

**Submission
No 6**

OPERATION OF THE LEGISLATION REVIEW ACT 1987

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Date Received: 30 November 2017



30 November 2017

Mr James Griffin MP
Chair, Legislation Review Committee
NSW Parliament House
Macquarie Street
Sydney NSW 2000

Dear Chair,

**NSW Society of Labor Lawyers Submission
Inquiry into the operation of the *Legislation Review Act 1987* (NSW)**

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the Inquiry into the operation of the *Legislation Review Act 1987* (NSW) ('Legislation Review Act').

The Society understands that the Parliament does not routinely conduct inquiries into the provisions of substantive Bills. In comparison, the Australian Senate committees have a procedure for frequent referral of Bills.

In an address at the Opening of the 2016 Law Term in NSW, Chief Justice Bathurst of the Supreme Court of NSW noted that in comparison to the six parliamentary scrutiny committees that exist at the Commonwealth level, NSW only has the Legislation Review Committee as a standing scrutiny Committee.¹

The Chief Justice doubted whether the Legislation Review Committee activities result in "practical boundaries being placed on the legislative encroachment of rights".² In the area of criminal law, the Chief Justice referred to 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".³ He said this report "identified an "entrenched culture" within the Parliament of "ignoring and deflecting the Committee's advice"⁴ and that on occasions Parliament effectively bypasses the Legislation Review Committee's scrutiny. His Honour provided an example - the *Crimes (Criminal Organisations Control) Act 2009*

¹ The Hon T Bathurst, "The Nature of the Profession; the State of the law," 4 February 2016, at 20: http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_speech.pdf

² *Ibid*, at 22.

³ *Ibid*, at 23.

⁴ *Ibid*, at 23: 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.

(NSW) - which was introduced and passed within 24 hours without real scrutiny.⁵ His Honour further said that:

*"It is particularly questionable whether the theoretical potential of [the Parliament's] formal and informal scrutiny mechanisms, is translating into an effective protection of fundamental common law rights."*⁶

The Chief Justice found that there are at least 397 legislative encroachments on the right to legal professional privilege, the right to protection against self-incrimination or the presumption of innocence (the rights his Honour focused on in his speech).⁷

There is a solution to this problem. The Society recommends the enactment of human rights legislation in NSW, similar to that in Victoria, as is it an ongoing challenge to protect fundamental rights against Parliamentary or executive encroachment without such legislation. The Victorian Charter of Human Rights and Responsibilities, based on the similar UK legislation, has been in existence for 10 years now and is a widely accepted part of the Victorian legal architecture.

However, in the absence of human rights legislation, there are reforms to the existing scrutiny mechanisms in NSW that would help the Parliament to better review its Bills.

The Society suggests that the Legislation Review Committee should be reformed to adopt a procedure similar to that of the Australian Senate for the routine referral of bills for substantive scrutiny. It should also measure legislation against the standards of the seven core international Human Rights treaties, like the federal parliamentary Human Rights Committee is required to do. These processes would better allow the Parliament to review the Executive's proposals, and also provide for more consultation and enhance stakeholder and community engagement.

In making this submission, the Society notes that the NSW Parliament has legislative responsibility for many areas that crucially affect the liberty and fundamental rights of individuals, including the criminal courts, the police, prisons, the incarceration of the mentally ill and the removal of children into care. These are areas in which the federal Parliament has either limited or no responsibility.

It is therefore very important that the criticisms of the Chief Justice be heeded and the Legislation Review Act amended to provide greatly enhanced scrutiny of Bills.



NSW Society of Labor Lawyers

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⁵ Ibid, at 24.

⁶ Ibid, at 70.

⁷ Ibid, at 71.