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The protection of human rights in NSW
through the Parliamentary process – a review
of the recent performance of the NSW
Parliament’s Legislation Review Committee

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The NSW Parliament’s Legislation Review Committee was established on the recommendation of a Parliamentary inquiry into the desirability of a bill of rights of rights for New South Wales. While the inquiry found that Parliament had not always fully observed human rights standards, it saw improved legislative scrutiny of bills as a more appropriate response than the enactment of a bill of rights. This paper examines a number of aspects of the Committee’s recent work in order to ascertain whether under its traditional common law scrutiny mandate the Committee consistently examines draft legislation in the light of the international human rights norms by which Australia is bound. It concludes that the Committee does reasonably well in identifying classical civil liberties concerns, though it tends not to apply a rigorous human rights analysis to these rights. On the other hand, notwithstanding its broad interpretation of its mandate, the Committee has done less well in relation to the identification and analysis of other rights, in particular in relation to economic, social and cultural rights. The paper argues that even with enhanced Parliamentary scrutiny, the adoption of a bill of rights would make a difference, as it would provide a clear and comprehensive set of standards and a framework for full human rights analysis, while the prospect of even soft judicial review would focus the minds of policymakers and legislators on human rights issues in the legislative process.

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The NSW Parliament’s Legislation Review Committee was established on the recommendation of a Parliamentary inquiry into the desirability of a bill of rights for New South Wales. While the inquiry found that Parliament had not always fully observed human rights standards, it saw improved legislative scrutiny of bills as a more appropriate response than the enactment of a bill of rights. This paper examines a number of aspects of the Committee’s recent work in order to ascertain whether under its traditional common law scrutiny mandate the Committee consistently examines draft legislation in the light of the international human rights norms by which Australia is bound. It concludes that the Committee does reasonably well in identifying classical civil liberties concerns, though it tends not to apply a rigorous human rights analysis to these rights. On the other hand, notwithstanding its broad interpretation of its mandate, the Committee has done less well in relation to the identification and analysis of other rights, in particular economic, social and cultural rights. The paper argues that even with enhanced Parliamentary scrutiny, the adoption of a bill of rights would make a difference, as it would provide a clear and comprehensive set of standards and a framework for full human rights analysis, while the prospect of even limited judicial review would focus the minds of policymakers and legislators on human rights issues in the legislative process.

Introduction

One of the frustrating aspects of the Australian debates over the role of bills of rights in the protection of human rights – at least until recently – has been the level of generality at which they have been conducted, as well as the rhetorical devices that have been deployed in those discussions. The virtues of a sometimes idealized Parliamentary democracy are pitted against a caricature of our judicial system; conversely, a rosy portrayal of a court-supervised bill of rights

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is set against a cynical, disillusioned or negative assessment of our Parliamentary institutions. Yet important as these longstanding debates are in political theoretical terms, of at least equal significance is the factual data – what has happened, particularly in those Australian or comparative jurisdictions that have bills of rights, and how does this compare with the situation in jurisdictions without a bill of rights? The selection and interpretation of facts are, of course, sometimes matters of interpretation and political perspective, but these add an important dimension to our debate by permitting us to test our hypotheses and assumptions. This paper is intended as a contribution to that inquiry.

The purpose of this paper is not to attempt to provide an overview of the state of enjoyment of human rights in New South Wales, or even all the major developments in that field in the last year or so. Rather it is to examine one important aspect of human rights protection by our democratic institutions, in particular the work of the NSW Parliament's Legislation Review Committee and the extent to which its recent work provides evidence of a wide-ranging, analytically satisfying and politically effective role play by that body in the protection of human rights in this State. One assumes that, whatever recommendations emerge from the National Human Rights Consultation, one dimension of them will almost inevitably be improved Parliamentary scrutiny. An important question is whether that will be enough – some commentators have argued that all the benefits of a statutory bill of rights can be achieved without a significant judicial role¹ -- or whether more is needed, in particular whether some form of judicial review is necessary. This paper addresses the following five questions:

1. How well has the Legislation Review Committee performed in identifying the range of human rights issues to which Bills introduced into the NSW Parliament have given rise? What human rights issues has the Committee not identified at all or given little consideration to?

¹ See, eg, Tom Campbell and Nicholas Barry, "A Democratic Bill of Rights for Australia", a submission to the National Human Rights Consultation, (2008) , available at http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Publicsubmissions_Submissions-Charterofrights-humanrightsact-humanrightslegislation-page6.

2. What is the nature of the analysis the Committee has undertaken of the human rights issues that it has identified? Has its analysis explicitly employed a human rights framework drawing on relevant international and comparative jurisprudence?
3. What impact have the reports of the Legislation Review Committee had
 - (a) on Parliamentary debates on the Bills it has examined; or
 - (b) in stimulating amendments to Bills responsive to human rights concerns raised by the Committee?
4. How does the Committee's identification and analysis of human rights issues compare with the approach of the ACT and Victorian scrutiny committees in the conduct of their traditional and human rights act-based scrutiny functions?
5. What are the implications of this experience for the need for and content of any federal bill of rights that may be adopted?

The review presented here does not attempt to cover Committee's entire period of operation since its establishment in 2003, but is based on an analysis of all Bills considered by the Committee in 2008 – which appears to be a not atypical year -- as well as a number of specific examples from other years, in particular 2009.

The research builds on work done by other Australian and overseas scholars who have examined the work of Parliaments in the protection of human rights, including David Kinley,² Janet Hiebert,³ Bryan Horrigan,⁴ John Uhr,⁵ and in particular recent work by Carolyn Evans and Simon Evans,⁶ and Jeremy Gans,⁷ among others.⁸

² See, eg, David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252.

³ See, eg, Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235; "Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?"(2006) 4(1) *International Journal of Constitutional Law* 1.

⁴ Bryan Horrigan, "Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making" in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 61.

These scholars have reminded us that the legislative process has many stages both outside and inside the legislature, that human rights analysis needs to be built in at virtually every stage of the process, and that by the time that legislation makes it to Parliament there are relatively limited opportunities to influence its content in major ways. Nevertheless, given the concern in the current debate over a national bill of rights about the potential erosion of the role of Parliament, it is important to consider the evidence for exactly how well Parliament does in fact in the protection of human rights. Where Parliaments enact legislation that involves serious violations of rights, or significantly and systematically fail to identify potential human rights issues in draft legislation or to ensure serious consideration is given to them, then the system is not working as it should be, and we need to take that into account when evaluating the overall performance of our system for the protection of human rights and the contribution that a bill of rights might make, and the strong or weak judicial review of legislation that might accompany it.

Background to the establishment of the Committee and its mandate

The Legislation Review Committee was established following an inquiry by the Law and Justice Committee of the Legislative Council into the desirability of a bill of rights for NSW. This inquiry was the only one of the five inquiries into the desirability of bills of rights held since 2000 that was a Parliamentary inquiry, and has also been the only one *not* to recommend a statutory bill of rights with a judicial review component. The Committee recognized that *The NSW Parliament has at times been responsible for neglecting to address ongoing needs of disadvantaged groups and for passing legislation which breaches human rights standards. Legislation is*

⁵ John Uhr, “The Performance of Australian Legislatures in Protecting Rights” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 41.

⁶ Carolyn Evans and Simon Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’ (2006) *Public Law* 785; Simon Evans and Carolyn Evans, “Evaluating the Human Rights Performance of Legislatures” (2006) 6(3) *Human Rights Law Review* 545.

⁷ Jeremy Gans, “Scrutiny of bills under bills of rights: is Victoria’s model the way forward?”, paper presented at *Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century*, Parliament House, Canberra, 6-8 July 2009, available at http://www.aph.gov.au/Senate/sl_conference/papers.htm.

⁸ See also Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009), especially Chapters 4 and 5.

*prepared within bureaucracies without any measurement against human rights standards, and then passes through Parliament without any, or at most ad hoc, discussion of such standards.*⁹

Nonetheless, the majority of the Committee concluded that the best solution was not to entrust the judiciary with more extensive duties of rights protection through the adoption of a bill of rights, but for Parliament itself to assume a more significant role in the protection of rights. The centrepiece of that solution was the establishment of a scrutiny committee similar to the Senate Scrutiny of Bills Committee. As a consequence, the Legislation Review Committee was established with a mandate very similar to that of the Senate Committee – a traditional common law scrutiny mandate that considers whether bills “unduly trespass on personal rights and liberties”, as well as addressing a number of other matters such as whether rights, liberties or obligations are made subject to insufficiently defined administrative powers or are unduly dependent on non-reviewable decisions.

1. The scope of the mandate – traditional common law mandate or a broader human rights mandate

The functions of the Committee with respect to bills are expressed in terms of the standard common law scrutiny mandate, derived from the Senate model. Seen in the light of the practice of the Senate Scrutiny Committee and similar bodies, this mandate, while covering important rights, is still very narrow when set against the range of international human rights by which Australia is bound. The common categories of undue trespass on rights and liberties identified by the Senate Committee are:

- Retrospective legislation which has an adverse effect on those to whom it applies
- Legislation by press release
- Abrogation of the right of a person to remain silent and not to incriminate oneself
- Reversal of the onus of proof in criminal offences and the imposition of strict liability offences
- Powers of search and seizure without a warrant.
- Abrogation of legal professional privilege

⁹ NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), para 8.1.

- Conferral on officials of oppressive powers.

The overwhelming majority of the issues addressed by the Senate Committee under its “undue trespass on rights and liberties” fall into these categories.¹⁰

The proponents of the NSW Committee presumably envisaged that it would devote most of its time to engaging with a similar range of issues (especially as it already possessed a similar function in relation to subordinate legislation). However, The Committee has read its mandate much more broadly. It has taken the view that the “personal rights and liberties” referred to include not just these rights, but to rights defined by reference to three main bodies of law:¹¹

- “Australian law, especially the common law, NSW statute law and the Commonwealth Constitution”
- “International human rights law, especially human rights treaties to which Australia is a party”; and
- “the law and jurisprudence of other jurisdictions.”

This is an encouraging statement of a very broad human rights mandate. But how has this expansive reading of its mandate affected the scope of rights issues considered by the Committee? Notwithstanding the expectations that arise from this broadly stated mandate, the Committee has in fact devoted its attention overwhelmingly to the more traditional categories of civil rights and liberties, has spent little time on other civil and political rights, and has barely mentioned economic, social and cultural rights. Let me elaborate:

- The Committee does a good job in identifying those standard issues – in about half of the approximately 120 Government bills introduced in 2008, it identified one or more issues of concern.

¹⁰ See the reviews by the Senate Committee on Scrutiny of Bills: *The Work of the Committee during the 41st Parliament, November 2004-October 2007* (2008), Chapter 2; *The Work of the Committee during the 40th Parliament, February 2002- August 2004* (2005), Chapter 2; and *The Work of the Committee during the 39th Parliament, November 1998-October 2001* (2002), Chapter 2. I am grateful to Sue Tongue for referring me to these discussions.

¹¹ *Information paper: Rights and Liberties considered by the Legislation Review Committee* (undated), available at <http://www.parliament.nsw.gov.au/legislationreview>.

- However, our review suggests that about an *additional* quarter of these 120 Bills gave rise to human rights concerns that were not identified, and perhaps half of these were substantial issues (including traditional civil rights issues). For example, in relation to a Bill regulating donations by property developers to politicians, and which included the use of strict liability offences,¹² the Committee made no mention of internationally or constitutionally guaranteed rights to freedom of communication or expression. Nor in relation to bills regulating the possession of laser pointers¹³ and of the body-piercing of minors¹⁴ did the Committee specifically refer to human rights standards explicitly. The point is not so much that the bills did were not a reasonable and human-rights consistent regulation, but that the process of analysis and evaluation is not clearly articulated in those terms and seems conclusory or intuitive rather than fully reasoned.
- The Committee failed signally to identify a range of economic, social and cultural rights issues or, when it did, to give them any detailed attention. For example in relation to a Bill relating to the setting of fees for foreign students in NSW public schools,¹⁵ the Committee did not address even in passing the scope of the right to education or of the right to equality (though no doubt any restrictions on them would have been easily justified). Nor in a Bill intended to address fraud in the context of public housing,¹⁶ did the Committee mention how this might affect the enjoyment of the right to adequate housing or whether it was a permissible limit on it. In relation to a Bill which regulated

¹² Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008

¹³ The Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008 provided that it would be an offence to be in possession of a laser pointer without reasonable excuse (proof of which lies on the person), with a maximum penalty of two years' imprisonment. The Committee expressed concern that this might be disproportionate, without referring to international notions of arbitrariness or proportionality, or providing a clear framework for how one would assess this, and making no reference to issues relating to the presumption of innocence: *Legislation Review Digest*, No 6 of 2008, 13 May 2008, pp 39-41.

¹⁴ Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008: see *Legislation Review Digest*, No 7 of 2008, 2 June 2008, pp 11-12, *Legislation Review Digest*, No 7 of 2008, 2 June 2008. While the conclusion that the restrictions on the rights of children in relation to their own bodies and private life were reasonable seems justifiable, a human rights analysis provides a more persuasive analytical framework for such a conclusion, compared with a simple statement of the desirable policy goals it pursues ("to affirm the rights of parents to be involved in decision making in relation to the care and protection of their children" and "to offer greater protection of the wellbeing of children living in New South Wales": *Legislation Review Digest*, No 7 of 2008, 2 June 2008, p 11), and the setting of 16 years as the relevant age limit (*id*, p 12).

¹⁵ Education Amendment Bill 2008.

¹⁶ Housing Amendment (Tenant Fraud) Bill 2008.

rail and road transportation and which could lead to the banning of a person from working in the industry,¹⁷ the Committee made no mention of the right to work or of reasonable limitations on that right. This reflects a broader disregard of economic and social rights – there are virtually no substantive references to or discussions of the International Covenant on Economic, Social and Cultural Rights in the first five years of the Committee’s reports, with the significant exception of an extended discussion of the right to adequate housing in consideration of a public housing amendment in 2004.¹⁸

The Committee has recently paid more attention to some economic and social rights – in particular the right to work -- in a number of bills introduced in 2009.¹⁹

2. Lack of standard human rights analysis in assessing limitations on rights

Even in the many cases where the Committee correctly identifies issues, the analysis it undertakes varies in its approach. In many cases the Committee simply states the issue and refers the issue to Parliament. In some other cases, it indicates its view that while there may be a trespass on rights, there is no “undue” trespass in the circumstances of the case. The standard analytical framework used to assess the permissibility of restrictions familiar in human rights jurisprudence is not employed, though the Committee has developed detailed guidelines in relation to the right not to incriminate oneself²⁰ and strict liability offences.²¹ But otherwise, there is no developed, human-rights based analytical framework that is employed by the Committee.

¹⁷ Dangerous Goods (Road and Rail Transport) Bill 2008.

¹⁸ Residential Tenancies Amendment (Public Housing) Bill 2004, discussed in *Legislation Digest No 9 of 2004*, 21 June 2004, pp 64-67, paras 16-31.

¹⁹ Crimes (Criminal Organisations Control) Bill 2009, discussed in *Legislation Digest No 5 of 2009*, 4 May 2009, p 22, paras 43-44 (prepared after the passage of the Bill which was introduced on 2 May and passed on 3 May); Criminal Organisations Legislation Amendment Bill 2009, discussed in *Legislation Digest No 6 of 2009*, 12 May 2009, p 28, para 31; Fisheries Management Amendment Bill 2009; discussed in *Legislation Digest No 10 of 2009*, 31 August 2009, p 47, para 34.

²⁰ Legislation Review Committee, *The Right to Silence*, Discussion Paper No 1, 21 September 2005.

²¹ Legislation Review Committee, *Strict and Absolute Liability*, Discussion Paper No 2, 8 June 2006.

One example of this was the Committee's consideration of a Bill regulating the advertising and sale of classified material, which included a range of strict liability offences.²² The Bill clearly raised issues of freedom of expression under the ICCPR and issues of protection of children under a number of conventions. The Committee concluded that the "provisions do not appear to unduly trespass on personal rights and liberties as they have the object of ensuring reliable classification information and protecting minors from inappropriate material. The penalties are not inequitable."²³ A standard human rights analysis which would have involved assessment of the presence of a legitimate objective, provision by law of any restriction, a rational connection between objective and means, and proportionality, as well as protection against abuse, is not in evidence.

3. Impact of the Committee's reports on Parliamentary debates and the final form of Acts

Although there are considerable methodological difficulties involved in trying to trace the impact of different inputs into the legislative process, the extent to which Committee reports are referred to in debates (or even the issues which are raised in scrutiny reports) may provide some indication of their impact.²⁴ While many members of Parliament have apparently regarded the digests as a useful product and read them regularly,²⁵ there are only sparse references to the Committee's reports in the debates on 2008 Bills in relation to which the Committee identified serious human rights concerns, and apparently no significant changes made to legislation as a

²² Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008.

²³ *Legislation Review Digest*, No 11 of 2008, 21 October 2008, p 27, para 13.

²⁴ Evans and Evans (2006), above note 6, at 551-552, argue that

"[A]n evaluation of [a parliamentary rights scrutiny committee] should not focus solely on whether outputs of legislation comply with human rights but focus also on the processes used by, and capacity of, legislatures when engaging with human rights issues. The process element of such an approach would investigate whether procedures (i) identify proposed legislation that raises potential human rights issues; and (ii) trigger or otherwise result in deliberative process that give proportionate attention to human rights issues."

²⁵ See Allan Shearan MP, "The Role of the Legislation Review Digest in NSW", paper presented at *2009 Australia-New Zealand Scrutiny of Legislation Conference*, Parliament House, Canberra, 6-8 July 2009, at pp 3-5, available at http://www.aph.gov.au/Senate/sl_conference/papers.htm

consequence of concerns raised by the Committee.²⁶ This pattern is similar to that seen in other Parliaments with scrutiny procedures, including those with human rights acts, though in the latter case there are considerably more references in Parliamentary debates.²⁷

4. Comparison with the ACT and Victorian Scrutiny Committees

When one compares the reports of the NSW Legislation Review Committee with those of its ACT and Victorian counterparts,²⁸ it comes as no surprise to see that there is a significant contrast, both in terms of the nature and scope of the rights issues identified and the systematic and detailed human rights analysis of bills that appear to engage or infringe on human rights (both those rights explicitly included in the relevant bill of rights and well as others). The explicit human rights act-based mandates and, in Victoria, the requirement for a reasoned statement of compatibility, appear to be critical elements of this arrangement.

The contrast can be graphically seen by contrasting the treatment of a number of pieces of similar legislation in the three jurisdictions relating to the regulation of graffiti. The legislation raised issues relating to freedom of expression, property rights, strict liability offences, and discrimination (among others). The NSW Committee review identifies a number of these issues (though not the freedom of expression or equality issues in those terms) and undertakes a standard common law scrutiny analysis.²⁹ In contrast the ACT examination,³⁰ and particularly

²⁶ The Chair of the Legislation Review Committee has written “Certainly it has been the NSW Legislation Review Committee’s experience that bills are rarely changed by the Parliament once they are introduced into the House as a result of the Committee’s comments, even when criticisms made in its Legislation Review Digest are widely quoted in the media . . . “While cross bench Members in the Legislative Council such as the Greens often emphasise the Committee’s comments regarding trespasses on personal rights and liberties, most legislation still goes through both Houses largely unchanged.” Shearan, above note 25, at pp 1,2.

²⁷ See Francesca Klug, *Report on the Working Practices of the JCHR*, Appendix 1 to JCHR, *The Committee’s Future Working Practices, Twenty-third Report of Session 2005-06 (July 2006)*; Michael C Tolley, “Parliamentary Scrutiny of Rights in the United Kingdom: The Work of the Joint Committee on Human Rights” (2009) 44(1) *Australian Journal of Political Science* 41. Klug notes the many references to human rights in the Parliamentary debates, but assess the impact in terms of changes to legislation during the course of Parliamentary passage as relatively modest in terms of the numbers of bill amended, though some of these were important pieces of legislation.

²⁸ See Byrnes, Charlesworth and McKinnon, above note 8, Chapters 4 and 5.

²⁹ Graffiti Control Bill 2008 (NSW); Graffiti Control Bill 2008 (NSW) -- *Second Reading Speech*; NSW Parliament Legislation Review Committee, *Legislation Review Digest*, No 13 of 2008, 10 November 2008, pp 16-22.

³⁰ For the first bill, see Crimes Amendment Bill 2008 (ACT); Crimes Amendment Bill 2008 (ACT) -- *Explanatory Statement*; ACT Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 51*, 3 March 2008, pp 3-6. For the second, see

the Victorian one,³¹ show rights analysis in full flight – perhaps excessively so. That there is such a detailed examination of the issues in the context of a developed analytical human rights framework – whatever one may think of some of the analysis – means that a qualitatively different exercise is being undertaken. At the same time, however, it appears that notwithstanding the detailed analysis in the Victorian SARC report, the legislation passed Parliament essentially unchanged. In the ACT the controversy over the legislation (which had two incarnations) led to the issue being referred to the Legislative Assembly’s Standing Committee on Planning, Public Works and Territory and Municipal Services, which prepared a report further examining the human rights aspects of the issue, as well as a range of other issues.³² It is hard to see this examination having taken place (at least in this form) without a scrutiny committee with a bill of rights mandate. At the least the ACT and Victorian bills of rights has generated a significant amount of discussion about rights in the scrutiny committees and the legislature – whether that is in itself a result worth valuing irrespective of how great an impact it appears to have had in the legislature might be debatable (though we should not neglect the less visible impacts on the bureaucracy of such discussions).

5. Legislating in haste and the scrutiny role of the Legislation Review Committee

It would be remiss of me if I did not refer to a number of significant pieces of recent legislation with major human rights concerns which have been given such speedy passage through the NSW Parliament that the Committee has hardly had a chance to carry out more than minimal scrutiny. In a number of cases there was no possibility of pre-enactment scrutiny and the Committee prepared its report after enactment and entry into force of the legislation – in at least one case a

Crimes (Bill Posting) Amendment Bill 2008 (ACT); Crimes (Bill Posting) Amendment Bill 2008 (ACT) -- *Statement of Compatibility*; ACT Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 2*, 2 February 2009; Letter from Jon Stanhope MLA in response to *Scrutiny Report No 2*, 2 February 2009; ACT Legislative Assembly, Standing Committee on Legal Affairs, *Comments on the Responses, Scrutiny Report No 3*, 23 February 2009, pp 15-16.

³¹ Graffiti Prevention Bill 2007 (Vic); Graffiti Prevention Bill 2007 (Vic) -- *Statement of Compatibility and Second Reading Speech*, in Parliament of Victoria, *Hansard*, Legislative Assembly, 20 September 2007, 3209-3215; SARC, *Alert Digest No 13 of 2007*, 9 October 2007 (report on Graffiti Prevention Bill).

³² ACT Legislative Assembly Standing Committee on Planning, Public Works and Territory and Municipal Services, *Inquiry into the Crimes (Bill Posting) Amendment Bill 2008*, Report 3, August 2009.

detailed and scathing review of the human rights infirmities of what by that stage had become an Act of Parliament.

There is a certain irony in the fact that some of this legislation was under the Ministerial charge of the Attorney-General, Mr John Hatzistergos MLC, who as a member of the NSW Parliamentary inquiry into a bill of rights was supportive of the role of Parliament and the proposed new scrutiny committee in protecting rights, who has publically reaffirmed the importance of the role of Parliament in the scrutiny of rights on many occasions since, and who has rejected the need for a bill of rights with a role for the judiciary as a back-up when Parliament fails to do its job properly. Yet it was he who was one of the Ministers who ensured the introduction and passage of the Crimes (Criminal Organisations Control) Bill 2009 through both houses of the Parliament on one day (2 April 2009), with the Legislation Review only able to deliver its extensive and critical report a month later.³³

A similar haste was evident in relation to the legislation some months ago in relation to covert search warrants,³⁴ and we saw a graphic illustration of how Parliamentary scrutiny can effectively be bypassed just over a week ago when on 23 September 2009 the Government, with the fervent support of the Opposition but over the opposition of some cross-benchers, rushed through a law to ensure that Dennis Ferguson, the convicted child rapist who had served his term of imprisonment, could lawfully be evicted from his public housing due to the protests of other members of the community, provided he were provided with accommodation in some other locality.³⁵ The Ministers involved offered the Parliament and the public no satisfactory human

³³ *Legislation Review Digest*, No 5 of 2009, 4 May 2009, 13-25.

³⁴ The Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009, which extended search and entry powers originally introduced under terrorism laws to a range of other offences, was introduced into the Legislative Assembly on 3 March 2009, seemingly without any public consultation. The Committee was able to prepare a report by 10 March 2009, the day before passage of the Bill by the Legislative Assembly. The Committee wrote of the Bill that it “considers that the broad covert search warrant powers significantly trespass on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity. The Committee also believes that the Act contains insufficient safeguards to address these. The Committee therefore refers the matter to Parliament.” *Legislation Review Digest*, No 2 of 2009, 10 March 2009, p 40. The Bill was passed by the Legislative Council on 24 March 2009 with an amendment including an additional offence, the amendment being approved by the Legislative Assembly on 31 March 2009, and assented to on 4 April 2009. No other changes were made. The Committee reiterated its concerns in its consideration of the Law Enforcement (Powers and Responsibilities) Amendment (Criminal Organisations) Regulation 2009: *Legislation Review Digest*, No 10 of 2009, 31 August 2009, pp 81-82.

³⁵ Housing Amendment (Registrable Persons) Act 2009 (the Bill was introduced and enacted by both houses on 23 September 2009).

rights analysis of a bill with major human rights implications that contained an extensive privative clause attempting to exclude the courts from any meaningful review of the law or its implementation in an individual case. Given the speed with which the Bill was passed, it was impossible for the Legislation Review Committee to review the legislation before it was enacted.³⁶

Conclusion

What conclusions can we then draw from this brief review? The first is that, as others have urged, human rights analysis needs to be built into the process of law-making at its early stages; that Ministers who introduce bills with human rights implications should be expected to explain to the Parliament how any restrictions on rights are permissible; that the NSW scrutiny committee needs to broaden its mandate not only in theory but also in fact (and be assigned the requisite resources to do this); that any serious Parliamentary scrutiny of human rights issues requires more time than is currently permitted for many bills; that there will sometimes be a tendency for Government to try to avoid the scrutiny of Parliament by rushing through bills which it claims are urgent; and that both Government and Opposition seek to outdo each other in enthusiasm to support bills on “hot button” issues that seriously infringe individuals’ rights without a detailed and systematic human rights analysis of those bills.

Would a bill of rights make a difference? It would provide a clear and possibly comprehensive set of standards and a framework for full human rights analysis, and the prospect of even soft judicial review would surely focus the minds of policymakers and legislators as they go about their tasks, and force a second look when things seem to have gone awry.³⁷ The paeans sung to democratic Parliaments are surely well-deserved, but these institutions have limitations as well. Our political and constitutional history – which goes back further into the past than the hundred years or so since Federation – has shown the importance of having not just majoritarian political

³⁶ The Committee reported in *Legislation Review Digest*, No 13 of 2009, 19 October 2009, pp 34-38. It drew to the attention of Parliament a number of aspects of the Bill, including its retrospective application to existing leases, provisions excluding compensation for unlawful acts or omissions carried out in good faith, the potential exclusion of the right to procedural fairness, and the exclusion of judicial review. However, the Committee did not refer to the human rights to protection against unlawful or arbitrary interference with one’s home or privacy, or the right to adequate housing (in particular issues relating to forced eviction and procedural rights).

³⁷ See Janet Hiebert, “A Hybrid Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny” (1998) 26 *Federal Law Review* 115.

institutions but also counter-balances to them, because sometimes they simply get it wrong. A bill of rights seems the obvious next step, one that should improve the operation of our Parliamentary institutions, not undermine them. As the former Democrats Senator Andrew Murray wrote in the context of the Commonwealth Parliament, in words that are equally applicable to our State institutions:³⁸

“While the Parliament and its Committees perform an important role in monitoring and protecting rights, it is not a substitute for a bill of rights. But neither would a bill of rights be a substitute for these Committees. We need both: a bill of rights to provide for consistency across jurisdictions and certainty for both Australian citizens and those who draft legislation and we need a rigorous Committee system to examine the implications of draft legislation and test it against the rights established in legislation.”

³⁸ Senator Andrew Murray, “Parliamentary Committees and the Protection of Rights: a Partial Evaluation”, a paper presented at the *International Conference on Legislatures and the Protection of Human Rights*, University of Melbourne, 20-21 July 2006, at p 8.