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Submission to the Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

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).

CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

We thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to contribute to this enquiry. The main Bill will establish the Parliamentary Joint Committee on Human Rights (the Committee)

A. Introduction: The New South Wales Legislation Review Committee (LRC)

The CCL has had considerable experience of the LRC, and reports that that experience is overwhelmingly negative. Its problems are instructive, and make a useful starting point for this submission.

The LRC was set up after an inquiry into whether New South Wales should adopt a bill of rights. It was feared[1] that a bill of rights might threaten the sovereignty of Parliament, and argued that a committee could provide equivalent protection to rights. **The result is a manifest failure. This committee is no substitute for a bill of rights.**

The extent of that failure is manifest on the LRC's own website—in its annual reports, its legislation review digests and its *Information Paper*. It does not have sufficient time to examine legislation. It does not have time to consult, or to allow public input. (It often barely has time to meet.) It has—by the deliberate choice of its creators—no set of rights against which to judge. It is routinely ignored.

A.1. Time.

The LRC has a mere five days, including weekends and public holidays, between the time a bill is introduced into the NSW Parliament and its passage

[1] See below. The CCL does not accept that the introduction of a bill of rights on the Canadian model provides any threat whatsoever to the sovereignty of parliament. On the contrary, it will, perhaps paradoxically, add to its autonomy.

through both Houses. When bills are declared urgent, it can only comment after their passage. Repeated complaints about this have led to no changes to the Standing Orders.[2] We note that the Scrutiny Committee often has little more time.

The LRC Minutes for March 8, 2010 show that it took only 35 minutes to consider 8 bills plus some regulations, and to deal with formal business. While the bulk of the work on its report would have been done before its meeting, such a brief consideration in committee is an indication of the extent to which even its members consider its work important—or of the lack of time to give matters a proper consideration. (It needed to report that same afternoon if its comments were to be considered before the bills were passed. This is its normal situation.)

A.2. Rights Standards.

The LRC has no *mandated* set of rights against which it judges bills and acts. This is a matter of deliberate policy—the New South Wales Parliament appears to have been afraid that its own processes could threaten its sovereignty. "The Parliament therefore decided not to define what rights and liberties people in New South Wales should enjoy but rather to determine such issues within the context of each bill."[3] Accordingly the LRC itself has collected a set of rights statements to guide its deliberations (when it has time to deliberate). According to its Information Paper, these include international human rights law, with special attention being paid to human rights treaties to which Australia is a party, the human rights laws of other countries (for example the United Kingdom, The United States, New Zealand, Canada and South Africa) and the range of rights recognised under Australian law, whether or not these are enforceable under existing law.[4]

A.3. Lack of impact.

The LRC has very little impact. It sends letters to ministers, about half of which are given an answer. In the year to June 2008, it met 16 times, commented on 99 bills, referred 170 issues concerning 70 bills to the NSW Parliament, and was referred to in debates a total of 24 times, in relation to 17 bills.[5]

A striking example of the failures of the LRC 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 organisation are then prohibited, with

[2] See the Annual Reports of the LRC for 2007-8 and 2008-9. The relevant standing orders are No. 88 for the Legislative Assembly and No. 137 for the Legislative Council.
[3] Legislation Review Committee, Information Paper, p. 3.
[4] Ibid. p. 6.
[5] New South Wales Legislation Review Committee, Annual Report 2007-2008 pp. 3—8.

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 disgraceful act was passed through both houses within a day of its introduction, and with very little notice to the public. When it finally managed to discuss it, the LRC expressed strong reservations—but its report was not completed and published till a month later. Although subsequent amendments were made to the Act, they were concerned with ensuring that it was beyond legal challenge. The actions of the LRC had no effect whatsoever.

Conclusion: if the Committee is going to be effective, it must operate under a system that requires it to be taken seriously. It requires (as a start only) a clear statement of the human rights and liberties by which bills are judged. It requires parliamentary processes which ensure that it has time to consider bills properly. It requires parliamentary time for its reports to be considered seriously.

B. The Scrutiny of Bills Committee's functions.

The existing Scrutiny of Bills Committee is required to scrutinise bills which come before Parliament and to report whether they trespass unduly on personal rights and liberties. The *Brennan Report* quotes the following criticisms:

'there is no clearly defined list of 'rights and liberties' that should not be 'unduly trespassed' upon;
the Committee's reporting function is limited and cannot take any stronger measures, such as declaring that a Bill is incompatible with human rights;
the Committee's timeframe does not allow adequate consideration or review of proposed laws, nor consideration of existing law; and the Committee's work is not adequately publicised, nor is there a body of jurisprudence developed'.[6]

There is risk uncovered here that the Committee will become as irrelevant as the New South Wales LRC.

[6] Commonwealth of Australia. Report of the National Human Rights Consultative Committee, September 2009, (the Brennan Report). Appendix D, p.4.

C. The Committee's ways of operating.

C.1. The effect of a bill of rights.

The passage of a bill of rights would substantially improve the Committee's effectiveness, especially of its educative and publicity functions. A warning to parliament that a proposed piece of legislation conflicts with the bill would have to be taken seriously. A culture of respect for human rights would be engendered, which would add to the Committee's effectiveness. But more importantly, a judgement by a court would create a climate of opinion in which parliament would be less susceptible to media hysteria and pressure from police and security agencies.

C2. Inviting public input.

The timetable to which the Committee operates precludes significant public input. The Committee should recommend that it be given more time between a bill's introduction and its consideration by Parliament[7], to receive submissions concerning rights and liberties issues. The Committee should be able to hold public hearings and to seek advice from government departments and outside sources.

C.3. An examination of existing legislation, policies and practices.

The Committee's work would be enhanced if it were informed by a detailed examination of the way legislation which trespasses on human rights has been implemented in practice and on the way pieces of legislation interact in ways which are incompatible with rights and liberties. The Brennan Report[8] proposes a comprehensive audit of existing legislation, to identify and repair gaps in existing legislation and repair gaps in human rights protection

The Committee will have the power to review existing legislation and should do this of its own initiative. This is especially important when a bill has been passed with minimal debate, in an atmosphere of fear, or when, for whatever reason, the Committee has not had time to examine it properly.

Unfortunately, it is not clear that the Committee will have the time and resources to carry out a comprehensive audit of existing legislation.

[7] I.e., before the second reading stage.
[8] Pp. 155-162.

D. Recommendations to Parliament and Government.

D.1. Statements of compatibility.

We welcome this requirement. The Brennan Committee reports[9] that submissions of the Victorian and ACT Governments described the positive impact of such statements on the human rights dialogue in their parliaments and in their public services. Other submissions argued that statements of compatibility would foster better informed debate inside and outside parliament, reduce the likelihood of rights being infringed inadvertently, and increase the transparency and accountability of government.

D.2. Recommending changes

There is special need at present for a strong voice in Parliament in support of rights. Ever since the attacks in the United States in September 2001, it has been tempting and possible for governments to pass legislation restricting rights by expanding the powers of police, ASIO and other agencies, using only the argument that the risk of death by terrorist activity is a greater threat to human rights than any government restriction.[10] Then, with the wedge inserted, emergency powers are extended to cover other crimes such as drug trafficking, new crimes such as associating with a person who is associated with a declared criminal organisation (the bikie laws), and even to being a nuisance to a religious celebration.

In the absence of a bill of rights, it falls to parliamentarians to call for changes in the law in defence of human rights. There is doubt whether the Committee can perform this role alone without support from the Courts operating a Charter or Bill of Rights across the entire legal system.

Conclusion

Parliaments have had difficulty in protecting human rights and liberties adequately, especially when it has been faced with demands for strong and quick action and media hysteria. NSW CCL does not believe that the Committee, unaided by the passage of a Bill of Rights, can fix the problem. The passage of this proposed bill will however add to the culture of human rights by requiring the Committee's review and statements of compatibility for legislation.

David BERNIE and Martin BIBBY
New South Wales Council for Civil Liberties
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[9] Pp. 165-167.

[10] Many human rights exist to prevent worse threats than that of terrorism. It is in any case a poor argument whenever less intrusive powers would work as well.