

THE VIEW FROM THE OTHER SIDE OF THE FENCE

SCRUTINY OF BILLS COMMITTEES

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Good morning, and thank you for this opportunity to share with you the view from the parliamentary side.

I am here to give you a perspective on legislative drafting from the point of view of scrutiny of bills committees. I do this as the manager of the team that provides advice and support to the New South Wales Parliament's Legislation Review Committee. Of course, as a parliamentary staffer, I do not represent the Committee and the views expressed are my own.

In this presentation, I will first set out what the Committee is looking for. I will then discuss what the Committee sees. I will conclude with some neighbourly advice on how we can work together to achieve what I believe to be our mutual goal of facilitating the enactment of high quality legislation which gives due regard to human dignity.

What the Legislation Review Committees is looking for

I will now set out what the Legislation Review Committee is looking for. My comments regarding the New South Wales Committee would generally hold true for the equivalent committees in the Commonwealth Senate, Victoria, Queensland and the ACT.

In this discussion, I will examine the NSW Committee's role with respect to bills. While the Committee also reviews subordinate legislation, I will leave that subject to Susan McInnes and Elizabeth Moore.

The Legislation Review Committee has been scrutinising bills for just under two years. The Committee works in the tradition of the Senate Scrutiny of Bills Committee, which was established in 1972, and has borrowed significantly from that tradition and that of the other scrutiny committees. However, the immediate origin of the New South Wales Committee is the State's recent debate over a bill of rights. That history also impacts on its operation.

As an alternative to having a bill of rights, the NSW Parliament established the Legislation Review Committee to report to the Parliament on whether any bill trespasses unduly on personal rights and liberties. The rationale for this, simply put, was that it is better that the determination of what rights should exist at law — or perhaps more precisely, how rights should be compromised — be left to a sovereign parliament. The Committee is to explain the rights implications of proposed laws so the Parliament can properly consider these issues before the law is made.

The Committee may comment on bills on five grounds. Whether the bill:

- (i) trespasses unduly on personal rights and liberties,
- (ii) makes rights ... unduly dependent upon insufficiently defined administrative powers,
- (iii) makes rights ... unduly dependent upon non-reviewable decisions,
- (iv) inappropriately delegates legislative powers, or
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.¹

Grounds one to three focus on the protection of personal rights and liberties and grounds four and five relate to preserving Parliament's role in making legislation. These grounds are identical to those of the Senate Committee and are included in, or similar to, the terms of reference of the ACT, Queensland and Victorian committees.

There are two core components to the work of the Committee.

- First, it sets out to identify where any bills trespass on personal rights and liberties.
- Second, once such a trespass has been identified, it raises questions to assist the Parliament to determine whether such a trespass is undue.

Nature of rights and liberties

To identify where bills affect personal rights and liberties, the Committee must determine what it considers such rights and liberties to be. One of its main reference points is Australian statute and common law, which provides for a number of fundamental rights, such as the presumption of innocence and the right to silence.

However, existing law is not an adequate reference point when considering the rights and liberties to which Parliament should have regard when making laws.

First, laws set out rules for resolving disputes rather than cataloguing what rights people should enjoy. As the law does not purport to be a statement of what rights are fundamental to human dignity, it is inappropriate to treat it as such.

Second, both common and statute law have often been a source of oppression and discrimination. The common law's former treatment of a married woman's right to control her property or her body, and the doctrine of *terra nullius* are obvious examples.

¹ Section 8A(1)(b) *Legislation Review Act 1987*.

Third, Parliament's role is to decide what the law *should* be. It would be strange if Parliament rejected enacting a bill of rights in order to preserve the sovereignty of Parliament, but then only had regard to those rights which had been judicially defined. The content of rights also needs constant re-evaluation with regard to technological and social changes. For example, technological changes in surveillance, communication and data management have required new approaches to the right to privacy.

In the absence of any local definition of fundamental rights, the Committee has regard to the international human rights instruments to which Australia is a party, in particular, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.

The Committee also draws on a wealth of jurisprudence from jurisdictions which have enforceable human rights instruments, such as member states of the Council of Europe, Canada, South Africa, the United States and New Zealand. The United Kingdom has been particularly useful in this regard. The commencement of the UK *Human Rights Act 1998* has led to a growing body of decisions of the UK Courts that analyse contemporary laws from that common law jurisdiction within a mature human rights framework.

What the Committee sees

I will now turn to what the Committee sees.

To date, over two thirds of bills introduced into Parliament raised issues worthy of comment under its terms of reference.

The Committee brought 60% of these bills to the attention of Parliament or wrote to the Minister for further information. In relation to the remaining 40% of bills raising issues, the Committee considered that any trespass to rights or delegation of legislative power was not undue or inappropriate.

The issues about which the Committee repeatedly has had concerns can be grouped into three broad subject areas:

- Fair trial and criminal responsibility;
- The rule of law and government responsibility; and
- Property and privacy.

Fair trial and criminal responsibility includes such issues as:

- Erosion of the right to silence;
- Reversal of the onus of proof;
- Strict and absolute liability offences;
- Denial of procedural fairness; and
- Removal of privilege for confidential professional communications.

Rule of law and government accountability includes issues relating to

- Retrospectivity;
- Access to government information;
- Ouster clauses;
- Interference with judicial process;
- Insufficiently defined administrative powers;
- Denial of review rights; and
- Inappropriate delegation of legislative power.

Property and privacy issues include:

- Entry and search of private property;
- Denial of compensation rights; and
- Collection and publication of personal information.

Most scrutiny committees produce a review of issues considered each year or after each Parliament that provides a useful reference on these issues.

I will now give three examples from the Committee's reports to illustrate its approach.

I will start with the Legal Profession Bill 2004.

The Committee raised issues in relation to the entry and search powers under the bill and its removal of the right to silence.

The Committee was not concerned with the trespass to rights provided by the entry and search powers. The Committee could see the public interest in the powers and considered that they had appropriate limits to protect rights as much as possible.²

The Committee was not as comfortable with the removal of the right to silence. Two similar provisions removed the right not to incriminate oneself in certain circumstances but provided limitations on the use of any answers along the following lines:

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- (4) If, before answering the question, the person objects on the ground that it may tend to incriminate the person, the answer is not admissible in evidence against the person in any proceedings for an offence, other than:
- (a) an offence against th[e] Act, or
 - (b) an offence relating to the falsity of the answer.

In this case, the public interest in compelling a person to answer questions was apparent to the Committee. However, the Committee had two concerns about how that information could be used:

- First, there was no limitation on the information being used in relation to any offence under the Act.
- Second, the use of such answers was only limited if the person objected to giving the answer but there was no requirement that the person be informed of this right to object.

The Committee concluded that:

... the privilege against self-incrimination is a fundamental right expressed in the International Covenant on Civil and Political Rights and the common law. The Committee consider[ed] that this right should only be modified or restricted to achieve a legitimate aim in the public interest and in a manner proportionate to that aim.³

The Committee therefore wrote to the Attorney General for advice regarding:

- the need to remove the privilege against self-incrimination; and
- the reason for a lack of a requirement that a person be informed of his or her right to object to compulsory self-incrimination.⁴

² *Legislation Review Digest* No 1 of 2005, p 21.

³ *Legislation Review Digest* No 1 of 2005, p 22.

⁴ *Ibid.* See also *Legislation Review Digest* No 5 of 2005, p 23 – 28 for the Attorney's reply.

An example of a bill raising issues regarding the rule of law and government accountability is the Local Government Amendment Bill 2005. That Bill contained an amendment to the *Freedom of Information Act 1989* to exempt from the Act:

The Department of Local Government (including the Director-General and other Departmental representatives)— [in its] complaint handling and investigative functions conferred by or under any Act on that Department.⁵

On this provision, the Committee concluded:

... that freedom of information is an important principle of democracy and the rule of law and that individuals have a general right to access information held by government.

... legislation that restricts or removes access to information held by government needs to be justified on strong public interest grounds and such restriction should only be made to the extent necessary to achieve the desired result.⁶

The Committee therefore wrote to the Minister for further information and referred the issue to Parliament.

These two examples illustrate the type of issues the Committee most frequently confronts. They are situations where there is an apparently compelling public interest, the promotion of which may have the effect of trespassing on personal rights and liberties. However, it is important to clarify the extent to which such a trespass is required and the point at which personal rights should not give way to public interest. These bills do not raise gross violations of rights, but they do require attention to ensure personal rights are not subject to ongoing erosion that can be catastrophic over time.

There are also occasions where Parliament decides to exercise its supremacy and pass legislation despite the fact that it significantly trespasses on personal rights. The Committee has considered bills that, rather than changing the general law, reverse the effect of judicial decisions.⁷ It has also considered bills that provide the state with an unreviewable power to terminate contracts and seize property without any right to compensation.⁸ One example will suffice for this presentation: the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005.

The history and law behind the bill is complex and does not avail of a simple summary so my description will necessarily be incomplete.

⁵ Schedule 2.1 Local Government Amendment Bill 2005.

⁶ *Legislation Review Digest* No 8 of 2005, pp 16 – 17.

⁷ See for example the Clyde Waste Transfer Terminal (Special Provisions) Bill 2003, which deemed a development consent to be given after the Land and Environment Court found such a consent to be prohibited by law: *Legislation Review Digest* No 7 of 2003.

⁸ See for example the Passenger Transport (Maintenance of Bus Services) Bill 2005 (*Legislation Review Digest* No 8 of 2005) and Passenger Transport (Bus Reform) Bill 2004 (*Legislation Review Digest* No 8 of 2004).

Prior to 1989, a sentence to life imprisonment rarely entailed a life in prison and a prisoner had a right to apply for early release.

The law was then changed so that, for certain offences, “life” meant life with no possibility of release. However, anyone with “existing life sentences” were able to apply for a redetermination of their sentence after 8 years in prison.

This regime was then made much stricter in 1997 for persons with life sentences imposed before 1989 for whom the sentencing judge had given a recommendation that they “never be released”. At the time of sentence, such recommendations had no statutory basis. This regime was then made even stricter in 2001 so that a person with a “non-release recommendation”, for practical purposes, had no real prospect of release.

On 15 April 2005, Justice Dunford of the Supreme Court decided that one person sentenced with a non-release recommendation, Blessington, was not fully covered by the 1997 and 2001 amendments. Further, he suggested that anyone subject to a “non-release recommendation” may now be able to appeal these recommendations since they were not reviewable at the time of sentence due to their lack of statutory basis.

It is also important to note that, at the time of committing the crimes for which he was sentenced, Blessington was 14 years of age.

The Bill had one explicit primary purpose. In the words of the Attorney General, it “ensures that Blessington is covered by the present regime applying to never-to-be-released prisoners”.⁹

The Committee raised a number of concerns in relation to the bill. Its primary concerns were that:

- It imposed a much harsher penalty on Blessington than that which was applicable at the time he committed the crime (contravening Article 15 of the ICCPR¹⁰);
- It extended the sentence on the grounds of a recommendation that had no statutory basis at the time, thereby trespassing on his right to equality before the law;
- It deprived Blessington of his right to have the length of his sentence determined by an independent arbiter according to the rule of law rather than by Parliament;

⁹ The Hon Bob Debus MP, second reading speech, *Legislative Assembly Hansard*, 4 May 2005.

¹⁰ “1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

- It removed any real possibility of release in contravention of Article 37(a) of the UN Convention on the Rights of the Child, which provides that “Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age”; and
- It denied the right of review of the non-release recommendation.¹¹

This bill is also an example of the speed at which legislation can be made in New South Wales. The Blessington decision was given on 15 April 2005. The bill was introduced when Parliament sat two and a half weeks later and received Royal Assent 2 days after that on 6 May. The Bill's two days in Parliament did not allow time for the Committee to report on it until after it was passed, so its comments were not debated in Parliament. The Committee has nevertheless written to the Attorney General to seek his advice regarding the justification for the apparent contravention of the Convention on the Rights of the Child.

Some neighbourly advice

I will now conclude with some reflections from “the other side of the fence” on how we can work together to facilitate the enactment of high quality legislation which gives due regard to human dignity.

Two related issues repeatedly come up in the Committee's comments:

- the need to limit any trespass on rights as much as possible; and
- the need for proportionality.

Trespasses to rights should be avoided as far as possible while achieving the object of a provision. Where it appears that a trespass to a fundamental right is necessary to achieve an important aim, a more creative approach may avoid the trespass altogether. If such an approach is not found, the full scope of any trespass should be tested to ensure that it stays within the bounds of what is justified.

Related to this is the need for any trespass to be proportionate to the object to be obtained.

For example, it may seem that the public interest requires that the onus of proving a defence or disproving an element of an offence should fall upon the defendant. However, the presumption of innocence would traditionally require that the onus placed on the defendant be limited to an evidential burden, as is the normal standard in the model criminal code.¹² A greater burden of proof on the defendant should require special justification. The fact that the greater burden makes it easier to secure a conviction is not a special justification.

¹¹ *Legislation Review Digest* No 6 of 2005.

¹² 13.3

Similarly, legislation taking away the right to silence should limit the use of answers obtained under compulsion to those uses necessary to achieve the compelling objective. Purposes such as punishment of the individual should not normally be allowed, as this is contrary to a fundamental right. Extraordinary justification is required to compel a person to answer questions and then to use those answers against him or her. It is not sufficient justification for removing the right to silence that, as an official once explained to us, “too many people were using it”.

Failure to adequately test the justification for trespassing on personal rights can give rise to what is sometimes referred to as “lazy drafting”. That is, a provision that trespasses on a right for an arguably justifiable purpose, but fails to adequately target the issue to be addressed or to limit the scope of power being conveyed. Such a provision infringes personal rights as a matter of convenience rather than a means of achieving a proportionate goal.

While I use the term “lazy drafting” to get your attention, I hasten to clarify that the term applies to the provisions of a bill, not to the drafter. The provision is lazy because it does not do its job as well and precisely as it should.

This may arise because:

- the proponent of the bill wishes the provision to be as broad as possible;
- a more general provision is easier to understand and apply; or because
- time does not allow for more precise drafting.

Of course, it may also be because the drafter has not considered the rights implications of the provisions or explored how these can be avoided or minimised.

It is vital that such thought and testing occurs during the drafting of legislation. While scrutiny committees do such testing, they have limited capacity to bring about change once a bill has been introduced. Scrutiny committees’ effectiveness largely lies in the threat of their criticism ensuring adequate consideration of rights during the drafting of bills.

In conclusion, the aim of legislative review committees is to ensure adequate consideration of human rights impacts of bills. Such committees cause inconvenience for proponents of bills when the human rights implications of their bills are not adequately explained. To avoid such inconvenience, and thereby give you a happier client, you can:

- draft bills that achieve their objects without trespassing on personal rights and liberties;
- if you cannot achieve the objects without trespassing on rights, draft bills so that their impact on personal rights and liberties is no more than absolutely required to achieve their objects; and

- alert departments to the rights implications of their bills and the need for such implications to be fully justified and explained in the second reading speech to avoid criticism from scrutiny committees.

In this way, we on “the other side” hope to achieve a symbiotic relationship with legislative drafters, whereby we can feed off each other’s work to achieve a higher standard of legislation that gives proper regard to human dignity.

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