public interest
ADVOCACY CENTRE

PIAC Submission to the Review of the Operation of the Legislation Review Act 1987

7 December 2017

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles difficult issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC's work on parliamentary scrutiny of human rights

PIAC has a long history of engagement in public debate about the protection of human rights in Australia, including parliamentary scrutiny processes, as well as the development of Human Rights Acts or Charters of Human Rights.

This includes a number of submissions to parliamentary committees at Commonwealth, state and territory level that have informed this submission, such as:

- A submission to the Senate Legal and Constitutional Affairs Committee Inquiry on the Human Rights (Parliamentary Scrutiny) Bill 2010[1]
- A submission in relation to the National Human Rights Action Plan Exposure Draft in 2012[2]
- Submissions in relation to the development of the Victorian Charter of Human Rights,[3] and about its review in 2011[4], and
- A submission in relation to the ACT Government consultation on the inclusion of Economic, Social and Cultural Rights in the *Human Rights Act 2004*.[5]

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1 Public Interest Advocacy Centre, *The first step to realising rights: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry on the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* (2010), available at https://www.piac.asn.au/2010/11/05/the-first-step-to-realising-rights-2/

2 Public Interest Advocacy Centre, *National Human Rights Action Plan Exposure Draft: Submission by PIAC* (2012), available at https://www.piac.asn.au/2012/03/07/national-human-rights-action-plan-exposure-draft/

3 Public Interest Advocacy Centre, *Submission to Human Rights Consultation Committee, Victoria on a proposed Charter of Rights* (2005), available at https://www.piac.asn.au/2010/07/13/sub-re-proposed-vic-charter-of-rights/

4 Public Interest Advocacy Centre, *Submission to the Human Rights Charter Review, respecting Victorians* (2011), available at https://www.piac.asn.au/2011/06/24/human-rights-charter-review-respecting-victorians/

Recommendations

Recommendation 1 – Human rights

The term 'personal rights and liberties' should be replaced by the term 'human rights'

Recommendation 2 – Definition of human rights

The Act should be amended to specifically define human rights, as including:

- *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.*

Recommendation 3 – Specific reference to human rights treaties

The Act should specifically refer to all human rights treaties to which Australia is a party (the seven specifically referred to in the Commonwealth Human Rights (Parliamentary Scrutiny) Act 2011, plus the Refugee Convention, the Convention against Genocide and ILO Conventions), plus any human rights treaties or conventions to which Australia will become a party in the future.

Recommendation 4 – Statements of Compatibility

The Legislation Review Act be amended to require any Minister, MLA or MLC who introduces a Bill or regulation must provide a Statement of Compatibility.

Recommendation 5 – Content of Statements of Compatibility

The Legislation Review Act should require that Statements of Compatibility should include reasons explaining why the legislation is, or is not, compatible with human rights, and that this must be tabled prior to the Minister or parliamentarian giving their second reading speech.

Recommendation 6 – Committee to report prior to parliamentary debate

Parliamentary standing orders and/or the Legislation Review Act should be amended so that, in the ordinary course of business, bills are not debated unless the Legislation Review Committee has provided its report on the bill's human rights implications.

Recommendation 7 – Urgent legislation

Where absolutely necessary, urgent legislation can be considered by the Parliament, in the absence of a report by the Legislation Review Committee, following an explicit procedural vote of that particular chamber. However, consideration should be given to allowing the Legislation Review Committee to provide an interim report to inform urgent debate, including identification of possible human rights issues even if consideration of these issues has not yet been concluded.

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[5] Public Interest Advocacy Centre, *ACT Government consultation on the inclusion of Economic, Social and Cultural Rights in the Human Rights Act 2004* (2011), available at https://www.piac.asn.au/2011/08/26/act-government-consultation/

Recommendation 8 – Minister, MLA or MLC to respond to issues raised in second reading debate

Parliamentary standing orders or the Legislation Review Act should be amended to require the Minister, MLA or MLC who introduces legislation to respond.

Recommendation 9 – Resourcing

Given the expanded functions that are proposed for the Committee and its secretariat, it is recommended that Parliament allocate increased funding and resources, including expanded access to human rights specialists.

Recommendation 10 – Remove 'impact on the business community' from section 9

Consideration should be given to removing sub-section 9(1)(b)(ii) of the Legislation Review Act, which requires the Committee to consider the impact of regulations on the business community, and relocation of this requirement to another parliamentary committee or process.

Recommendation 11 – Ability to undertake inquiries on substantive human rights issues

The Legislation Review Act should be amended to allow it to undertake inquiries on substantive human rights issues, by referral from any of:

- *The Attorney-General*
- *The Legislative Assembly, or*
- *The Legislative Council.*

Recommendation 12 – Amendment to NSW Interpretation Act 1987

Recommendation 2 of the 2001 Inquiry into A NSW Bill of Rights should be implemented, namely amending section 34(2)(d) of the Interpretation Act to allow courts to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.

Recommendation 13 – A Charter of Rights

Noting the limitations of parliamentary-based human rights scrutiny regimes, further consideration be given to the creation of a Charter of Rights, or Human Rights Act, in NSW.

1. Improving parliamentary scrutiny of human rights

PIAC welcomes the decision by the NSW Parliament to conduct this inquiry into the operation of the *Legislation Review Act 1987* (the Act), and sees this as an opportunity to improve the parliamentary scrutiny of human rights in this state.

In this submission we will make a range of recommendations to achieve this purpose, as well as providing comments on related matters, such as consideration of the introduction of a NSW Charter of Human Rights.

1.1 Personal rights and liberties versus human rights

1.1.1 Terminology

An initial question that is raised by both the terms of reference for this inquiry, and the Act itself, is what terminology should be used. Specifically, the terms of reference[6] and Act both refer to 'personal rights and liberties'.[7] This phrase is not defined in the legislation itself.

Despite the fact the Committee has to date taken a broad view of what is meant by this term (see discussion at 1.1.2, below), some may interpret this terminology to refer to a more limited range of human rights, such as those contained within the International Covenant on Civil and Political Rights (ICCPR), while excluding rights located in other treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This could, inadvertently, lead to some human rights issues not being considered adequately, or at all, in the scrutiny of Bills and regulations in the future. For this reason, PIAC suggests that the phrase 'human rights' should be used instead, particularly as we believe this terminology is more likely to be understood as encompassing a broader range of rights.

Recommendation 1 – Human rights

The term 'personal rights and liberties' should be replaced by the term 'human rights'.

1.1.2 Definition

Irrespective of the term that is employed, PIAC has a more substantive concern that the *Legislation Review Act 1987* does not currently define what is meant by rights and liberties.

As noted by Byrnes, this has not prevented the Committee itself from adopting a wide definition of rights, including reference to:

6 Term of reference (1)(i).
7 For example, section 8A(1)(b)(i).

- '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.'[8]

However, this does not preclude a future Committee from narrowing its focus to a specific sub-set of human rights.

For that reason, PIAC supports an amendment to the Act to include a specific definition of the human rights that the Committee should consider in its role of scrutinising legislation, with the practical definition already in use (as outlined by Byrnes, above) a useful starting point.

Recommendation 2 – Definition of human rights

The Act should be amended to specifically define human rights, as including:

- *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.*

1.1.3 Specific reference to human rights treaties

The Commonwealth *Human Rights (Parliamentary Scrutiny) Act 2011*, which establishes that jurisdiction's equivalent of the NSW Legislation Review Committee, specifically nominates seven international treaties as containing the human rights which that Committee must consider. These are:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Covenant on the Elimination of All Forms of Racial Discrimination (CERD)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- The Convention on the Rights of the Child (CRC), and
- The Convention of the Rights of Persons with Disabilities (CPRD).

PIAC supports enumerating these treaties as part of the amended definition of human rights, above, and/or as part of an amendment to section 8A as providing relevant human rights for consideration by the Committee.

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8 Andrew Byrnes, *"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"* (October 25, 2009), UNSW Law Research Paper No 2009-43, p6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497225

However, as we noted in our submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010:[9]

> There is a concern that several human rights conventions have not been included in the definition, including:
>
> - The Convention relating to the Status of Refugees, opened for signature 28 July 1951;
> - The Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948; and
> - The International Labour Organisation conventions to which Australia is a party.

As a result, we reiterate our view from that submission that any definition 'should include all of the human rights and freedoms contained in all human rights treaties to which Australia is a party. This should include any human rights treaties or conventions to which Australia will become a party in the future.'[10]

Recommendation 3 – Specific reference to human rights treaties

The Act should specifically refer to all human rights treaties to which Australia is a party (the seven specifically referred to in the Commonwealth Human Rights (Parliamentary Scrutiny) Act 2011, plus the Refugee Convention, the Convention against Genocide and ILO Conventions), plus any human rights treaties or conventions to which Australia will become a party in the future.

1.2 Statements of Compatibility

1.2.1 Dialogue model

The process of considering human rights issues under the *Legislation Review Act 1987* appears to be relatively straight-forward – the legislation is introduced into Parliament (section 8A(1)(a)), and is then reviewed, and reported on, by the Committee.

While under section 11 the Committee may call for evidence from a variety of sources, and may request additional information from the Minister or other member who introduced the Bill, the primary site for human rights considerations is at the Committee itself.

This stands in contrast to the model adopted by both Victoria, and the Commonwealth.

In Victoria, the *Charter of Human Rights and Responsibilities Act*:

> requires that any Member of Parliament who introduces a Bill into Parliament must table a statement of compatibility before giving the second reading speech. The statement must state whether in the member's opinion the Bill is compatible with human rights, and if so, how it is compatible, and if not, the nature and extent of any incompatibility.[11]

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9 PIAC, above n 1, p4.

10 Ibid.

11 Source: http://humanrights.vgso.vic.gov.au/legislation-development/developing-leg-policy/statements-compatibility accessed on 27 November 2017.

It even requires that '[i]n the case of a Bill at Cabinet, the submission must have a compatibility statement attached.'[12]

This statement of compatibility is then considered by the Victorian Scrutiny of Acts and Regulations Committee, as part of its overall human rights scrutiny role.

The Commonwealth similarly requires that, for legislation and other regulatory instruments that are disallowable, a statement of compatibility with human rights must be prepared, and submitted with the explanatory memorandum of the legislation.

As with Victoria, this statement of compatibility then forms part of the consideration by the Parliamentary Joint Committee on Human Rights in its role of scrutinising the impact of legislation on human rights, if any.

The theory behind these requirements, for what is described as 'pre-legislative scrutiny', is that the earlier in the process human rights must be considered, the greater the likelihood these concerns will shape the policy and legislation development process – rather than being addressed primarily, or even exclusively, at the parliamentary stage.

It must be acknowledged that the evidence for the efficacy of this theory in practice is contested. Williams and Reynolds suggest that, at the Commonwealth level, pre-legislative scrutiny has not, to date, produced observable benefits:[13]

> These goals [encouraging early and ongoing considerations of human rights issues in the policy and law-making process] have not yet been realised. Indeed, having now completed its fourth year, the major achievements of the regime are difficult to identify. Although in [Statements of Compatibility] and via direct correspondence, Ministers have started justifying their policies through a human rights lens, there is no evidence that this burgeoning 'culture of justification' has in fact led to better laws. On the contrary, there is evidence that recent years have each seen extraordinarily high numbers of rights-infringing Bills passed into law.

On the other hand, Rajanayagam notes that, while there are weaknesses in the current application of pre-legislative scrutiny at the Commonwealth level:[14]

> Most of these issues are easily fixed: where SOCs do not cite foreign and international sources, the departments clearly know they exist, such that citing them is not particularly onerous; and legislation that violates human rights on any reasonable understanding ought to be scrutinised strictly (both in parliamentary committees and in public forums).

And again:[15]

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12 Above n 11.

13 George Williams and Daniel Reynolds, *The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights*, (2016), Monash University Law Review, Vol 41, No 2, p506.

14 Shawn Rajanayagam, *Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act*, (2015) UNSW Law Journal, Volume 38(3), p1070.

15 Ibid p1076.

> What is encouraging is that most of the problems that have been identified are not impossible to remedy. Legislators and bureaucrats must take their HRPS Act obligations more seriously, and the Attorney-General's Department (and perhaps even the Parliamentary Joint Committee on Human Rights) must provide more assistance and training to equip government departments with skills necessary to discharge their obligations.

On balance, PIAC submits that a requirement that Ministers or other MLAs or MLCs who introduce legislation must provide a Statement of Compatibility would be a useful addition to the human rights framework in NSW, especially if the below recommendations, which address some of the problems encountered at Commonwealth level, are also adopted.

Recommendation 4 – Statements of Compatibility

The Legislation Review Act should be amended to require any Minister, MLA or MLC who introduces a Bill or regulation must provide a Statement of Compatibility.

1.2.2 Content of Statements of Compatibility

One of the weaknesses surrounding Statements of Compatibility at the Commonwealth level is the limited guidance provided by the *Human Rights (Parliamentary Scrutiny) Act* in terms of what must be included in these documents.

Sub-section 8(3) of that Act simply states that 'A statement of compatibility must include an assessment of whether the Bill is compatible with human rights.'

While the Commonwealth Attorney-General's Department has provided additional information surrounding what should be included, the lack of legislative force behind this prescription means that adherence to their advice is inconsistent.

In contrast, the Victorian *Charter of Human Rights and Responsibilities Act 200*6 is more prescriptive in terms of what is required in Statements of Compatibility there:

> Section 28(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
> (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of incompatibility prepared under subsection(1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.
> Note
> The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.
> (3) A statement of compatibility must state-
> (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
> (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

These requirements, and especially the need to provide reasoning why particular legislation is, or is not, compatible with human rights, appears far more appropriate as part of a 'dialogue' model.

It is also important that, unlike the Commonwealth legislation the Statement of Compatibility is required to be introduced prior to the Minister or parliamentarian providing the second reading speech on the Bill.

Recommendation 5 – Content of Statements of Compatibility

The Legislation Review Act should require that Statements of Compatibility should include reasons explaining why the legislation is, or is not, compatible with human rights, and that this must be tabled prior to the Minister or parliamentarian giving their second reading speech.

1.3 Parliamentary Procedure

1.3.1 Timing of Scrutiny Reports

One of the major weaknesses of schemes which establish legislative scrutiny of human rights, in NSW and other jurisdictions such as the Commonwealth, Victoria and the ACT, is the timing of the reports that are prepared compared to the timing of parliamentary debates of the legislation that is being scrutinised.

Specifically, there are too many instances of reports being finalised, including those prepared by the Legislation Review Committee, only after the legislation has already been debated and passed by the Parliament itself. This obviously defeats the primary purpose of a legislative human rights scrutiny scheme.

As described by Williams and Reynolds, with respect to the Commonwealth Parliamentary Joint Committee on Human Rights:[16]

> The Committee's effectiveness is being undermined by its delay in producing reports. On 66 occasions so far, the Committee has handed down a final report criticising the human rights impact of a Bill or instrument which, by the time the report was finished, had already been enacted into law.

Similar issues were identified by McNamara and Quilter, in their examination of the parliamentary scrutiny of criminal law bills in NSW, including where the Legislation Review Committee did not report until after some Acts were fully operational.[17]

It should be acknowledged that, in many instances, it is those Bills that are the most controversial that Governments, of all persuasions, have sought to proceed with as a matter of urgency, potentially by-passing the scrutiny of bodies such as the Legislation Review Committee.

However, it is exactly those pieces of legislation that are most likely to raise complex issues of human rights, and therefore would benefit the most as a result of this scrutiny.

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16 George Williams and Daniel Reynolds, above n 13, p501.

17 Luke McNamara and Julia Quilter, *'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in NSW'* (2015) ClCrimJust 9, 27(1).

Therefore, PIAC suggests that it is incumbent on this inquiry to consider and develop proposals to increase the likelihood of such Bills being subject to proper examination.

This could include a change to parliamentary standing orders and/or the *Legislation Review Act* itself, so that in the ordinary course of parliamentary business, bills are not debated unless the Legislation Review Committee has first reported on their human rights implications.

We acknowledge that, in deference to parliamentary sovereignty, there needs to be a process to allow urgent legislation to be considered in exceptional circumstances. In these cases this could be achieved via an explicit procedural vote that debate is permitted to proceed without the final report of the Legislation Review Committee.

However, in these circumstances, this inquiry should consider whether the Committee should be able to provide interim reports and/or advice to inform parliamentary debate, potentially outlining those issues which have already been identified during whatever scrutiny has been able to be performed prior to the debate commencing.

Recommendation 6 – Committee to report prior to parliamentary debate

Parliamentary standing orders and/or the Legislation Review Act should be amended so that, in the ordinary course of business, bills are not debated unless the Legislation Review Committee has provided its report on the bill's human rights implications.

Recommendation 7 – Urgent legislation

Where absolutely necessary, urgent legislation can be considered by the Parliament, in the absence of a report by the Legislation Review Committee, following an explicit procedural vote of that particular chamber. However, consideration should be given to allowing the Legislation Review Committee to provide an interim report to inform urgent debate, including identification of possible human rights issues even if consideration of these issues has not yet been concluded.

1.3.2 Responding to issues raised by the Committee

Another major weakness of legislative scrutiny schemes is the failure of human rights issues raised in Committee reports to be addressed by the parliament during its debate.

McNamara and Quilter found this was a serious issue in NSW:[18]

> Of the 40 criminal law bills in relation to which one or more 'rights and liberties' issues was referred to Parliament by the Committee, the Committee's comments were expressly referred to in only 14 bill debates. In relation to a further eight bills, reference was made to a rights and liberties issue, without reference to the Committee. There was no reference to the Committee or its concerns in 18 of the 40 criminal law bills examined. This means the for 45 per cent of the bills for which the Committee deemed the potential 'rights and liberties' infringement to be sufficiently serious to warrant a referral to Parliament, no Member of Parliament mentioned the Committee's concerns.

[18] Luke McNamara and Julia Quilter, above n 17.

Williams and others have reported similar issues at the Commonwealth level.

This failure to even address the potentially serious findings of the Legislation Review Committee during subsequent parliamentary debate is a serious limitation on the effectiveness of the 'dialogue' model. In this instance, there can be no dialogue between the Committee and the parliament where one of the participants refuses to engage.

As with the issue of urgent legislation, discussed above, there are limits in terms of how to address this issue without interfering with the sovereignty of the chamber itself. However, PIAC suggests that either standing orders or the *Legislation Review Act* be amended to require the Minister, MLA or MLC who introduces legislation to address any concerns raised by the Legislation Review Committee during the second reading debate.

Recommendation 8 – Minister, MLA or MLC to respond to issues raised in second reading debate

Parliamentary standing orders or the Legislation Review Act should be amended to require the Minister, MLA or MLC who introduces legislation to respond.

1.4 Miscellaneous Issues

The following are a range of additional issues surrounding the current *Legislation Review Act* and/or to support the better implementation of parliamentary scrutiny of human rights in NSW.

1.4.1 Resources

If the previous recommendations are adopted in full, the role of the Legislation Review Committee will be significantly expanded.

Given the important functions of the Committee, both current and proposed, it is essential that the Committee, and its secretariat, are provided with sufficient resources to allow it to carry out all of its functions in a thorough and timely manner. Therefore, it is likely that the Committee will require additional funding, and especially access to human rights specialists, as a consequence of this review.

Recommendation 9 – Resourcing

Given the expanded functions that are proposed for the Committee and its secretariat, it is recommended that Parliament allocate increased funding and resources, including expanded access to human rights specialists.

1.4.2 Removal of 'impact on the business community'

The primary functions of the *Legislation Review Act* currently, as outlined in Section 8A, include scrutinising Bills with respect to:

- Trespasses on personal rights and liberties

- Making rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
- Making rights, liberties or obligations unduly dependent upon non-reviewable decisions
- Inappropriately delegating legislative powers
- Insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

Section 9 sets out a similar list of functions with respect to regulations, although it also adds 'that the regulation may have an adverse impact on the business community' (sub-section 9(1)(b)(ii).

This already seem like a strange fit when sitting alongside other functions which relate more directly to either human rights or administrative or constitutional principles.

It would be even more of an outlier if the above recommendations are adopted, and the Committee becomes a more human rights-oriented institution. Consequently, consideration should be given to removing this scrutiny function from the *Legislation Review Act*, and potentially relocating it with another parliamentary committee or process.

Recommendation 10 – Remove 'impact on the business community' from section 9

Consideration should be given to removing sub-section 9(1)(b)(ii) of the Legislation Review Act, which requires the Committee to consider the impact of regulations on the business community, and relocation of this requirement to another parliamentary committee or process.

1.4.3 Ability to undertake inquiries on substantive human rights issues

As part of a broader re-orienting of the Committee towards a more human rights-specific body, PIAC believes it would also be useful to consider the issue of allowing it to undertake additional inquiries on substantive human rights issues.

Based on the NSW parliament website, it appears that in the past 16 years (since the 2001 Inquiry into *A NSW Bill of Rights*, discussed below), the Legislation Review Committee has only undertaken three such inquiries, all referred in 2006:

- The Right to Silence
- Public Interest and The Rule of Law, and
- Strict and Absolute Liability.

It does not appear that there have been any similar inquiries in the past decade. Nor is there any explicit ability for the Attorney-General or the NSW Parliament to make such referrals to the Committee in the *Legislation Review Act* itself.

This stands in contrast to the functions of the Parliamentary Joint Committee on Human Rights at the Commonwealth level.

The legislation establishing that body grants a right to the Attorney-General to refer these issues to that Committee:

> 7 Functions of the Committee.
> The Committee has the following functions:
> (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the parliament on that matter.

This function has already been exercised five times in the six years of operation of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), including:

- Freedom of speech in Australia
- Review of *Stronger Futures in the Northern Territory Act 2012* (conducted in 2016)
- Examination of the *Stronger Futures in the Northern Territory Act 2012* (conducted in 2013)
- Examination of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*
- Examination of the *Social Security Amendment (Fair Incentives to Work) Act 2012*

PIAC submits that the NSW *Legislation Review Act* should have a similar function. However, we do not believe that it should be restricted solely to matters referred to it by the Attorney-General. In an effort to increase both the bipartisanship of the Committee, and its authority within the Parliament, it should also be able to receive referrals from either the Legislative Assembly or the Legislative Council.

Recommendation 11 – Ability to undertake inquiries on substantive human rights issues

The Legislation Review Act should be amended to allow it to undertake inquiries on substantive human rights issues, by referral from any of:

- *The Attorney-General*
- *The Legislative Assembly, or*
- *The Legislative Council.*

1.4.4 *Interpretation Act 1987* amendment

One of the related matters that should be dealt with as part of this inquiry relates to the 2001 inquiry, by the NSW Standing Committee on Law and Justice, that examined the question of *A NSW Bill of Rights*, as a result of which the Legislation Review Committee was granted its current functions.

While that Committee did not recommend the introduction of a Bill of Rights, it did recommend an amendment to the NSW *Interpretation Act 1987*, to better ensure judicial consideration of human rights.

Existing section 34(2)(d) of that Act allows courts to consider 'any treaty or other international agreement that is referred to *in the Act*' [emphasis added] as relevant material in the interpretation of Acts or statutory rules. However, it does not explicitly refer

to a broader ability to consider all relevant international human rights instruments as part of this function, despite this being the understood common law position.

As a result, the 2001 Committee recommended that:[19]

> The Attorney-General amend s34 of the *Interpretation Act 1987* (NSW) to confirm the common law position that judges are able to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.

However, despite this recommendation, s34(2)(d) of the NSW *Interpretation Act* remains un-amended, 16 years later. PIAC submits that the current inquiry should serve as a reminder to the NSW Parliament of this earlier recommendation, and an opportunity to better ensure human rights are considered in NSW.

Recommendation 12 – Amendment to NSW Interpretation Act 1987

Recommendation 2 of the 2001 Inquiry into A NSW Bill of Rights should be implemented, namely amending section 34(2)(d) of the Interpretation Act to allow courts to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.

1.5 A Charter of Rights

There is one final issue that is closely related to the current inquiry, and should at least be raised as part of its deliberations, and that is the possible introduction of a Charter of Rights, or Human Rights Act, in NSW.

This inquiry is considering how to improve the *Legislation Review Act 1987*, including how to better ensure the parliamentary scrutiny of human rights in both bills and delegated legislation.

As we have seen above, PIAC believes that there are a range of possible improvements to the operation of the Act that would help the Committee to better achieve these aims.

However, there are structural limitations on the effectiveness of a purely-parliamentary based approach to these issues.

These are articulated by Williams and Reynolds in their review of first four years of the *Human Rights (Parliamentary Scrutiny) Act 2011* which, even though they relate to the Commonwealth Joint Committee on Human Rights, have relevance to the Legislation Review Committee:[20]

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19 NSW Parliament Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), recommendation 2, p139, available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5231/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf

20 George Williams and Daniel Reynolds, above n 13, 507.

> In a system in which Parliament, or at least the lower house, remains weak with respect to the executive, it is hard to see any parliamentary based scheme for human rights protection producing major alterations to executive proposals for new laws. It is simply not realistic in such a system to expect that a parliamentary scrutiny regime will overcome the power imbalance between these two arms of government.
>
> In addition, in the absence of independent judicial supervision of Parliament's work, the incentives to comply with the regime are few. It was for precisely this reason that a Human Rights Act was the primary recommendation of the National Human Rights Consultation in 2009. By giving the judiciary a role to play, the responsibility of ensuring compliance with human rights would no longer fall exclusively on the branch of government most frequently charged with breaching those rights. The evidence of the regime's operation to date suggests that this recommendation should be revisited, and that the parliamentary scrutiny regime be incorporated within a national Human Rights Act that combines parliamentary deliberation with appropriate judicial protection for human rights.

PIAC is perhaps not as critical in our assessment of parliamentary scrutiny regimes, however we share their concerns around the power imbalance between the executive and the parliament, and support their conclusion: that the introduction of a Human Rights Act, or Charter of Rights, would provide additional recognition of, and protection to, human rights (in this case, in NSW).

Recommendation 13 – A Charter of Rights

Noting the limitations of parliamentary-based human rights scrutiny regimes, further consideration be given to the creation of a Charter of Rights, or Human Rights Act, in NSW.