

**Submission
No 3**

INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

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SUBMISSION

BACKGROUND

1.1 I became a member of the Legislative Council in September, 1979 and served until February, 2003.

1.2 I welcome this opportunity to make a submission to this inquiry into the Legislative Council committee system, particularly as I chaired the Select Committee on Standing Committees of the Legislative Council, commonly and jocularly known as "the Committee on Committees" and which reported in 1986.

1.3 However, I take the view that it would be somewhat presumptuous of me to make a comprehensive submission regarding the extensive committee system that now exists in the Legislative Council, given that I ceased to be a member as long as thirteen years ago. I consider that it would be far better to focus my attention on what might be done to improve the system of the scrutiny of bills and regulations, a task currently performed by the Legislation Review Committee.

BRIEF HISTORY OF MY INVOLVEMENT IN THE REVIEW OF BILLS AND REGULATIONS

2.1 The then Committee on Subordinate Legislation was established in 1960. I joined the Subordinate Legislation Committee soon after I became an MLC in 1979 and I was Chairman from 1980 to 1987. Prior to my chairmanship, the committee was chaired by the late Sir Adrian Solomons of the Country Party. I was on friendly terms with Sir Adrian but the committee's performance was compromised by the lack of any staffing assistance.

2.2 I then began to lobby the then Premier, the late Neville Wran, for some staffing assistance which was granted in the form of a part-time researcher, a legal academic from Macquarie University. At last there was a review of regulations and recommendations as to which might offend against the criteria the Committee was required to consider.

2.3 In 1987 the Subordinate Legislation Committee was superseded by the Legislative Assembly's Regulation Review Committee. This committee was provided with adequate staff resources to carry out its duties. The Regulation Review Committee remained until 2003 when its duties were vested in the present joint Legislation Review Committee.

2.4 In 2001 the Legislative Council Standing Committee on Law and Justice, chaired by me, recommended that a joint legislation review committee should be established to work separately from the joint Regulation Review Committee. We took the view at that time that the protection of rights and liberties should be the responsibility of both houses of Parliament, though we took the view also that separate joint committees should review legislation and regulations. However, the

then government chose to combine both the review of legislation and regulations in the present Legislation Review Committee.

2.5 The recommendations of the Law and Justice Committee flowed from the then current NSW Bill of Rights reference. When it became apparent that the then Premier, the Hon Bob Carr, was opposed resolutely to a bill of rights, I decided, with the support of the committee, that the legislation review committee concept would be an appropriate fall-back position.

MY VIEWS NOW REGARDING THE SCRUTINY OF BILLS AND REGULATIONS

3.1 I have no subsisting objection to the review function of both bills and regulations being vested in the one parliamentary committee, provided that such committee is resourced and staffed adequately, though separate committees are to be preferred.

3.2 A much more relevant consideration is whether such committee functions should be exercised by a joint house or single house committee. I would maintain that the single house model, especially an Upper House model, is very much to be preferred. The Australian Federal Parliament has a Scrutiny of Bills Committee and a Regulations and Ordinances Committee, both of which are located in the Senate. I am very strongly of the opinion that these review functions are very much more suited to an upper house, which after all is a house of review in both Federal and State jurisdictions. In addition, upper house members have greatly reduced electorate responsibilities and can therefore devote more time to parliamentary scrutiny responsibilities.

3.3 Another relevant aspect is that the culture or disposition of the Legislative Assembly could be said to be antipathetic to either a legislation or regulation review function. The lower house is where governments are made or unmade and where the executive arm of government is stronger and arguably dominant. Most ministers are located in the Assembly and the general tendency is to put bills through the house quickly and with little time reserved for quiet reflection.

THE PRESENT LEVEL OF PERFORMANCE OF REVIEW COMMITTEES IN THE NSW PARLIAMENT

4.1 The Chief Justice of NSW, the Hon Tom Bathurst, was reported in The Sydney Morning Herald on 5 February, 2016 as having said in a speech to mark the beginning of the law term that it was "questionable" whether mechanisms for scrutinising bills in this State were "translating into an effective protection of fundamental common law rights". His Honour had conducted a review of State legislation and concluded that on a conservative estimate, there were "at least 397 legislative encroachments" on three basic common law rights, including the privilege against self-incrimination and the presumption of innocence.

4.2 The Chief Justice said that there were 52 provisions in NSW which encroached on the presumption of innocence, ranging from "reversing or altering the onus of proof (on the prosecution) for an element of an offence, to removing the presumption of innocence for an entire offence altogether". As a "particularly extreme example", the Chief Justice noted that section 685 of the Local Government Act provides that an allegation of a particular offence, including that a person has not obtained a council approval, is "sufficient proof of the matters alleged, unless the defendant

proves to the contrary". Thus the section renders someone guilty of a criminal offence by a mere accusation, His Honour said.

4.3 A very useful contribution to the question of whether the Legislation Review Committee is effective in practice is contained in "Institutional Influences on the Parameters of Criminalisation - Parliamentary Scrutiny of Criminal Law Bills in New South Wales" by Luke McNamara and Julia Quilter, reported in "Current Issues in Criminal Justice" Vol 27 No 1.

4.4 It is apparent that the Committee has a very heavy workload, e.g. in 2014 it examined 118 bills. It produces the "Legislation Review Digest" approximately 15 - 20 times annually under a tight timeframe.

4.5 The learned authors, in a very detailed review of the Committee's work, state that "Overall, we found little evidence that the work of the Legislation Review Committee enhances the quality of parliamentary debate on criminal law bills. Government and Opposition MP's appear to be very selective and strategic about how and when they make reference to the Legislation Review Committee and rights and liberties concerns." (p.30) Also, "Unfortunately, the Committee's good work achieves only limited visibility in Parliament, and there is little evidence that the quality of parliamentary debate is enhanced." (p.35)

4.6 My own hope, perhaps a naive one, is that a Legislation Review Committee located in the Legislative Council on the Senate model would have more influence and impact than the present Joint House Committee does.