am joined by Mr Lee Evans, the deputy chair and member for Heathcote; Mr Michael Johnsen, the member for Upper Hunter; the Hon. Shaoquett Moselmane, MLC; Mr David Shoebridge, MLC; and Mr David Mehan, the member for The Entrance. I have apologies from the Hon. Natasha Maclaren-Jones, and Ms Melanie Gibbons will be with us shortly.

The Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing coverage of proceedings are available. I also remind everyone that these proceedings are being broadcast and web-screened, and a transcript of evidence will be published by the Committee. Before the proceedings begin, I remind everyone to switch off their mobile phones because they can interfere with the Hansard recording equipment. It is now my pleasure to welcome Professor George Williams, AO, Dean of UNSW Law, and Mr Aaron Taverniti, a former social justice intern. Do you wish to make a brief opening statement?

Professor WILLIAMS: It is a pleasure to be here today. I well remember appearing at the Standing Committee on Law and Justice hearing in 2000 that led to the amendments to the Act and, indeed, the establishment of this Committee, and on that occasion debating very similar issues that we will be looking at today. I will be talking about a few general matters before passing on to my colleague to focus particularly on a question of procedure relating to timing. Our general submission is that as currently established this Act does not provide sufficient review of the bills as set out in the terms of reference. We submit that there are significant improvements that could be made now nearly 20 years down the track.

In the light of what is being done not only in comparable jurisdictions overseas but also elsewhere in Australia, we believe a lot can be done to improve the current situation. As someone who looks very carefully at the work of Committee and the Legislation Review Act, an important question I ask is: How do we measure whether it is effective? Is it a good use of taxpayers' money and is it effective in doing what it should do? There are many different ways of measuring that.

One is simply the work that the Committee does. It has a reputation as being a hardworking committee. It reviews bills and regulations, issues reports and puts out a large volume of material, particularly compared to many other committees of this Parliament. Of course, activity of itself is not a measure of success. Even though that deserves due regard, the Committee, and indeed the work of the legislation, is not a success in many respects. That is because, as currently constituted, the legislation does not provide an effective means of review, or least as effective as it could be.

For example, if we look at the level of consideration that is given to key legislation, it is often lacking in this Parliament simply because of the efflux of time. Often the impact of the work of this Committee is quite low compared to other committees in other parliaments. Therefore, one of our primary submissions is that the activity, work, effort and taxpayers' money that goes into this Committee should be better given effect to by institutional changes that would mean its work would have a greater impact and it would achieve more along the lines of what should be achieved.

We can look at our submission, but we would look to things like references in *Hansard*: How often is this body referred to? How often does it lead to amendments on the floor of either House? How often does the Executive pre-vet legislation prior to its production in order to anticipate the findings of this Committee? How often is the public aware of this body? How often does it lead to broader education and debate about these matters to build confidence in Parliament and to improve the community's understanding of the role of lawmakers? On those measures, we would say there is more that could be done to improve the work of these processes.

One of the changes we would urge is simply about clarity. This was debated nearly 20 years ago in establishing section 8A of the legislation. At the moment, the standard the Committee must apply is vague and unarticulated. As someone who has worked for decades in this area, I am unable to provide a concrete answer as to exactly which rights and liberties the Committee should be assessing against. That is a fundamental problem, not only for the Committee but also for Parliament generally, in understanding whether it might trespass against

those rights and liberties. It is also a problem for the community in being able to better understand the standards against which this process operates. I think it is also particularly important that we move from this vague standard to a more articulated set of standards for educative reasons. The community would benefit from a clearer set of guidelines on human rights and the like to understand what standards the Parliament is seeking to apply.

The Committee could either follow the path of simply referring to international standards, as does the Federal Parliament and as do some of the submissions. However, our primary submission is instead that those rights and liberties should be articulated as the standard, particularly for New South Wales. It is something that has clear community support—a clear buy-in from the Parliament and the people themselves—and not the more abstract at an international level. The Committee could look to Victoria and the Australian Capital Territory—and Queensland will have its own instrument, perhaps by the end of this year—which have state-based sets of liberties and human rights that could be used for educative and parliamentary processes.

The second reform would be a statement of compatibility process. Instead of this Committee simply receiving a bill or regulation without a clear articulation from the Executive perspective as to whether there is compliance, it would be very useful to have that standard up-front with the bill or regulation. That would give the Executive the capacity to state its view up-front—whether it is compliant or non-compliant—and it would get the debate off to a much quicker start than the Committee, which must almost have a standing start with the material it receives. It is also very important to have a statement of compatibility because that means the Executive itself has gone through a process of pre-vetting or determining compliance. That is often the most powerful part of these processes.

As we all know, it is very difficult to get any government to change course once legislation is introduced in the Parliament. At that point the game is often over. Often the most important process is that prior to introduction. It is about anticipating the work of the Committee and knowing the set of standards with which it must comply. The Executive could go through that process within bureaucracies, Cabinet and the like. That is exactly what happens in Victoria, the United Kingdom and elsewhere. As someone who drafted the Victorian Charter of Human Rights and Responsibilities Act 2006 and having been involved in that careful process with Government in Victoria, it is clear to me why those re-enactment processes are so important. That is why the statement of compatibility is one of the key triggers.

The third thing I would mention is that even if you have clarity and even if you have a statement of compatibility, they are the processes that we have at the Federal level already. That scheme is not overly effective. It is hard to find many examples of where the Federal scrutiny regime leads to changes once legislation is introduced. Hopefully though, it is producing more change prior to introduction. It has also got relatively low levels of public knowledge and that is because the Federal scheme, like the New South Wales scheme, suffers from one other key defect, that is, the lack of an incentive for compliance. If you look at other comparable jurisdictions, they recognise that there needs to be a role for courts in these processes.

I do not advocate anything like the United States process where courts can strike down laws of the Parliament. But I think courts should be able to interpret your laws in ways that are consistent with the articulated rights, and also if they find that there is a clash send it back to Parliament for revisitation. Parliament is sovereign; it has the final word. But knowing that the courts cast an eye over these things over the longer term is effective in other jurisdictions in exercising the minds of committees and parliamentarians, knowing that the process does not end with scrutiny, but if scrutiny is not listened to and is not effective, then it can cause problems down the track. I will leave it there and pass on to my friend.

Mr TAVERNITI: I thank the Committee for the opportunity to be here this morning and to elaborate on our centre's submission. At its core, the concern we expressed in our submission is that although the Committee has done and continues to do important work performing its scrutiny role with an evident concern in bringing rights issues to the Parliament, the Committee is currently operating in a wide institutional environment in which it is not afforded sufficient time to make a meaningful contribution to parliamentary debate and to promote the passage of rights compatible legislation. Our recommendations is for proposed changes to this institutional environment, which we argue is the result of the Committee's establishing Act and the standing orders of both Houses.

The Committee's biggest challenge is the time frame within which it is expected to perform its scrutiny function. Ordinarily, debate in either House must be adjourned for five days, allowing time both for the Committee to scrutinise a bill and for members to have an opportunity to consider a bill in its terms. However, this affords members inadequate time to consider the Committee's report before debate resumes. To bring this issue of timing into sharp relief, from a quick review of the Committee's outlook so far this year, of the 32 bills it considered, it commented on 21, pointing to no less than 38 discrete rights issues which were brought to the attention of Parliament. Despite these many and often serious concerns being raised, on two occasions these bills passed both Houses before the publication of the Committee's report. On nine occasions, the bill passed either House the day

after publication; and on six occasions the bill passed either House on the same day's publication. In regard to these 21 bills, I was unable to find recorded in *Hansard* a single reference to the Committee's reports or the concerns the Committee raised.

In the light of this current practice, we ask the Committee to consider a recommendation that the length of the adjournment be doubled to give parliamentarians adequate time to read the Committee's report on a bill and take into account the Committee's concerns. We think it also follows that it is incumbent on the proponent of the bill to respond to and address these concerns during the second reading debate. The utility of reports is severely diminished if they remain unread and unremarked upon in debate. If the proponent of a bill considers a particular bill's passage to be urgent, then they should explain to the Parliament why the circumstances warrant the bill being treated as such, why the ordinary time frame of the passage of the bill should be set aside, and what the consequences would be if the ordinary adjournment process were retained.

The CHAIR: Thank you both for your remarks. I have one question to commence with. I understand from your submission and your opening remarks that the matter of perhaps amending the Act to refer to specific rights and liberties is something that you are supportive of, but I am interested to understand the process that you believe the Government should use to identify such rights and liberties?

Professor WILLIAMS: I do, and it is not from an academic perspective I say that. I say that as someone who is a legal adviser to this Committee for some years. I can recall occasions when the Committee secretariat would ring me up and we would have a very lengthy discussion of how we would even start the process. I would say, "Which rights are you talking about?" and it was often not clear what the starting point would be. So even at that basic function, it is not always clear. I recognise now that the Committee has been in existence for a long time. But even then, there are enormous grey areas in this field.

As to the process and what you should adopt, the Committee's good fortune is that there is now a high degree of clarity around what might be regarded as the basic essential rights of a democracy in a State. Victoria has the 20 rights, which have been accepted now for a period of over 10 years without significant concern. They represent your freedom of speech, association. There is basically a core set of rights that are well accepted. They relate to the civil and political rights. They are rights that have been accepted internationally also now for decades. In addition, you could also, if the Committee wished to, look at economic, social and cultural rights—right to education, housing and the like. Particularly if we are talking about rights that should influence lawmaking, what the community regards as important standards to be applied, then there are good reasons to include those as well.

I think the appropriate course would be for the Committee not to now unilaterally decide on what those are. One of the real values here is education and engagement, but if the Committee was minded to make a recommendation that this should be articulated, it should be set out clearly, it should invite submissions on that subject. For example, you would receive one from us, saying, "Here is what Victoria and the ACT have done, here is what Queensland will likely do, and here is how we think that they should be adapted for New South Wales."

Mr DAVID SHOEBRIDGE: There is a particular political culture in New South Wales, and particularly in the Parliament, that basically churns legislation through. Often, little, if any, intelligent debate happens, and preformed political positions work their way through Parliament. Do you think that is a bigger problem than a process issue of a 10-day adjournment?

Professor WILLIAMS: I certainly come to this with a sense of realism about the debate as well. Of course, that is not particular to this Parliament, even though there are different approaches here. We can point to any of the State parliaments and see exactly the same sorts of issues, and, indeed, at the Federal Parliament as well. You only have to look at a number of the recent anti-terror measures, which have been enacted with enormous speed, put through without capacity for adequate debate.

Mr DAVID SHOEBRIDGE: Warm off the photocopier.

Professor WILLIAMS: Very much so. That is not unusual in the times we live. Indeed, you can look at other countries as well where Executive control of parliamentary bodies is well accepted and has been so for a long period of time. So the question is: How do you work within that framework? For me, my response is that, first, the timing is important because otherwise we are almost giving up the game without actually enough time to even report before a bill is debated. That is one thing. But there is no reason to suggest that that by itself would be enough. For me, often the greatest gains are at the preventative end before you even get into Parliament. That is why I would urge changes that actually require the Executive up-front to consider its position through statements of compatibility. The experience in Victoria and elsewhere is that people who draft legislation have a high tendency to want to comply with the rights in legislation and so will draft things up-front in ways that have a high level of compliance. But even that I accept is not enough by itself. That is why the other aspect you have in the

ACT/Victoria is that the courts have a role as well through interpretation. That I think that is within the bounds of the most realistic scheme for Australia at the moment.

Mr DAVID SHOEBRIDGE: Just taking a step back, the real problem is that the Parliament has surrendered its power to the Executive. In most parliaments in this country, the Parliament is little more than a kind of PR exercise to implement the will of the Executive. Are you saying that most of your recommendations come to try to improve Executive practice? That is what you are getting at. What about the role of Parliament?

Professor WILLIAMS: Many of them are. You are right, there is a level of acceptance on my part that this is the way the world is. Within that world I want things to improve. If we gave you a set of recommendations that did not take account of the reality of how the Parliament operates—

Mr DAVID SHOEBRIDGE: Or does not operate.

Professor WILLIAMS: Or does not operate. Yes, a high degree of recommendations are about improving Executive practice. But I would also say that the evidence internationally is that even if you focus just on Parliament, you are still missing the point. It is about the different arms of government working together. It is called a dialogue, as often as it is referred to—having the Executive introduce better drafted bills in the first place, giving Parliament greater capacity to scrutinise, and there often it is about securing high levels of public involvement and media scrutiny. That can shift but within parameters. And also recognising that courts have a role at the end of the process.

Mr DAVID SHOEBRIDGE: What about giving scrutiny to the operation of this Committee? You may run under the misapprehension that this Committee debates matters of substance when it does not. Its meetings are normally a rubberstamping of a pre-formed position that has been adopted between the secretariat and the Chair and debate is not encouraged, to say the least. Do you think the public viewing of the Committee process and shedding some light on that by perhaps publishing the transcripts of the Committee or otherwise having them available for viewing might assist?

Professor WILLIAMS: I would need to be convinced about transcripts of the Committee being made available, in part because I think ideally they should be robust and unencumbered by—

Mr DAVID SHOEBRIDGE: Assume they are not.

Professor WILLIAMS: Obviously I do not have that information.

Mr DAVID SHOEBRIDGE: I have just given it to you. You can look at the timing of the Committee, if you want. I think Julia Quilter looked at it and acknowledged that the average time of a Committee meeting over the course of four or five years was three, four or five minutes. That by definition is not robust debate.

Professor WILLIAMS: Absolutely, and I accept and understand that. I have read that material and I do not think you need the transcript to actually see from the analysis that she has done that the Committee does not have the capacity, if anything else. Nor does it actually operate in a way that the public might think it might. But, again, that is not particularly unusual for these committees.

The Hon. SHAOQUETT MOSELMANE: It is not because there are no opportunities for robust debate in the hearings. It is because a lot of the bills have already been dealt with, the legislation has been passed and it is history. But the opportunities to debate it are there at the Committee level. You made a comment with regard to changes to legislation prior to introduction. How do you suggest that happens? What is the mechanism? What process do you see where the Government puts legislation before the Committee or before the Opposition prior to introducing it, given consideration of the political issues that the Government might have at hand?

Professor WILLIAMS: The main drivers for that would be that you have a piece of legislation. Let us say it is the Legislation Review Act, which sets out in clear terms that here are the rights and standards that it is expected legislation will comply with and that this Committee will scrutinise against. If you also know that at the end of the day a court will interpret legislation in the light of those standards in the event of ambiguity and send it back to Parliament, if it turns out that Parliament has missed the fact that there is a clash between those standards then that sets up in the mind of any legislative drafter a very clear imperative that they need to draft legislation as far as possible to be compliant with those standards.

The Hon. SHAOQUETT MOSELMANE: What is the time frame to go through that process? The Government may want to introduce something and have the legislation done within a month. This may take a month or it may take less. I do not know. What do you perceive is an acceptable time frame?

Professor WILLIAMS: There is no clear answer to that because often we are dealing with legislation that might have been within the midst of drafters and departments for several months. It can often take that long. But then it gets into Parliament and it might pass in a matter of a few days. That is why often the key period is

that period of a month or more during the drafting and policy internal debate procedure within government. That is often where the greatest gains are to be made. As we know, once it is in Parliament governments are not usually for turning unless the numbers are there in the upper House. What I would say is the experience in Victoria, the ACT and other jurisdictions: if you are pragmatic and want to drive the greatest outcomes, you need to make the best use of that pre-enactment period. There have been two incentives there for that because at the moment there are no incentives of any great weight. You have a set of standards that I cannot even articulate for you. Nothing happens if there is no compliance. The period is not long enough to even have the Committee do its job properly in terms of reporting and leading into debate. You have quite an elaborate process but it is all geared to not actually produce outcomes in the community interest. But for me it starts at the drafting stage, as often these things do.

Mr DAVID MEHAN: You think Victoria has produced better legislative outcomes because of that process?

Professor WILLIAMS: Yes I do. It is by no means a panacea. I certainly would not say that. For example, one of the most powerful things in the Victorian process is a requirement that when Cabinet signs off on legislation Cabinet has before it a statement as to whether it complies with the human rights standards. I know from talking to people who draft and are involved in those processes that you do not want to put to Cabinet something which says that we know this is going to breach this legislative standard. That is how people work in these areas. The lawyers and others are motivated not to breach that. So before it gets to Cabinet, let alone Parliament, there is a strong desire on their part to draft in a compliant way. Sometimes political pressures go the other way. There are examples in Victoria where Cabinet will say, "Actually, we are going to breach those standards because we think we should." That happens. Sovereignty enables that to happen. But there are many examples around public housing and areas like disability. There are a legion of examples where things are different prior to introduction because of those processes.

The Hon. SHAOQUETT MOSELMANE: You recommend that the Attorney General prepare statements with regard to compatibility, rather than government departments. Why the Attorney General's office?

Professor WILLIAMS: They vary between jurisdictions. Sometimes a statement of compatibility is by the drafter or the department, the responsible Minister or sometimes the Attorney. It is often the Attorney because that provides one efficient point for drafting these documents rather than requiring the expertise to be throughout every government department. So it is cheaper often to do it that way. It also means that the Attorney's department becomes a key part of the drafting process. You need a sign-off, if you like, and they identify again prior to introduction if there are inconsistencies between legislation or regulations and the standards.

There are good reasons to do it that way, but you could have the relevant department doing it. That is what often happens at the Federal level. But it is difficult. People lack expertise across departments to do this work. Also I think you are less likely to get higher standards. Either way, the statement of compatibility is important because it is the Executive's public statement of compliance or non-compliance and that puts the Executive to the public test. It can try to fudge that if it wants, it can hide things, but nonetheless it is a public statement that can be scrutinised by committees and the community to determine whether it is complying with the set of clearly articulated standards.

Mr MICHAEL JOHNSEN: I think you said you co-authored the Victorian charter.

Professor WILLIAMS: I chaired the Government process and then assisted with the drafting of the legislation.

Mr MICHAEL JOHNSEN: I was going through it while you were answering questions. Let us take the principle that virtually every piece of legislation will impact on one of these charter points in some way, shape or form. Every piece of legislation limits someone somewhere to do something. It could be against community standards or for whatever reason. As you said before, there are reasons why the Government might say, "We think it is worth doing this." For example, look at freedom of association and the example of outlaw motorcycle gangs. We all agree that every person has the right to freedom of association with others but there are certain circumstances where there clearly is organised crime and laws are put in place.

The reports of the Legislation Review Committee into each piece of legislation that comes to the Committee or is put before Parliament are referenced against other Acts of Parliament and/or international human right charter obligations and all those sorts of things. There is nothing in here that I can see that is any different from how we operate in New South Wales from a legal and a constitutional perspective now. Again, look at freedom of expression and freedom of association.

Mr DAVID SHOEBRIDGE: Is there a question?

Mr MICHAEL JOHNSEN: I am getting there. You had your turn. Give me a go.

Mr DAVID SHOEBRIDGE: But we ask questions.

Mr MICHAEL JOHNSEN: What benefits specifically would this have? You mentioned about having reference when drafting legislation, but what specifically is so different from what we do now just because there is a document there when the Parliament already references against other Acts of Parliament and other obligations that we have around human rights? What is so different from what we do now?

Professor WILLIAMS: I would say that at the most basic level it is driving a set of outcomes in Victoria—and Queensland will go down this path because it has seen those outcomes—that are improving the lives of people in the community. It is doing that in a number of ways. One is that it is leading to legislation which is better drafted to take into account often the dignity and respect people need to be afforded. A good example is how Victoria has had to deal with the treatment of children with disabilities in schools.

It has led to a much more sensitive, appropriate outcome in that jurisdiction by having the benefit of clear standards against which to debate, and often debates are quite lengthy as a result. Often where it has the greatest impact is not even the legislative area; it is within the application of policy by departments. There you see there are many examples of where departments have changed practices because of a legislative standard: the change, for example, in the autonomy they give people with disabilities within shared housing; the respect they give people who are being detained due to mental illness against their will—and New South Wales has some particular problems in that area.

There is a long list of on the ground examples of where it is changing the behaviour of government, leading to the redrafting of laws. I would say it is leading to outcomes that would not otherwise be happening because of that instrument. Whereas, by contrast, in New South Wales what I see here is you have a law that does not even articulate the standards, so we are not actually quite sure what we need to comply with in the first place. Yes, we can refer to legislation and the like, we can refer to common law values, but as someone who has worked in this area for a long time, we can have very lengthy debates about what is in and what is out—it is very hard.

Victoria also has a strong educative component that you cannot have in New South Wales. In drafting the preamble there, for example, I drafted that so it could be used in primary schools about people's rights and responsibilities. Responsibilities are there very clearly in order to say: This is about communities. They are making hard decisions but understanding basic rights like free speech and other matters. The community is engaged by virtue in a way that I do not think happens in New South Wales to the same extent. I could go on, but there are some quite specific things of that kind that can be pointed to. For me the bottom line is these sorts of laws have value if they improve people's lives and make a difference to governance in a way that is positive for the community and better uses taxpayers' dollars in doing so. Victoria is by no means perfect but the evidence is that it is a significant improvement by virtue of that and what we have seen in New South Wales.

Mr DAVID SHOEBRIDGE: Just for the record, the Committee does not refer to legislative standards apart from section 8A. I am unaware of these reports, but if you have examples please provide them.

Mr MICHAEL JOHNSEN: You might want to read your digest every week. I do not disagree with what you are saying but I could also give you countless examples of the difference between the intent of a piece of legislation and/or regulation and the delivery on the ground. If I can put it in its most basic form, if you have to deal with a particular government agency, we all know that it depends on who answers the phone at the other end as to how well or otherwise you get treated. Is that fair to say?

Professor WILLIAMS: I agree absolutely with what you said about the form of the legislation and the document as opposed to the intent and the actual delivery. When I ran that Victoria process the thing that really struck me is that if you want to make a difference to people's lives it is at the service delivery end, and also it is in ensuring that laws and practices are developed up-front to prevent the problems occurring in the first place. The Victorian charter is quite unusual. It is not designed for the courts—very few court cases. It is designed for exactly those things. For example, when the charter came into force and when they set down their standards, one of the first things the Department of Health and Human Services did was appoint charter champions whose job was to work with people delivering government services to improve the consistency of delivery and to ensure that it did so in a way that respected the standards in that legislation. And that has driven change. Again I can point to kids with disabilities. There is a long list of them.

Another key one is in public housing where there was a range of arbitrary practices that were leading to people being rendered homeless, including with children, in ways that did not need to happen but the policy was leading to those outcomes. Those things changed. That is where it is possible to point to a long list of examples of where people's lives have been improved because often the service delivery end has been improved by virtue of a clear set of standards and knowledge that if you do not comply with those standards there are consequences.

Whereas in New South Wales we do not have standards, we do not have consequences, and people do not even know about the process—it does not have the visibility required to drive behaviour.

Mr MICHAEL JOHNSEN: I pick you up on something you said there and said earlier: You said that the Victorian one was not necessarily set for the courts' use, but earlier you said that it is helpful for the purposes of the courts to have a reference point to deal with situations. Is it useful for the courts or not?

Professor WILLIAMS: The best situation is that the courts are there but they are not needed, because my view is if you have courts—

Mr MICHAEL JOHNSEN: Do you mean you would like to get rid of the law industry?

Professor WILLIAMS: No. I think the best use often in this case is courts are a powerful disincentive to bad behaviour—that you do not want to get in court in the first place. That is why prevention is the key. If you designed a model where it was litigated all the time I would say that is failing—the damage has been done, it is too expensive, access to justice is a real problem. The way that Victoria was drafted is to say the courts are there as a backstop but these are powerful incentives never to get there. They have got there on rare occasions where things have gone wrong. A good example of that is where children have been put into adult prisons and that has led to litigation. But in the vast number of cases, as I have said, through the drafting process and the enactment process you have clear standards and consequences, people are motivated not to end up in court and behaviour is changed. That is the best use of the courts—as an incentive to good behaviour, not as the front line, because they are not effective and they are too expensive for that.

Mr MICHAEL JOHNSEN: How does this change that? Is that not the existing situation?

Professor WILLIAMS: In New South Wales?

Mr MICHAEL JOHNSEN: Yes.

Professor WILLIAMS: Not in New South Wales, because at the moment there is no capacity to even bring a court action against the basic standards, as opposed to Victoria, the Australian Capital Territory and Queensland. So Parliament here can, let's say, read a report that this Committee puts out but can simply ignore the findings knowing that there is no capacity to do anything at the end of the day, not even at the most basic level for a court to interpret legislation where possible to be consistent with the basic rights. The Federal system has the same consequence. You can have intensely elaborate scrutiny mechanisms but they are basically ineffective because there is no consequence for noncompliance. My view is we should have consequences for compliance that mean up-front things are done better without the need to get into court at the end of the day.

The Hon. SHAOQUETT MOSELMANE: Mr Taverniti, you have articulated that the Committee is not afforded meaningful contribution. What do you recommend we should do to have that meaningful contribution? What changes to our processes do you think we ought to adopt to make a better and more meaningful contribution?

Mr TAVERNITI: The main thing is in the time frame. When we drafted the submission and then a couple of days ago when I looked at the output of the Committee for this year, on both occasions the vast majority of bills are passed the day after the adjournment ends, which also happens to be, on occasion, the day after the Committee's report is published. At least giving the Committee double the time—it would still publish its reports as it does now, usually after five days or so—would give parliamentarians an extra business week to read the report and try to have a contribution in Parliament about it. Because at the moment bills are passed the day after and the *Hansard* bears that out, with no references this year so far to bills that the Committee has reported on that have been problematic in regards to rights.

Mr DAVID SHOEBRIDGE: To test that, can you think of a single occasion where there has been adequate time for the Parliament to consider this Committee's recommendations—and there have been plenty of occasions where there has been adequate time—and that consideration has had a meaningful impact on the final legislative outcome?

Mr TAVERNITI: I cannot speak to that.

Professor WILLIAMS: I think the answer is no. That is why we would say time frames is one thing we would want, but really you need a holistic set of changes to see a difference made.

Mr DAVID SHOEBRIDGE: Maybe the Parliament should grow a backbone and actually undertake its role as a part of our constitutional framework and stand up to the Executive on occasion. Nods do not turn up on *Hansard*, Professor. That is a question.

Mr MICHAEL JOHNSEN: Mr Chair, could I ask that Committee members actually seek the call before they start making comment or asking questions?

The CHAIR: Thank you, Mr Johnsen.

Mr DAVID SHOEBRIDGE: It was a question.

Professor WILLIAMS: I think it would be desirable for there to be more scope for parliamentarians to act as the community would like parliamentarians to do: that is to scrutinise legislation and to have robust debates about these matters. But as we know in Westminster parliaments around the world the party system often exerts a vice-like grip on those things. As much as the community would like to see it, I am not saying it is likely to happen because the experience is that this is the way parliaments of this kind operate worldwide.

Mr DAVID MEHAN: Your evidence is that the work of the committee does not get referenced by Parliament at all usually in a debate. You have mentioned a statement of compatibility and you have also mentioned a requirement that the Minister or the introducing member talk to the committee's report during the debate. For that to be a requirement would it require an alteration to the Act we work under or could it be done by standing orders?

Professor WILLIAMS: I think it would be desirable for it to be in the Act. In fact, the equivalent provisions are in the Federal scrutiny legislation as well. I think it is better, for reasons of thoroughness and also to put them beyond the government of the day in any one House, that it should be incorporated in the Act. You have got the beginnings of that anyway, and that is the approach taken in other jurisdictions within the legislative law.

The CHAIR: I thank you both very much for appearing before the Committee. The Committee may wish to send you some additional questions in writing and replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions that may be forthcoming?

Professor WILLIAMS: Yes.

The CHAIR: We appreciate your time this morning. Thank you.

(The witnesses withdrew)

DOUGLAS JOHN HUMPHREYS, President, The Law Society of New South Wales, sworn and examined

The CHAIR: Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr HUMPHREYS: No, Mr Chair.

The CHAIR: Before we commence with questions would you like to make a brief opening statement?

Mr HUMPHREYS: I will. I will take the Committee to the submission we made in 2017, which was signed by my predecessor Ms Pauline Wright. Some of these are a bit aspirational but I think it is fair to say that we believe that what we are saying is and has some good basis for sound administration. Certainly we believe that the Act should be amended to provide that members of the committee are drawn from across the political parties without a government majority. That is probably aspirational. I am aware of politics, but it seems to me that the committee, if it is going to do its role, needs to be bipartisan and needs to be able to look at matters standing independent and apart from the political process, because that is, in fact, the role of this Committee when we are talking about the performance of the basic rights of members of the society that we live in.

We believe that it is important for committee members to receive initial training in the role and requirements of the committee and, indeed, the basis of law upon which you are being asked to make a ruling. I am not suggesting in any way that you are not informed. In fact, my general view is that members of Parliament are very, very well informed. But it is always good in going into a new role to be in a position whereby there is a baseline of knowledge that you are just reminding yourself of. Indeed, I find in my own position, whilst I have done a law degree and I have done a masters degree, it is always good to go back to basics and remind yourself of the basics. That is why as part of our training as a lawyer we have continuing legal education. I am just saying that I think there is benefit in having a baseline of which you are certain as to what is the role of the committee, what are the baselines that you are drawing upon and what are the outcomes you are looking for. It would not require much, but it is always good to have that.

We are certainly concerned as to the time frames that are currently running. My previous roles were in the Federal Parliament, and, indeed, where matters were adjourned they could take some considerable period of time to enable the bills to be considered by the committees. There would be upper House committees in the Senate and there may even be public hearings in relation to committees—I have appeared before many committees in relation to bills that have been before the upper House Senate where there has been a considerable time frame. The reports of the committees have, in fact, substantially resulted in changes to the bill because the Government, of its own volition, has been, as a result of the evidence and the determination of the committees, able to introduce amendments to a bill that has even passed the lower House.

So, in my view, there needs to be an adequate timeframe to ensure that there is adequate and proper scrutiny of matters coming before the upper House. If it is to be a House of review it has to have a proper basis upon which you can conduct a review, and a meaningful review. Certainly I do not suggest that there should not be a situation whereby you can bypass a bill if it is considered urgent, but there need to be clear guidelines as to what is urgent. Is it urgent because it is a political issue or is it urgent because it is urgently needed to turn out and pass money—appropriation of funding—or to bring in an urgent change as a result of something? There needs to be flexibility, but it should not be a situation whereby it can be used as an excuse to bypass all meaningful review.

Certainly we would suggest there need to be increased resources to the Committee to enable you to properly scrutinise bills. You cannot do that if you are starved of resources. Your jobs are busy enough as it is with your electoral issues and the issues of Parliament. The life of a parliamentarian is not an easy one and I certainly have no issue with the idea that you would be properly resourced. I think the citizens of New South Wales would not decry a small addition of resources to this Committee to enable it to properly function. The biggest thing that we believe is that this Committee needs to review the bill against the traditional common law rights, including presumption of innocence, legal professional privilege and the privilege against self-incrimination, as well as reviewing the bill against the seven core human rights treaties to which Australia is defined.

We made reference in our submission to the speech of the learned Chief Justice of New South Wales, Tom Bathurst, last year at the opening of the law term, I think it was, where he went through and in a very erudite and in a proper way detailed how we had chipped away at traditional common law rights. There was a suggestion by one commentator that fascism can creep up on you and by the time you realise it is happening it is too late. I am not suggesting for one minute that we live in a fascist State—far from it—and today is a good exercise of that, but I will give you an example that I take from the Federal sphere. There is a proposal that the Australian Federal Police have the right to demand identification of citizens in airports. I use airports a lot—you do too, I am sure—

and I am quite happy to subject myself to the indignities of having to take my belt off and keep my trousers up when I am going through a metal detector, and take my shoes off and expose my holey socks—one of the things I have to do if I am going to the airport is to make sure I am not wearing socks that have got my toes sticking out of them—and various other things.

Mr DAVID SHOEBRIDGE: It does have those residual benefits.

Mr HUMPHREYS: Can I say I have actually thrown away whole sock draws because I am not prepared to suffer that indignity. My point is this: As a citizen, I should be able to go about my lawful business, until the Government can properly articulate good reasons. I get that we live in very difficult times with terrorists and all that sort of thing. I get that. The Lindt cafe siege was just down the corner from where the Law Society resides. But why should I have to produce my identification while I am simply going about my lawful business if I am at a particular place? If somebody wants to convince me that there are good reasons why it will enhance the safety of the airport by allowing police to check identifications, I am happy to debate that. But I am not happy to debate it in the absence of clearly articulated reasons.

In using that example, I am simply saying to you that there is an example of where we are chipping away at common law rights to go about our business unhindered by the state. As I said, it might well be that there are good reasons, but I simply want to have them articulated and have a debate about whether or not those reasons actually stand up to scrutiny and whether or not the harm that we are doing to the right to peacefully go about our business without interference is actually outweighed by the necessity. If someone can convince me that there is a necessity I will not have an issue with that, because I do understand that we are living in different times. It is really important that we do those things and that this Committee has some teeth and is able to properly review matters that are coming up to give us the biggest statement of compatibility.

I went through quite an interesting situation of having to turn out and justify why we would include that. Previously, I was the principal member of the Veterans' Review Board and we were updating the Act and I wanted to include some provisions in relation to contempt of the tribunal, contempt of the court. I lifted them out of another tribunal, the administrative appeals tribunal, and said. "Well, they are there, let's have those here." I had to go through and justify why we should have those powers in relation to contempt. Bearing in mind, all I can do is refer people; I cannot prosecute them. There were times when it would have been great, I must add, if it was a situation whereby—and I had to justify it because a question came up from the committee at the Federal Parliament on compatibility. We simply do not have that here.

I think we can do better. I think we can turn around and try to show that we are serious about trying to limit executive creep and maintain the rights of citizens to go about their business in a way that is as free as it can be. In saying that, I also accept the fact that if I walk down the street I am likely to be the subject of video surveillance from hundreds of camera, some of which I know about and many of which I do not. That is just part of life and I get that and the benefits it has had for authorities in terms of detecting crime and arresting offenders. We just live in such a different world. I think we need to be constantly checking, "Is this okay?" That has been a bit of an issue, but I think it gives you an idea of where I am trying to come from.

Mr MICHAEL JOHNSEN: Thank you for appearing today, Mr Humphreys. I am going to touch on the example you gave about airport security before I go on to a further question. Do you agree with random breath testing?

The Hon. SHAOQUETT MOSELMANE: That is different to airport security in many ways.

Mr HUMPHREYS: Random breath testing was brought in in an attempt to allow police to detect people who would otherwise not be detected and would pose a danger to others.

Mr MICHAEL JOHNSEN: Is that principle not the same for airport security?

Mr DAVID SHOEBRIDGE: Comparing random passport checking to random breath testing—that cannot be your question.

Mr MICHAEL JOHNSEN: I am sorry, Mr Shoebridge, you are not here at the moment. Is it not the same principle?

Mr HUMPHREYS: No. Driving is a privilege; not a right. It has to be earned and there are conditions that we attach to it. What we say now is that you do not drive a vehicle when you are affected by alcohol. As part of the compliance regime for that, you can be the subject of random breath testing. Sure, I can drink and drive and take a risk. What happens if I turn up at the airport without my identification? The airport will accept my Qantas frequent flyer card. What happens if I leave my licence at home do not have photographic identification? Am I going to get ejected from the airport?

Mr DAVID SHOEBRIDGE: It is hard to injure by someone turning up to the airport without a passport, unlike driving the car drunk.

Mr MICHAEL JOHNSEN: I did say I was talking about the principle of it.

Mr HUMPHREYS: What I am saying to you is what is the evil that will be solved by me having to carry identification and produce it on demand at the airport? The evil that you are talking about is that I may be driving over the blood alcohol limit. It could also be the case that I had too many drinks the night before and have not had enough sleep and it is still in the system—that is my fault. What it does is create a compliance regime and I get that and can cope with that because I have seen the affect of motor vehicle accidents. I have appeared for people who have been charged with serious offences when they have been affected by alcohol and who would not have otherwise been detected. We can argue about driving when you have drugs in your system—if it has been six weeks since you have had a joint, it will still come up positive. There is a compliance issue that I am not sure that we are dealing with. I get that. But what I am really saying to you is where is the evil? How will that properly and reasonably address that evil? I do not think the argument has been made.

Mr MICHAEL JOHNSEN: I would argue that you do not know and that is why it is random. However, I am going to use that to ask a further question. In your submission to the inquiry you proposed that the Act be amended so that bills are reviewed against common law rights and Australian human rights treaties. What common law rights and liberties are most important to you and why?

Mr HUMPHREYS: I have indicated that one of the greatest common law rights is the right to go about your business without being the subject of undue interference by the State. We have talked about the presumption of innocence, legal professional privilege and the privilege of self incrimination. Some of those rights have been chipped away it. There is a plethora of other rights. There is the right to walk across land. Indeed, in England, there have been enormous litigations over the common law right to walk on public pathways. We do not have a system of public pathways here, but at least we have a situation where there is the right to walk down the street without being accosted and a demand being made for the production of identification. From my way of thinking, they are there. You need to go back and have a look at a speech by Chief Justice Bathurst. He has indicated where those rights have been chipped away it. If you ask me, they are all important, because they form the basis of us being citizens in a free state. Are we going to go a situation like it is China where there is a social standing and wealth indicator that can be chipped away at if we do not pay a parking fine?

Mr DAVID SHOEBRIDGE: Their point system.

Mr HUMPHREYS: Their point system. Forgive me, but I find that just extraordinary. If I pick my nose in public is that going to lose me social points? I have got no idea.

Mr MICHAEL JOHNSEN: On a reputational basis it might.

Mr HUMPHREYS: It certainly would. It is not a pleasant thing to do, but I do not know that it should stop me from boarding an aircraft.

Mr DAVID MEHAN: You talked about the composition and you referred to the Federal Senate and some committees in other States. There seems to be equal government and non-government members on the Federal committee?

Mr HUMPHREYS: That is as I understand it. Look, I will quite happily tell you I am not across it. Perhaps the good Professor Williams spends all of his time doing really good things. I am not across it. My answer is there are different models. It is a matter of trying to choose a model that is the best acceptable model. We have said, look, it is probably better if it was not dominated by the Government. Compromise it at the Federal level because there are equal numbers, and you still get minority reports.

Mr DAVID MEHAN: There is that. A few of the submissions have suggested some kind of requirement on the Executive or the mover of the bill to justify it before Parliament. Do you see that as an important element of oversight?

Mr HUMPHREYS: Certainly there is a requirement in Commonwealth legislation—I talked about the example that I am familiar with—to talk about compatibility with the human rights requirement. That is how I got into the particular issue when I was the Commissioner.

The Hon. SHAOQUETT MOSELMANE: Do you mean the second reading of the bill?

Mr HUMPHREYS: Yes, it should include that. That should be tabled with the papers. At least then it allows and enforces the Executive in justifying the bill to say, well, yes, this is where we say it might, or it may, or it absolutely does not interfere with anything else. At least it requires people to turn their mind to that issue.

That, to me, is the benefit of having such a statement of compatibility. It does require people to turn their mind to that issue. Public servants, as I was then, have to go through an exercise of doing that, and that is a good thing

Mr LEE EVANS: You recommend that the Committee consider having two separate independent legal officers, one to advise on the bill and one for the regulations. What would be the advantage of that model?

Mr HUMPHREYS: Resources. I do not think you are properly resourced. In saying that, look, I can do both. It is probably better to try to have expertise in relation to it. One of the biggest things that I tend to find is that we have what I call principles-based legislation and then we have a whole lot of regulations underneath. In many cases, the evil is actually contained in the regulations.

Mr DAVID SHOEBRIDGE: And that is an increasing trend in all Parliaments.

Mr HUMPHREYS: Yes.

Mr DAVID SHOEBRIDGE: A principles framework and delegated power to regulations.

Mr HUMPHREYS: That is right. It seems to me that you need a dedicated resource to enable you to keep an eye on the plethora of stuff. Again, one of the great evils that when there is a response to any issue within the community, we have to pass regulation to solve it. Ladies and gentlemen, I have no idea how Parliament is supposed to solve every evil in the world, but apparently there are some in the community who seem to expect that that is the case. They also seem to think that a regulatory approach is the way of going about it. So we have had an explosion of regulation and legislation. Again, it is just the breadth and width of it. When one goes overseas, you actually find that Australia is a highly regulated environment. I sometimes wonder if, in fact, we have lost the plot in that we are trying to solve everything through regulation.

Mr MICHAEL JOHNSEN: That I totally agree with.

Mr HUMPHREYS: Rather than turning around and simply holding people to account when they do the wrong thing. We have seen and we are seeing a bad cultural practice from what is coming out of what is happening in Melbourne. I am sorry, people will no doubt shine a light on it and no doubt there will be changes, but that is one way that cultural issues are being exposed. I am simply saying to you, and you might find that strange as a lawyer, but regulation will not solve every problem.

Mr MICHAEL JOHNSEN: With all due respect, thankfully I am not a lawyer and never was. Correct me if I am wrong, but every piece of legislation and every regulation comes through this Committee for scrutiny and Parliament has the ability to scrutinise every regulation. Is that correct?

The Hon. SHAOQUETT MOSELMANE: It gets rubber stamped in the Chamber.

Mr DAVID SHOEBRIDGE: I do not think the question is about ability, it is about capacity. That is the proposition.

Mr HUMPHREYS: Mr Shoebridge, that is exactly what I am saying. It is about the capacity to look at it. It is about the capacity to turn around and say, "Yes, I get this part", or, "What is this? Why are we do doing that? Is it a proper response? Is there an alternative?" That requires resources and it requires time.

Mr MICHAEL JOHNSEN: Every regulation has the ability to be referred to Parliament now. What should we change that would make it better? I know you are talking about resources, but we can already use Parliament for scrutiny and regulation.

Mr HUMPHREYS: I think there is an issue that in fact it does not get properly looked at because of the time frame and the amount of stuff that is coming through. When was the last disallowance motion, if I might be so bold, on a regulation in New South Wales?

Mr DAVID SHOEBRIDGE: There was one on Crown Lands earlier this year, but they are hen's teeth.

Mr HUMPHREYS: I am saying to you, given the sheer amount of stuff that is coming through, how many disallowance motions do you have? It happens not infrequently in other places about perhaps having some more. I am simply saying to you that I think there might be a capacity to do better. I am not going to tell you how to suck eggs. You are adult people with a lot of resources available to you. You surely can come up with a way that you can adequately and properly turn that over to look at stuff. As I said, I am not an expert in parliamentary procedures. I am just saying to you, you probably need more time and more resources.

Mr DAVID SHOEBRIDGE: Mr Humphreys, a lot of good process representations have come through Ms Wright's submission, which you endorse, and a variety of other submissions about having 10 days between the second reading speech and the second reading debate so there is time to review changing the composition. At the end of the day, it is a question of culture, is it not? We need a Parliament that has a culture that undertakes a

human rights analysis. When I talk to former members of this Committee, such as John Dowd and others, they say there was a culture in this Committee that was robust and rugged. They called in external legal advisers and they undertook their job with a view to upholding a human rights framework. Do you think there is a culture problem in the New South Wales Parliament about human rights?

Mr HUMPHREYS: I am not going to be so bold as to turn around and make what I think is a very political comment. I am simply going to say that I think the processes can be done better. I am saying that it is a matter for the Parliament as to what culture it has got. The only way I can impact on the culture is I can change the Government by voting. If the Government takes a particular view and it ignores matters, well then it will eventually suffer the ire of the electorate. I am not going to comment on that, because I do not think it is useful.

The Hon. SHAOQUETT MOSELMANE: The reality is that the Government has the numbers on committees and the Government members respond to the Ministers, their bills and the legislation that comes through. As Mr David Shoebridge said, it is a culture that exists. It could be a bipartisan committee that reports back to the chambers, but the reality is that that is not the case. I will give one example. Reports never were confidential so I used to show them to my shadow Minister colleagues for their comments before going to the committee. Now they are assigned as confidential so that I cannot even show them to my parliamentary colleagues before coming to the committee to raise issues at the committee level. Not only is there that culture, but there is a culture of restricting discussions because members are not able to show the material that comes before them to their shadow Ministers to enable them to make contributions at the committee level. That is just a statement.

Mr HUMPHREYS: I was going to ask you whether that was a statement or a question.

Mr DAVID SHOEBRIDGE: In weighing up the different values of confidentiality of the committee process, as opposed to getting input particularly from shadow Ministers and other valuable people in the community, do you think the Committee should err on the side of getting greater input rather than confidentiality?

Mr HUMPHREYS: My view, and probably the view of the society, is that the more transparent we basically are within the legislative process, and the consideration of legislation, the better will be the outcome because there will be different views. There will always be matters and it comes back to just the reading of legislation. People will go through and they will come at it from a particular mindset. All of a sudden if it is shown to somebody else and they will turn around and say, "Did you really mean that?" because as I read it reads something else. All of a sudden people will say, "Actually that it is right. We need to review that." Because it could be interpreted in a manner that is not inconsistent with the intention.

I certainly agree with the comments of Professor Williams that the courts are the last place to go to deal with stuff like that because it is expensive, it is slow and I am not sure that it is the best use of time. It is a gold-plated Rolls Royce solution to what should be a really easy problem. My view is, as always, that the more input you have from the widest variety of sources the better the outcome. The Government and the Parliament can then make value-based decisions in terms of competing views. That is, indeed, what you should be doing. You will always make a decision but are you making the best decision based on the best information that is available to you from the widest possible sources?

Mr DAVID MEHAN: Everyone has a number of recommendations as to how the committee system can provide a better service to the State. We do a lot of work now and we produce comprehensive reports that are tabled in Parliament but there is no obligation on anybody to justify the passage of legislation against a committee report. Would not the most simple thing we could do, through this process today, be to recommend some requirement that the Executive be required to justify itself against a committee report?

Mr HUMPHREYS: That is one option. Having a basic statement of compatibility of human rights contained in the actual legislation itself is another option.

The Hon. SHAOQUETT MOSELMANE: Professor Williams has recommended that it should go to the Attorney General's department to prepare the recommendations.

Mr HUMPHREYS: Indeed, that is where I got the grief from—that particular matter that I was talking about. We had some animated discussions about it and I eventually won.

The Hon. SHAOQUETT MOSELMANE: If there was a process whereby Ministers conveyed legislation to the Attorney General's department to review and to report on the compatibility of each piece of legislation, do you think that would take-up more of the Government's time?

Mr HUMPHREYS: I do not think that it takes particularly long. Gentlemen, you are all aware of how long it takes and the number of processes it has to go through. Putting in a small requirement like that is not going to damage the defence of the realm, in my respectful opinion.

Mr DAVID SHOEBRIDGE: Do you think there may be some benefit in having an expressed reference to Australia's treaty obligations, particularly human rights, Indigenous rights?

Mr HUMPHREYS: We have included in our submission: "… review the bill against the seven core human rights treaties to which Australia is a party, as defined by *the Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)." That is why we said that there should be a statement of compatibility against those odds. So my answer is absolutely "yes". However, I am also only too well aware of the fact that many of those rights have not been incorporated in the domestic law and whilst we say, particularly at the Commonwealth level, we are signatures to those, we do not actually enact them.

Mr DAVID SHOEBRIDGE: What about a specific reference to the rights of Australia's First Nation people—Aboriginal and Torres Strait Islander peoples?

Mr HUMPHREYS: Again, these are all part of what I consider to be core elements that we should be looking at.

Mr DAVID SHOEBRIDGE: That would be one of the core elements?

Mr HUMPHREYS: Yes, of course.

The Hon. SHAOQUETT MOSELMANE: Also multiculturalism?

Mr HUMPHREYS: Yes. There is a whole raft of stuff. It depends on how wide you want to cast the net. I am married to a migrant; I know all about multiculturalism and that sort of stuff. You need to really look at stuff in terms of how it is going to impact and whether or not it is going to impact against some people more particularly than others.

Mr DAVID SHOEBRIDGE: The Hon. Shaoquett Moselmane has asked questions about confidentiality and the like, if there was a greater period of 10 sitting days, for example, in which to consider legislation, do you think the Committee should have an expressed capacity to seek stakeholder input? If so, realistically, would the Law Society be able to respond in that kind of time frame?

Mr HUMPHREYS: We have a capacity, if we need to, to turn stuff around very quickly. I am sure the Committee is aware of how quickly we can turn it around.

Mr DAVID SHOEBRIDGE: Indeed.

Mr HUMPHREYS: We have a policy department and we have an extensive committee area. If needed to, the answer is probably we can. We would always prefer to have a more extended period to actually consider the matter so that we can go to our stakeholders and get considered and careful input. As I said, what I tend to find, particularly with committees—without being pejorative of my own profession—sometimes if you ask two people you will get three opinions. That is all part of the deal. The more you consult, the wider the net, the better the input will be because people will turn up and say, "Have you thought about this?" and you will say, "No, I haven't." That is what I am saying. The idea that you have a longer period of time—we set 10 days, in my own personal view I think we should have more to allow you, where necessary, to cast the net very wide and get input.

Mr DAVID SHOEBRIDGE: Mr Humphreys you may not be aware of a fairly recently established upper House committee called the Legislative Council Selection of Bills Committee. The sole purpose of that committee is to identify those bills coming through the Parliament that could be assisted by a relatively prompt inquiry similar to the way the Federal Senate does it.

Mr HUMPHREYS: No, I was not aware of that but I am aware of the way the Commonwealth works.

Mr DAVID SHOEBRIDGE: I ask you to either respond now or on notice, once you have had a look at the terms of reference of the Legislative Council Selection of Bills Committee, to this question. Do you think there may be a benefit in giving this Committee a specific power to reference something to the Legislative Council Selection of Bills Committee to encourage one of those inquiries?

Mr HUMPHREYS: As a matter of principle my answer is "yes".

Mr DAVID SHOEBRIDGE: When it comes to common law rights, and assuming that there was a willingness to expressly reference common law rights, how would the Parliament or the Committee go about articulating the specific common law rights?

Mr HUMPHREYS: I think the answer to that question is the Bill of Human Rights, which this State does not have as compared to Victoria. That actually incorporates all of the Commonwealth rights that we are used to, in an actual Act of Parliament. But there will always be some who will argue that it is not wide enough

and sort of things. If you talk about the problem of advice, it is such a wide term that people can then suggest matters to you. Whether it is acceptable or not as being a pre-existing right is a matter for others to determine.

Mr DAVID SHOEBRIDGE: The joy of the common law; it is a moveable feast.

Mr HUMPHREYS: Indeed. What I thought was a common law right today may not be tomorrow.

Mr DAVID SHOEBRIDGE: Indeed. I think there are 20 human rights principles in the Victorian charter?

Mr HUMPHREYS: Yes.

Mr DAVID SHOEBRIDGE: Would that be the best starting point of which you are aware?

Mr HUMPHREYS: I would urge the Committee that those rights are a very, very good starting point.

Mr DAVID MEHAN: Is there a problem with that approach because it does not give the flexibility of change?

Mr HUMPHREYS: That is why I said I think you need to be careful so that we do not exclude stuff in the way it is drafted. I think it should be inclusive, not exclusive. It is a good starting point. Then, as I said, you start to argue and we get into issues about privacy. The world is changing in such a way. We talk about the impact of the internet and I know that they can track me on my mobile phone. Is that an invasion of my common law rights? These are the sorts of things that are being discussed now, where five years ago we would not have thought about them. That is why I think you need to be very inclusive. As I said to you, at one point freedom of speech at the Commonwealth level and freedom of political discourse were never considered to be a right, because it was not included in the Constitution.

Mr DAVID SHOEBRIDGE: It has always been there, apparently.

Mr HUMPHREYS: It has always been there, indeed.

Mr DAVID SHOEBRIDGE: Following the Labor interpretation.

Mr HUMPHREYS: As I said, you need to be inclusive, because the probable is a movable feast, as you said, Mr Shoebridge.

The Hon. SHAOQUETT MOSELMANE: Is the 2017 submission that you spoke about part of the inquiry?

Mr HUMPHREYS: Yes, and I believe we attached an earlier submission in 2016.

The CHAIR: Thank you for your contribution. The Committee may wish to send you some additional questions in writing, and the replies to those questions will be public and form part of your evidence. Would you be happy to provide a written reply to any further questions?

Mr HUMPHREYS: Indeed, but I do not guarantee the time frame.

(The witness withdrew)

(Short adjournment)

RICHARD LANCASTER, Member, New South Wales Bar Association, affirmed and examined

ANDREW BYRNES, Member, New South Wales Bar Association, affirmed and examined

The CHAIR: I welcome witnesses representing the New South Wales Bar Association. In what capacity are you appearing before the Committee today?

Mr LANCASTER: My relevant position for today's hearing is member of the Human Rights Committee of the NSW Bar Association.

Professor BYRNES: I am Professor of Law at the University of New South Wales and today I am representing the NSW Bar Association, as a long-time member of the Human Rights Committee. I also mention, because it is relevant, that I was for about two years, from 2012 to 2014, the external legal adviser to the Commonwealth Parliamentary Joint Committee on Human Rights.

The CHAIR: Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr LANCASTER: No, thank you.

The CHAIR: I invite you to make a brief opening statement, if you wish.

Mr LANCASTER: Yes, we will do so and we will share it. The NSW Bar Association welcomes the opportunity to appear before the Committee and commends the Committee for initiating this inquiry to improve the operation of the legislative scrutiny process of the New South Wales Parliament. The Bar Association recognises the significant role that the Parliament and this Committee can play in ensuring the protection of human rights and the special responsibilities that this role brings with it. Our introductory statement draws on and supplements our written submission. It is primarily concerned with those aspects of the Committee's mandate and practice that go to the protection of human rights against legislative encroachment, rather than the other matters within the Committee's mandate.

The Bar Association acknowledges that under a somewhat vague and limited mandate, presently the Legislation Review Committee has done significant work in relation to the protection of human rights in some areas. However, the association considers that the current mandate and practice embody a limited view of human rights that fails adequately to reflect the evolution of international rights law over the last 70 years, a process in which Australia has, for the most part, been a significant and constructive participant. Accordingly, as you may have seen from our written submission, the thrust of the Bar Association's submission is that the mandate and practice of the Committee need to be brought up to date to reflect these dimensions of human rights protection and good practice in other comparable jurisdictions. In short, this involves at least the six specific changes set out in paragraph 36 of our written submission.

These changes are: first, the expansion of the mandate of the Committee to include specific reference to core international human rights instruments that have been accepted by Australia; secondly, the introduction of a requirement that proponents of both bills and regulations present statements to the Parliament of human rights compatibility and an assessment of their impact on human rights; thirdly, the adoption of a procedure under which the Committee engages in a dialogue with the responsible Minister when the Committee identifies human rights concerns before it finally reports to the Parliament on the legislation in question; fifthly, the expansion of the Committee's mandate to include review of existing legislation; and sixthly, ensuring that the Committee is regularly briefed on and takes into account relevant decisions and recommendations of international human rights bodies, including decisions of human rights treaty bodies.

We note that the Commonwealth, the Australian Capital Territory [ACT], Victoria and the Northern Territory have all adopted one or more of these measures since about 2004. In the case of the ACT and Victoria, that has been within a framework of a statutory charter of rights, an approach that it seems Queensland is soon to follow. The NSW Bar Association has previously supported the adoption of a statutory charter of rights at both the Commonwealth and State levels, including a rule of statutory interpretation requiring human rights consistent interpretation of laws where reasonably possible. It considers that while the six changes just mentioned can themselves improve the protection of human rights, the adoption of a statutory rights framework would further enhance that overall protection.

Professor BYRNES: Why does the Bar Association, and indeed other submitters, make these proposals and how would they improve the parliamentary process for the protection of rights in New South Wales? These are questions which have already been raised by a number of members of the Committee this morning. The short answer is that they would improve the quality of the lawmaking process by promoting a rigorous, principled and

systematic evaluation by the executive and the Parliament of all laws and regulations by reference to a clear and comprehensive list of internationally recognised human rights, which Australia has embraced. This in turn will lead to improved policymaking and a better impact on the people affected by these laws. At the moment that does not happen consistently or systematically in this State.

Under current practice the range of rights against which bills and subordinate legislation are assessed is largely confined to traditional civil and political rights. There are far fewer references to economic, social and cultural rights, other than occasional references to the right to property, and occasionally the right to work. Equally important—a point that has been made already this morning—the standard of undue trespass on personal rights and liberties does not provide a rigorous, analytical framework that requires proponents of legislation to clearly justify restrictions on rights; for example, by requiring the demonstration of a legitimate objective and of a rational and proportionate relationship between that objective and the measure adopted. As a result, often the committee expresses concern about a bill in general terms without much discussion of the scope of or permissibility of a restriction on rights, then refers the matter to the whole Parliament with little guidance to Parliament in most cases as to how it should assess and respond to the nature and strength of those human rights concerns.

When one compares New South Wales with those scrutiny committees with an explicit human rights mandate, those of the Commonwealth, the ACT and Victorian legislatures in particular, the contrast is striking. Each of those committees has a clearly articulated analytical framework for analysing the permissibility of a restriction on the enjoyment of a human right and the proponent of the legislation is required to clearly demonstrate in a statement of compatibility that the proposed law satisfies that standard. These frameworks require government and the public service to have explicitly thought through these issues before a bill is formulated and presented, and to have marshalled relevant evidence to demonstrate the justifiability of restrictions in the statement of compatibility, rather than relying on simple assertion. The requirement of a statement of compatibility also makes it easier for scrutiny committees to carry out a focused, rigorous and transparent human rights analysis, generally involving a dialogue with the relevant Minister. Sometimes restrictions on rights are modified or dropped as a result of this dialogue. In other cases the basis for the restriction is clearly and objectively justified on the public record. Either outcome enhances the quality of the legislative process and the final product.

In conclusion, the New South Wales Bar Association urges the Committee to take this opportunity to overhaul its existing mandate and practice to ensure that the New South Wales parliamentary procedures for review of the human rights compatibility of existing and proposed primary and secondary legislation reflect current best practice and incorporate international human rights standards appropriate to a twenty-first century legislative scrutiny procedure.

The CHAIR: Thank you both for your opening remarks. You have made clear the importance of a statement of compatibility. What other jurisdictions have a statutory charter of human rights and what impact has it had on the quality of scrutiny from your point of view?

Professor BYRNES: Within Australia, the ACT and Victoria are the only two with a statutory charter of rights. The Commonwealth is done by means of an Act and an order of the Parliament. The Northern Territory is done by sessional orders of the Northern Territory Legislative Assembly. Has it made a difference? I join with my colleague George Williams in this, that the role that this Committee plays is as one component of a broader system. It contributes to it but is obviously not going to be a panacea. I think it is very true that the prospect of judicial review under a statutory charter, even though the courts cannot strike down legislation just at best send it back to Parliament for another look, is one mechanism which makes proponents of legislation look carefully at it.

I think the other aspect is it is part of a feedback loop which goes back into the public service. Combining the statement of compatibility which has to be compiled and the possibility of judicial review, particularly if there is an obligation on public authorities to comply with the charter or the Human Rights Act, does in fact lead to changes and a better quality of analysis. A lot of it is iceberg I think. We do not see a lot of thinking in the public service that does takes place. Some empirical research that Hilary Charlesworth, Gabrielle McKinnon and I did on the ACT Act showed that following the adoption of that charter and education of public servants, it was very clear that in a significant number of cases the existence of that Act and the legislative process had led to changes in the way that policy options were shifted and framed to better accord with human rights guarantees.

Mr DAVID MEHAN: You have suggested a process that provides for a compatibility statement, the Committee then drawing issues with that to the Minister concerned, then another process and another process. Currently the Committee prepares a report that is largely not referenced by anybody in the House. Would not a simple mechanism be to require the executive to look at the Committee's report and at least comment on it during the debate so that the House can decide whether rights have been addressed properly?

Mr LANCASTER: There are a number of potential procedures that could be adopted. I believe the reason we suggested it occur earlier in the process is to give a greater opportunity for the proponent's response to

any concerns. There might be a certain momentum that is gained once the bill is drafted and before Parliament and has gone to a committee of Parliament for consideration. By requiring the identification of any impact or effect on human rights at an earlier stage and raising that with the relevant Minister, our expectation is it would be more effective in avoiding either accidental impacts on human rights, simply because they have not been considered—which can be redressed—or else making any interference with human rights that might be perceived to be a conscious one and one that is justified by reference to other considerations. One of the basic thrusts of our submission, as the Committee would have seen, is to make the process a more systematic, considered one, rather than the more generalised approach that seems to be in place at the moment.

Professor BYRNES: If one looks at the Commonwealth, the correspondence with Ministers, admittedly it does take some time and what you may want to do is have an immediate response, particularly if the legislation is going through. Many of the cases in which the Committee requests advice from the Minister require some quite detailed and time-consuming analysis. The downside of that is the bill may have been pushed through the Parliament before that comes in. One, or perhaps even both, might be the option. To pick up another approach, which is adopted by none of the Australian legislatures but is adopted by the United Kingdom Joint Committee on Human Rights which has a slightly different mandate, is that there is often informal consultation on draft legislation between the department and the Committee, so that potential human rights issues can be identified before it is introduced and before that stage where it gets frozen and it is hard to move. That part of it has been seen as a very valuable way of moving things back to a point in time where it can make a difference. That might be something that is worthwhile considering.

The CHAIR: To continue on that line for a minute, one of the questions asked previously was about some suggestions around the 20 rights in Victoria. With respect to the Act, should it be amended to refer to specific rights and liberties? What processes would the Government use to identify such rights and liberties?

Mr LANCASTER: The Commonwealth legislation refers to seven primary human rights instruments that it relates to. Our submission was careful not to suggest that this State be limited to those seven because there are other significant international instruments to which Australia is a party that should be included. The list is not a particularly difficult one to formulate. In addition to the seven there are a number that we could identify if the Committee wished.

The CHAIR: Thank you.

Mr DAVID SHOEBRIDGE: Going back to the United Kingdom model, does that committee operate behind closed doors in confidential session or does it operate as an open public committee?

Professor BYRNES: Both, I think. It holds more inquiries than the Australian equivalents do. I believe that its deliberative hearings are in house; they are not public hearings. It is the same, I think, with all the other committees in Australia.

Mr DAVID SHOEBRIDGE: One of the issues that has affected the operation of this Committee in the last parliamentary term has been the change in practice so that the draft reports are expressly now said to be confidential, which prevents Committee members from consulting with their colleagues or third parties such as the Bar Association or the Law Society on them. Whilst there may be some benefit in having confidentiality to allow deliberation amongst members of Parliament, do you think, overall, there is greater benefit in its being confidential, or greater benefit in having those draft reports transparent so that consultation can occur?

Professor BYRNES: Perhaps I can answer that in a slightly roundabout way by talking about my experience with the Commonwealth parliamentary committee. It seems to me that one of the advantages of that committee and various other scrutiny committee is the ability of those committees to act in a parliamentary rather than a politically partisan way. It is a quite striking feature, I think, of those committees—and this Committee as well—that they have been able to reach consensus positions, although in recent times there have been some dissenting reports.

It is important—and parliamentarians have been able to do this—to distinguish between a party-political role, which may support a piece of legislation as a policy matter, at the same time as a member of a scrutiny committee might nonetheless, stepping away from that partisan role, identify particular human rights issues with it as a matter of technical scrutiny. Whether the confidentiality of a draft report would promote or undermine that, I am not sure. There are, I am sure, other ways of getting input on particular legislation and the issues without showing draft reports around, but I think ultimately that is a matter for the Committee. I think it is important to try and maintain that distinction, as far as possible, of an impartial technical scrutiny rather than—

Mr DAVID SHOEBRIDGE: Getting to the non-partisan model, do you think it makes sense to have the Government have the numbers on the Committee or should it be a committee where the Government does not dominate, given that it is Government action that largely is going to be the subject of scrutiny of the committee?

Professor BYRNES: I think there are different models. I think it is 5:5 in the Parliamentary Joint Committee on Human Rights. I think it is 4:3 in the Victorian one. On the Senate scrutiny committees—

Mr DAVID SHOEBRIDGE: On the 5:5 committee—

Professor BYRNES: Five Government members and five non-Government members.

Mr DAVID SHOEBRIDGE: Who has the chair?

Professor BYRNES: It is a Government chair.

Mr DAVID SHOEBRIDGE: So it is Government dominated. What about Victoria?

Professor BYRNES: In Victoria I think it is 4:3. I would have to check.

Mr DAVID SHOEBRIDGE: The Government has four?

Professor BYRNES: I think it is Government four.

Mr DAVID SHOEBRIDGE: What about the United Kingdom?

Professor BYRNES: I am not sure. I could provide that. There are different models.

Mr DAVID SHOEBRIDGE: I am asking your opinion about the different models.

Professor BYRNES: I suppose the question presupposes, in some sense, that people are coming to the Committee with their Government, Opposition or minor party hats on.

The Hon. SHAOQUETT MOSELMANE: That is usually the case.

Professor BYRNES: It is—

Mr JOHNSON: For some.

Professor BYRNES: It is, for some issues. I suppose what struck me about the Parliamentary Joint Committee on Human Rights was, particularly on the basis of the advice provided by the secretariat, members of the committee were able to identify in some cases quite serious human rights concerns with bills, notwithstanding the fact that their parties had supported the introduction of the bills and the members, themselves, may have subsequently voted for the bills. I think it is the same with the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills, which are, once again, consensus committees although they are made up of different party members.

Mr DAVID SHOEBRIDGE: I invite you to look at the minutes of this Committee and at the divisions on the Committee and determine, for your own purposes, whether you think it is partisan.

The Hon. SHAOQUETT MOSELMANE: A lot of it is clearly political. You obviously want the best outcome for legislation to be compatible with human rights and all the rights, whether it is a treaty or multiculturalism or whatever it may be. How do you reconcile the political needs of Government and the efficiencies that the Government needs with the needs of compatibilities, where those needs mean extended periods before legislation is put onto the table for debate? During those debates if there is a compatibility checklist the debate may be diverted not to the legislation but towards the compatibility issues that the checklist may input.

Professor BYRNES: I have a couple of responses to that. The first is that human rights compatibility with legislation is not inconsistent with governments achieving policy. As was mentioned earlier this morning, many pieces of legislation actually promote the enjoyment of human rights. In areas where there might be concerns that there are encroachments, this process—it can be carried out expeditiously, although it may be a matter of resources—can identify concerns. It may identify ways of achieving the goal with minimal infringement on human rights or, if that is not possible, be in a clear public justification there is an overriding public purpose and interest that may override or may justify a particular infringement. So I do not see the two goals as inconsistent.

I suppose the point goes back to this notion of this Committee and similar committees as technical scrutiny committees. They are not saying, "We support this particular policy." They say, "If this is the Government's goal"—and it is obviously the entitlement of the elected government to pursue its own policies—"these are the human rights concerns that are raised if it wants to pursue it in this way. We think that there might be less intrusive ways of achieving this goal." Sometimes governments adopt that and are persuaded; sometimes they are not and they say that, after a much more considered and detailed reflection than often takes place now, they do want to insist on this—that the goal justifiably overrides the limitations. It is really about the process and detailing and broadening the analysis that takes place to produce better laws and a better public justification when there are encroachments on rights.

Mr DAVID SHOEBRIDGE: Most of that is the focus of the Executive, though, not at the parliamentary role. Can you turn your minds to what Parliament could be doing as, at least notionally, an independent organ in our Constitution?

Mr LANCASTER: Urgent action by an executive, by way of legislative amendment, does not have to be a thoughtless process. That is why we suggest a structure which requires proponents to consider the effect on human rights and prepare a compatibility statement or an impact assessment. Even if it is legislation that is brought forward that the Executive thinks are circumstances of urgency, or where it is a priority to be passed—

Mr DAVID SHOEBRIDGE: Assume for a moment that I am persuaded of that. I am not arguing that; I am asking about the role of Parliament.

Mr LANCASTER: The first point is that Parliament, through this Committee, will be better placed to deal with urgent legislation of that sort if there is a procedure in place for dealing with the compatibility of the statement that comes in if there is some process, be it formal or informal, for consultation with the relevant Minister. That procedure will be in place as well.

Mr DAVID SHOEBRIDGE: So it is a good starting point.

Mr LANCASTER: All relevant parties will expect there to be a process that needs to be gone through. That will not necessarily be a brake on action from the Executive's perspective, but the Executive will come to expect that it is there and the Committee will be in a position to point to the procedures of Parliament to require that certain steps be taken. As Professor Byrnes said, that does not necessarily mean a negative one way or the other about the final form of the legislation. It is just to avoid thoughtlessness and intuition and to replace it with a systematic consideration of rights before even the most urgent bill is passed. We think this Committee can insert itself, with appropriate legislative amendment of course, into that process, not with any particular policy outcome in mind but with better laws and regulations in mind that are done thoughtfully.

The Hon. SHAOQUETT MOSELMANE: Professor George Williams suggested that the Attorney General prepare statements of compatibility rather than departments. Would that make it more efficient? Would that make the process easier for the Government and the Executive?

Mr LANCASTER: I can perhaps offer a slightly different view. The Commonwealth experience has been to leave it with the relevant Minister and the relevant department. That obviously has some drawbacks in that, certainly initially and sometimes subsequently, you get statements of compatibility that are not particularly sophisticated or do not necessarily address all the rights that should be addressed. That would be covered if the Attorney General's Department were to do it. On the other hand, it would make clear that the relevant department—that is, the policy-making department—had not yet fully understood the human rights framework and taken ownership of it. There is a good deal to be said for leaving it with the departments. Any good lawyer can write a compatibility statement, but I think it is that internalisation of those rights and concerns as part of the policy-making process that is the real thrust of all these schemes. Getting that institutional memory and practice is extremely important.

Mr DAVID SHOEBRIDGE: The agency that is doing it should be the agency that considers these matters, not as a separate reference?

Professor BYRNES: Yes, and of course they do consult with the Attorney General's Department at the Federal level and the department does provide advice on those issues.

Mr LANCASTER: The Commonwealth Parliament has published a guide for the preparation of these statements. I think the same has happened in Victoria. But there are existing documents that can be provided to the Minister and his or her department to indicate the way this sort of question needs to be approached. Putting in place the structure is the important thing, and this Committee can take steps to create that education of proponents of legislation and regulations.

Mr LEE EVANS: Do you think the Committee is best placed to review domestic State laws against international laws?

Mr LANCASTER: Yes. The Acts and regulations and the conduct of State actors—that is, State of New South Wales actors—are matters for which Australia is responsible under its treaty obligations. It is essential that each of the different polities within Australia take this into account when preparing and passing their own legislation and regulations. It is part of New South Wales's responsibility to the federation to ensure that Australia is, to the extent it possibly can be, not in breach of its international obligations.

Mr DAVID MEHAN: A few witnesses have referred to a couple of studies and analyses of New South Wales that have shown that the Committee prepares reports—largely ignored by Parliament—that probably do

not have a huge influence on the development of legislation. You have referred to other jurisdictions where there are different and more comprehensive processes that must be followed before legislation goes through Parliament. Are you aware of any studies showing that those processes produce a better result, or do they just substitute what we have—which is ignored—with a process that has the look of something being done but at the end of the day does not have a huge impact either?

Professor BYRNES: Yes, there is a number of studies, and I would be happy to provide them to the Committee. I refer in particular to a study conducted by the Canadian political scientist Janet Hiebert. However, there are also studies of the Victorian and Australian Capital Territory experiences. They go beyond the benefits of improved and more explicit policy-making process to changes in policy that are of greater benefit. I am certainly happy to send those to the Committee if that would be helpful. Of course, parliamentarians are making human rights judgments all the time—every time you vote on a piece of legislation. It is not something that is new to you. I suppose what we are suggesting is that there are different ways of doing it in order to ensure a better result. Partly that involves making oneself more familiar with international standards as well as local human rights standards to the extent that that is necessary.

Another issue is that it is not just for this Committee. This Committee obviously has a very important and primary role. However, it seems to me that there is an argument that every committee and the Parliament as a whole should have regard to the human rights implications of polices and legislation when they are undertaking inquiries into legislation and other matters that come before them. In doing so that knowledge and responsibility is spread and is not seen as something that is parked off in this Committee, which may then be conveniently ignored if urgency or other political considerations come to the fore.

Mr DAVID SHOEBRIDGE: Perhaps in the first half of the parliamentary term all parliamentarians should do a human rights course. You do not pick things up by osmosis being a member of Parliament; things need to be imparted.

Professor BYRNES: That is obviously a matter for the Parliament, but in the initial stages of the Commonwealth Committee all members of the committee volunteered for training and capacity-building sessions so that they could build on their existing human rights knowledge within the international framework with which not all of them were necessarily familiar. I think that has continued. Yes, there is a role for that, but parliamentarians are very busy people.

The Hon. SHAOQUETT MOSELMANE: Most members do not know anything about government in the first place.

Mr DAVID SHOEBRIDGE: I will declare an interest in this because I am a member of the Parliamentary Friends of Reconciliation, as is the Hon. Shaoquett Moselmane. The group put a submission to this inquiry proposing that there be an additional provision in section 8A, being a requirement to report to both Houses of Parliament about the impact any bill has on Aboriginal and Torres Strait Islander people. It should have regard to any negative or detrimental impact the bill may have, any positive or advancing impact, or any other matters the Committee sees fit to consider. Given the special obligation I believe we have to First Nation peoples, what would you think about that kind of specific legislative provision?

Mr LANCASTER: We would be supportive of it. That submission is expressed in terms of a new subsection in section 8A. We have obviously recommended a more thorough-going review of the legislative framework that governs the operation of this Committee. However, there is no question that specific reference to taking into account the rights of Indigenous Australians should be a required as part of the consideration given to compatibility statements and assessment of impacts on human rights.

Mr DAVID SHOEBRIDGE: Are you suggesting that we have an express reference to the International Convention on the Rights of Indigenous Peoples?

Mr LANCASTER: Yes.

Mr DAVID SHOEBRIDGE: Do you have a view about whether or not an express statutory provision such as that proposed by the Parliamentary Friends of Reconciliation—a general reference to the treaty or maybe both—might be the way forward?

Mr LANCASTER: At least a specific reference to the treaty. In our view, there is no harm in specific reference to the rights themselves.

Professor BYRNES: I would also add that in addition to the United Nations Declaration of Rights for Indigenous Peoples, the provisions of the International Covenants and the Racial Discrimination Convention, the covenants contain the right to self-determination which would address some of those issues. The Commonwealth parliamentary committee, although it does not have the UN Declaration on Indigenous peoples as

part of its mandate, has drawn on that in interpreting the other treaties. We would obviously support that general topic being included.

The Hon. SHAOQUETT MOSELMANE: You mentioned that there were seven compatibility human rights, but there seems to be more in the treaty that Mr Shoebridge has suggested—multiculturalism, racial and religious discrimination and so forth. In terms of government trying to meet the compatibility, where do you stop or where do you start? How wideranging can the list be or how narrow can it be to make it an efficient and responsible government when legislation goes through in kicking off all the compatibility issues?

Professor BYRNES: When the Commonwealth Parliament was set up, in some of the discussions around Victoria people said, "seven treaties?" They counted up 110 different rights. In fact, that is more complex than it needs to be. There about 20 to 25 rights. Most of them are already familiar to us. They are the classics: civil and political rights, which already fall within the scope of the Committee's mandate; the right to work, the right to property; the right to education; Indigenous rights. So it is not so much a vast new universe opening up but a different structure, opening access to a different way of analysing the rights and some different jurisprudence on the international level that helps to carry out that process. Yes, there is a learning curve for everyone in the initial stages but it is like most things. Public servants, politicians and the community adapt after that initial learning curve stage.

Mr DAVID SHOEBRIDGE: It seems to me that in terms of a statement of compatibility and human rights framework, we could probably most easily look to Victoria and the ACT as statutory models. Do you have a view about which of those would be the preferential model for us to look at?

Professor BYRNES: I think Victoria is probably stronger in terms of its statement of compatibility. In the ACT, the statement of compatibility historically has been a short one-liner from the attorney general, whereas the substantive statement of justification is in the explanatory statement or explanatory memo for the bill. You really have two models—one is where you combine a traditional scrutiny function, like this Committee has, with a human rights scrutiny function, which happens in Victoria and the ACT, or you have a separate human rights function. I think combining the two probably makes sense because there is an overlap and then you are getting the extra teeth in that committee. The Northern Territory, on the other hand, has sessional orders which say that you must have a statement of compatibility. They have a number of general sector committees and they do that function.

Mr DAVID SHOEBRIDGE: Nobody is suggesting that we shold look to the Northern Territory for a human rights framework.

Professor BYRNES: They do have a statement of compatibility requirement, which is more than we have here.

Mr DAVID SHOEBRIDGE: Next I will ask you to rank us.

Mr DAVID MEHAN: This Committee is currently not limited to what rights and liberties it could throw in the mix and consider having been infringed upon by various bills before the Parliament. Is there not a risk with that sort of statement of compatibility model that you have a reference back to something? Is there a risk with that? In the Victorian situation, have they not crystallised a current view of the world that might change? For want of a better term, they might have crystallised the view of the ruling class. If we are limited to that, then the Committee might not be able to raise other issues that might be important to the members of the community.

Professor BYRNES: I think that problem is avoided by two things. One is the very broad language of human rights language which does allow evolution. The second way is if this Committee retained its existing mandate, which I think it should—undue trespass on personal rights and liberties—that is an elastic one which can evolve. We are certainly not saying that it should just be the international human rights instruments, as I think we said earlier. Common law rights, where there is some overlap, specific Federal constitutional rights or State constitutional rights about freedom of political communication, those sorts of things would fall within that. I think there is sufficient flexibility for that to happen. The issue with Victoria and the ACT is that they confine themselves to look almost overwhelmingly to civil and political rights, which is something that this Committee does not. I think it is important to have that whole gamut of rights.

Mr LANCASTER: Ultimately, the question is answered by those treaties and obligations that the Australian Government enters into or has entered into over the last few generations. They certainly should, in any legislative amendment to the Legislation Review Act, include language broad enough to include current rights and liberties that this Committee addresses but also Australia's international obligations under these other treaties that we have mentioned.

Mr DAVID SHOEBRIDGE: You have proposed a regulations-making power to cover future treaties?

Mr LANCASTER: Yes. In that way, it cannot get ossified if it is dependent on what Australia as a nation decides to do.

The CHAIR: Are there any questions in our last couple of minutes?

Professor BYRNES: May I ask for your indulgence? I want to make a few comments about one of our other proposals. As part of the international aspect, we are proposing that the Committee be briefed regularly on the findings of international human rights treaties and bodies that bear on Australia, whether they be a review of the Australian report or decisions in individual cases, particularly those that relate to New South Wales legislation or analogous legislation in other States. I will mention three of those that might be of interest. I do not think they have come back to the Committee.

In 2017 the UN Human Rights Committee, which is the body that supervises the International Covenant on Political and Civil Rights, made a number of comments about electoral legislation in the Commonwealth Act but also in State Acts relating to provisions excluding persons of "unsound mind" from the right to vote and raise concerns about that as being potentially discriminatory against people with particular intellectual impairments or psychosocial impairments. It seems to me that that is the sort of thing—and it is in the Parliamentary Electorates and Elections Act 1912 still—that might usefully come back to this Committee. It has probably not come the Committee before but it is something that the Committee might well have an eye on.

Another case which got a lot of attention from the Committee about 10 or more years ago is the Blessington and Elliot case involving a horrible murder by two children at the time, who were sentenced to life imprisonment. Various piece of legislation were introduced to significantly limit the opportunities of at least one of them—Blessington—to apply for release on parole after a certain period. This Committee took a very strong position on that and was very critical of it. It was one of those cases in which the bill was, I think, introduced one day and passed the next. The Committee's report was only published after the passage of the legislation.

The case was brought to the UN Human Rights Committee, complaining that this involved violation of a number of international treaties, including the Convention on the Rights of the Child. The Committee itself had raised this and sought advice from the Attorney General, which was not forthcoming. In 2014, the Human Rights Committee found in fact, similarly to the committee's intimations, that this involved violations of a number of rights. It seems to me that it would be very appropriate to keeping our legislative process updated for those sorts of things to come back to the Committee, particularly where the Committee has looked at these issues earlier.

The third one, although this one may now have been solved, was a case called *G v Australia* relating to the ability of transgender persons to get their birth certificate reissued with their new gender on it. The restrictions on that where people are married requiring them to be divorced in order to get that also went before the Human Rights Committee. In the middle of last year the Human Rights Committee held that this was also a violation of international human rights in the New South Wales legislation.

The fourth one is the one that we mention in our submission, the Beasley case, involving the exclusion of deaf jurors from jury duty in New South Wales being a violation of the Convention on the Rights of Persons with Disabilities. I notice that the ACT legislature has introduced legislation referring to that decision in order to eliminate that provision from ACT law. What we are suggesting is that there is a loop that needs to be closed. There is a dialogue and a process that would help in fact to reinforce some of the findings that this Committee has made and that might bring some more attention to those issues.

Mr LANCASTER: There is a question of procedure as well in terms of how is it that this Committee does inform itself or become informed of these matters. There are a couple of options, it seems to us. One is the secretariat of the Committee keeping an eye out for these recommendations. Another is a more formal role where an obligation is placed on the Attorney General or the Attorney General's department to inform this Committee of that sort of development. Of course, a third option might be informal arrangements with, for example, our own committee and inviting communication to indicate that these steps have been taken internationally and they should be taken into account.

The CHAIR: Thank you. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to supply answers in writing if you receive any questions?

Professor BYRNES: Yes, of course.

The CHAIR: Thank you very much for your contribution.

(The witnesses withdrew)

MARTIN BIBBY, Member, NSW Council for Civil Liberties, affirmed and examined

STEPHEN BLANKS, President, NSW Council for Civil Liberties, affirmed and examined

The CHAIR: Do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

Dr BIBBY: No.

Mr BLANKS: No.

The CHAIR: Before we commence with questions would you like to make a brief opening statement?

Dr BIBBY: There is what the Committee was, there is what the Committee has become and there is what the Committee could be. I want to concentrate on the last bit. It was set up in the first place in place of passing a bill of rights. It was argued at the time that it would be a satisfactory substitute; Parliament itself could take charge of issues of rights and of liberties and this was going to be its way of doing it. At first I think the Committee took its duties very seriously. It sought information from Ministers. It drew attention to proposed legislation which conflicted with rights and liberties. It sought input from expert people from outside the Committee, notably people from law faculties and senior lawyers. But after a little bit it was routinely ignored. It had no status. It did not recommend the rejection of legislation where it trespassed unduly on rights and liberties but merely referred to the Parliament the fact that there might be a problem.

We had difficulty with it then because it appeared to be somewhat weak. The consequence, if I remember correctly from a statement by your former chairman Mr Johnsen, was in one year they made 170 adverse comments on legislation on 80 different bills and they were referred to in Parliament a total of 17 times. I understand there were no amendments made to anything. That would be enough to dispirit any Committee member. It is perhaps not surprising then that things deteriorated somewhat. The Committee is subject to a number of significant problems. Apart from the lack of impact, there is the lack of time. The process of producing a bill one week and passing it by the end of the next leaves the Committee with five days, including a weekend generally, to look at legislation. That is when matters are not even declared urgent. There is a lack of clear standards. I think the Bar Association had been referring to those sorts of things.

It also has been affected by rather poor argument. In our submission there are two or three examples of that. For instance, when a bill had the consequence that prisoners would not be entitled to vote the report simply said that it is commonly the case that people who are in jail lose some of their liberties. Effectively it is saying that they are losing their liberties so we can go on taking their liberties from them. There was no effort to say that this is contrary to fundamental rights in a democracy. There was no looking at whether it was justified and certainly no balancing of any benefits to be gained from denying prisoners the right to vote against the benefits and important values involved in having the right to vote. The Committee has tended to be run rather roughshod, I think, in its arguments.

Another example we have given is a case where the Committee has simply adopted the statement from the relevant Minister's second reading speech and adopted it without criticism. Essentially what I am saying is it has tended not to take a very strong critical approach. It is not the function of this Committee to simply push Government legislation through. It is not the function of the Government members of this Committee at whatever time to push legislation through. Apart from the Legislative Council itself, it is to be a last check which will ensure that rights and liberties are protected. It is not to be an echo of Cabinet or even an echo of a party room but a separate judgement upon that.

I would like to turn to what you might be. I think you could do worse than to take account of what the Federal parliamentary committees do. The Committee on the Scrutiny of Bills, for instance, routinely refers matters back to Ministers and asks for better explanations, and it gets them, generally of a page or more in length, in relation to each query. When they are not satisfied with that then they draw the attention of the Senate to the weaknesses in the Minister's arguments or to the fact that the bill seems to transgress unduly on rights and liberties.

The practice may be compared also with the human rights committee of the Federal Parliament, which feels quite able to provide recommended amendments for bills. The better your Committee might be like the Parliamentary Joint Committee on Intelligence and Security. That has the advantage of having very senior politicians on it. There were five former Ministers—one from the Government, four from the Opposition—there were a number of shadow Ministers; there are, I think, three parliamentary Whips on the Government side; and there is a Federal president of one of the parties, all on that committee, so it is listened to.

In a recent report on the detention and questioning rights of ASIO, it had no hesitation in rejecting at least 10 proposals—in fact, 10 requests—from ASIO and from the Attorney-General's Department, so it is quite strongly independent. And it has proposed that the power of ASIO to detain people who are not suspected of any crime for seven days be removed. That committee is something we would recommend you to examine and to adopt processes that are as strongly independent as that.

There is the problem of prestige. If a committee is more vigorous, that is one thing. I am not wanting to insult the people here. You are distinguished yourselves, but you do not have the recognition that is necessary and it is not automatic. That is why we propose the rather radical suggestion of including former judges on the Committee with the power to put in their own report or indeed to vote. I accept that that is an unusual suggestion for a parliamentary committee, but something needs to be done to improve the practice of the Parliament in protecting rights and liberties. If that is not the kind of thing that can be done then we strongly recommend that you recommend that the Parliament instead pass a bill of rights so that matters can be taken out of the hands of the Parliament at least in terms of making a judgement. I will hand over to Mr Blanks.

Mr BLANKS: I do not have anything to add to that statement.

The CHAIR: Thank you for those opening remarks. Are there any questions?

Mr MICHAEL JOHNSEN: Yes. Thank you, Dr Bibby. Earlier you mentioned prisoners not having the right to vote and so forth. Is it not fair to say that if someone was convicted of a crime which led to incarceration that by definition would suggest that they have impacted on someone else's rights and liberties—that of their victim—yes or no?

Dr BIBBY: Very probably. But it does not follow from that that they should lose particular liberties themselves.

Mr MICHAEL JOHNSEN: Is it not fair to say, though, that society in general has a particular view that you must not take the view that it is all care and no responsibility. You mentioned a bill of rights. What about a charter of obligations to match each right?

Mr BLANKS: If one can answer that, that is an old trope. Of course there is an obligation to comply with the law of the land. Those obligations are strict. They are enforced. If you breach the law of the land you are subject to the penalties that apply. What human rights dialogue does in one of its aspects is provide an internationally recognised and agreed framework for assessing the quality of legislation, the laws which people have to comply with. It is an internationally agreed and accepted set of standards and not just fixed standards but also procedural standards so that there are mechanisms for determining whether laws infringe human rights standards—proportionality, for example: Is the law proportional to the problem that it addresses?

Of course you might say you would like Parliament to be free to decide that persons who are subject to a sentence of imprisonment do not have the right, while they are in prison, to vote. You might, like some American States, say that that loss of the right to vote should extend after they are released from prison either on parole or permanently. Taking that position might attract attention in the media. One has to recognise that there are international standards which deal with how one assesses that kind of provision. You run into the potential for infringing those standards which the international community has agreed are appropriate.

Mr MICHAEL JOHNSEN: The issue of human rights and liberties comes into effect with every piece of legislation that gets passed—is that not fair to say?

Mr BLANKS: Not every, but a large number.

Mr MICHAEL JOHNSEN: Ninety-nine point nine per cent.

Mr BLANKS: Perhaps not, but certainly a large number.

Mr MICHAEL JOHNSEN: And I will correct you on something: I do not have the view that once you have served your term you should continue to be deprived of voting rights, for example.

Mr DAVID SHOEBRIDGE: He did not say that.

Mr BLANKS: I did not say that. I was just saying in the United States there are some States which have taken that position and from a political point of view you might want to say that is open.

Mr MICHAEL JOHNSEN: This is about this particular Committee and its functions, and the value that it may be able to provide to the parliamentary process—the democratic process within Parliament. Are you aware that regulations, for example, can be brought up by any member, as can legislation be brought up by any member around any issue to be discussed in Parliament and therefore the floor of the House, whether it be the

Legislative Assembly or the upper House, has the right to discuss and debate all sorts of issues, whether they be human rights or otherwise, on any piece of legislation or regulation?

The Hon. SHAOQUETT MOSELMANE: With the consent of the Government.

Mr DAVID SHOEBRIDGE: So the question is: Are you aware there is a Parliament?

Mr BLANKS: Yes. And of course. But the Committee would not in any way impinge on that function of Parliament. What we are talking about is whether or not this Committee ought to be given appropriate conditions in which it can operate well.

The Hon. SHAOQUETT MOSELMANE: Dr Bibby, my recollection is that you suggested committee reports back to the Parliament are problematic. If so, who else could the Committee report to?

Dr BIBBY: No, I am not suggesting that it should not report to Parliament. I am sorry if I gave that impression.

The Hon. SHAOQUETT MOSELMANE: I thought you suggested that if it is reporting to Parliament, where the Parliament is controlled by the Government, then there is no follow-up.

Dr BIBBY: No, the problem is that, even when it does report to the Parliament, the Parliament largely ignores it. And that was the point of Mr Johnsen's comment a decade or so ago. It is a question of the Committee being taken seriously. That is going to be solved only in part by the Committee taking itself seriously. I do not believe a four-minute meeting, passing a set of resolutions and statements that have been prepared over a weekend is a committee taking itself seriously or taking its job seriously. I do understand that the pressures of time might force people into this, so I am not criticising individuals, but the Committee's processes do not indicate that it takes the role seriously. And the Parliament's treatment of the Committee does not indicate that it takes the Committee seriously either. That is an issue that the Committee must address.

Mr MICHAEL JOHNSEN: Dr Bibby, you mention that reports are prepared over the weekend; they are actually given to members prior to the weekend. And you talk about a four-minute meeting. Do you not recognise the fact that members have the draft report in front of them for a number of days prior to the meeting and they can form their own views and have their own assessments?

Mr BIBBY: I am not privy to that process, of course, and I would be very interested to find out how it proceeds. I had assumed there had been at least some discussions. If a bill is introduced on a Thursday and the committee is required to report on the Tuesday, there is not very much time for discussions.

Mr MICHAEL JOHNSEN: I have faith in all the committee members that they have the intellectual capacity to be able to put these arguments together over a number of days prior to the meeting.

Mr DAVID SHOEBRIDGE: They are just never articulated in the committee.

Mr MICHAEL JOHNSEN: In the submission from the Council for Civil Liberties you talk about poor argument. What do you mean by that?

Mr BIBBY: I will give examples. An argument which simply says, "This matters and therefore we can override civil liberties" is not a competent argument. You need at least to engage in the principles of balancing. You need to demonstrate that the matter which is taken to override is more important than the matter that you are overriding. But that is only the start. You need to show that there is no alternative. You need to show that the degree of overriding of a right or liberty is the minimum that is necessary for the purpose, and other arguments of these kinds. They do not do this.

Mr MICHAEL JOHNSEN: With respect, have you read any of the points within various digests where it specifically brings up "this may potentially impinge on X, Y, Z; however, it has been considered otherwise" blah, blah, blah?

Mr DAVID SHOEBRIDGE: That is exactly what he just said.

Mr BIBBY: The "howevers" are extremely brief.

Mr BLANKS: Stating the conclusion is not really adequate; it is like a judge giving the orders without giving reasons. In order to be able to assess whether or not the committee's view of a matter is the best view, it is necessary to set out the process of reasoning which led to the committee's conclusion and expose that process of reasoning to public scrutiny. To the extent that this committee does not do that, that is one of the matters which has led to the problems we have identified in the submission.

Mr MICHAEL JOHNSEN: The process that you are talking about for that scrutiny, would you suggest, for example, that the discussions that may take place in committee are publicised?

Mr BLANKS: No, that is not what I was referring to. There is a process of reasoning which enables legislation to be evaluated as to whether or not it appropriately impinges on rights and liberties. There is almost no problem the Parliament in New South Wales is dealing with that is not dealt with in other jurisdictions around the world, where other jurisdictions which do have human rights-based legal systems have engaged in a process of reasoning in relation to that legislation having regard to the human rights standards. It is a process of reasoning; it is like writing a judgement.

Mr MICHAEL JOHNSEN: So the process of reasoning takes place, whether you agree with it or not, and therefore you end up at the conclusion with the tabled digest. You are not happy with the tabled digest process because you call it a conclusion, but at the same time you do not want to have or do not see the need to have the reasoning and the process publicised.

Mr BLANKS: If the only reasoning that has gone into the conclusion is the discussion that takes place at the committee meeting—and we know that the committee meetings are very short, so there is not going to be very much discussion there—if that is the only reasoning that has led to the conclusion, then that ought to be exposed. But that is unlikely to be the case. If that is the case, then the committee is really not doing its job at all because the committee ought to be engaging in the process of reasoning to examine whether or not the proposed legislation impinges rights and liberties by reference to the various standards which we have referred to and which other submitters here have referred to, which are objective standards which enable legislation to be evaluated.

Mr MICHAEL JOHNSEN: Do you think there is an overarching principle that the whole broad-ranging issue of human rights and liberties can be often more subjective than objective?

Mr BLANKS: No, I do not think so. One of the interesting journeys I have been on as a lawyer for the last 20 years in my involvement in civil liberties, I used to think exactly that, that there is some subjectivity in it. But when you look at the way in which human rights law has developed internationally over the last 70 years, the whole world, every jurisdiction around the world is dealing with the same set of problems, whether it be counterterrorism or whether it be protests or whatever. There is a standard in the human rights treaties—the rights of Indigenous; there are so many issues common around the world—there is an international standard for dealing with all of these issues, which has led to a body of jurisprudence and discussion of various solutions come up with by various individual jurisdiction, enabling comparison and enabling assessment by reference to standards. That is the really important thing the idea of human rights is.

The Hon. SHAOQUETT MOSELMANE: I am interested in your reaction to my next comment. This report that we currently get is confidential and in terms of transparency and in terms of opportunities for members to have a say is pretty much restricted. What is your reaction to that?

Mr BLANKS: Compare it to the process in the Australian Parliament where a large number of committees take public submissions—and there are some in this Parliament as well that take public submissions, including this review. There would be quite a significant amount of legislation that comes to this committee which would benefit, where the committee would benefit from public submissions.

Mr DAVID SHOEBRIDGE: Thank you both for your contributions. In the coopting or otherwise placing a retired judge on the committee, what would you see the role of the retired judge to be? To be a legal reference point or, if I could call it, a standard participating member of the committee? What would you see the role being?

Mr BIBBY: Both of those. I accept that it is a radical suggestion but, as I said before, something needs to be done.

Mr DAVID SHOEBRIDGE: Suggestions involving judges are rarely radical.

Mr BIBBY: I would make the judges members of the committee so it would be a kind of joint parliamentary, extra parliamentary committee still having the role of making recommendations to the Parliament. That is not going to be able to determine what happens to things, but the inclusion of such people would give the committee a status it would be very hard for Parliament to ignore.

Mr DAVID SHOEBRIDGE: That is part of rebuilding the status of the committee so its conclusions are respected by Parliament?

Mr BIBBY: That is right.

Mr DAVID SHOEBRIDGE: The Parliamentary Friends of Reconciliation, which I have an interest in, being a member of the committee, as is the Hon. Shaoquett Moselmane, has recommended a specific addition in section 8A to include reference to the rights and the interests of First Nations peoples. Do you support that either

as an express statutory provision or maybe a reference to the International Declaration on the Rights of Indigenous Peoples, or maybe both?

Mr BLANKS: I heard the answer that the Bar Association gave to that question and I think they answered it quite well. I think the first layer of dealing with that would be to include the Declaration on the Rights of Indigenous Peoples in the list of human rights instruments, to which this Committee should have express regard. I do not have a firm view on whether it is wise to seek to include specific other references to consider the interests of Indigenous people. The danger with that suggestion is that once you go down that path you have a lot of groups, such as business groups, who want to be included on the list of interests that have to be considered.

Mr DAVID SHOEBRIDGE: For some time now, this Parliament has been passing laws that have made first nations persona in Australia the most incarcerated people on the planet. Do you not believe that there is an express obligation to identify their needs and interests in the legislation that we pass? Putting to one side their status as Indigenous peoples and traditional custodians of the land, should not the affect of what this Parliament has done be something that we should have front and centre?

Mr BLANKS: I would like to think that putting such a provision into the Legislation Review Act would solve the problem of Indigenous incarceration, but I suspect it will not.

Mr DAVID SHOEBRIDGE: I was not suggesting that. I was suggesting that it would be a measure that would go in the right direction.

Mr BLANKS: I do not have a firm view on that.

Dr BIBBY: We might take that on notice.

Mr DAVID MEHAN: You have suggested a bill of rights. Let us assume that that may not happen any time soon. You have suggested judges on the committee. Let us assume that that does not happen any time soon either. Other submissions have suggested that there should be some sort of obligation on the executive or the member who introduced the bill to the House to measure it against the Committee's report or against a statement of compatibility. What is your view on those suggestions?

Mr BLANKS: They have merit. There are a lot of measures that could be done short of a Victorian-style human rights charter or appointing outsiders to the Committee, which could improve the work of this Committee.

Mr DAVID SHOEBRIDGE: It would be hard to go backwards.

Mr BLANKS: I adopt that. It would be hard to go backwards.

The Hon. SHAOQUETT MOSELMANE: What is your view on the recommendation by the University of New South Wales Gilbert and Tobin Centre of Public Law that debate on bills be adjourned for 10 clear calendar days, rather than five calendar days?

Dr BIBBY: You will note in the submission that we have actually suggested two weeks.

The Hon. SHAOQUETT MOSELMANE: Why 14 days and not 10 days?

Dr BIBBY: It is just a different figure plucked out of the air. But you are going to need longer than five days with weekends to get the level of consideration of arguments and presentation of arguments that we recommend.

Mr DAVID MEHAN: Are there any studies that suggest that the Victorian system is operating more effectively than the system we have in New South Wales that you are aware of?

Mr BLANKS: I will take that on notice. I am not aware of any. Anecdotally, everything I hear from people in Victoria suggests that the Charter of Human Rights and Responsibilities is well accepted and is having a positive impact on public administration and the laws that are passed. I do not detect any significant unpopularity. That is a slightly different question. If I come across any academic studies I will let you know.

Mr DAVID SHOEBRIDGE: Probably the most relevant alternatives for us to consider are the Australian Capital Territory model and the Victorian model. Do you have any views about which of the two models are preferable for us to consider? What are their strengths and weaknesses?

Mr BLANKS: Again, I heard the Bar Association's answer to that question and I would agree with the reasons that they gave. I agree that the Victorian model is preferable, but either of them would be an improvement on what we have now.

Dr BIBBY: I agree.

Mr DAVID SHOEBRIDGE: Do you believe that the best starting point for articulating the human rights standards is the 20 basic standards adopted in Victoria?

Mr BLANKS: I would have to take that on notice.

The CHAIR: I thank you both for your contributions today. There may be some additional questions in writing, which will be on the public record as part of your evidence. Are you happy to provide a written reply to any further questions you may get?

Mr BLANKS: Yes

Dr BIBBY: Yes.

(The witnesses withdrew)

KIRK MCKENZIE, Committee Member, NSW Society of Labor Lawyers, affirmed and examined

LEWIS HAMILTON, President, NSW Society of Labor Lawyers, affirmed and examined

The CHAIR: Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr MCKENZIE: No.

Mr HAMILTON: No.

The CHAIR: Before we commence with questions, would either of you like to make a brief opening statement?

Mr HAMILTON: I have a brief opening statement, but if anyone has any questions they can step in. We thank the Committee for allowing us to present evidence to this inquiry. My name is Lewis Hamilton and this is my colleague Kirk McKenzie. We are both committee members on the NSW Society of Labor Lawyers. The NSW Society of Labor Lawyers aims to promote changes in substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. We have operated since 1977. The society provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community. We are not affiliated to NSW Labor, although, undeniably, our views do often converge. But there are often times when our views do not, and we do not speak on behalf of NSW Labor, its membership, or the State parliamentary Labor Party.

Our position on the terms of reference before this Committee was captured in a brief submission to the inquiry made by the society on 30 November 2017. That position has not changed, although we seek today to elaborate on a number of points that may be useful in the Committee's deliberation. The first point we want to make today is about procedure. It relates to the role this Committee has played in the past in the review of legislation. We do not seek to trivialize the important work that this Committee has done in reviewing legislation. On review of the regular Legislation Review Digests, it is clear that the Committee is drawing attention to the relevant aspects of section 8A of the Act. This is not, however, done for all bills; and some evade scrutiny by this Committee.

In our view, it is not possible for this Committee, as it is currently structured under the Act, to properly scrutinize every piece of legislation that is brought before the Parliament in a meaningful way. This arises because of a number of factors, not least because there are other important matters pressing on its members' time and also because, like all committees, matters tend to be drawn down political party lines and this can often skew the approach to proper scrutiny. This is perhaps the reason various bills are overlooked by the Committee, but what this calls for, in our view, is an alternative process after a thorough review of legislation, not merely through the New South Wales Parliamentary Counsel's office, but by a separate mechanism that has as its focus a proper rights review of legislation.

This brings us to our second point, which is in respect to the current criteria under which new legislation is considered. Those criteria in section 8A of the Act fall within various categories. Broadly, they require the Committee to review legislation by reference to general statements on, firstly, personal rights and liberties and, secondly, various strands of what we would call "government power", which is misuse of power by bureaucrats and so on. Those criteria are limited because, in our view, they are not sufficiently prescriptive and they do not require thorough review by way of reference to the international human rights treaties, which our country has ratified or acceded to.

Our third and final point follows on from the first two. It is to do with the solution to the current problem. The Act, having been introduced in 1987, is now clearly deficient in two areas. The first is that, unlike other Parliaments, it does not require submission of a statement of human rights compatibility when a bill is introduced. Instead, it leaves all scrutiny functions to a time-poor committee which, of course, is not going to be able to comprehensively report on each and every piece of legislation. The second failing is that the Act does not require review by reference to the human rights treaties to which Australia is a party, for example, by reference to the International Covenant on Civil and Political Rights, or the other six core treaties that are referred to in the Federal legislation. Instead, it requires review by reference to vague notions of personal rights and liberties, which provides little guidance for the Committee in conducting its work.

In our view, there is a tried and tested method in other States and Territories for the review of legislation. That method is by way of comprehensive human rights legislation. My colleague Mr McKenzie will go into further detail on the history and development of rights legislation and why it may be necessary. Before he does, I say this:

If one looks to other States and Territories around Australia, the process adopted by their human rights legislation is particularly focused on the process for review of each new bill. The Australian Capital Territory Human Rights Act 2004 requires an ongoing role for the Attorney-General's department. Each bill presented to the Legislative Assembly requires a compatibility statement to be drafted, addressing whether each new bill is compatible with human rights and, if not, how it is not.

Victoria's *Charter of Human Rights and Responsibilities Act 2006* adopts a similar approach but instead places the onus of producing a compatibility statement on the member introducing the bill. The Queensland Attorney-General has recently announced that the Victorian Charter is likely to be replicated in that State within the next few months. These methods of review provide an additional step in the process beyond that in the New South Wales Legislation Review Act in the form of a compatibility statement. In adding that step, they improve the parliamentary scrutiny of legislation in line with basic human rights principles. Our view is that following this inquiry into the New South Wales Act, the Committee should recommend the path followed by Victoria, the Australian Capital Territory, and now Queensland. My colleague Mr McKenzie will now provide further submissions on behalf of the Society.

Mr McKENZIE: I will speak briefly because I understand you have quite a few questions, although we are running ahead of time. I would like to say, particularly to the Coalition members of the Committee, that the development of human rights over the past 70 years—since the adoption of the Universal Declaration of Human Rights on 10 December 1948—has had a surprising influence from representatives of the two major political organisations in this country: the Coalition and Labor. If The Greens had been in existence in the early years, I am sure they would have been involved as well.

The history is that a former member of this Parliament, Dr H V Evatt, ensured that during the late 1940s Australia had quite an involvement in the initial drafting of the treaty that is the basis of the Victorian Charter of Human Rights and Responsibilities by simply making sure that we had a seat at the table. That treaty and its companion treaty on economic, social and cultural rights started to be drafted in the late 1940s and early 1950s. It was drafted by the United Nations Commission on Human Rights, as it was called then. Australia was one of 18 members of that Commission. The member, or the person who was our delegate to that commission was Fred Whitlam, the father of Prime Minister Whitlam, who had been appointed by the Liberals in 1945 as the Commonwealth Crown Solicitor and advised both governments for the next 14 years until he effectively retired.

His retirement job was as Australia's representative on the United Nations Commission on Human Rights. He, from 1949, took his instructions from the Liberal Government. He was really expressing the point of view of the Coalition Government during the drafting process. He had a prominent role in the drafting. When Eleanor Roosevelt, the wife of the deceased American President, retired as the Chair of the United Nations Commission on Human Rights in 1951, the rapporteur of that Commission became the chair and Fred Whitlam became the rapporteur. He was effectively the Secretary of the Commission and presided over the first drafts of the International Covenant on Civil and Political Rights [ICCPR], which were presented to the General Assembly in 1954. During the ensuing 12-year period, there was a major redrafting process, which was under the supervision of successive Coalition Ministers.

In 1966, when two covenants—one on civil and political rights and one on economics, social and cultural rights—were adopted by the General Assembly after this exhausting drafting process, the Coalition Government directed its Ambassador of the United Nations to vote in favour of it. When the Whitlam Government came along, Gough Whitlam, being the son of his father, ensured that both of those treaties were signed while he was Attorney-General of the Commonwealth during the 14 days after they were elected. He was Attorney-General for only 14 days. Both treaties were signed on the thirteenth day. Apparently Lionel Murphy, who was then becoming the Attorney-General, was quite miffed that he did not get that opportunity.

The signing process means that you are flagging that you are going to go through the process of ratification, and the ratification process means that you thereby adopt an obligation under international law to implement the treaty into your domestic laws, which was the intention of the drafts originally. It was not the Whitlam Government that ratified the ICCPR, it was the Fraser Government in 1980. What I am saying to you is that up until that period these human rights standards were a joint project.

The Hon. SHAOQUETT MOSELMANE: There was a consensus.

Mr McKENZIE: Yes, there was a consensus about it. That consensus in recent years has declined, not only within the Coalition ranks. There are people in the Labor ranks also who are suspicious of international human rights treaties being relied upon in domestic law. In the 1980s the Hawke Government attempted to introduce legislation, but ultimately it was abandoned as a result of complaints within its own ranks. We had a referendum in 1988, which did not succeed. We had human rights consultations in 2010, which did not result in human rights legislation.

In particular, Victoria has replicated the English Human Rights Act. They call it the Charter of Human Rights and Responsibilities, but essentially it is very similar to the British Act, which has been in place for some 20 years. The Victorian Charter has now been in place for 10 years. The Australian Capital Territory has legislation, as Lewis mentioned. The way that legislation in Britain and Victoria works, it does not involve any derogation of parliamentary power to the courts. All the courts in Victoria can do is to look at the Charter and say, "This legislation is inconsistent with the Charter". It calls for the Parliament to do something about it, but under the legislation the Parliament can either do something about it or do nothing. It cannot ultimately involve any derogation of parliamentary power. In any event, the Victorian charter, just like the British Human Rights Act, is an ordinary Act of Parliament and can be changed at any time.

What we say is that the Victorian charter has been a success, it is based on the International Covenant on Civil and Political Rights, which is now more than 50 years old. It is not a radical document and, as I said, it was adopted with the support of the Coalition Government at the time. A lot of the rights within the treaty are based on English common law rights, which have been in place for centuries—for example, in the fair trials section, the presumption of innocence, independent courts, things that we regard in New South Wales as almost beyond argument. The remainder of the treaty is carefully drafted, not radical. That treaty has now been ratified by 170 countries. If you look at the list of countries that have not ratified it, it is usually the countries that are sort of failed States or continually criticised for not adhering to any human rights standards. Australia has ratified it. We say that the Victorian charter is working well and it would be a useful addition to New South Wales legislation to introduce it here. It would make your job a lot easier.

The CHAIR: You have mentioned Victoria as a model of success. What is the basis for the definition for that success as you see it?

Mr McKENZIE: There was a review of the charter down there a couple of years back and they concluded, just as they did in Britain, that its major impact has been the change to culture—in other words, when people think about introducing new legislation down there they do pay attention to the standards in the document and, in fact, the public service has been educated to apply the standards in their ordinary day-to-day work. So in both Britain and Victoria I think the major advantage has been that it is actually drawing attention at every stage to the existence of these standards that Australia as a whole, including State Parliaments, have an obligation to introduce into their domestic laws. We have done it partly in New South Wales and federally—the Anti-Discrimination Act is an example of this Parliament introducing parts of that treaty and federally there are other examples. But it is pretty piecemeal and, as a result of the absence of any guide in our law, we do not have access to the precedent that exists in Europe for example—it has a Court of Human Rights.

It is suggested that Doc Evatt first suggested the formation of the European Court of Human Rights—a former member of this Parliament, and a boy born above a pub in Maitland. Some people say that the European Court of Human Rights is one of the most influential courts in the world today, and it was a New South Wales person who recommended its existence. But we do not have access to the precedent that exists in a document that they rely on, which is fairly similar to the Victorian charter or the British Human Rights Act. That is the benefit you get out of it. The Victorian legislation, like the British Act, is a fairly light-touch piece of legislation. The court cannot say to the Parliament, "Sorry, you cannot do that." They can say, "Sorry, this infringes the previous Act, the Victorian charter you have passed. We suggest you might change it." There is no compulsion. It is still within the Victorian Parliament to do what the Victorian Parliament wants to do.

The Hon. SHAOQUETT MOSELMANE: There is no compulsion but there is accountability as a result?

Mr McKENZIE: Yes.

Mr MICHAEL JOHNSEN: Thank you, Mr McKenzie, as a Coalition member I appreciated the history lesson. I do not know how I would have been able to execute my duties without it. Mr Hamilton, you mentioned about the procedure and process of the Committee and suggested that the Committee should focus on international human rights obligations. I am assuming you are aware of the Legislation Review Act 1987? You referred to it a number of times.

Mr HAMILTON: Yes.

Mr MICHAEL JOHNSEN: Do you know of any part of that Act which restricts the Committee's ability to do that?

Mr HAMILTON: No. In the sense that it provides a broad statement in relation to personal rights and liberties. So it is within the Committee's discretion to consider that broadly or to consider it narrowly. We accept that. I suppose the other jurisdictions we are referring to have more prescriptive requirements for what must be considered in their legislation. Both the Australian Capital Territory and the Victorian charter take whole segments

from the International Covenant on Civil and Political Rights as part of their review process. So there is more of an obligation I suppose for the relevant committees in those States to consider in a prescriptive way those individual rights. We would accept that under the current Legislation Review Act it is open to the Committee to consider generally personal rights and liberties, but we think that it should be more prescriptive in the legislation.

The Hon. SHAOQUETT MOSELMANE: Thank you for appearing before the Committee today. Mr McKenzie the history lesson was enlightening and I appreciated it. It was really informative. I think the message to be taken from it is that historically the Coalition and Labor were far more open-minded in looking at human rights when legislating, but you are saying that is not the case these days. Mr Hamilton, in your introductory comments you called for alternative processes to our system. Can you outline two or three points in the process that you think could be improved as an alternate process?

Mr HAMILTON: We think as a general principle the Committee does good work. We accept that not all bills that come before the Committee do have recommendations in light of section 8A of the Act. What we would say is that the addition to that process in other jurisdictions is that there is a requirement that a compatibility statement be delivered. The method that that is provided for in the Australian Capital Territory and Victoria is different. In the Australian Capital Territory it relates to the Attorney General's department delivering a compatibility statement, whereas in Victoria the onus is on the member of Parliament to draft a compatibility statement.

Mr DAVID SHOEBRIDGE: Normally the Minister.

Mr HAMILTON: In practice, it is normally the Minister. That process is naturally different to New South Wales. We think it is a better process in the sense that it requires—

The Hon. SHAOQUETT MOSELMANE: Which one would be a better process? The Minister drafting it or the Attorney General's department?

Mr McKENZIE: It depends on how independently the Attorney General's department pursues its activities. I understand that politicians have a far greater degree of control over departments.

Mr DAVID SHOEBRIDGE: Did you hear the submission from Professor Byrnes? He said the benefit of having the Minister produce it is that it requires the department to engage with the human rights framework as it is developing policy. The demerit of that is that sometimes—I think the polite phrasing was—you have a less sophisticated response from the Minister than you would have from the Attorney General's department. Have you turned your mind to those pros and cons?

Mr HAMILTON: As a general principle I think you should have someone with legal training drafting these statements. In that sense it is better done by the public service, providing that it is not done on political lines.

Mr DAVID SHOEBRIDGE: The Parliamentary Friends of Reconciliation have proposed a specific provision in section 8A referring to the rights and interests of Aboriginal and Torres Strait Islander peoples. The Bar Association recommends a specific reference to the UN Declaration on the Rights of Indigenous Peoples. I have said before and say again that I am member of the Parliamentary Friends of Reconciliation, as is the Hon. Shaoquett Moselmane. What do you think about that as a specific reference point for this Committee's work?

Mr McKENZIE: I would agree with that. I think that far too often legislation imposes new criminal offences or increased penalties that often tend to affect Indigenous people more than other sections of the population. I can give you an example; about six years ago the Parliament created a new consorting offence with the rationale of trying to prevent bikies and people involved in south-western Sydney drug running from associating. The Law Society and the Bar Association opposed the creation of that offence, because they understood at that time that it was not meant to be of general application. Several years later the ombudsman did a survey of who the legislation had been used against, and the majority of nuisance had been against Indigenous people, remarkably. There was no mention of this effect, but the police used their new power where they wanted to use it—that was, in Walgett and Moree dealing with youth crime.

The first person who was convicted of consorting was a 19-year-old person in northern New South Wales who had some mental health problems, and his crime was to associate with a couple of mates, one of whom had been convicted of breaking and entering and someone else who had been convicted of some relatively modest offence. He was sentenced to 12 months in jail. That case went to the High Court, and the argument was that it should be implied into the constitutional right of freedom of association. The High Court said, "Sorry, there is nothing there and we cannot do anything." That is an example of how, if we had a human rights standard, some greater consideration might have been given to it. The Law Society at the time found three breaches of international law based on the way in which that legislation was set up. That is a long way of answering your question.

Mr DAVID SHOEBRIDGE: For the record, I appreciate the historical construct that you gave to the human rights framework that we have inherited in New South Wales.

Mr DAVID MEHAN: If we assume that we may not adopt a human rights standard to measure ourselves against and the Committee still produces reports that comment on rights and liberties and human rights issues, would there be an improvement in the Committee's work if we did not adopt a standard but the Executive was required to balance legislation against the report in deliberations of Parliament? That would mean there would be some measure of what legislation is being passed through Parliament against the report the Committee produces.

Mr McKENZIE: I certainly think there would be. As you are probably aware, the Federal Parliament decided five or six years not to proceed with human rights legislation, but they did have a halfway house whereby you have compatibility statements for new legislation and a Joint Parliamentary Committee on Human Rights was set up at the same time. This committee considers references of bills that might have a human rights aspect. It has not been totally successful so far, but they are still working through the process. It would certainly be useful to have as part of Committee's remit a reference to, say, seven core human rights treaties plus the three that Mr Shoebridge has mentioned, the declaration on Indigenous peoples, as a standard to assess new legislation against.

The CHAIR: Thank you for your contribution and your submission. We may wish to send you additional questions in writing, and the replies to those will be made public. Would you be happy to provide a written reply to any further questions of the Committee?

Mr HAMILTON: Absolutely.

Mr McKENZIE: I did bring a copy of Chief Justice Bathurst's speech, because I did not know whether you had it.

The CHAIR: It has been heavily referenced today, yes.

(The witnesses withdrew)

(Luncheon adjournment)

ALASTAIR LAWRIE, Senior Policy Officer, Public Interest Advocacy Centre, affirmed and examined

The CHAIR: Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr LAWRIE: No.

The CHAIR: Would you like to make an opening statement?

Mr LAWRIE: Yes. Thank you for the opportunity to address the Committee today in relation to our submission on the operation of the *Legislation Review Act 1987*. The Public Interest Advocacy Centre has a longstanding interest in the protection and promotion of human rights in New South Wales and nationally. We acknowledge the existing role of the Legislation Review Committee in contributing to the protection of personal rights and liberties in New South Wales. However, similar to other organisations that have made submissions to this inquiry, we believe there is scope for this role to be strengthened in a few key areas. The first challenge is one of timing, and in particular of ensuring that reports of the Legislation Review Committee are produced prior to debate of the relevant legislation with sufficient time for its findings to be adequately considered by parliamentarians in that debate.

In our submission we have suggested strengthening the processes required to circumvent the time frame for the ordinary consideration of legislation, such that the relevant Chamber must specifically vote to agree that such urgent legislation will be debated prior to the Legislation Review Committee report. We have also suggested that, in the event of legislation being debated prior to a final report of the Committee, the Committee be allowed to provide an interim report to the Parliament in which it at least identifies the relevant human rights that may be infringed upon by the bill. However, we are also attracted to the proposals to increase the period of time for adjournment of debate from five days to 10 days, as put forward by the University of New South Wales and the Gilbert + Tobin Centre of Public Law, among others in their submissions. We also see merit in proposals made by them and others that where a government claims a bill is urgent, the relevant Ministers 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.

The second challenge is related, and that is one of engagement. Even where the Legislation Review Committee produces a substantive report in time for it to be considered by the Parliament, it does not have substantive impact if it is not directly engaged with by the relevant Chamber during debate. One way of addressing this issue is to amend standing orders to require that the Minister, member of the Legislative Council [MLC] or member of the Legislative Assembly [MLA] who introduces legislation should respond to any issues raised by the Legislation Review Committee in the second reading debate. This would then increase the dialogue between the Committee and the Parliament about the protection of human rights. However, we would suggest that this dialogue should begin much earlier in the process, including by requiring Ministers, MLAs or MLCs introducing legislation to prepare a statement of compatibility that is tabled prior to or accompanying the second reading speech.

As outlined in our submission, we believe that this statement should be modelled on the statement of compatibility required under the Victorian *Charter of Human Rights and Responsibilities Act 2006*, including that a statement of compatibility must state whether in the member's opinion the bill is compatible with human rights and if so how it is compatible, and if in the member's opinion any part of the bill is incompatible with human rights, the nature and extent of that incompatibility. The Public Interest Advocacy Centre [PIAC] acknowledges that there are still limitations to this approach and that it depends to some extent on the good faith of Ministers, members of the Legislative Assembly and members of the Legislative Council who are preparing or overseeing the preparation of the statements in terms of the level to which they engage with the human rights issues raised by the relevant bill. However, we believe that there will nevertheless be benefits to starting discussion about the potential impact of legislation on human rights prior to these bills being introduced in the Parliament. The PIAC believes that if both of these issues, timing and engagement are addressed, the role of the Legislation Review Committee in protecting and promoting human rights will be enhanced.

Mr MICHAEL JOHNSEN: I refer to your recommendation on page 11 that the impact on the business community is removed from section 9 of the Act to which regulations are examined. Can you elaborate as to why you think that would be appropriate?

Mr LAWRIE: We think that the Legislation Review Committee should be oriented primarily towards review of human rights, both in terms of legislation and regulations. We see analysis of business impacts to be a separate focus and separate skill set and think that it might be better reviewed and analysed elsewhere. If the Parliament then found that there was no other place for it to occur, then by all means it should be retained at this

point. We are not suggesting that it is unimportant, but we think that if this Committee is oriented more towards human rights, that analysing both human rights and the business impact seem to be going in different directions.

Mr MICHAEL JOHNSEN: Are businesses not run by and employ humans?

Mr LAWRIE: Sure.

Mr MICHAEL JOHNSEN: Why would it need to be separate?

Mr LAWRIE: I think we are talking about the analysis of human rights international jurisprudence versus potentially financial or economic modelling of the impact of different laws. I think that those are different skill sets.

Mr DAVID SHOEBRIDGE: Are there any international covenants on the rights of business?

Mr LAWRIE: Not that I am aware of, but I can take that question on notice.

Mr MICHAEL JOHNSEN: I am happy for anyone to correct me if I am wrong, but the purview of this Committee does not look at financial modelling or anything like that regarding businesses; it looks at people's rights and liberties within the business.

The Hon. SHAOQUETT MOSELMANE: Rights for a successful business, perhaps.

Mr DAVID SHOEBRIDGE: What does that mean, rights and liberties within a business?

Mr MICHAEL JOHNSEN: For example, you do not want to have laws that disadvantage individuals, it could be regarding wages or conditions or whatever the case may be, which are part of the human rights and liberty broad spectrum. That is what we as a committee look at, as opposed to business viability, per se. I am trying to tease it out, because we only look at the human rights activity, not business modelling.

Mr LAWRIE: Obviously I am not a member of the Committee, so I am not aware of what you are exactly looking at. The legislation says that the regulation may have an adverse impact on the business community. That does not suggest that it is limited to the human rights of the business community, that suggests that it could be a range of different impacts.

The Hon. SHAOQUETT MOSELMANE: You propose that the Committee is allocated increased funding and resources to discharge its functions. Where did you get the information from that there was a shortage of funding and therefore you recommend that there should be an increase?

Mr LAWRIE: I think part of that is based on reports that currently not all regulations are being analysed. I believe that is the case. All regulations should be analysed, we believe, in which case if that is not able to be done within the current resources of the Committee, then the resources of the Committee should be expanded.

The Hon. SHAOQUETT MOSELMANE: I was not sure whether resources were an issue for this Committee, but I take your point.

Mr DAVID SHOEBRIDGE: With resources, the one area that is not given attention—and it is not due to a lack of effort from staff, they do what they can—is the regulations and the vast number of regulations that are passed through this Parliament. As part of a modern legislative framework, if you like, a facilitating Act is done, then much of the detail is done in regulations. A number of submissions have suggested a separate committee or a subcommittee dealing with regulations. Does the PIAC have a view on that?

Mr LAWRIE: I think it would be useful to have it as a subcommittee of the Legislation Review Committee, rather than a separate committee because a lot of the issues and skills would be similar.

Mr DAVID SHOEBRIDGE: At least a shared secretariat?

Mr LAWRIE: It does not even necessarily need to be a separate subcommittee, provided that the resources are allocated across both.

Mr DAVID SHOEBRIDGE: The NSW Parliamentary Friends of Reconciliation group, of which the Hon. Shaoquett Moselmane and I are members, has made a recommendation that section 8A of the Legislative Review Act be amended to include an explicit reference to the rights and interests of Aboriginal and Torres Strait Islander peoples. The Bar Association and others have made a specific reference to the United Nations Declaration on the Rights of Indigenous Peoples. Do you believe one or both of those provisions would be of assistance in section 8A?

Mr LAWRIE: Taking it back a step, we have suggested that at the very least the seven core international treaties be included as part of the definition of human rights. We would certainly be open to including the UN Declaration on the Rights of Indigenous Peoples as part of that.

Mr DAVID SHOEBRIDGE: That would be the eighth?

Mr LAWRIE: Sure. In terms of the reconciliation group submission, we are supportive of it in principle. We are not an Indigenous organisation and so we would defer to the views of Aboriginal and Torres Strait Islander groups whether they believe that that is necessary. We would also be keen to ensure that there was a process in which the views of Aboriginal and Torres Strait Islander people could be included in those considerations.

Mr DAVID SHOEBRIDGE: The Committee received a submission from the NSW Society of Labor Lawyers. They pointed particularly to laws such as the consorting laws that passed through Parliament, notionally to address something like outlaw motorcycle gangs, but then ended up—as so often happens with discretionary police laws—having a very large impact on Aboriginal and Torres Strait Islander peoples. Given that first nations peoples in this country are perhaps the most incarcerated people on the planet, do you think we have an obligation to expressly reference their interests in this Committee?

Mr LAWRIE: As I said, we support it in principle. We are not an Indigenous organisation so I do not think we are going to suggest the exact wording that should be adopted. We would be urging the Committee to ensure that there was a way for Indigenous people to both comment on that, and also then to be involved substantively in the considerations of the Committee between a bill being produced and it being taken to the Parliament.

Mr DAVID SHOEBRIDGE: Given the disproportionate rate at which first nations peoples in this State find their way into the criminal justice system, and not only in that system but also in other systemic disadvantage, do you think it is right for the PIAC to simply say it has an in principle position but will leave it up to Indigenous organisations to run this? Is your position to defer to the views of Indigenous peoples or do you actively support it as well?

Mr LAWRIE: We see merit in the proposal, and I hope I have been conveying that. But, in terms of the final wording and the process in which Indigenous people can participate and express their concerns in that, I do not think we want to be seen as the final arbiters of that.

The Hon. SHAOQUETT MOSELMANE: Ultimately, the Committee would be the final arbiters of that process. We are hearing comments and views from witnesses as to whether that would be something they would support, and you have said so.

Mr LAWRIE: And in principle we do.

Mr DAVID SHOEBRIDGE: Let us take something very simple, such as a specific reference to the United Nations Declaration on the Rights of Indigenous Peoples. You give in principle support. I am asking whether you give unambiguous support rather than qualified in principle support?

Mr LAWRIE: Including that alongside the other seven international core treaties?

Mr DAVID SHOEBRIDGE: Yes.

Mr LAWRIE: Yes. The further recommendation is in principle support.

The Hon. SHAOQUETT MOSELMANE: To strengthen the process you suggested amending the standing orders or attaching a statement of compatibility to legislation, among others. What do you see as the easiest to start off with to strengthen the process? Amending standing orders might mean going through various committee levels and then having a decision made on the floor of the Chamber. Are there any easier processes that we could adopt earlier on to make the process stronger?

Mr LAWRIE: I think one of the easiest—or most straightforward, anyway—would be the proposal in other submissions to increase the time frame from five days to 10 days to at least allow time for the Committee's reports to be considered prior to debate rather than the day before.

The Hon. SHAOQUETT MOSELMANE: What about the attachment of a statement of compatibility with the bill as it comes through?

Mr LAWRIE: I do not necessarily think that that is an easy change, because I think that that is a substantive change to how human rights are considered in the development of legislation. But we would see that as a more important change in the long run because it would change the culture of how human rights are considered within the executive and also in departments as they prepare legislation.

Mr DAVID MEHAN: Thank you for your submission. Say we have compatibility—we have heard a lot about that—and the report is already there, and already makes comment. You have also referred to how the statement of compatibility impacted on Commonwealth legislation. There is a suggestion that it has not really done much there. How do you get a better effect by issuing a statement of compatibility or get a better effect with

the report that we get through the existing process? Would it be useful to have a positive obligation on whoever put the bill in to comment on the reports we do, or the statement of compatibility?

Mr LAWRIE: That is one of the recommendations in our submission. The Minister in the Legislative Assembly or Legislative Council who proposes legislation would be obliged to respond to the issues raised in the committee's reports, potentially in the second reading speech, or at least at some point during the second reading debate. We think that would give more importance to the Committee's findings.

Mr DAVID SHOEBRIDGE: The two obvious models for us to choose from, if we were going to go down the path of entrenching a more comprehensive human rights package in the workings of Parliament and executive government are the Victorian and the Australian Capital Territory [ACT] models. Have you had a look at those two models? Do you have any views about strengths and weaknesses in them or a preferred model?

Mr LAWRIE: We have looked at both models. I think both would be an improvement on the current situation in New South Wales.

Mr DAVID SHOEBRIDGE: Or either, even.

Mr LAWRIE: If we were to suggest one I guess we are drawing from the Victorian model in terms of the level of detail that is required in statements of compatibility, because we appreciate the requirement to set out the reasons, including where it is incompatible. But, as you said, either would be an improvement in terms of human rights considerations.

Mr DAVID SHOEBRIDGE: Much of what has been put in submissions, and particularly with the oral exchanges with the witnesses today, has focused upon the benefits of a statement of compatibility and how that entrenches improved executive practice. I suppose I am interested in what path you see to reinvigorate Parliament's scrutiny so that Parliament itself can be a genuine check on executive excess.

Mr LAWRIE: I think some of the process recommendations that we have made in terms of making sure that the Committee's reports have time to be considered properly by parliamentarians and are, at least, addressed during parliamentary debate, would assist in elevating the importance of those considerations.

Mr DAVID SHOEBRIDGE: I am sure you have a list, so I will just stop you there. There have been many occasions where Parliament has had plenty of time to consider a recommendation of this Committee but, apart from one instance in the long-distant past about a penalty provision for an environmental law offence, there has not been a single occasion where the consideration of a recommendation of this Committee has made a substantive change. That process point is very unlikely to deliver a substantive change. Do you agree?

Mr LAWRIE: I think there are limitations of the approach. I think we have been explicit about that in our submission. These would be incremental changes. We conclude our submission by noting that longer-term and more substantive change would probably be achieved via the introduction of a charter of human rights or a human rights Act in New South Wales, but—noting that that might not be possible in the short term or that it may not be passed—we still see benefit in making the incremental changes now.

The CHAIR: I think that might be it. Mr Lawrie, thank you for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. Those replies will form part of your evidence and be made public. Would you be happy to provide a written reply in the event you are sent some questions?

Mr LAWRIE: Yes.

The CHAIR: Thank you very much. I appreciate your contribution today.

(The witness withdrew)

(Short adjournment)

MELANIE FERNANDEZ, Deputy Chief Executive Officer, NSW Council of Social Service, affirmed and examined

The CHAIR: Do you have any questions concerning the procedural information sent to you?

Ms FERNANDEZ: No, it was straightforward.

The CHAIR: Would you like to make a brief opening statement?

Ms FERNANDEZ: Thank you for the opportunity to appear today before the Committee. As members are aware, the NSW Council of Social Service [NCOSS] is the peak body for health and community sector organisations across New South Wales. We work directly with vulnerable and disadvantaged people and communities to hear from them about their key concerns and challenges. We travel across the State to regional, rural and remote communities to hear directly from them about their key challenges, the things they think would make a difference and the key solutions they see in their communities.

NCOSS agrees with many of the organisations that will be appearing before the Committee that the Legislation Review Act needs to be amended to clarify the standards when reviewing bills against human rights standards and to make reviews mandatory before a bill passes through the Parliament. This could have significant impacts on vulnerable communities and the people we work with and serve. A charter of human rights is our preferred method for clarifying these human rights standards. This clearly places the importance of the human rights of all peoples front and centre and would make a real difference for the people we work with.

We hear directly from communities about the challenges they face, but particularly the multiple and intersecting forms of disadvantage they face, whether that be Aboriginal communities, rural, regional and remote communities, culturally and linguistically diverse communities, LGBTI communities, people experiencing poverty, and the different demographics of children, young people and older people. A charter would be a crucial step in ensuring that the human rights of these diverse populations and vulnerable groups are considered.

What we have seen in other jurisdictions—particularly in Victoria, which has had a charter of human rights since 2006—is that that has led to public authorities becoming more responsive to the needs of vulnerable people, particularly the population groups we work with. It has also empowered those vulnerable people to learn more about their own rights and to ensure they are enforced. We have seen results, particularly for children and young people, around mental health and mental health bills having a focus on human rights, domestic and family violence, and the victims experiencing it.

One key example, is the results for Aboriginal people and communities that have been achieved in Victoria through its charter. We work directly with many Aboriginal communities, particularly in regional and remote New South Wales. We hear about some of the challenges they face around systemic discrimination in accessing health, housing, employment and justice. The Victorian charter has delivered significant results for Aboriginal people in those communities. In northern New South Wales and the Far West there are still consistent problems with racial discrimination in accessing housing. In one instance in Victoria the charter was used to successfully challenge the eviction of an Aboriginal tenant because the housing provider had failed to respect her cultural rights.

There have also been significant changes in Victoria in respect of access to justice and ensuring Aboriginal people's cultural rights are implemented with Corrections Victoria developing a diversity program with Aboriginal men and Victoria Police conducting a systemic review of policies and procedures to prevent racial profiling and unconscious bias. These are some examples that we have seen of the Victorian charter resulting in direct outcomes for the vulnerable communities we work with. We want to see that being taken forward. We urge the Committee to take this opportunity to recommend a charter which would reframe the way human rights are viewed in this State and which would have significant impacts for our constituents and the services we work with. There should also be an extensive consultation process undertaken with communities, and particularly the diverse communities I have mentioned, in shaping that charter and taking the process forward.

Mr DAVID SHOEBRIDGE: Thank you for your submission and your presentation today. There are two basic models we could look to: the Victorian model and the Australian Capital Territory model. They are obvious examples of nearby jurisdictions that seem to have a more developed framework than New South Wales. Have you looked at those different models and do you have a preferred model?

Ms FERNANDEZ: We do not necessarily have the legal expertise, so we would defer to the experts in those areas. From the experience we have drawn from looking at the legislation in Victoria, that has demonstrated significant outcomes that we would want to see replicated here. Obviously we want to ensure that work is done in the consultation process to make sure that it is fit for this jurisdiction, drawing in some of the mechanisms that

could be used from a Federal and international level to make sure that some of our commitments to international covenants and conventions are brought into that process as well.

Mr DAVID SHOEBRIDGE: If you read between the lines, some submissions effectively are saying that this Committee tends to focus too much on civil and political rights and it does not look at broader human rights, such as the right to housing, clean water and those sorts of matters. Do you have a view about that? Do you see a way forward?

Ms FERNANDEZ: That broader remit is a key focus for us—access to the basic rights. We have just undertaken our latest round of community consultations. When we are out in communities we are hearing strongly from them about what people interpret as basic human rights. It is not necessarily just those fundamental political and civil rights that would be covered in some of the remit at the moment. That is why we encourage an expansion of language around human rights that covers those broader accesses to the fundamentals of safe, secure and affordable housing, safety and the broader elements around that and particularly some of the fundamental rights that we see in international jurisdictions and in some of the international frameworks that we work around—the right to sanitation, infrastructure and clean water. It seems kind of ironic talking about it in our context but what we hear when we go out to the far west of New South Wales is that a number of those communities do not have ready access to clean water. Some those broader fundamental human rights would really be applicable in our State.

Mr DAVID SHOEBRIDGE: That leads me to the next question. The Parliamentary Friends of Reconciliation—of which the Hon. Shaoquett Moselmane and I are both members so I declare that interest—recommended that section 8A of the Legislation Review Act—which is the main provision we are looking at—be amended to include a specific reference to considering the interests of Aboriginal and Torres Strait Islander peoples. The Bar Association and others have recommended an express reference to the United Nations Declaration on the Rights of Indigenous Peoples. What does your organisation think about one, both or either of those?

Ms FERNANDEZ: I think the United Nations declaration sets a really universal standard and that is what we advocate for in our positions, not just in this context but more broadly as well. I think that that really is a good standard to be held to. It is very important not just in that international context but also at a grassroots level when we are talking directly to some of those regional and remote communities. Often there is a connection to the declaration and the framework that provides for that self-determination and that prior free and informed consent, which is important. I think that is a really important structure to have in place and referenced to.

The Hon. SHAOQUETT MOSELMANE: That was a good example about the Aboriginal people. Are there any other examples that you can give? You mentioned LGBTI or multicultural communities. Can you give us another example of how legislation that is being discussed regarding human rights have impacted positively on other communities?

Ms FERNANDEZ: There are multiple areas, depending on whether you are using international frameworks or other human rights frameworks, where that has delivered outcomes. If you are looking specifically at the charter in Victoria, if you are wanting to replicate that sort of model, which is what we would recommend, as I mentioned when they moved to a mental health bill that was considered through the frame of looking at the charter of human rights. So a broader human rights perspective to the mechanisms around mental health is important in that context. They also had some legislation concerning young people and youth justice in particular and the use of their charter in that legislation. Those are some good examples of particularly vulnerable cohorts that have benefited in that jurisdiction.

When we look at the implementation, NCOSS does lot of work particularly around women and girls as a vulnerable group. Earlier this year we went to the Commission for the Status of Women at the United Nations. Some of the international conventions and covenants that we see and sign on to are not necessarily the reality on the ground, particularly for culturally and linguistically diverse women living in our communities. For the declaration around Indigenous peoples, the feedback that we get from the communities that we work with is that they do not see those international frameworks necessarily delivering an outcome on the ground.

This is an opportunity for some of that framing around objective human rights standards to be brought to the practicalities of when bills come before this Parliament to ensure that they are considered. The reality we hear when we are engaging with our members around some of the work that we do in the Commission for the Status of Women is that we are signing on to agreed conclusions that are at a great standard in those international contexts but are not necessarily making a real difference in people's lives on the ground. Those are some contexts where we have seen good human rights legislation make a big difference on that global stage. But this is an opportunity to leverage off those commitments that we are making but ground them in a more local context that can make a difference at a State level.

Mr MICHAEL JOHNSEN: You talked briefly in your opening statement about domestic violence, but it was mentioned. I would like to touch on that issue. Given that the Legislation Review Committee's role is to look at human rights and liberties impacts, can you point to any piece of legislation that has had a negative impact that may be associated, for example, with the domestic violence issue where someone has had a negative impact because of legislation that the Committee may have missed or overlooked? Can you point to anything?

Ms FERNANDEZ: I might have to take on notice the question about any specific legislation that has had negative impacts. I think that there is definitely context using specifically a human rights framework in the context of domestic and family violence to achieve positive outcomes when we are looking at some of the reviews of strategies. That has happened in Victoria and also in the Federal sphere where those frameworks have been put in place around developing strategies to tackle domestic and family violence. When we are looking at it in the Federal context, the commitments we have made play heavily in the national strategy to eliminate violence. There are definite positives but in regard to a specific example of legislation, I might have to take that on notice and come back with a response.

Mr MICHAEL JOHNSEN: Thank you for that. I think it is fair to say—and I say this in a positive way—it is easy to talk about ideals, positive impacts, broad statements and things like that. What I am really interested in is: How is it playing out with humans? That is what I am really interested in and that is why I am asking you for an example.

Ms FERNANDEZ: Yes. When we look at domestic and family violence issues, there are definitely examples around the way in which we approach domestic and family violence and the way it is understood in a human rights context, which could have different outcomes for people living in communities. For example, if you are thinking about the way we understand domestic and family violence and the factors that come into play—I am probably still talking hypothetically as opposed to saying anything concrete—there is value in shifting conversations about domestic and family violence into a human rights framework when we are talking about how women, other victims or survivors experience violence and their fundamental human right to safety.

When we are thinking about the types of services and the supports in community that we are funding and the strategies and the approaches that we are having in the family violence space, an understanding of a right to safety is a fundamental thing as part of that. Sometimes the conversation around domestic and family violence does not necessarily have that gender equality and power imbalance and fundamental human right kind of understanding around it. It is definitely important to those spaces

Mr MICHAEL JOHNSEN: If you could get back to us with some examples I would appreciate it.

Mr DAVID SHOEBRIDGE: If you are doing that would you mind looking at budget bills that have closed women's shelters and defunded payments to victims of crime as well as other more discretionary bills such as the consorting laws that have a particular impact on Indigenous communities and the move-on powers given to police? They may be things you might also want to address in the answer.

Mr MICHAEL JOHNSEN: I think we should stick to the bailiwick of this particular inquiry.

Mr DAVID SHOEBRIDGE: Domestic violence was one thing that I brought up. I thought I should include the defunding of women's shelters, the removing of payments of compensation to victims of crime and the discretionary police powers that we know have a particular impact upon Indigenous communities. I would not limit your answer to Mr Johnsen's question simply to domestic violence.

Ms FERNANDEZ: Yes. I will have to come back to you in terms of particular legislation but when we are hearing from particular victims of violence or people have who experience in communities similar to the example that I have given around Aboriginal tenants facing racial discrimination there is often discriminatory elements that come into play. That is probably still not speaking directly in terms of bills that have come before this Committee and what sort of difference that might have made, but we still hear a lot from communities about the responses that might not be well informed by practices that do not have racial discrimination as part of them and mean that victims often are not willing to report and do not want to go through those processes. Broadly in some of the positive areas where you might see a better rollout of tackling systemic discrimination there is definitely a positive space to go into.

The Hon. SHAOQUETT MOSELMANE: It is not the immediate impact. It is the long-term cultural impact as a result.

Ms FERNANDEZ: Yes.

The Hon. SHAOQUETT MOSELMANE: It is not just identifying one practical example and saying there is the result. It is the cultural understanding of human rights, Indigenous rights and all those aspects of the impacts that legislation may have on all kinds of people.

Ms FERNANDEZ: Yes. Hopefully that was clear in the point that I was making earlier around the fact that what we hear from communities is about the fundamentals of having access to decision-making that is framed around human rights and our obligations, whether they be through some of the international frameworks or through specifically what would be outlined in a charter. We need an objective set of standards that then mean the policies, the programs and the legislation that governs their lives is seen through that point of view and that frame. That means that when you are thinking about family and domestic violence we are getting a shift to a culture where we are looking at people's fundamental human rights and inequities and systemic discrimination and disadvantage that populate some of those cultural practices or racial discrimination so we deliver better outcomes for those communities and better equity across our State.

Mr DAVID SHOEBRIDGE: Do you think the role of this Committee should be to look only at legislation as it is passing through Parliament or do you think there should be an obligation to also take a retrospective view of particular bits of legislation that may have in hindsight had a particularly harsh impact?

Ms FERNANDEZ: I think it is useful to have a view to where we could deliver better outcomes for vulnerable people. Whilst I do not necessarily have those examples of not having that framework of human rights in previous reviews looking at previous bills that have come before the Committee, I think it is useful to have a view that this needs to be a better focus in our State and really needs to be central to all of our decision-making. If there is a review I think that would be useful.

Mr DAVID SHOEBRIDGE: I will give you a practical example. Today the Bureau of Crime Statistics and Research published a report on the impact of changes to the bail laws that this Parliament made in 2014 and 2015. It found across the board an 11 per cent increase in bail refusals as a result of those changes and an 87 per cent increase in bail refusals by courts for Indigenous defendants. Do you think that kind of reporting should trigger a review by this Committee or another committee?

Ms FERNANDEZ: Yes, and we would be suggesting that there be a stringent consultation process with the broader community and particularly advocacy groups representing diverse and vulnerable populations in our State in shaping how this is taken forward, particularly if there was a charter of rights shaping that charter. I think it would be useful, because a number of our members would potentially have more of those concrete examples of actually what are the challenges that they are hearing about in their advocacy service. The example that I have is around a tenants advocacy service that has been speaking to us. I think it would be useful for those various group that work with Aboriginal communities or with other vulnerable populations to be brought into that consultative process to see what they are hearing. There might be some concerns about things that you want to review.

Mr DAVID SHOEBRIDGE: Maybe we should have a sort of annual health check where we hold a fairly open hearing to we hear about human rights challenges and invite specific stakeholders? Something like that?

Ms FERNANDEZ: Yes, I think a review process is always a good one in a context like this. Ideally you would want to be in a situation where we are making those decisions before we are implementing.

Mr DAVID SHOEBRIDGE: We should have the ambulance at the top of the cliff rather than the bottom.

Ms FERNANDEZ: Exactly. That is why it is important for us to see those processes being built in now and building in the rigour that it would be a requirement for a report to come to the Committee before the bill passes through the Parliament. Whilst there is definitely work to be done on legislation that may be having adverse impacts on communities, doing that work proactively is always going to be a better way to go about it.

Mr DAVID SHOEBRIDGE: The upper House has established a new Selection of Bills Committee. The purpose of it is to replicate some of the work the Senate does federally where before contentious bills come on for final debate in the Senate they are referred to a committee for investigation and report and key stakeholders are brought in. Do you think there would be some sense in this Committee having an express power to refer matters to that committee, or do you think we should do all the inquiries ourselves? You can take it on notice.

Ms FERNANDEZ: For a question like that I would want to defer to one of our members who has more expertise around implementation. I will take it on notice.

The CHAIR: Thank you for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions that may be sent to you?

Ms FERNANDEZ: Yes. That is fine.

The CHAIR: Thank you for your contribution today.

(The witness withdrew)

(Short adjournment)

DAVID TURNER, President, NSW Young Lawyers, affirmed and examined

SAMUEL MURRAY, Executive Councillor and Constitutional Law Co-Coordinator, NSW Young Lawyers, sworn and examined

The CHAIR: Good afternoon and welcome. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process.

Mr TURNER: I do not.

Mr MURRAY: Neither do I.

The CHAIR: Before we commence with questions, would you like to make a brief opening statement?

Mr TURNER: Only to say that we are grateful for the opportunity to speak to our submission before the Committee and that we stand by the written content of the submission. We are happy to answer any questions in relation to it. Other than that, no.

The CHAIR: Fantastic.

Mr DAVID MEHAN: Thanks for coming, fellas. You have said that the Committee should be given the power to consider all bills but also draft bills. Do you want to expand on that?

Mr TURNER: Yes. The purpose for which that recommendation was made was to allow for more business to be transacted by this Committee during non-sitting periods so that the Committee could act in an advisory capacity during, for example, the winter break.

Mr MURRAY: It is also so that the thoughts and considerations of this Committee can be taken into account in the drafting of bills before they are introduced to the Parliament. In that way private members or the Government can request advice from the Committee as to its thoughts on the bill before it has been introduced so that the first draft of the bill as introduced to the Parliament can reflect the thoughts of this Committee.

Mr TURNER: I suppose in that sense there is a timetabling or convenience purpose to it. There is also a substantive purpose.

The Hon. SHAOQUETT MOSELMANE: Do you think the Committee should do the compatibility or do you think the Minister should be responsible for it?

Mr MURRAY: For the purposes of the impact statements that we have proposed, it is our suggestion that for all legislation it is the Minister and in the case of delegated legislation it be whoever is the relevant decision-making authority who is making the delegated legislation—yes.

The CHAIR: You also recommended that an impact study be required for all subordinate legislation. How might this work in practice?

Mr MURRAY: It would work in practice in the sense that it would be the decision-maker who issues the delegated legislation would similarly issue the impact statement. Because lawyers at some point would presumably who be involved in the drafting of the delegated legislation, it would be our expectation that those same lawyers in drafting the delegated legislation would help the decision-maker in the advice regarding the drafting of that impact statement.

The Hon. SHAOQUETT MOSELMANE: Is there an example somewhere? Where did you get the idea from? Is there an example in Victoria or another jurisdiction?

Mr MURRAY: I cannot assist the Committee with that.

Mr TURNER: I believe that there is a similar process—and I should say I cannot assist beyond my awareness of the process—in the regulatory impact statement in the better regulation space in the Department of—

Mr DAVID SHOEBRIDGE: Whatever Fair Trading is now—that particular department in New South Wales keeps changing its name—the better regulation provision—

Mr TURNER: Yes.

Mr DAVID SHOEBRIDGE: Fair Trading, "Business Niceness"—it has a new name. Thank you both for your submissions. Mr Murray, you were suggesting that lawyers will draft the regulation therefore lawyers can produce the regulatory impact statement or the compliance certificate.

Mr MURRAY: Not quite—rather that the lawyers who have assisted with the drafting can also assist with the drafting by the decision-maker of the impact statement.

Mr DAVID SHOEBRIDGE: Professor Byrnes for the Bar Association suggested that in some ways making it so that the actual policy crew who produce the legislation—or, in your case, regulations—have to engage with the draft in a compatibility certificate has a lot of benefits, because then the agency doing the work who understands the impact of its legislation also has to come to grips with the human rights framework. Therefore getting the agency which may include non-lawyers drafting the compatibility certificate may have benefits over and above, say, getting the Attorney General's department or Parliamentary Counsel if there is an external agency drafting the certificate. Do you have a view about that?

Mr MURRAY: We think that would be useful for their input. We certainly think that sort of oversight would be valuable. For the same reason we have recommended some basic legal training for members of this Committee, we think that a modicum of legal expertise would be useful in assessing the impact of the delegated legislation.

Mr DAVID SHOEBRIDGE: What I am coming at is delegated legislation and legislation tends to be drafted by the Parliamentary Counsel's Office in one form or another. Surely we would want the agency to be drafting the compatibility certificate and the assurances rather than Parliamentary Counsel or whoever drafts the regulation or the Act. We may be furiously agreeing here but I am not sure.

Mr MURRAY: Yes, we are agreeing. Our proposal is that the agency does draft it, simply that they do it with the benefit of some legal advice from someone.

Mr DAVID SHOEBRIDGE: Or they get upskilling and training in the human rights framework which you would think would have a benefit in their initial drafting task anyhow, or their initial policy tasks.

Mr MURRAY: Yes—some sort of upskilling in the context of that legal expertise would be useful.

Mr DAVID SHOEBRIDGE: Just as we should be upskilled, so should all the agencies.

Mr MURRAY: Yes.

The CHAIR: Do you believe the definition of personal rights and liberties is too broad or too narrow? How might it be improved to enhance the scrutiny of bills?

Mr MURRAY: Our submission does not focus on the definition of personal rights and liberties. The only thing we say about it is at page 8 of our submission where we recommend:

> … that the Act be amended to require the Committee to consider all Bills for compatibility with core human rights, including those under international human rights treaties …

But the bulk of our submission is about patterns of the review process rather than the actual substantive process of that review.

Mr TURNER: We are aware that the Law Society of New South Wales, for example, specifically referred to the core seven human rights treaties in their conception of the scope of the Committee's review. We just made that comment in relation to that scope.

Mr DAVID SHOEBRIDGE: Do you endorse that?

Mr TURNER: That is the beyond of the scope of my understanding of this issue.

Mr DAVID SHOEBRIDGE: The Parliamentary Friends of Reconciliation—for full disclosure, the Hon. Shaoquett Moselmane and I are members of that group—made a recommendation that section 8A of the Legislative Review Act should include an express reference to consideration of the interests and needs of Aboriginal and Torres Strait Islander peoples. The Bar Association has recommended an express reference to the United Nations Declaration on the Rights of Indigenous Peoples. Do you have a position on either or both of those propositions?

Mr TURNER: Although it was not addressed in our submission, that sounds like a very wise suggestion from the Bar Association.

Mr DAVID SHOEBRIDGE: Would you endorse it?

Mr TURNER: I would.

The Hon. SHAOQUETT MOSELMANE: A representative from the University of New South Wales who appeared before the Committee this morning suggested that the compatibility certificate effectively be done

by the Attorney General's department rather than by the Minister himself or herself. There was even the suggestion that the Parliamentary Counsel suggest a compatibility study. What is your response to that?

Mr MURRAY: In the context of delegated legislation or legislation generally?

The Hon. SHAOQUETT MOSELMANE: Legislation generally.

Mr MURRAY: Our submission is that the impact statement should be used for not all legislation but for urgent legislation—and we have a separate proposal regarding the passing of urgent legislation—and for delegated legislation. We do not think the compatibility statement should, in the sense of the impact statement we are proposing, take the place of the review activities of this Committee in respect of all legislation. In the context of the impact statement as we are proposing it, our suggestion is that in the case of urgent legislation it be drafted by the Minister proposing the legislation or the relevant mover of the legislation in Parliament and in the case of delegated legislation by the relevant decision-maker—for example, a Minister or other member of the Government.

The Hon. SHAOQUETT MOSELMANE: What do you define as urgent legislation?

Mr TURNER: We do not propose to define urgency. Urgency connotes exigency or emergency. I think it would be a difficult task to define it.

Mr DAVID SHOEBRIDGE: Say there is a by-election looming—

The Hon. SHAOQUETT MOSELMANE: You seem to differentiate between urgent and non-urgent. I was just wondering what urgent is in your view.

Mr MURRAY: While we do not think there should be a formal definition, what we considered should be a factor that goes into the idea of urgency—and this is at page 6 of our submission—is that a bill should be considered urgent if there would be a significant, unacceptable or disproportionate impact on the New South Wales community if the bill is not dealt with immediately. In the context of that kind of legislation, we think that in addition to providing the impact statement, a written explanation should be provided for why the bill is urgent; not merely say that it is urgent.

Mr DAVID SHOEBRIDGE: That is as good a definition as we have heard to date.

Mr MICHAEL JOHNSEN: Thank you both for coming along today. I would like to go back to the review of draft bills. Let us put some political reality in the context around what we are talking about here. Would you think, in that context, it would be appropriate that given the Parliamentary Counsel effectively drafts legislation mostly, would you think then that in order to review, and in an advisory capacity, the draft bill, that discussions between Parliamentary Counsel and the secretariat, for example, would be more appropriate rather than at the political committee level?

Mr MURRAY: No, because we think that the democratic mandate of this committee and the value of representation that it represents should be reflected in that earlier process of drafting.

Mr MICHAEL JOHNSEN: The committee will still have access to that bill that is being put, but is it not about getting the technical aspects correct at the draft stage before it gets put to the Parliament?

Mr MURRAY: Yes, but, we think, especially in the context of a large volume of legislation coming through this committee and concerns about resources of this Committee to thoroughly investigate all of them, the more capacity this committee has to review legislation earlier in its life cycle the better it would be for that review process.

Mr MICHAEL JOHNSEN: For it to come to the committee the secretariat has to go through it in the first instance. So what is the difference in resources?

Mr MURRAY: Because it is happening earlier. That work of the committee can take place at an earlier point in the legislative process so the committee has a chance to review it at times when it is not reviewing a half a dozen other pieces of legislation that are similarly being introduced to Parliament during that same sitting process.

Mr MICHAEL JOHNSEN: I understand, but it is still put together by the secretariat.

Mr MURRAY: Yes.

Mr MICHAEL JOHNSEN: What I am suggesting is: would it be more appropriate for the secretariat and the Parliamentary Counsel to have those advisory discussions, given that they are doing the same work, prior to coming to the committee in a draft report?

Mr DAVID MEHAN: He said no because it is democracy—it should be out there with us.

Mr MURRAY: While I think those discussions themselves would be useful, I do not think that displaces the need for an advisory role for this committee. In particular, we are not saying that all legislation that is being considered to be drafted that needs to be introduced needs to go to this committee before being introduced; it is simply an option for people who are putting together draft bills, be it members of the Government or private members, to be able to use the resources of this committee before it is introduced in Parliament.

Mr MICHAEL JOHNSEN: I will put it another way. Who do you think would reasonably have the technical expertise? The politicians or the secretariat and the Parliamentary Counsel?

Mr DAVID SHOEBRIDGE: Point of order: It is difficult for this witness to answer something such as technical specifications if the member does not identify what he means by technical specifications. Is it policy framework? The specific drafting? What does it mean? I think it is unfair to the witness to put something like that.

The CHAIR: Mr Johnsen, do you want to rephrase the question?

Mr MICHAEL JOHNSEN: I will clarify "technical" on the basis that it is within the charter of the Legislation Review Committee.

Mr MURRAY: Surely, definitionally, the committee has the expertise to look at things within the committee's charter. If your question goes to the expertise to be able to assess the impact of legislation on the rights and liberties of individuals, while in a technical sense it is possible that the secretariat might have more technical expertise, so to speak—

Mr MICHAEL JOHNSEN: That is not what I am suggesting.

Mr MURRAY: But that is also why our submission suggests that that sort of expertise and training be made available to this committee as well so that the committee is not fully reliant on the secretariat, to the extent that that may or may not be the case.

Mr DAVID SHOEBRIDGE: I think you have just really, really well proven your training point—the need of MPs to be trained. You demonstrated it magically. Mr Murray or Mr Turner, given that, say, 70 per cent of legislation is largely non-controversial—it is the kind of machinery of government—I assume that that is what you are talking about in terms of the opportunity to have earlier engagement on legislation at a sort of pre-drafting point rather than the current system we have, which is a kind of gotcha process, where the executive holds on to legislation until it is utterly completed, even when it is not controversial. Is that what you are talking about—the ability to engage earlier on legislation which is largely non-controversial but may be assisted by engagement?

Mr TURNER: I do not think we have specifically turned our mind to that situation. I think the situation that we have turned our minds to was legislation which may have required, because of its subject matter, earlier input or legislation which would have benefited from input in a non-sitting period. However, I appreciate that is a circumstance where that capacity to advise at a draft stage would be procedurally useful in the sense that that time can be used on, as you describe, machinery.

Mr DAVID SHOEBRIDGE: If you are talking about non-sitting weeks and utilising the capacity of the committee, it is that non-controversial legislation where they may add points. Also, Mr Johnsen's points about political reality, the political reality is the more controversial the legislation the less likely a government is to release it out early for general viewpoint, and that fights against your proposition in that regard.

Mr TURNER: I see.

The Hon. SHAOQUETT MOSELMANE: The alternative view that was put to us was that when a second reading speech on a bill is adjourned for five calendar days, it was proposed that we have it for 10 calendar days. Would that resolve the issue of urgency and give the committee and the Ministers an opportunity to get the compatibility certificate? Would that resolve it?

Mr MURRAY: We do not think it would necessarily resolve it. We think it would be helpful in dealing with it, but it is difficult to say whether 10 days are necessary, or 15 days. So we think just having that advisory capacity would assist in a different sense. But that is not to dispute the value of an extra five possible days. Just going back to Mr Shoebridge's comment a second ago, the 70/30 split, so to speak, I think there is almost a third category of legislation that, on its face, is not controversial and no-one expects it to be controversial but still might inadvertently intrude on personal rights and liberties once someone with the relevant training takes a look at it. We think there is a value in that advisory work being done ahead of time—the sort of thing that would not be kept from the committee because it is specifically controversial but issues of it might still be picked up.

Mr DAVID SHOEBRIDGE: That is what I was thinking in terms of the 70 per cent, actually reviewing it. It is non-controversial but it could be improved upon with a human rights lens being put across it.

Mr MURRAY: Yes. If that is what you mean by the 70 per cent, then yes.

Mr DAVID MEHAN: It would also assist on those occasions when a draft bill is put out there—I think of the Voluntary Assisted Dying Bill. We cannot look at it until it is introduced to the House. But that one was out there for quite some time and it may be that this committee's purview over it and comment on it could have helped in that debate before it was introduced to the House.

Mr MURRAY: Exactly.

The CHAIR: Any other questions? Thank you both very much for your contribution today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Mr MURRAY: Yes.

Mr TURNER: Yes, we will.

The CHAIR: Thank you for joining us.

(The witnesses withdrew)

DARREN DICK, Senior Policy Executive, Human Rights and Strategy, Australian Human Rights Commission, affirmed and examined

ROSALIND CROUCHER, President, Australian Human Rights Commission, sworn and examined

ROHAN NANTHAKUMAR, Research and policy officer, Australian Human Rights Commission, affirmed and examined

The CHAIR: Thank you. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Professor CROUCHER: No.

The CHAIR: Before we commence with questions, would you like to make an opening statement?

Professor CROUCHER: I will be very brief. Last week, I finished the work with Philip Ruddock on the religious freedom panel. But, as usually happens when I come off a big area of work, my body says I can just sick. I was crook as a chook last week. This morning in Canberra I had to give a key note address with very little voice. That is all by way of preliminary. I know this is your last session of the day. I have a prepared statement that I will not read; I will just provide it to you. We also have some accompanying materials. What I thought I would briefly share with you is the insights that I gained when I was leading an Australian Law Reform Commission inquiry into the parliamentary scrutiny processes as part of the review into the encroachments on liberties, freedoms and rights and the extent to which such things were appropriately justified. That knowledge certainly carried forward into my current role at the Human Rights Commission.

Through my work at the Law Reform Commission, I saw the great value of bringing the lens of the human rights instruments into the scrutiny of bills. Certainly, it did enhance aspects of the parliamentary process, but it also had a much greater ripple affect back into the departments that were involved in preparing the statements of compatibility. It changed the thinking around the issues in a very precise way. The thinking took place not through the old lens of trespassing unduly on rights and liberties, which has been the formula in all of the scrutiny committees—State and Federal—for many years, but rather through a specific lens of compatibility with human rights instruments. It engendered and encouraged what I described in that report as "rights mindedness". It is a long project, but it started an osmotic effect in the preparation that people do in departments for bills. It brought it into the parliamentary arena and the discussion of the various committees.

That framing of the international human rights instruments was a constructive enhancement in that sense of right mindedness. That work did create a number of key challenges, which the Federal committee face, some of which are partly due to its evolving nature. It has only been in place for just over five years, and in the scheme of things that is a fairly short time. Some of the challenges include: the relationship of the Parliamentary Joint Committee on Human Rights with the other committees that review legislation, such as the Standing Committee for the Scrutiny of Bills and Standing Committee on Regulations and Ordinances, which have the rights and liberties lens that New South Wales has; the timetables for reviewing bills; the enormous pace of bill review that happens during sitting periods; and whether the process could take a longer lens to look at things more thematically.

There are lots of opportunities for reframing how it works. In the statement that I will provide the Committee with there are a number of challenges identified. Essentially, the idea is to lift the idea of "rights mindedness" not only within parliament, but also within the feeder of all of the material that comes into Parliament. It provides a framework around which discussions can occur that connect the day-to-day rhythm of scrutiny with the international framing of responsibilities through the conventions. That might be enough as a scene setter. Given the time of day, I would like to take whatever questions you would like to ask of us.

Mr DAVID MEHAN: Is your submission that section 8A (b) (i), which concerns trespasses on personal rights and liberties, does not encompass human rights?

Professor CROUCHER: That is a really good question. Of course it can; it does not do so expressly. The shift that happened when the Parliamentary Joint Committee on Human Rights was established was to have the framework and lenses for rights and liberties to expressly connect to the international human treaties that Australia had signed up to. The language of rights and liberties is beautiful language, but it is early twentieth century language, which is distinct from language post World War II and the signing up to conventions. There is an opportunity to take that language into the post World War II arena by expressly linking to the treaties. Rights and liberties should encompass those things. The "human" adjective that came in post World War II simply put a different label on what we might say were already the rights and liberties that were embraced by the Commonwealth.

The Hon. SHAOQUETT MOSELMANE: When you say "lifting rights mindedness" do you mean changing the culture? What do you mean by that statement?

Professor CROUCHER: That is a really good question. By virtue of having to prepare a statement of capability—if done appropriately and conscientiously —it can be a real decline. It is a bit like a university essay: What is conceptual framework? Have you checked against your conceptual framework? What evidence have you used to answer things? You cannot just say, "Yes, it is compatible." The guidance material that the Attorney-General's Department in Canberra has developed is very helpful in that regard. It is that process of osmosis that I was describing. It is not only about Parliament, but also about the material that is introduced to Parliament. It is about analysing and articulating the human rights dimension in the rights and liberties space in a much more sophisticated and human rights-anchored framework.

Mr DAVID SHOEBRIDGE: It is about educating and reforming the executive before it gets to Parliament—is that what you are talking about?

Professor CROUCHER: Rather than saying that this person needs more education than that person, I just saw it as a way of thinking through things differently much earlier in the piece. It would start before things even got to parliamentary counsel, then go through parliamentary counsel and then go back into the departments that are doing the drafting so that—

Mr DAVID SHOEBRIDGE: This is all Executive as opposed to parliamentary. I am not arguing with you, I am just saying you are putting a lot of the benefit in improving the human rights framework of the Executive.

Professor CROUCHER: Yes, indeed. Sorry—

Mr DAVID SHOEBRIDGE: We are a parliamentary committee.

Professor CROUCHER: Indeed, but by virtue of the material that the Executive—in the way you have described it—prepares that material for Parliament, Parliament gets the picture in a way that is perhaps not articulated without that lens being imposed.

Mr DAVID MEHAN: And Parliament gets the picture from our digest now, but the evidence is that not a lot of people read it and it does not receive much attention in the debate, if at all.

Mr DAVID SHOEBRIDGE: And produces no substantive outcome.

Mr DAVID MEHAN: That also. We have all this stuff, as you. Do you have any suggestions how we get Parliament to pay more attention to it during the debate in a way that might lead to better legislation?

Professor CROUCHER: If one was stage-managing it, one of the things you could suggest is that when the Committee—like the Parliamentary Joint Committee on Human Rights [PJCHR] work—has identified issues, then when it is introduced, then the second reading speech expressly picks up the language or the analysis and addresses the issues of right compatibility in presenting the bill to Parliament. You are asking me for an example.

Mr DAVID SHOEBRIDGE: There are three basic models we could look at. We are a provincial Parliament, so we can look at the model—

Professor CROUCHER: I do not think there is anything provincial about the New South Wales Parliament.

Mr DAVID SHOEBRIDGE: We are. There is the model in Victoria, in the Australian Capital Territory, or the model that you are putting forward, which is the Commonwealth model. Of those three models, which one do you think would be of most relevance and most benefit to New South Wales? You could reject them all, if you want.

Professor CROUCHER: There is the ideal and there is the practical. Because I come from an academic background, I always like to aspire to the ideal, and that is why I use the expression "rights mindedness", because, to me, that is the ideal that we enhance the whole sense of thinking about the impact that our laws have in a rights impact way. In a practical sense, domestic Parliaments work in ways of evolution. You cannot wipe the slate clean. Interestingly, in the work that I have just come from in the religious freedom review, all participants from different sides of debate were arguing for human rights charters as the way to go, as if it is sort of a magic wand and an end in of itself, rather than being, yes, we can capture human rights in the international sense in that way, but then what happens afterwards? That is when the lawyer and the academic try to unpack and think well, if there was something federally, how would that work with States? Are we going to do an override federally and cut out the States in respect of human rights instruments? What about the testing of rights legislation as against those

human rights Charters? Does that happen in tribunals in courts? What about chapter 3 of the Constitution. You start going off in this crazy spin.

Mr DAVID SHOEBRIDGE: If I can bring you back to those three models—the Victorian model, the Australian Capital Territory model and the Commonwealth model. The Commonwealth model is the parliamentary scrutiny model with some guidance from the Executive, but the Victorian model is a much more structured model with compatibility status and the like. The Australian Capital Territory is an earlier version of that.

Professor CROUCHER: It is.

Mr DAVID SHOEBRIDGE: Which do you think we should be looking at?

Professor CROUCHER: I like the Commonwealth model, I have to say, but I am a Commonwealth body. It is probably better that I confine my comments to that.

Mr DAVID SHOEBRIDGE: Rather than you saying that is the model you preference, that is the model you are familiar with, so that is why you are speaking to it; is that right?

Professor CROUCHER: I am speaking to it because I had an opportunity to look long and hard at it in the inquiry I did three years ago and saw the virtues of it in the way I have described. Given time, it could keep the supremacy. I am a legal historian by inclination and academic preference. I am a firm believer in the sovereignty of Parliaments. Mind you, if we had human rights instruments, there would be an enhancement of our work at the Human Rights Commission, so I really do not mind which way we go. The model of parliamentary scrutiny that the PJCHR has with compatibility statements is worth a try. It is a step along the road to shifting the language toward the human rights framework.

Mr DAVID SHOEBRIDGE: I do not mean to harp on the point, but the overwhelming majority of submissions have pointed to the Victorian model as the one that should be adopted by New South Wales. We have similar legislative responsibilities and similar legislative issues that we deal with at a State level. I am going to ask you again, is your submission supporting the Commonwealth model based primarily on your familiarity with the Commonwealth model as a functioning model rather than your view of the relative merits of the Victorian and Commonwealth model?

Professor CROUCHER: It is fair to probe; I do not mind probing questions. We confined our comments to the Commonwealth model, and I would rather just leave it at that. It is really fun to have these debates about these issues, and I know we will have these debates again—

Mr DAVID SHOEBRIDGE: I am not trying to debate it with you. I am trying to work out whether your submission has been informed by you comparing the relative merits of the Victorian and Commonwealth models or you are coming here about the Commonwealth model.

Professor CROUCHER: No, we are providing some information that we think is helpful about the Commonwealth model.

Mr DAVID SHOEBRIDGE: All right.

Professor CROUCHER: May I ask my colleague: Did you want to say anything?

Mr DICK: The only thing I want to add to that, in many ways the Victorian model is the full Charter model and brings a whole lot of added extras, whereas the scrutiny side of it is not too dissimilar in that the Federal scheme is entirely focused on the parliamentary scrutiny side of things and it is probably a little more developed than what happens in Victoria and the Australian Capital Territory, because it has got the added focus that comes through the Charter with the role of the courts and those other things as well. I am not sure it is a question of having any rule. The Federal focus has been on how can Parliament get better information about human rights to assist it in the scrutiny task.

Mr DAVID SHOEBRIDGE: The Parliamentary Friends of Reconciliation group, of which the Hon. Shaoquett Moselmane and I are two of a number of members, recommended that section 8A of the State Act be amended to include an express reference to the needs and interests of Aboriginal and Torres Strait Islander peoples. The New South Wales Bar Association has recommended that the United Nations Declaration on the Rights of Indigenous Peoples be an additional reference point in addition to the seven treaties that generally identify it. Do you have a view about either or both of those propositions?

Mr DICK: The Commission has consistently recommended that the Federal scheme also include the United Nations Declaration on the Rights of Indigenous Peoples. The declaration does not create new rights or additional rights beyond what are already in the seven treaties, but it is a much more explicit way of showing how

it applies to Aboriginal people and Torres Strait Islander people. We certainly support that that instrument be included. We think we have provided much greater clarity for Parliament as well. What happens with rights a lot of the time is that people will say, "You have breached my rights", but unless you can ground specifically that Article X says this or Article Y says that, it makes—

Mr DAVID SHOEBRIDGE: Section 8A currently has a bit of "the vibe" feel to it. Express rights that have a reference would be helpful.

Mr DICK: Yes. As an example, the Federal Parliament at the moment has a bill before it about the selection of a nuclear waste dump site. It is looking into the consent procedures that ought to be in place for that. I think Article 28 of the Declaration on the Rights of Indigenous Peoples says that if there is to be a nuclear waste dump built on the site of Aboriginals peoples land, there must be pre, prior and former consent. That is a very specific articulation of the standard that exists in the ICCPR in article 1 and article 27, and in the ICERD in article 2 and article 5, et cetera, but you still have to discern it a little bit when you are applying it to Aboriginal people whereas if you go direct to the declaration you get a much more specific articulation of what it actually means.

Mr DAVID SHOEBRIDGE: I assume your recommendation that it should be included in the Commonwealth model flows through to your recommendation that it should be included in any State model as well.

Mr DICK: Certainly.

The Hon. SHAOQUETT MOSELMANE: This morning Professor Williams said it would be his recommendation that the Attorney General should prepare statements of compatibility whereas others have said departments should prepare statements of compatibility. In your view which would be more appropriate, given your earlier explanation about the like-mindedness in spreading the knowledge of human rights across all departments rather than just the Attorney General's department?

Professor CROUCHER: I think you have probably answered your own question. You get the best statements through the Attorney General's department federally, and probably in the State as well, because they have thought about these issues in a different way. They are principally lawyers and are legally trained in thinking through that way of things. The ideal, for me, is this osmosis, this expansion of like-mindedness through other departments. It might be more efficient to run it all through the Attorney General's department but I think the ideal is better served by encouraging a wider base.

The Hon. SHAOQUETT MOSELMANE: Do you think because it is the Minister's department, departmental officers may not take a more courageous position on the compatibility statement? Do you think that maybe an independent of the Attorney General's department who is not related to any other Minister could give a different interpretation and maybe a stronger interpretation?

Professor CROUCHER: That is a pro of having it concentrated but it depends what ideal you are seeking to serve. But having the obligation to at least think through that lens shifts the narrative about issues of rights and the framing of legislation.

Mr DAVID SHOEBRIDGE: Do you want a good certificate? Do you want a new outcome? They may be different things.

Professor CROUCHER: Yes. And shorter term certificates and longer term outcomes may not necessarily be achieved in the same way.

Mr DICK: I think the reflection from the Federal scheme too is the experience has been variable with statements being prepared by the home departments and the Ministers. There are some departments that are not Attorney General's departments that do very good statements of accountability and there are some that continually do very poor ones. But what you have is an interaction with the parliamentary committee as well because they will look at the statement of compatibility and they will say, "This is not up to scratch. We have got five more questions for you to answer. Come back and amend it." The problem at the moment is that they do that and then the bill has gone through Parliament before the response has come through. But on several occasions the Federal committee has called a department to account several times in relation to a single bill.

I guess the long-term hope is that if a department is continually told that it is not meeting its obligation to provide a frank assessment of human rights to the Parliament in a statement of compatibility, which is part of the explanatory memorandum, it will be treated the same as, say, not completing a regulatory impact statement in an appropriate manner and that over time you would get that lift. But that, ultimately, is going to depend on how the Parliament treats the statements and how it considers them, and whether it does very explicitly express its dissatisfaction back to the Minister or the department about their non-compliance or the fact that they are just not taking it seriously enough. There are a lot of cultural factors involved.

Mr DAVID SHOEBRIDGE: If they keep getting the legislation through, despite making inadequate certificates, surely there would be a kind of "bite me" culture developing in the committee, "What are you going to do? I keep getting my legislation through because Parliament is refusing to stand up to the committee." Is part of the problem that Parliaments across the country are playing second fiddle to an increasingly empowered Executive?

Mr DICK: Maybe it is. The Federal committee puts out a guidance note and every year they do a report that reflects on the trends over the course of the year. So one of the trends that has been there for the last five years is a creep into reducing merit review processes for bills and independent assessment, privacy breaches and those types of things. They are mainly procedural rights that get knocked off in the legislation, but you get this continual narrative from the committee saying, "These are the areas where rights are continually being infringed. These are the common areas where departments are not meeting their obligations." That serves a useful purpose in highlighting that but, as you say, that will depend on the make-up of the Parliament and how seriously they attach the advice they are getting to that and so forth.

Mr DAVID SHOEBRIDGE: What, if anything, has come from highlighting those inadequacies? Have you seen departments change their culture? Have you seen improvements as a result of highlighting the inadequacies or it is a kind of toothless process?

Mr DICK: No, there have definitely been bills where they have changed as a result of the process. There was one very early bill—

Mr DAVID SHOEBRIDGE: I am not talking about bills. You were talking about the committee saying, "Department X keeps producing substandard compatibility certificates. They keep failing to engage properly with this process and this has now been apparent over a number of years." Has the highlighting of those inadequacies changed anything?

Mr DICK: Sometimes it has, yes. As I said, sometimes when they do that in relation to a bill it has been withdrawn and then reintroduced having addressed the comments as well. That has particularly happened in relation to disability-related issues sometimes where the impact on people with disability was never considered in a bill.

Mr DAVID SHOEBRIDGE: You have seen bills withdrawn in those circumstances?

Mr DICK: They have been withdrawn and then reintroduced with those concerns addressed. The bill changed; not just a sort of a rewriting of the statement to justify it. But it is variable between departments. The joint committee also has the ability to do standalone inquiries as well, so if there is a particular area that they are worried about they can then inquire into a piece of legislation. They have done standalone inquiries into things like the Northern Territory emergency response, immigration laws and those sorts of things that then take on a bigger prominence and issue. It is very difficult to measure entirely how effective that has been but I suspect it has.

The Hon. SHAOQUETT MOSELMANE: Do those departmental officers communicate with the Parliamentary Counsel as to the various aspects of the bill when they are writing compatibility certificates?

Mr DICK: The Federal Attorney's department provides advice to departments but it is not legal advice, it is just assistance in preparing it. They certainly get that level of advice in the first instance. I do not know entirely, I think because the bill and the statement, as part of the explanatory memorandum, are being done at the same time it is all wrapped up in that process. I would be surprised if there was not engagement on that.

Mr DAVID MEHAN: You said that the committee will send the bill back or ask questions about it. Is the willingness of the committee to take that sort of action influenced in some way by the composition of the committee—whether it is equal government and opposition?

Professor CROUCHER: That is a really good question. Over time it has changed. As a general observation, it depends on the tone that is set by the chair of the committee to think like a parliamentarian rather than like a party member. That is the goal of the committee to get it working in that parliamentary way and not split it on party lines in terms of preparing the reports. If it does split on party lines that it is not a very effective parliamentary scrutiny committee or it is not the most effective that it could be. I think that has certainly been the experience of chairs in the past to make those observations.

Mr DAVID SHOEBRIDGE: I am more than happy for you to take this question on notice. Given the very poor drafting of section 8A, would there be a capacity for this Committee to effectively adopt the criteria that are found already in the Commonwealth's criteria for a statement of compatibility? Could we do that effectively, using the current framework of section 8A? The Commonwealth Attorney-General seems to have

done a lot of detailed work in guidance for a statement of compatibility. In the absence of legislative reform, could we adopt what is happening at the Commonwealth level within a framework of section 8A?

Professor CROUCHER: You probably could.

Mr DAVID SHOEBRIDGE: Probably could?

Professor CROUCHER: The scrutiny committees over time have evolved iteratively. Do you remember the specific year of the first one?

Mr DICK: In the 1940s, was it?

Professor CROUCHER: Yes, it was during the war with that kind of scrutiny; not trespassing unduly on the rights and liberties framework came up pretty early on. The committees were analysing those things themselves, with secretariat support over time, I assume. There is nothing to suggest that expanded terms of reference of a committee could not do the same thing. The statement of compatibility is a way of channelling that thinking in a structured way, which provides supports to a committee in thinking around those issues. A first step could be to define those things through the lens of the international instruments as a way of saying that rights and liberties are considered in light of international instruments.

Mr DAVID SHOEBRIDGE: That could be the practice of this Committee. Even if we do not get legislative reform, we could say that should happen, and that would be consistent with section 8A as it currently lies.

Professor CROUCHER: Yes, and it can be done through standing orders, which is how most of the Federal committees have achieved those sorts of frameworks.

Mr DAVID SHOEBRIDGE: What I am putting to you is that changes to standing orders and legislative change require a majority in at least one of the Houses, but if this Committee was persuaded the framework put out in the Commonwealth statement of compatibility considerations was a useful framework for us to adopt, could we adopt that within the current terms of section 8A?

Professor CROUCHER: Probably. There is nothing to suggest that you could not.

Mr DICK: Except that you would not have a requirement for statements of compatibility from departments, so you would have to take what information you have in the explanatory memorandum and effectively do the statement yourself, I guess. You would not be provided with that information.

Professor CROUCHER: If I could add to that, the beauty of the statements of compatibility is people have to do a lot of homework to make sure that they answer those questions. That assists greatly the committees that have that framework.

Mr DAVID SHOEBRIDGE: I am not suggesting that it is a substitute for the departments and the Executive doing that work while they are drafting legislation. I am suggesting it may be a first step to getting there if, as a result of this inquiry, we decide to use that kind of structure to guide our analysis under section 8A.

Professor CROUCHER: That is a very constructive approach.

The Hon. SHAOQUETT MOSELMANE: I am not sure whether my question falls within the remit of this inquiry, but I am thinking about committee reports in which we make recommendations. In your view, should committees, before making recommendations, examine those recommendations against a checklist with regard to the compatibility statements? Would that be a good idea?

Professor CROUCHER: Ideally, you would want the loop closed on the analysis that is made and that the bill is modified to take into account the scrutiny observations. In introducing bills, those observations should be brought to the attention of the House—ideally, that is how it would work. That is not necessarily happening at the moment at the Federal level. There is room for that to happen so that you start to get the loop closing and to get the traction, both in the parliamentary and the Executive context, in approving the right-mindedness that I have spoken about from the beginning.

Mr DICK: Briefly, one extra thing as a side answer to your point is that when the commission engages in any parliamentary committee—for example, I have been at the Legal and Constitutional Affairs Legislation Committee, the Standing Committee on Aboriginal and Torres Strait Islander Affairs, et cetera—we will always start with the statement of compatibility. Usually our submission start with the statement of compatibility, and we may say, "We do not think it is very good; it has missed the following four issues, and we think you should focus on these issues." It does not work just for parliamentary joint committee; we use it as a basis for every committee.

The Hon. SHAOQUETT MOSELMANE: That is what I was asking.

Mr DICK: Yes. It does serve a good purpose. Quite frankly, if we go through a statement of compatibility and think it accurately describes the issues and balances the rights, concluding that the rights are proportionate or not proportionate using a reasonable measure, then we might not make a submission to an inquiry, because the statement does the work already. We try to build that sort of culture and have other committees utilise the material. It is a good conceptual framework that can assist every committee. If we do make a submission because there is a problem with the statement of compatibility, we will state what our problems are and then we will state the issues that the parliamentary joint committee has found. Often you get the analysis from both the Human Rights Commission and the parliamentary joint committee, which can then informs another committee. That adds to the weight of consideration and evidence, and then it is up to the committee as to how they deal with that. It is giving them the information upfront in an explicit way.

The CHAIR: Thank you for appearing before the Committee today. The Committee may wish to send you some additional questions in writing, and the replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Professor CROUCHER: Of course. If we may, we will table some packets of information we have prepared that might assist the Committee in some of its deliberations.

The CHAIR: Thank you.

(The witnesses withdrew)

(The Committee adjourned at 16:26)