

**Submission
No 6**

INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

Organisation: The Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

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3 March 2016

The Director
Select Committee on the Legislative Council Committee System
Parliament House
Macquarie St
Sydney NSW 2000

By email: committeeoncommittees@parliament.nsw.gov.au

Dear Director,

Inquiry into the Legislative Council committee system

Thank you for the opportunity to provide submissions to this inquiry. The Law Society of NSW acknowledges that the work of the Upper House Committees enables the Legislative Council to effectively: (a) hold the Government to account in relation to both its legislative agenda and general administration; (b) allow for community engagement in the parliamentary process; and (c) develop sound policy for the New South Wales community.

Bearing in mind the role of the Legislative Council committee system, the Law Society provides comments below in respect of the scrutiny of bills and regulations, and in respect of community engagement and awareness.

1. Overview of the Law Society's submissions

Briefly, the Law Society's submissions are that there should be:

- (1) A procedure similar to the procedure of the Australian Senate to ensure that bills are more regularly referred to Legislative Council committees for substantive scrutiny;
- (2) Consideration given to the timeframes available for proper scrutiny of bills. At minimum, the utility of the reports on bills provided by the Legislation Review Committee is likely to be enhanced by requiring both Houses to adjourn debate on bills pending the reports of the Legislation Review Committee.
- (3) A scrutiny mechanism in NSW that expressly considers the core seven human rights treaties as set out in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This may entail establishing a new joint parliamentary human rights scrutiny committee, or may be achieved by expanding the mandate of the Legislation Review Committee; and
- (4) A separate mechanism to carry out the scrutiny of regulations.

The Law Society also takes this opportunity to commend the work of the Legislative Council committees and secretariat staff for taking a flexible and innovative approach to consulting with Aboriginal communities in recent inquiries.

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2. Scrutiny of bills and regulations: protection of rights from legislative encroachment

The Law Society understands that Legislative Council committees do not regularly undertake substantive scrutiny of draft legislation. They have received references for only 11 bills since 1997.¹ By comparison, the Australian Senate committees have a procedure for regular referral of bills. These committees have received referrals for approximately 180 bills in the current Parliament (from 2013 to present).²

Relevantly, in his address at the Opening of the 2016 Law Term in NSW, the Chief Justice of the Supreme Court of NSW discussed the state of common law rights in NSW in respect of legislative encroachments. In this speech, the Chief Justice noted that in comparison to the six formal parliamentary scrutiny committees that exist at the Commonwealth level, NSW only has the Legislation Review Committee.³

The Chief Justice also questioned the extent to which the power scrutiny committees wield translates into “practical boundaries being placed on the legislative encroachment of rights.”⁴ In the area of criminal law, the Chief Justice cited a study that found that “there is no evidence that the Committee has any impact on the *outcomes* of parliamentary decision-making processes on criminal law bills.” He also noted that this report “identified an “entrenched culture” held by Parliament of “ignoring and deflecting the Committee’s advice”⁵ and that there are clear instances of Parliament effectively bypassing the Legislation Review Committee’s scrutiny, such as in the case of the *Crimes (Criminal Organisations Control) Act 2009*, which was introduced and passed within 24 hours with no possibility of rights scrutiny.⁶ The Chief Justice commented that:

The number and strength of both types of scrutiny mechanisms [statutory and common law based mechanisms of protection against encroachment] within New South Wales, whether assessed independently or in comparison to Commonwealth counterparts, is not necessarily ideal. It is particularly questionable whether the theoretical potential of both formal and informal scrutiny mechanisms, is translating into an effective protection of fundamental common law rights.⁷

The Chief Justice noted that even on a conservative search, that there are at least 397 legislative encroachments on the rights to legal professional privilege, the privilege against self-incrimination or the presumption of innocence (which were the particular rights he focused on for the purpose of the analysis).⁸

¹ *Legislative Council Committee System: Discussion Paper* (“Discussion Paper”), [3.2]

² Note 1, [3.4], [3.6]

³ The Hon TF Bathurst, “The nature of the profession; the state of the law,” Opening of Law Term Address, 4 February 2016, [20]:

<http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_speech.pdf>

⁴ *Ibid*, [22]

⁵ *Ibid*, [23] citing L McNamara and J Quilter, “Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales” (2015) 27(1) *Current Issues in Criminal Justice* 21

⁶ *Ibid*, [24]

⁷ *Ibid*, [70]

⁸ *Ibid*, [71]

The Law Society's longstanding position is to support the enactment of human rights legislation.⁹ Even with the existence of scrutiny mechanisms, it is difficult to protect rights against legislative encroachments without domestic human rights legislation. In the absence of human rights legislation, we submit that, from the perspective of protecting common law rights and the rights under international human rights law, there are reforms to the existing scrutiny mechanisms in NSW that would assist the Legislative Council to better perform its function as a House of review.

2.1. Substantive scrutiny

The Law Society submits that the Legislative Council should adopt a procedure similar to that of the Australian Senate for the referral of bills for substantive scrutiny. This would better allow the Legislative Council to hold the Government to account; and would allow for more transparency and community engagement. Ideally, it would also result in legislation more grounded in evidence and informed by consultation. In making this submission, the Law Society notes that states have legislative responsibility for many portfolios that materially affect the lives of individuals, including criminal justice, planning, transport and infrastructure, the delivery of housing and homelessness, education and health.

2.2. Technical scrutiny

In respect of the technical examination of bills and regulations, the Law Society acknowledges the work of the Legislation Review Committee (which is administered by the Legislative Assembly), and notes it also has responsibility for the scrutiny of regulations subject to disallowance by resolution of either or both Houses of Parliament. The Law Society notes that the Legislation Review Committee is required to report to both Houses whether any bill:

- (i) trespasses unduly on personal rights and liberties, or
- (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
- (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
- (iv) inappropriately delegates legislative powers, or
- v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.¹⁰

We note that the Legislation Review Committee was set up in response to the recommendations made by the Law and Justice Committee of the Legislative Council in its

⁹ For example, the Law Society of NSW gave the following evidence in 2001 to the Law and Justice Committee's inquiry that led to that Committee's report *A New South Wales Bill of Rights*:

At the moment we would say that our whole system is characterised by a large amount of legislation and regulation that then says "What is left over are your rights". Our whole system at the moment is negative rather than positive. With respect, Mr Chair, we need a Bill of Rights in this country so that people can understand what their rights are and then look to our legislative bodies to enact legislation that is in conformity with those rights. At the moment we tend to say that our rights are what are left over after legislation and regulation have finished. (Law and Safety Committee, *A New South Wales Bill of Rights*, October 2001, [5.24]).

That report led to the amendment of the *Legislation Review Act 1987* to insert s 8A, establishing the mandate of the Legislation Review Committee as it exists now.

¹⁰ Section 8A, *Legislation Review Act 1987*

2001 report *A New South Wales Bill of Rights*.¹¹ The Law and Justice Committee recommended, among other things, that a joint scrutiny committee be established instead of enacting a Bill of Rights in NSW.

Timeframes for review of bills

We understand that one of the key practical problems for the Legislation Review Committee in carrying out its work is the often very short turnaround time to respond to bills. In the Legislative Assembly, debate on bills must adjourn for five clear days; being five calendar days not including the day the bill is introduced (but does not exclude weekends).

In the Legislative Council, debate on bills must be adjourned for five clear days. However, if the Bill is declared urgent, or standing orders are suspended, then debate may proceed without adjournment. In the Law Society's experience, this is not uncommon. Further, there is no obligation on either House to stop consideration of a bill simply because the Legislation Review Committee has not yet reported on the bill.

Given this, we submit that the Legislation Review Committee's work, and the utility of its reports, could be assisted by addressing the timeframes for review of bills, and requiring that both Houses adjourn debate on bills pending the reports of the Legislation Review Committee. These reports should be made available within a reasonable timeframe.

Scrutiny for human rights compliance

The Law Society notes that the scrutiny carried out by the Legislation Review Committee can include consideration of whether bills and regulations comply with Australia's human rights obligations under international treaties. However, consideration of these treaties is not explicitly included in the text of s 8A of the *Legislation Review Act 1987*. Given that international human rights bind the states as much as the Commonwealth, and the concerns noted above about legislative encroachments on rights in NSW, the Law Society submits that that either:

- (1) the Legislation Review Council's remit should be expanded to expressly include the scrutiny of bills measured against the seven core human rights treaties to which Australia is a party as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); or
- (2) a new scrutiny committee should be established, similar in structure and mandate to the Parliamentary Joint Human Rights Committee ("PJHRC").¹² The Law Society notes that the PJHRC's reports are often comprehensive. They are usefully divided into bills on which a response or further information is required from the relevant Minister or legislation proponent; and bills where the Minister's attention is drawn for advice only.

¹¹ New South Wales Parliament Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2011, <[https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/\\$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf)>

¹² See Parliament of Australia, Parliamentary Joint Human Rights Committee website for information about the role of the committee, the relevant human rights treaties, PJHRC membership and reports: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights>

In relation to the operation of the PJHRC, the Law Society concurs with recent comments made by the Australian Law Reform Commission in its *Interim Report on Traditional Rights and Freedoms*¹³, and with the Law Council of Australia in respect of that Interim Report.¹⁴

The Law Council submitted that the functions of the PJHRC should extend to initiating its own inquiries in respect of human rights issues without requiring a reference from the Attorney-General;¹⁵ and that its functions should include a broader human rights monitoring role.¹⁶

The Law Society agrees with these submissions made in respect of the PJHRC, and recommends that they be considered in the NSW context if a NSW joint Parliamentary human rights scrutiny committee is to be established, or if the Legislation Review Committee's role is to be expanded to include a human rights scrutiny function.

The Law Council and the ALRC both noted that the PJHRC's role could be supported better by proper attention being paid to the issues in Explanatory Memoranda.¹⁷ The Law Council submitted also that, given its workload, the PJHRC should be resourced with increased secretariat support.¹⁸ We submit that this would also be a relevant consideration in the NSW context if the Law Society's suggestion in relation to human rights scrutiny is to be implemented, consistent with recommendations previously made by the Law and Justice Committee.¹⁹

Further, we note that NSW government agencies are currently under no requirement to prepare statements of compatibility with human rights in respect of draft legislation. The Law Society submits that if a new human rights scrutiny function is to be established (either through the existing Legislation Review Committee or through a new mechanism), that an accompanying obligation to provide statements of compatibility should be established.²⁰

2.3. Scrutiny of regulations

The Law Society submits that greater attention should be given to the scrutiny of regulations, noting that the detail of how legislation will operate is likely to be contained in the regulations. Regulations may therefore, in practice, have more impact on the rights and liberties of individuals than the legislation to which they are subordinate.

¹³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, August 2015, [2.25] – [2.30]:
<<https://www.alrc.gov.au/publications/parliamentary-scrutiny-processes> >

¹⁴ Law Council of Australia submission to the Australian Law Reform Commission, *Interim report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, 9 October 2015, at 11-15,
<http://www.lawcouncil.asn.au/lawcouncil/images/3065_-_Interim_Report_into_Traditional_Rights_and_Freedoms.pdf>

¹⁵ *Ibid*, [39]-[41]

¹⁶ *Ibid*, [42]-[44]

¹⁷ *Ibid*, [37], [38]

¹⁸ *Ibid*, [45]

¹⁹ Note 11, recommendation 1, [8.54]

²⁰ In this regard, we note for the consideration of the Select Committee on the Legislative Council Committee System that the Law Council submitted the preparation of statements of compatibility with human rights by government agencies could be assisted by further resourcing being made available to the Attorney-General's Department and to the government agencies drafting these statements. Alternatively, better statements of compatibility might result if an independent statutory office holder is instead assigned the responsibility of preparing them (Law Council submission, [50], [51]).

Given this, we submit that it is desirable to revive a separate Regulation Review Committee, or at a minimum, to form a Regulation Review subcommittee within the existing Legislation Review Committee to ensure that regulations receive proper scrutiny. This is consistent with the recommendation made by the Law and Justice Committee in its 2001 report on *A New South Wales Bill of Rights*.²¹

3. Community engagement and awareness

The Law Society takes this opportunity to commend the work of the Upper House Committees and the secretariat staff for its work in respect of engaging Aboriginal communities in consultation.

Recent examples include the consultations undertaken in respect of:

- (1) the inquiry into reparations for the Stolen Generations in NSW;
- (2) the inquiry into the family responses to the murders at Bowraville; and
- (3) the upcoming consultation with Aboriginal communities to be held by the General Purpose Standing Committee No. 2 in relation to the inquiry into elder abuse.

The Law Society understands that the flexible approach adopted by the Upper House Committees and secretariat staff include:

- (1) travelling to regional and remote communities to facilitate consultations;
- (2) taking consultations in non-traditional locations (such as meeting under a tree in respect of the Bowraville inquiry);
- (3) providing training to committee members on how to take evidence from Aboriginal communities; and
- (4) working in concert with other organisations (including the Law Society) to facilitate consultations, including facilitating travel for community members.

The Law Society is pleased to be able to support the engagement between the Legislative Council committees, and members of the Aboriginal community. In our experience, the direct consultation model is highly effective. It is more likely to provide the Legislative Council with better information from vulnerable or marginalised sections of the community. Many of these individuals may not otherwise be heard but may sometimes be disproportionately and adversely affected by proposed legislation; or affected by a lack of legislative attention.

Thank you once again for the opportunity to provide comments. Questions may be directed to

Yours sincerely,

Gary Ulman
President

²¹ Note 11, recommendation 1, [8.54]