**Submission No 11**

# INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

**Organisation**: New South Wales Council for Civil Liberties

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New South Wales
Council for Civil Liberties

# NSWCCL SUBMISSION

# LEGISLATIVE COUNCIL COMMITTEE SYSTEM

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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).

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The New South Wales Council for Civil Liberties (CCL) is grateful for the invitation to make a submission to the Select Committee concerning the Legislative Council Committee system. We would be glad of the opportunity to appear before the Select Committee to address these matters further, and to answer questions.

We concentrate on five matters.

**1. The hasty passage of bills.**

CCL is concerned about the very rapid passage of controversial bills through the New South Wales Parliament. The Australian Law Reform Commission has held that 'every exercise of public power is expected to be justified by reference to reasons which are publicly available to be independently scrutinised for compatibility with society's fundamental commitments'.[1] The provision of reasons and their scrutiny requires time.

It is not uncommon for bills to go through all their stages in both Houses in the course of a single week. Every so often, one is put through both Houses in one or two days. This latter process prevents any input by members of the Council, let alone members of the public. It makes a mockery of the role of the Council as a house of review. The former, one week process, permits a quick input, but denies the Parliament the benefit of considered, researched, carefully reasoned input. It virtually prevents interaction between members of the Council and members of the public on the content of novel and controversial bills.

Some notable examples:

The Liquor Amendment Act 2014. (Lockout laws.) This measure was announced one week in January 2014 and was through the Parliament the next. (It did not take effect, however, till February 24.)

The Crimes Amendment (Organisations Control) Bill 2009. This was rushed through the Parliament within a day of its introduction, and subsequently amended, also in haste. As well as CCL, it was attacked by the Law Society of New South Wales and by Amnesty International, who said that the bill eroded fundamental human rights—it undermined the assumption of innocence and impeded the right of freedom of association. Subsequently, it was struck down by the High Court. The subsequent Crimes Amendment (Consorting and Organised Crime) Bill 2012 and the Crimes (Criminal Organisations Control) Bill 2012 were rushed through Parliament in a matter of days.

The Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, which included the one-punch laws and mandatory penalties, was also passed through Parliament with unacceptable speed.

Each of these bills was highly controversial, and involved serious incursions on human rights and civil liberties. In no case was there reasonable time for public and committee discussion.

In our view, the normal process should be for bills to routinely be sent to one or other Council Committee for consideration and possible amendment, before the second reading debate. This would reflect the processes of the New Zealand Parliament, where bills are referred before they

[1] Australian Law Reform Commission, Traditional Rights and Freedoms-Encroachments by Commonwealth Laws, Report No 129 (2015) at [3.2] note 1, quoting Murray Hunt.

receive a first reading, and the Queensland Parliament, where they are referred after the first reading.

**2. The Legislation Review Committee. (LRC)**

We take it that the reference to committees in the terms of reference for this inquiry includes joint committees—as the account of its role in the Discussion Paper would suggest. The LRC was set up in 2001, to carry out the important role of protecting rights and liberties—supposedly because it was a better way of doing so than the passage of a bill of rights.[2] In the past, the members of that Committee laboured diligently but to very little effect, as the Committee itself reported. The concerns it raised were met by bland assertions (made without proof) that the legislation is balanced, or they are just ignored.

In a great many cases, the LRC has had no more than a day or two to consider bills and make a report. In the worst cases, bills have been passed before the Review Committee has finished its investigations.

The Appendix to this submission is an extract from a damning submission made to the Legal and Constitutional Affairs Committee of the Federal Parliament in 2010. In summary, we argued that the LRC did not have sufficient time to examine legislation. It did not have time to consult, or to allow public input. (It often barely had time to meet.) It has—by the deliberate choice of its creators—no set of rights against which to judge. It was routinely ignored.

Since then, the situation has deteriorated. The chief Justice of New South Wales, The Hon. T.F. Bathurst QC, notes that this change follows alterations to the Legislation Review Committee since 2011. These have meant the membership has been almost halved with the lower house now dominating Committee members.[3]

Whereas in the past the LRC at least drew the attention of the Houses of Parliament to intrusions on human rights which might need to be corrected, now it appears to see its role as providing excuses for those intrusions, or merely reiterating material from the relevant minister's second reading speech.[4]

Perhaps the worst example of this is seen in its comments on 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 an dangerously extensive definition in the Criminal Code.

The LRC took 6 minutes to consider this bill and fourteen others.[5]

It is worth pursing this case, as an example of how poorly the LRC functions.

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[2] Legislation Review Committee, 'Public Interest and the Rule of Law: Discussion Paper' (Discussion Paper No 1, 10 May 2010), 1.

[3] Opening of the Law Term Address, 'The Nature of the Profession, the State of the Law', February 2016, paragraph 19.

[4] Ibid.

[5] Unconfirmed minutes, Tuesday October 27, 2015.

The LRC reported as follows:

1. The Committee notes that the Bill extends the operation of a scheme for preventative detention orders. This impacts on the right to liberty by allowing people to be imprisoned by the State without charge and without trial. However, the Committee notes that a recent review of the *Terrorism (Police Powers) Act 2002* found that preventative detention orders remain necessary for police to deal with terrorist threats. Similarly, the preventative detention order provisions contain a number of safeguards to guard against abuse of these extraordinary powers. For example, questioning the imprisoned person is prohibited. Given the circumstances, the Committee makes no further comment.[6]

And further:

*Right to Liberty*

> The Committee notes that the Bill extends the operation of a scheme for preventative detention orders. This impacts on the right to liberty by allowing people to be imprisoned by the State without charge and without trial. However, the Committee notes that a recent review of the *Terrorism (Police Powers) Act 2002* found that preventative detention orders remain necessary for police to deal with terrorist threats. Similarly, the preventative detention order provisions contain a number of safeguards to guard against abuse of these extraordinary powers. For example, questioning the imprisoned person is prohibited. Given the circumstances, the Committee makes no further comment.

Since there is no reference to which review is meant, CCL presumes that it is the NSW Statutory Review, published in October 2015. That review, it is true, asserts that the preventative detention powers are a necessary tool for combating terrorism, *but the only reason given is that they are required for national consistency!*[7] By contrast, the then Independent National Security Legislation Monitor, Brett Walker SC, and the Council of Australian Governments Review of Counter Terrorism Laws had both argued that the preventative detention powers should be repealed.[8]

A competent report by the LRC, we believe, would have drawn the attention of the NSW Parliament to all three reports, summarised their arguments (which would have exposed the limitations of the NSW statutory review), noted that the provision had never been used, and recommended that the two Houses consider whether the continued invasion of liberties is justified.

Justice Bathurst notes that a 2015 report from the Legal Intersections Research Centre at the University of Wollongong 'assessed what impact the Committee's recommendations had on criminal bills between 2010 to 2012. The commentators reported, that although "the Committee performs

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[6] Legislation Reform Committee, Digest 99/56, 2015 p.2.

[7] 'The Review agrees with the need to maintain national consistency in counter terrorism legislation as far as possible, acknowledging that jurisdictions agreed to enact these extraordinary powers as part of a complementary scheme. The foundation of this cross- jurisdictional approach was a reference of powers to the Commonwealth to allow for the creation of comprehensive and consistent terrorism offences for Australia. As such, the Review concludes that the PDO powers remain a necessary tool for police in combating terrorism and should be retained.' NSW Department of Justice, Statutory Review of the Terrorism (Police Powers) Act 2002,p. 5

[8] Independent National Security Legislation Monitor Annual Report 2012, Chapter III
Council of Australian Governments, Review of Counter Terrorism Laws 2013, Recommendation 39 and paragraphs 248-276.

the valuable function of identifying, and bringing to Parliament's attention, aspects of proposed new laws... there is no evidence that the Committee has any impact on the outcomes of parliamentary decision- making processes on criminal law bills". The report also identified an "entrenched culture" held by Parliament of "ignoring and deflecting the Committee's advice"'.[9]

The failures of the LRC may be contrasted with those of the Federal Parliament's Human Rights Committee. While the CCL does not consider the latter committee to be effective in protecting human rights, since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.[10]

CCL is of the view that Legislation Review Committee does not achieve its purpose, and that the passage of a bill of rights is a necessity. Until that is done, the Legislative Council should ensure: i. that the Legislation Review Committee is given more time to complete its inquiries, before any Bill is brought on for debate, ii. that its reports take proper account of objections to legislation, iii. that there is parliamentary time for its reports to be considered seriously, and iv. that its reports lead to significant changes.

**3. Passing Bills before Committees have completed their consideration.**

Parliamentary procedures allow for the Legislation Review Committee to consider a Bill (for the first time) after it has become law. In our view, legislation should only be able to be treated like that in cases of genuine emergency, and such legislation should have sunset clauses which require it to be reconsidered with a short time—at most a year.

**4. Punishment of recalcitrant witnesses.**

As noted in the Discussion Paper, sections 4.4 and 4.5 of the Parliamentary Evidence Act 1901 permit Committees to compel witnesses to attend hearings, and to compel them to answer lawful questions. Logically, there is no compulsion without penalty for non-compliance; but the Evidence Act is draconian in its provisions for penalties, and worse in its procedures.

If a person is found in contempt of Parliament for failing to answer lawful questions, the person can be jailed for up to one month. (Section 11). Unlike the Federal Parliamentary Privileges Act 1987, there is no alternative of a fine.

But a question may be lawful yet not reasonable (are you or have you ever been a member of the Communist Party?), or a refusal may otherwise be excusable or morally mandatory; but the Act makes no provision for that.

There is, as the Discussion Paper notes, no provision for due process. The witness 'shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be'. (Section 11.) There is no provision for a hearing, nor for representation by counsel.

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[9] Opening of the Law Term Address 2016, at 23. The report he quotes is 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

[10] Australian Law Reform Commission, Traditional Rights and Freedoms-Encroachments by Commonwealth Laws, Report No 129 (2015) at [3.69]

If the person knowingly gives false evidence, the penalty can be five years. (Section 13).

CCL is of the opinion that it is time for this portion of the Parliamentary Evidence Act to be revisited, and calls for a separate inquiry to be instituted to make recommendations for its revision. This might be done as part of the creation of a NSW Parliamentary Privileges Act; but should be done in any case if it is decided not to create such an Act.

**5. The Council and the Executive.**

As the Discussion Paper notes, there has been repeated conflict between Council Committees and the Executive, and indeed between the Council and the Government, over the existence of a power to require ministers and public servants to produce documents.

As J. S. Mill argues,[11] whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government". It has further been held that 'the broad reach of the legislative power conferred by s. 5 [of the Constitution Act] indicates an imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws but, as an anterior matter, to the manner of operation of existing laws. That anterior matter 'embraces the way in which the Executive Government is executing the laws'.[12]

The power of the Houses of Parliament to examine Government documents is also an important safeguard of open government when the Executive is keeping matters secret, and freedom of information requests are denied. Arguments for open government are thus arguments for the retention of this power. (Secrecy in government provides the opportunity to conceal wrongdoing, corruption and incompetence, inaccurate information and poor reasoning, democracy requires that the electorate has access to knowledge, and so on.)

There is no doubt, since Egan v Willis, about the power of the Council to require the tabling of government documents. The issue raised in the Discussion Paper, which is still a matter of dispute, is whether this power extends to Council Committees, or whether it can be delegated to them. CCL has no doubt that it should so extend. The Committee system is the principal means for the Council to obtain knowledge that, as argued above, is essential for its operation. It would be possible for the Council to take the long route and itself require the provision of documents whenever they are denied to a Committee, and then refer them to the relevant Committee. Were that to happen enough times, Ministers and public servants might cease their objections. But it would be preferable to settle the matter by legislation.

Similar arguments apply to statutory secrecy. There are good reasons why some matters are kept secret--issues of security, privacy and so forth. But these matters are not absolute--the rights and concerns involved have to be balanced against others. It should not be open to public servants of Ministers to avail themselves of these reasons, other than in cases of emergency, when Committees can (and do) meet in closed session to examine such matters.

[11] J. S. Mill. Utilitarianism, Liberty, Representative Government, London, J.M. Dent and Sons, 1962
[12] (Priestly JA in (1996) 40NSW Law Reports 650 at 692, and quoted with approval in Egan v Willis, (1998) 71 at 52.

It is true that Committee members have occasionally been accused of leaking material presented to Council Committees to the news media. The scandals involved would largely be avoided if it were standard practice for material presented to Committees to be officially released.

This submission was prepared by Dr Martin Bibby MA BD PhD on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Select Committee.

Yours sincerely,

**Therese Cochrane**
**Secretary**
**NSW Council for Civil Liberties**

**Appendix**
Extract from a submission to the Legal and Constitutional Affairs Committee of the Federal Parliament, concerning the Human Rights Parliamentary Scrutiny Bill, 2010

**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[13] 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 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[14]….

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."[15] Accordingly the LRC itself has collected a set of rights statements

[13]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.
[14] 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
[15] Legislation Review Committee, Information Paper, p. 3.

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.[16]

**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.[17]

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 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.

[16] Ibid. p. 6.

[17] New South Wales Legislation Review Committee, Annual Report 2007-2008 pp. 3—8.