Submission
No 11

INQUIRY INTO CONSULTATION ON HIGHLY CONTENTIOUS BILLS

Organisation: NSW Council for Civil Liberties

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NSWCCL SUBMISSION

Highly Contentious Bills

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Submission to the Procedure Committee of the New South Wales Legislative Council Consultation on highly contentious bills.

The terms of reference for this inquiry are:

That the Procedure Committee inquire into and report on the parliamentary modernisation proposals that:

1. (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, and
2. (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

The CCL thanks the Procedure Committee for its invitation to comment on these matters.

The term 'members of parliament' ,as it is used in this submission, includes members of the Legislative Council and of the Legislative Assembly.

I. Determining that a bill is highly contentious.

The CCL believes that the processes the New South Wales Parliament (the parliament) adopts are often ill-fitted for thorough discussion of issues. And though some matters are referred to committees to allow for public consultation, too often government majorities on those committees wave legislation through without change. The "consultation", that is, is hollow.

The problem with what is proposed in the terms of reference for this inquiry is that some committee is going to have to decide when the alteration a bill proposes is sufficiently substantial, and that the public interest that is likely to be provoked is sufficiently widespread, to trigger the special procedures.

We are not sanguine about the prospects of a committee applying the procedures to much government legislation.[1] It would be better if the standard procedures of the parliament ensured 'that the intent and possible ramifications of draft legislation were fully explored' in all cases.

II. The origins of controversy.

Highly contentious issues are of several kinds.

i. There are issues, such as those concerning abortion and assisted dying, that have been debated for a considerable period of time. The literature on these matters is full of sophisticated arguments generally found in journals of bioethics or of general philosophy. When legislation is proposed on such matters, there may be a point in the parliament allowing

[1] See for instance our submission to the Legislation Review Committee's 1997 inquiry into its role and function.

extra time for its members to refresh their memories of these complex arguments, so that they do not spend their time rehearsing simple positions to which there are known and decisive objections.

It is difficult to see, however, how green and white papers would help with this, unless it is proposed that Government produce a philosophical treatise supporting the proposed legislation.

ii. Similarly there are political-economic issues, such as the relative desirability of publicly owned versus privately owned enterprises. The issues here combine economic theories and experience—sometimes bitter experience—and these two are complexly related. They are generally the subject of heated academic debate, across several disciplines. Here too, one might see a need for members of parliament to be brought up to date, so that the argument used are themselves up to date, and are not rooted in prejudice.

iii. Of a different kind are issues that arise suddenly as a result of a crisis, or are thrust into the foreground when some difficult case emerges. The ant-terrorist legislation that followed 9/11 is an example of the former, and the change to double jeopardy law is an example of the latter.

These issues are controversial, not in that they have been debated at length, but in that they are not debated enough. There is pressure on members of parliament and governments to be seen to act quickly and decisively; but the legislation conflicts with established legal principles. (The principles protect the rights of individuals, and their establishment and defence not infrequently involved civil and/or international war.)

It is highly desirable that the Parliament does not rush into passing such legislation, but takes the time to consider carefully whether the changes are really necessary, whether some other changes may meet the need, whether the changes are proportional to the harm being prevented and so on—that is, that the Parliament gives proper consideration to the principles of balance.

iv. There are matters that are only contentious because of the persistence of prejudice. The proposal quite some time ago by the Bjelke Peterson government in Queensland to require equal time to be given in the science curriculum in schools to creationist views as is given to the whole theory of evolution is such an example; contention about the safety of vaccination is another.

III. Current practice.

i. CCL has expressed before its concern that bills are commonly passed by the NSW Parliament within a week of their introduction, irrespective of the severity of their impact on the rights and liberties of NSW residents and citizens.[2] Sometimes, indeed, far-reaching and highly intrusive bills are rushed through, with no opportunity for public input, nor for serious debate in the Parliament. A good example from the recent past is the passage of the Crimes (Criminal Organisations Control) Act 2009 (NSW). The Act permits the Police Commissioner to apply to an eligible judge (where eligibility is determined by the NSW Attorney General) to have an organisation made a declared organisation. Members of that

[2] See for instance our submission to the Legislation Review Committee's 1997 inquiry into its role and function.

organisation are then prohibited, with a penalty of imprisonment, from associating with each other; and the notion of 'membership' is expanded to include anyone who is connected with the organisation. The Police Commissioner may prevent any member of the organisation being present when evidence which he (or she) declares to be criminal intelligence is presented.

This act, which, as McNamara and Quilter note, 'effected an unprecedented expansion of the parameters of criminalisation' in New South Wales, was passed through both houses within a day of its introduction, and with very little notice to the public.[3]

Perhaps the worst example of this haste was the treatment of the Terrorism (Police Powers) Amendment Bill 2015. That bill (now an act) perpetuates the most egregious intrusion on rights and liberties in Australia's history—the power given to police to intern terrorist suspects without trial, on the basis of a mere reasonable suspicion that they might commit a "terrorist act"—a term given a dangerously extensive definition in the Criminal Code. The bill, it is true, was sent to the Legislation Review Committee; but that Committee took just 6 minutes to consider this bill and fourteen others.[4] The bill then went to the Legislative Council, which passed it in a single day.

IV The traditions of parliaments.

The traditions Australian Parliaments have inherited from the British Parliament were intended to ensure that proposed legislation is properly considered and debated.
When fully applied, there is be a suitable gap between the first reading of a bill and the second reading debate—a gap long enough for complex argument to be absorbed and responded to.
The second reading debate is not truncated. (It should not be subject to the closure for instance.)
There is a gap between the second reading debate and the committee stages, to allow time for public input and mature consideration.
There is a further gap after the third reading before the bill has its second reading debate in the house of review (normally the upper house, but the lower, if the bill is introduced in the upper house).
Similar times for careful consideration are provided for the house of review.
Bills raising complex, contentious issues are sent to a select committee, which will have adequate time to hear evidence and argument. Members of government forming majorities on such committees are prepared to show some gumption, and to recommend changes.

If these procedures were adhered to in all cases except when there is a genuine emergency, there would be little need for the special measures proposed in the terms of reference for this

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[3] 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.

[4] *Unconfirmed Minutes*, Tuesday October 27, 2015.

inquiry. It would also obviate the problem of determining who decides that the changes proposed by a bill are substantial enough, and that the public interest is likely to be sufficiently widespread, to trigger special procedures.

V. Democratic entitlements.

Rule by the people is not ensured by electoral processes alone, nor by consultation (though that helps), but by participation in decisions by people who are affected. Many controversies could be averted if better procedures for participation were adopted; and the resulting policies, being informed by the experience and wisdom of a wide range of people, are likely to be better than those determined by a small, although expert, group. That is the promise of democracy.

Some participatory arrangements do exist—parents' and teachers' involvement in education policy and implementation, or the NSW Coalition of Aboriginal Regional Alliances, for instance. The parliament should encourage the Government to foster such arrangements.

Recommendations:

1. The Procedure Committee should recommend that that the standard procedures of the New South Wales Parliament be modified, to allow sufficient time to ensure in all cases including highly contentious ones that the intent and possible ramifications of draft legislation are fully explored.

2. The Government should be encouraged to foster participation in decision making in policy formation and in its implementation.

This submission was prepared for the New South Wales Council for Civil Liberties by Dr. Martin Bibby PhD, a member of the Council's Committee.

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