



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

Legislatures and the Protection of
Human Rights Conference
University of Melbourne
20-22 July 2006

7 AUGUST 2006

Report 29

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen
Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

Introduction

This is a report on the Committee's attendance at the *Legislatures and the Protection of Human Rights* Conference held from Thursday, 20 to Saturday, 22 July 2006 at the University of Melbourne. The Conference was hosted by the Centre for Comparative Constitutional Studies of the Law School at the University.

The Conference was attended by members of parliaments, representatives of legislative scrutiny committees, academics, human rights lawyers and others.

The Committee was represented by Ms Karin MacDonald MLA (Deputy Chair), Dr Deb Foskey MLA and Mr Max Kiermaier, Secretary.

Conference aims

The Conference aimed to build on the growing awareness of the significant role of legislatures in protecting human rights. It also aimed to examine how effective legislative scrutiny mechanisms have been in practice.

Miegunyah Public Lecture

As part of the Conference, the Miegunyah Public Lecture was delivered by Professor David Feldman (Rouse Ball Professor of English Law, University of Cambridge, and Miegunyah Distinguished Fellow, University of Melbourne) on the topic '*The roles of parliaments in protecting human rights: a view from the UK*'.

Among the themes developed by Professor Feldman were:

- In an age of contemporary international developments, human rights are under threat. Politicians are getting "cold feet" when it comes to legislating to protect human rights.
- The protection of human rights is not just the preserve of lawyers and the judiciary. Rather, there is a significant role for politicians, parliaments and the public service.
- Parliament's role is however limited as it can't deliver practical services (eg advice to victims). But it can encourage others to do so.
- The important role of Parliament is to scrutinize. But it is difficult to resolve the tensions between Ministers and Members, and between the Members as public representatives and Members as party members.
- It is appropriate and legitimate for Parliament to ask an Executive how Acts comply with treaty obligations.
- There must be a separation of powers between Executive, Judiciary and Parliament. Judges and Government must not necessarily be on the same side.
- Need for parliamentary scrutiny committees to be well resourced, and have an independent Chair (eg Opposition Member), be devoid of whips, have a membership interested in at least some aspect of human rights, be willing to put difficult questions to Government, have experienced secretariat and legal advice – and be boring at times!

Conference proceedings

The Conference was conducted over 7 panel sessions and the program appears at Attachment A. A list of selected Conference papers which can be viewed from the Centre's website - <http://cccs.law.unimelb.edu.au/> - appears at attachment B.

Panel One—“Who best protects rights” legislatures or the courts? Implications for the bill of rights debate”

In the first panel session Professor George Williams suggested that both institutions are required, and that governments must also be involved. Citing examples such as asylum seeker legislation, anti-terrorism laws and changes to electoral laws involving prisoners and enrolment registration cutoffs, Professor Williams argued that legislatures have in fact legislated against human rights. The only check is the “good sense” of members, which he argued is not good enough. Mechanisms other than Parliament are needed. One mechanism is the courts. Judges are in a better position to examine the way a law has worked, as opposed to Parliament who needs to imagine how a law will work.

Professor James Allan presented a contrary view on the need to spell out Bills of Rights in legislation. While not arguing against human rights, he said that they were “woolly concepts” and when committed to black letter law caused the courts to have a dominant role and make decisions on what are essentially value judgments. In a democracy, he argued, you will always have reasonable disagreement between reasonable people, and therefore it was not always evident on whether a human right had been transgressed and decisions on these matters should not be handed over to unelected judges. He maintained that Canada, with its Bill of Rights laws, had less liberal freedom of speech laws than in Australia, without a Bill of Rights.

Panel 2—Legislatures and the protection of rights: comparative perspectives.

Professor Paul Rishworth outlined the development of the New Zealand Bill of Rights Act, and highlighted the requirement for the Attorney-General to bring to the attention of the House of Representatives any provision in a bill that appears to be inconsistent with any of the rights and freedoms in the Act.

Satya Prateek summarized the situation in India and highlighted the monopoly of the judiciary, notably the Supreme Court.

Dr John Dinan outlined the long history of the US Congress enacting rights protecting statutes, including granting suffrage to African Americans and lowering the voting age to 18, equal protection laws (eg desegregation in schools, anti-slavery laws, racial discrimination), sex discrimination, disability rights, age discrimination and due process rights. Significantly, he noted that in areas such as freedom of speech and freedom of the press, it was the Supreme Court that took the lead, rather than Congress. Also, Congress had not been active in same sex laws, all developments on that front coming from the courts.

Panel 3—Cultures of rights in the Legislature.

Senator Andrew Murray and Mr Allan Shearan MP, respectively, made presentations on the roles played by the Senate's Scrutiny of Bills and Regulations and Ordinances Committees, and the NSW Legislation Review Committee. Senator Murray noted that the scrutiny committees' narrow terms of reference meant that deliberations were more focused. He also favoured a bill of rights, augmented by a rigorous committee system, while Mr Shearan asserted that the NSW Committee acted as an alternative to a bill of rights.

Panel 4—Rights and the Executive.

Professor John McMillan built on the theme that Charters can be problematic, inefficient and ineffectual in providing practical resolution to issues. Human rights protection is ultimately a practical experience and oversight agencies such as the Ombudsman have an important role to play. Professor McMillan saw strength of the Ombudsman's Office in that it was multidisciplinary in nature and not dominated by lawyers. An example of success he cited was that now there were only about 40 asylum seekers in detention, as opposed to about 250 just a few years ago.

Gabrielle McKinnon advocated the need to develop a culture of human rights in the Executive and spoke on the steps taken to promote such a culture in the ACT public service and community. Important were the need to raise an awareness of human rights and specific legislative requirements, engagement to create a perception that human rights are relevant and acceptance of the need to comply with procedural rules, and a commitment to respecting human rights. Interestingly, Ms McKinnon said that a survey of one agency in ACT Government had shown that as yet there was not a wide acceptance and knowledge of human rights, but there were encouraging signs.

Stuart Beresford, in a paper subtitled "*you can lead an agency to water but you can't make it drink*" spoke of the struggle over the last 15 years to develop a culture of human rights in New Zealand, with the notable exception of privacy issues. Too often the state had been left to defend, rather than promote, human rights issues. Rights are seen in extreme terms and in a society like New Zealand, not needed to be worried about. Mr Beresford referred to the proactive roles NZ agencies had played in raising human rights issues and processes, and to encourage a culture in the public service.

Panel 5—Human rights and legislatures in a globalising world.

Professor David Kinley's response to the question "Does the globalising economy help or hinder human rights compliance?" was "Both", with the problem being finding an appropriate balance. He believed that it was the development of a "culture of compliance" which was crucial, not just promulgating a range of provisions that must be complied with. "There are fine clothes, but is there an emperor beneath?" summed up his position. Professor Kinley referred to a number of international mechanisms which can be used "carrot and stick" style to prompt development of a compliance culture (eg AusAID and World Bank funding all have "good governance" requirements), and there was the possibility of linking trade benefits (eg through WTO membership) to human rights.

Hafid Abbas gave an enlightening account of the development of a human rights culture in Indonesia which, given the low base of the Suharto era, has been quite significant progress. Mr Abbas spoke of the 1993 National Action Plan on Human Rights (RANHAM) and outlined the program for the next 5 years, targeting national, provincial and municipal levels of government.

Professor Jeremy Gunn spoke on what the US Congress has done to promote human rights outside the US, concentrating on the Religious Freedom Act 1988 as an example. Also, as further examples of how the Congress influences the development of human rights he used the examples of congressional hearings to approve appointments to senior administration positions, and the threat the the Congress could legislate to implement a law if other actions were not followed.

Panel 6—Legislative scrutiny in comparative perspective

Dr James Kelly referred to the Canadian experience and was critical of how well the legislature was performing there in its scrutiny role. In his view, the size of the Parliament meant that aspiring Members (approximately two thirds) were too close to the Executive to really rock the boat too much. However, this has not resulted in the judiciary becoming supreme. Although on average 2 statutes per year have been invalidated by the courts, most of these instances were to statutes enacted prior to 1982. There is now a growing use by the Supreme Court to suspend, rather than invalidate, a statute and let the Parliament come up with a remedy. This has led to the emergence of “Charter dialogue” on issues, but is more often than not initiated by the judiciary, rather than the legislature. It has also resulted in an institutionalised rights vetting process in the Ministry of Justice, monopolizing rights setting on behalf of the Cabinet. This allows Cabinet to meet its legislative agenda. Dr Kelly laments that Parliament has been displaced as a rights vetting body.

Joanna Davidson spoke on the Work of the Crown Law Office in New Zealand, in particular the work of that office in assisting the Attorney-General prepare Section 7 (of the NZ Bill of Rights Act) reports on human rights conflicts in bills to Parliament. A key element to the ability of the office to go about its work was its ability to be independent of the policy process. It was also noted that the correspondence it entered into with the Executive on human rights issues in bills was published on its website to assist public debate.

Angus Francis gave a presentation on the post legislative scrutiny process applying to the immigration portfolio, focusing on reporting structures in annual reports and the estimates committee process. However, he believed that the process is ad hoc when it comes to what, and when, is evaluated, and this will not change unless core human rights performance criteria are adopted. The remainder of Mr Francis’ presentation focused on the development of the federal Government’s “Pacific Solution”.

Panel 7—Deliberating about rights: law or politics.

Professor Janet Hiebert outlined the operation of the UK Human Rights Act and the work of the Joint Committee on Human Rights. She noted that the government was always anxious to avoid a negative compatibility statement, and lamented the fact that when a government responds positively by way of amending legislation, it is portrayed by the media as a backdown, and hence the Government becomes reluctant to do so.

Finally, Dr Carolyn Evans and Dr Simon Evans discussed preliminary results from their as yet unfinished survey of Members in the US and Australia regarding on attitudes to human rights and the efficacy of scrutiny procedures. They concluded that the performance was strong, but lacking in focus. Committees inform rather than make recommendations (and perhaps there were good reasons for this). They “achieve through modesty”. Importantly, committees must avoid the appearance of capture by the government. A major problem identified in the survey was the general lack of time given to the scrutiny process prior to legislative debate.

Bill Stefaniak MLA
Chair

August 2006

International Conference on Legislatures and the Protection of Human Rights

Program

Thursday 20 July

6pm-7.15pm: Miegunyah Public Lecture – *'The roles of parliaments in protecting human rights: a view from the UK'*

Speaker: Professor David Feldman, Rouse Ball Professor of English Law, University of Cambridge and Miegunyah Distinguished Visiting Fellow, University of Melbourne

Chair: Professor Michael Crommelin, Zelman Cowen Professor & Dean, Faculty of Law

Friday 21 July

8.30am-9.00am: Registration and coffee

9.00am-9.15am: Welcome and acknowledgment of country (Dr Simon Evans and Dr Carolyn Evans, Conveners)

9.15am-10.30am: Panel – *'Who best protects rights: legislatures or the courts? Implications for the bill of rights debate'*

Speakers:

- Professor George Williams, *'The case for a role for the judiciary'*
- Professor James Allan, *'The case for parliamentary control'*

10.30am-11.00am: Coffee break

11.00am-12.30pm: Panel - *'Legislatures and the protection of rights: comparative perspectives'*

Speakers:

- Professor Paul Rishworth, *'The New Zealand Parliament and the protection of rights: praxis and pitfalls'*
- Satya Prateek, *'"Achieving" by enacting: Locating the Indian Parliament in the human rights discourse'*
- Dr John Dinan, *'The United States Congress and the protection of rights'*

12.30pm-1.30pm: Lunch

1.30pm-3.00 pm: Panel – *'Cultures of rights in the legislature'*

Speakers:

- Senator Andrew Murray, *'Parliamentary Committees and the protection of rights: a partial evaluation'*
- Allan Shearan MP, *'The role of the Legislation Review Committee'*
- Dr John Uhr.

3.00pm-3.30pm: Coffee break

3.30pm-5.30pm: Panel – *'Rights and the executive'*

Speakers:

- Professor John McMillan, *'The role of the Ombudsman in ensuring executive compliance with rights'*
- Gabrielle McKinnon, *'Giving meaning to a culture of human rights'*
- Stuart Beresford, *'Developing a human rights culture in the public service: you can lead an agency to water but can you make it drink?'*

6.30pm for 7.00pm: Dinner at University House

Saturday 22 July

9.00am-10.30am: Panel – *'Human rights and legislatures in a globalising world'*

Speakers:

- Professor David Kinley, *'Does the globalizing economy help or hinder human rights compliance?'*
- Hafid Abbas, *'Decentralization and local elites' role in promotion of human rights'*
- Professor Jeremy Gunn, *'Legislatures and the exportation of rights: the case of the US Congress and Religious Freedom'*

10.30am-11.00am: Morning tea

11.00am-12.45pm: Panel – *'Legislative scrutiny in comparative perspective'*

Speakers:

- Dr James Kelly, *'The commonwealth model and bills of rights: comparing legislative activism in Canada and New Zealand'*
- Joanna Davidson, *'The role and impact of the government lawyer in pre-legislative scrutiny'*
- Angus Francis: *'Post-legislative scrutiny in the immigration portfolio'*

12.45pm-1.45pm: Lunch

1.45pm-3.00pm: Panel – *'Deliberating about rights: law or politics'*

Speakers:

- Professor Janet Hiebert, *'Governing under a Bill of Rights: What does a compliance culture entail?'*
- Dr Carolyn Evans and Dr Simon Evans, *'The effectiveness of Australian parliaments in the protection of rights'*

3.00pm-3.15pm: Concluding remarks by convenors

3.15pm: Conference close

Conference papers and presentations

Available conference papers

- [Professor David Feldman, Miegunyah Public Lecture – ‘The roles of parliaments in protecting human rights: a view from the UK’](#)
- [Professor George Williams, ‘Who best protects rights: legislatures or the courts? Implications for the bill of rights debate - The case for a role for the judiciary’](#)
- [Professor Paul Rishworth, ‘The New Zealand Parliament and the protection of rights: praxis and pitfalls’](#)
- [Satya Prateek, ‘“Achieving” by enacting: Locating the Indian Parliament in the human rights discourse’](#)
- [Dr John Dinan, ‘The United States Congress and the protection of rights’](#)
- [Senator Andrew Murray, ‘Parliamentary Committees and the protection of rights: a partial evaluation’](#)
- [Allan Shearan MP, ‘The role of the Legislation Review Committee’](#)
- [Gabrielle McKinnon, ‘Giving meaning to a culture of human rights’](#)
- [Professor David Kinley, ‘Does the globalizing economy help or hinder human rights compliance?’](#)
- [Hafid Abbas, ‘Decentralization and local elites’ role in promotion of human rights’](#)
- [Dr James Kelly, ‘The commonwealth model and bills of rights: comparing legislative activism in Canada and New Zealand’](#)
- [Joanna Davidson, ‘The role and impact of the government lawyer in pre-legislative scrutiny’](#)
- [Professor Janet Hiebert, ‘Governing under a Bill of Rights: What does a compliance culture entail?’](#)
- [Dr Carolyn Evans and Dr Simon Evans, ‘The effectiveness of Australian parliaments in the protection of rights’](#)
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