

INQUIRY INTO CONSULTATION ON HIGHLY CONTENTIOUS BILLS

Organisation: The Law Society of New South Wales

Date Received: 8 November 2019

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8 November 2019

The Director
Procedure Committee
Parliament House, Macquarie Street
Sydney NSW 2000

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

Dear Director,

Consultation on highly contentious bills

The Law Society of NSW appreciates this opportunity to provide a submission to the NSW Legislative Council's Procedure Committee ('the Committee') consultation on highly contentious bills. This submission has been informed by the Law Society's Public Law and Criminal Law Committees.

The Law Society commends the Committee for undertaking consultation on these important issues. We strongly support initiatives aimed at increasing scrutiny and improving the consultation process relating to government bills. In our view, government should be required to follow a prescribed consultation process before introducing most bills to Parliament. Our submission will focus on the first paragraph in the Terms of Reference, the parliamentary modernisation proposal that:

- (a) prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process.

1. A prescribed consultation process for bills should be implemented

To ensure that all bills consistently receive an appropriate degree of consultation and public consideration, we recommend that a prescribed consultation process for bills be implemented. The chosen model should incorporate an element of flexibility, noting that the context surrounding some bills may require different treatment. A robust mechanism with unambiguous steps and requirements should be established to ensure the prescribed consultation occurs consistently and as intended.

We recommend that the prescribed consultation process be required to begin prior to the introduction of a bill in Parliament. Such an approach would align with democratic principles relating to public participation as a means to ensure better decision-making and the accountability of politicians. If consultation only occurs following the introduction of a bill in Parliament, it can be costly and cumbersome to make amendments to take into account legitimate public views at this stage. Early consultation can help to ensure that when a bill is

introduced to Parliament, it has already been informed by evidence and public views, increasing the efficiency of government processes and avoiding delay. To this end, we recommend that consultation processes take place prior to a bill's introduction to either House of Parliament.

As part of the prescribed consultation process, the Law Society supports the use of a Green Paper at an early stage, prior to the introduction of a bill in Parliament. As noted in the discussion paper, Green Papers provide a valuable opportunity for government to receive feedback on policy or legislative proposals. In addition to a Green Paper, the Law Society also supports the use of a Cabinet endorsed White Paper, or alternatively, an exposure draft and regulatory impact assessment pertaining to the draft bill, prior to a bill's introduction in Parliament. Regulatory impact assessments, when completed with appropriate rigour, are a valuable tool which can be used to examine broader economic and social costs and benefits in more detail, and to explain legal concepts in plain English for the broader public. Exposure drafts can allow the public and impacted stakeholders to consider how a government policy is intended to be implemented through legislation. An exposure draft affords an opportunity to identify and comment on unforeseen or unintended consequences that may become clear through the drafting process, and can also serve to allay concerns about the breadth of a policy and its potential impact.

2. The name and definition of “highly contentious” bills are problematic

In our view, the reference to “highly contentious” bills in the Terms of Reference for this consultation is problematic. The definition provided for a “highly contentious” bill appears to encompass proposed legislation that may be considered highly important and deserving of proper consultation, without necessarily being ‘contentious’. In our view, the level of scrutiny or consultation afforded to a bill should be reflective of its importance and impact, not the degree of ‘contentiousness’.

The proposed definition of a “highly contentious” bill is “a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes”. We note that the requirement that the bill must also “provoke widespread public interest in the proposed change” is problematic for many areas of law. For example, in relation to criminal law, numerous bills that would impact the rights of an accused may not attract widespread public interest but could potentially have a significant impact on criminal justice processes and rights, and therefore be of very significant social concern. The Committee should further consider whether there are other proposed bills which may fall outside the scope of this definition, particularly those which may have significant impact, even if only for a small cohort.

3. Most bills should be subjected to the prescribed consultation process

The Law Society is of the view that proper consultation should not be limited to those bills which are considered “highly contentious”. Rather, we recommend the bar be lowered to include all bills likely to have substantial impact, be considered important or cause contention for any cohort in our community, not only those provoking “widespread public interest”.

We acknowledge that conducting a comprehensive consultative process can be time-consuming and costly, and that there may be good reasons why certain bills should be expedited. It should not be necessary for clearly low-importance, non-contentious bills, for example, to be subjected to a prescribed consultation process. If there is a strong rationale underpinning the accelerated progression of important or “highly contentious” bills (as defined in the consultation's Terms of Reference), a robust and transparent mechanism should be in place to ensure this is done in an appropriate and considered manner. At a

minimum we suggest a truncated consultation process, for example a community consultation briefing, be required.

Clear definitions and measures would need to be developed to determine whether a bill is considered of importance or to have substantial impact, or clearly of low-importance and non-contentious, and to what degree. Further consideration should also be given to whether the Selection of Bills Committee, or another entity, is best suited to determining this categorisation of bills. The Committee may then wish to consider incorporating a graduated approach into the prescribed consultation process, whereby the extent of consultation may be determined by the degree of importance and impact of that bill as categorised, with consideration being given to any consultation process undertaken prior to the introduction to Parliament.

4. The prescribed consultation process must allow adequate time for public comment and be appropriately resourced

In 2017, the Law Society made a submission to the Legislative Review Committee's inquiry into the Operation of the *Legislation Review Act 1987* (NSW). That submission is attached for your information. The Law Society recommended that current resources available to the Legislative Review Committee be reviewed to ensure they are adequate to facilitate the Committee performing its functions. For the present consultation, we recommend that any proposal for a more comprehensive and prescribed consultation process for suitable bills be properly costed and resourced having regard to the significant additional costs that may be imposed upon the Parliament or responsible Ministers.

In the Law Society's 2017 submission, we also recommended that amendments should be made to the timeframes for consideration of bills, including that both Houses should be required to adjourn debate on bills pending the reports of the Legislative Review Committee for a longer period of time than is currently provided for. In a similar regard, we recommend that any prescribed process for consultation on bills ensure a reasonable and appropriate timeframe for public comment, to allow proper consideration of the bill's content and likely impact. Responsible Ministers should also be required to demonstrate that such views have been considered through a public report or other written response prior to the bill's introduction in Parliament.

We note that in recent years the Law Society has often had very limited timeframes in which to give proper consideration to the issues raised by certain bills, and to prepare meaningful policy advice. It is vital for stakeholders to be given sufficient time to give proper consideration to legislative proposals in order to generate the most useful feedback. We refer the Committee to the Law Society's 2019 State Election Platform, which noted that studies about the effectiveness of the NSW Legislative Review Committee have identified an "entrenched culture" held by Parliament of "ignoring and deflecting the Committee's advice",¹ and that it is not uncommon for legislation to pass within 24 hours, with no possibility of public scrutiny.²

¹ 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.

² For example, the *Liquor Amendment Act 2014*, the *Independent Commission Against Corruption Amendment (Validation) Act 2015*, the *Sydney Public Reserves (Public Safety) Act 2017*, and the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017*.

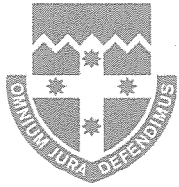
Thank you again for the opportunity to contribute to the Committee's consultation. If you have any queries in relation to this submission, please contact Claudia Elvy, Policy Lawyer, on (02) 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth Espinosa', written in a cursive style.

Elizabeth Espinosa
President

Enc.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC/HRC:PWeh1403750

27 November 2017

Mr Michael Johnsen MP
Chair
Legislation Review Committee
Parliament House
6 Macquarie Street
Sydney NSW 2000

By email: Legislation.Review@parliament.nsw.gov.au

Dear Mr Johnsen,

Inquiry into the Operation of the Legislation Review Act 1987 (NSW)

Thank you for the opportunity to provide a submission in relation to the Legislation Review Committee's ("Committee") current Inquiry into the Operation of the *Legislation Review Act 1987* (NSW) ("Act"). The Law Society's Public Law and Human Rights Committees have contributed to this submission.

The Law Society considers that parliamentary committees and their inquiries serve an important role in thoroughly analysing proposed legislation while creating a forum for public discourse that incorporates the views of the community. The Law Society recognises that the Committee is a very busy one and is occupied with a large amount of work that is often required to be completed in very short timeframes. Within that context, we are pleased to offer the following comments for the Committee's consideration.

We note that in 2016 the Law Society made a submission to the Inquiry into the Legislative Council Committee System.¹ That submission is attached for your information. A number of our recommendations in that submission are relevant to this review, including our recommendations that:

- consideration should be given to the timeframes for proper scrutiny of Bills;
- consideration should be given to the inclusion of a mechanism that expressly considers the core seven human rights treaties as set out in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); and
- a separate mechanism created for the scrutiny of regulations.

These and other recommendations are set out in this submission.

¹ Law Society of NSW, Submission No 6 to Legislative Council Select Committee on the Legislative Council Committee System, *Inquiry into the Legislative Council Committee System*, 3 March 2016.

1. Overview of the Law Society's submission

Briefly, our submission sets out the following:

- (1) The Act should be amended to provide that members of the Committee are drawn from across political parties, allowing some flexibility in membership over the life of a Parliament to ensure relevant expertise where available.
- (2) Committee members should receive initial training in the role and requirements of the Committee and Committee membership, as well as further training and support as required.
- (3) Amendments should be made to the timeframes for consideration of Bills, including that both Houses should be required to adjourn debate on Bills pending the reports of the Committee for a longer period of time than currently provided for.
- (4) The Act should set out a procedure for cases in which the government wishes a Bill to bypass review by the Committee on the basis that it is urgent.
- (5) The current resources available to the Committee, including the availability of an Independent Legal Officer, should be reviewed to ensure that they are adequate to facilitate the Committee performing its functions under the Act.
- (6) The Act should be amended to expressly require the Committee, when considering whether a Bill trespasses unduly on personal rights and liberties, to
 - a) review the Bill against common law rights, including the presumption of innocence, legal professional privilege and the privilege against self-incrimination; and
 - b) 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). To assist the Committee to undertake such a review, all Bills should be accompanied by a statement of compatibility with those human rights obligations.
- (7) Consideration should be given to either:
 - a) reviving a separate Regulation Review Committee or, at a minimum, forming a Regulation Review subcommittee within the existing Committee to ensure that regulations receive proper scrutiny; or
 - b) providing for two separate Independent Legal Officers for the Committee, with one to focus on assisting the Committee in relation to the review of Bills and the other to focus on assisting the Committee in relation to the review of delegated legislation subject to disallowance.

2. Current operation of the Act

The Committee was established in response to recommendations made by the Legislative Council's Law and Justice Committee in its 2001 report *A New South Wales Bill of Rights*.² Prior to that, a Regulation Review Committee undertook the review of regulations subject to disallowance.³

The current Act provides for the establishment of the Committee as a joint committee of Parliament.⁴ All Bills introduced in the NSW Parliament must be considered by the

² New South Wales Parliament Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2001, <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1737#tab-reports>>.

³ Established under the *Regulation Review Act 1987* (NSW).

⁴ *Legislation Review Act 1987* (NSW) s 4.

Committee.⁵ While a House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, the Committee is not precluded from making a report because the Bill has been passed or has become an Act.⁶

The Committee is also required to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament and consider whether the special attention of the Parliament should be drawn to any such regulation on any ground, including the grounds identified in the Act.⁷ The Committee is not precluded from exercising its functions in relation to a regulation after the regulation has ceased to be subject to disallowance, if the Committee resolves to review and report to Parliament on the regulation while it is still subject to disallowance.⁸

The functions of the Committee with respect to regulations do not include an examination of government policy, except as is necessary to determine whether the regulations implement current policy or the matter has been specifically referred to the Committee by a Minister.⁹

The Committee can also initiate a systems review of regulations or inquire into any question in connection with regulations referred to it by a Minister.¹⁰

3. Constitution of the Committee

The Act provides that the Committee is to be made up of five members from the Legislative Assembly and three Members from the Legislative Council.¹¹ We note that the Law and Justice Committee of the Legislative Council previously recommended that the NSW committee with responsibility for reviewing legislation be a Committee of the NSW Upper House, the Legislative Council.¹²

Generally the Upper House of Parliament is understood to be a “House of review”, operating as a check on the government of the day. This role is reflected in the Federal Parliament where the Senate has a Standing Committee for the Scrutiny of Bills. That Committee is made up of six senators, three government senators and three non-government senators.¹³

However, we understand that NSW is not the only state to have a joint committee established to consider proposed legislation. South Australia has a joint Legislative Review Committee made up of members from both Houses of Parliament.¹⁴ Tasmania has a joint Standing Committee on Subordinate Legislation.¹⁵ In Western Australia the Standing Committee on Uniform Legislation and Statutes Review and the Legislation Committee are both committees of the Legislative Council, although the Parliament has a Joint Standing Committee on Delegated Legislation.¹⁶ Victoria has a joint Law Reform, Road and Community Safety Committee and a Legislative Council Legal and Social Issues Committee which may review proposed legislation.¹⁷

⁵ Ibid s 8A(1).

⁶ Ibid s 8A(2).

⁷ Ibid s 9(1).

⁸ Ibid s 9(1A).

⁹ Ibid s 9(3).

¹⁰ Ibid s 9(2).

¹¹ Ibid s 5.

¹² Above n 2.

¹³ Standing Orders of the Senate, Standing Order 24(2)(a)

<http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standing_orders/b00/b05#standing-order_c05-024>.

¹⁴ *Parliamentary Committees Act 1991* (SA).

¹⁵ *Subordinate Legislation Committee Act 1969* (Tas).

¹⁶ <http://www.parliament.wa.gov.au/parliament/commit.nsf/WCurrentCommitteesByName>.

¹⁷ <https://www.parliament.vic.gov.au/committees/list-of-committees>.

The Law Society considers that while there would be benefits in members of the Committee being drawn solely from the Legislative Council, it is most important that the composition of the Committee be drawn from across political parties. For the work of the Committee to be effective and have public support, it is important that the Committee does not have a majority of government members. We note that this requirement is not currently contained in the Act and consider that it may be appropriate for the Act to be amended to reflect such a requirement.

The Law Society also considers it desirable that there be some flexibility in Committee membership over the life of a Parliament to ensure that the Committee has relevant expertise where available. However, this should not be prioritised over balanced representation.

We do not consider that it would be appropriate or practical to have requirements in relation to qualification or experience of members of the Committee. However, the Law Society does consider that members of the Committee should receive training in their role on the Committee. It may be appropriate for the requirement for appropriate training of Committee members to be addressed in guidelines or Standing Orders rather than in the Act itself.

In relation to the number of Committee members provided for in the Act, the Law Society suggests below that consideration be given to reviving a separate Regulation Review Committee. If that suggestion is not taken up and the review of delegated legislation continues to be undertaken by the current Committee, we recommend that the number of Committee members be increased. This would provide additional resources and allow for the establishment of a regulation review subcommittee as proposed below.

4. Timeframes for review of Bills

We understand that one of the key practical problems for the Committee is carrying out its work in very short timeframes. In the Legislative Assembly debate on Bills must be adjourned for five clear days, being five calendar days not including the day the Bill is introduced.¹⁸ In the Legislative Council debate on Bills must be adjourned for five calendar days.¹⁹

If a Bill is declared urgent, or standing orders are suspended, debate may proceed without adjournment.²⁰ We understand that this is not uncommon. Further, there is no obligation on either House to stop consideration of a Bill simply because the Committee has not yet reported on the Bill. Section 8A(2) of the Act expressly provides that a House of Parliament may pass a Bill whether or not the Committee has reported on the Bill.²¹

Given this, we consider that the Committee's work, and the utility of its reports, could be assisted by addressing the current timeframes for review of Bills, and requiring that both Houses adjourn debate on Bills pending the reports of the Committee for a longer period of time. The Law Society notes that the NSW Parliament has legislative responsibility for many areas of law that materially affect the lives of individuals, including criminal justice, planning, transport and infrastructure, the delivery of housing and homelessness, education and health. Ensuring that the Committee has appropriate time to consider these Bills is essential.

We appreciate that it is necessary that urgent government business is not unnecessarily delayed by the Committee process.²² However, it is undesirable for Bills to be identified as urgent simply for political purposes.²³ To address this, we consider that it may be useful for the

¹⁸ Legislative Assembly Standing Orders, Order 189.

¹⁹ Legislative Council Standing Orders, 137.

²⁰ Above n 18, Order 189, Above n 19, 138.

²¹ Above n 4, s 8A(2).

²² Select Committee on the Legislative Council Committee System, Government Response, 26 May 2017.

²³ By way of example, we note bills such as the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016* (NSW). We also note Bills such as the *Crimes (Criminal Organisations Control) Bill 2009* (NSW), which was introduced and passed within 24 hours.

Act to contemplate such situations and establish a set of criteria for determining the urgency of a Bill. This would help to ensure that Bills are treated consistently over time. The criteria for urgency should reflect circumstances where there would be a disproportionate or unacceptable outcome if the legislation is not passed immediately.

We propose that in cases where the government wishes a Bill to bypass the Committee on the grounds that it is urgent, the relevant Minister should be required to:

- provide reasons as to why the Bill is urgent, with reference to the criteria to be built into the Act;
- set out what the consequences would be if the passage of the Bill is delayed; and
- provide a brief statement stating how the Bill affects the issues that would normally be considered by the Committee.

This will be a crucial process. Urgent Bills are frequently those that raise the most pressing human rights issues and are therefore those which are the most in need of careful consideration by the Committee.

5. Committee resourcing

It is important that the reports of the Committee are available within a reasonable timeframe. To facilitate this, the Committee must be appropriately resourced. While the Law Society is not in a position to specify with any particularity what resources the Committee requires to support its work, we are of the view that it is important that the Committee be resourced appropriately to ensure the timely flow of Bills, following proper scrutiny.

We understand that the NSW Parliament's joint committees are currently administered by the Legislative Assembly.²⁴ We have little information about the Office of the Department of the Legislative Assembly, or how similar it is to the Office of the Department of the Legislative Council.²⁵ We consider that it would assist the Committee to consider current resourcing to determine how that may affect the practical implementation of the Act, including whether the support provided by the Independent Legal officer for the Committee is adequate.

In undertaking this analysis, the Committee may wish to consider the model developed by the ACT Legislative Assembly under the *Financial Management Act 1996* (ACT) with respect to parliamentary appropriations for the Office of the Legislative Assembly, and also "Offices of the Assembly" (including the Auditor-General, the Ombudsman, and the Electoral Commissioner). Under that Act the Speaker of the Legislative Assembly, after consulting the appropriate committee, advises the Treasurer of the appropriation that the Speaker considers should be made for the financial year for the office. If the Treasurer presents an appropriation that is less than the recommended amount the Treasurer must present to the Legislative Assembly a statement of reasons for departing from the recommended appropriations.²⁶ We note that, if adopted, this proposal should apply beyond the Committee to other parliamentary Committees.

²⁴ Department of the Legislative Assembly, NSW, Submission No 18 to Legislative Council Select Committee on the Legislative Council Committee System, *Inquiry into the Legislative Council Committee System*, 12 April 2016.

²⁵ For information on the latter see the Select Committee on the Legislative Council Committee System "The Legislative Council Committee System" dated November 2016 <<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6096/Final%20report.pdf>> and above n 22.

²⁶ *Financial Management Act 1996* (ACT) ss 20-20AC. See discussion in Gabrielle Appleby, 'Horizontal accountability: the rights-protective promise and fragility of executive integrity institutions' (2017) *Australian Journal of Human Rights* 168, 184.

6. Factors to be considered by the Committee – review of Bills

Section 8A(1) of the Act sets out that the Committee must report as to whether a Bill, by express words or otherwise:

- (a) trespasses unduly on personal rights and liberties; or
- (b) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; or
- (c) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; or
- (d) inappropriately delegates legislative powers; or
- (e) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

We note that in 2010 the Committee released a discussion paper on “Public Interest and the Rule of Law” and sought submissions on a number of questions arising from that paper.²⁷ That paper stated that in the absence of any definition of personal rights and liberties under the law or the NSW Constitution, the Committee has regard to a range of sources in determining which personal rights and liberties the proposed legislation may impact upon, including Australian and international law.²⁸

The Law Society suggests that a significant source of personal rights and liberties are existing fundamental common law protections, including the presumption of innocence and the rights to legal professional privilege and against self-incrimination.²⁹ We consider that those common law rights should be considered by the Legislation Review Committee when reviewing Bills.

The Law Society has also previously expressed the view that personal rights and liberties can be considered by application of standards which Australia has committed to under international law, including the *International Covenant on Civil and Political Rights* (“ICCPR”).³⁰ To achieve this, the Law Society suggests that the Act should be amended to expressly require the Committee to review Bills against the seven core human rights treaties to which Australia is a party as defined by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).³¹ This may be achieved by the inclusion of those principles as criteria in the Act for the consideration of the Committee.

Additionally, we note that NSW government agencies are not currently required to prepare statements of human rights compatibility in respect of draft legislation. We have previously suggested that in order to support any new human rights scrutiny function being undertaken by the Committee, an accompanying obligation on NSW government departments and agencies to provide statements of compatibility should be established.³² We propose that this should be similar to the requirements imposed on Federal government departments and agencies under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

7. Factors to be considered by the Committee – review of regulations

Section 9 of the Act requires the Committee to consider whether the special attention of Parliament should be drawn to any regulation subject to disallowance on any ground, including:

²⁷ Legislation Review Committee, “Public Interest and the Rule of Law” Discussion Paper No 1, 10 May 2010.

²⁸ Ibid, 2.

²⁹ We note the NSW Chief Justice’s consideration of these considerations in his Opening of Law Term Address, “The Nature of the Profession; The State of Law”, 4 February 2016, transcript available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160204_speech.pdf.

³⁰ Law Society of NSW, Submission No 4 to Legislative Review Committee, *Public Interest and the Rule of Law*, 24 June 2010.

³¹ We previously suggested this approach to the Select Committee on the Legislative Council Committee System. See above n 1, 4.

³² Above n 1, 5.

- (a) that the regulation trespasses unduly on personal rights and liberties;
- (b) that the regulation may have an adverse impact on the business community;
- (c) that the regulation may not have been within the general objects of the legislation under which it was made;
- (d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- (e) that the objective of the regulation could have been achieved by alternative and more effective means;
- (f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- (g) that the form or intention of the regulation calls for elucidation; or
- (h) that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989* (NSW), or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Law Society has previously submitted that greater attention should be given to the scrutiny of regulations, noting that the detail of how legislation will operate is frequently contained in regulations.³³ In practice, regulations may have more impact on the rights and liberties of individuals than the legislation to which they are subordinate.

On this basis, we have suggested that it is desirable to revive a separate Regulation Review Committee, or at a minimum, to form a Regulation Review subcommittee within the existing 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*.³⁴

In response to our submission to this effect in 2016, the Department of the Legislative Assembly noted that the overwhelming majority of regulations are “machinery in nature” and therefore the number of regulations that the Committee reports on is relatively small when compared with the total number of Bill reports published.³⁵ The Department of the Legislative Assembly also noted that

... the Committee reviews every regulation that is made within the regulation's disallowance period (15 sitting days). At every meeting, the Committee considers and formally notes a list of regulations that it has determined do not require individual reports. Although not published, this list includes the explanatory notes of those regulations that the Committee determined to not warrant particular comment. Other regulation reports are considered in the same way as bill reports, and adopted for inclusion in the weekly digest.³⁶

The number of statutory rules and regulations disallowed by Parliament is very small. For example, data published by the Legislative Council shows that in the 55th Parliament (2011-2014) thirteen disallowance motions were moved in respect of statutory rules and regulations and only three were agreed to.³⁷ While this may be attributable to a number of factors, it does little to alleviate concerns that the Committee may not have sufficient time or resources to thoroughly review proposed statutory rules and regulations.

While the Law Society continues to see the merit in establishing a separate Regulation Review Committee, we understand that as a practical matter it will be necessary to consider the available resources. In any event, assessment of whether a Bill unduly trespasses on rights is of a different nature to that in assessing those matters set out in section 9(b)-(h) of the Act.

³³ Above n 1.

³⁴ Above n 2, recommendation 1, [8.54].

³⁵ Above n 24, [5].

³⁶ Above n 24, [6].

³⁷ Available at:

<https://www.parliament.nsw.gov.au/lc/Documents/Legislative%20Council%20disallowances.pdf>.

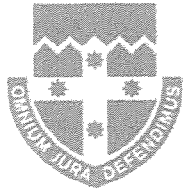
We note that in relation to Bills, the Committee is required to consider whether a Bill inappropriately delegates legislative powers. To complement this, we think that it would be appropriate for the Committee to carefully consider the effect of regulations that amend the operation of a primary Act.³⁸

Should you have any questions or require further information, please contact

Yours sincerely,

Pauline Wight /
President
Encl

³⁸ For example, sections 44 and 44A of the *Drug Misuse and Trafficking Act 1985* (NSW) allow regulations to be made that amend schedules 1 and 2 of that Act.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/IIC/GUvk:1089956

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]