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Comparative approaches to legislative scrutiny

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Biographical details for Mr Michael Johnsen MP

Michael was first elected to the NSW Parliament at the March 2015 General Election as the Member for Upper Hunter after the retirement of long serving member the Hon. George Souris MP. He was elected as Chair of the NSW Parliament's Legislation Review Committee soon after entering Parliament, and – without shame or acclaim - boasts the fact that he brings no law experience to the role but rather, relies on the technical advice of the committee members and staff who practice or have practised law and relates that to practical outcomes for the general population and how most people might see legislative and regulatory instruments affecting their day to day lives.

Prior to that, Michael was Mayor of Upper Hunter Shire Council for four years and has been a councillor since September 2008.

Michael is a former dairy farmer turned financial planner. Michael owned and operated a successful financial planning practice for almost 20 years out of a 25 year career in financial planning.

Upper Hunter is the fifth largest electorate in NSW and very diverse in its geography, demography and industry and is the economic powerhouse of mining and agriculture in NSW.

Michael lives in the Horse Capital of Australia, Scone and the term "World class wines, mines and equines" is one he uses often to remind people just how important the Upper Hunter is to not only NSW but the National economy.



Introduction and overview of presentation

Thank you for allowing me to present today on the topic of comparative approaches to legislative scrutiny. My presentation will look at aspects of Australian and international scrutiny of legislation committees for similarities and differences and possible advantages and disadvantages. I will also highlight a couple of challenges that I think scrutiny committees face.

I am currently the Chair of the New South Wales Legislation Review Committee. While my paper has been prepared with reference to primary material and academic works, it also includes my own observations from the perspectives of a Chair of a scrutiny of legislation committee, a Member of New South Wales Parliament and a member of the community.

During question time, I would be delighted to hear any further or different insights from Members or staff working for scrutiny of legislation committees. I have only been a Member of Parliament and a Chair of the Legislation Review Committee for a bit over a year so I am eager to learn from other jurisdictions. Of course, I would also be happy to take any questions about my paper.

Background to scrutiny of legislation committees

I would like to start by considering some key background issues:

1. What is a scrutiny of legislation committee?
2. Why do committees of this nature exist?
3. When did committees of this kind first appear in Australia?

What is a scrutiny of legislation committee?

Professor Bryan Horrigan has said that, at a basic level, scrutiny of legislation involves 'evaluation of proposed or existing laws against designated benchmarks for good law-making processes and outcomes.'¹

Professor David Feldman, former legal advisor to the United Kingdom's Joint Committee on Human Rights, has also described the scrutiny of legislation process as reviewing and reporting on legislation against published criteria and then leaving it to the Parliament to determine what action, if any, to take on a Committee's report.²

These broad definitions certainly describe the work of the New South Wales Legislation Review Committee and I think it is fair to say they also would apply to the other Australian and international committees that I will refer to today.

Why do committees of this nature exist?

The role of scrutiny of legislation committees has been described by various academics and other commentators.

¹ B Horrigan, 'Commonalities, intersections, and challenges for the scrutiny and interpretation of legislation in Trans-Tasman jurisdictions and beyond,' *Australasian Parliamentary Review*, Vol 27(2), Spring 2012, p 5.

² D Feldman, 'Parliamentary scrutiny of legislation and human rights,' [2002] *Public Law* 323, pp 332-333.



Professor Feldman argued that the ‘object of scrutinising legislation is to keep in check the tendency of governments to extend their powers, or the liabilities of citizens, too greatly, or for unacceptable purposes, at the expense of individual freedom.’³

Similarly, Professor Luke McNamara and Ms Julia Quilter suggested that the deliberations and insights of scrutiny committees ‘might curb (intended and unintended) infringements of rights and liberties arising from parliamentary law-making.’⁴

So scrutiny of legislation committees can perform a very important function in bringing to the Parliament’s attention potential infringements of rights and liberties and other matters of propriety.

When did committees of this kind first appear in Australia?

The first legislative scrutiny committee in Australia was a committee scrutinising delegated legislation, the Commonwealth Senate Standing Committee on Regulations and Ordinances, which began operating in 1932.⁵ South Australia’s Joint Committee on Subordinate Legislation was the next committee of this kind to be created in 1938. Other jurisdictions slowly started to create similar committees for scrutinising delegated legislation:

- Victoria – 1956
- New South Wales – 1960
- Tasmania – 1969
- Northern Territory – 1974
- Queensland – 1975
- Western Australia – 1976
- Australian Capital Territory – 1989.⁶

However, it wasn’t until 1981 that the first parliamentary committee in Australia to scrutinise Bills was created, the Commonwealth Senate Standing Committee for the Scrutiny of Bills.⁷ Scrutiny of Bills committees were also established in the following other Australian jurisdictions:

- Australian Capital Territory – 1989
- Victoria – 1992

³ D Feldman, ‘Parliamentary scrutiny of legislation and human rights,’ [2002] *Public Law* 323, pp 336.

⁴ L McNamara, J Quilter, ‘Institutional influences on the parameters of criminalisation: Parliamentary scrutiny of criminal law bills in New South Wales,’ *Current issues in criminal justice*, Volume 27, Number 1, July 2015, p 23.

⁵ L Grenfell, “An Australian spectrum of political rights scrutiny: ‘Continuing to lead by example?’” (2015) 26 *Public Law Review* 19, p 21; S Argument, ‘Legislative scrutiny in Australia: Wisdom to export?’ (2011) 32 *Statute Law Review*, 9 June 2011, p 2.

⁶ L Grenfell, “An Australian spectrum of political rights scrutiny: ‘Continuing to lead by example?’” (2015) 26 *Public Law Review* 19, p 24; S Argument, ‘Legislative scrutiny in Australia: Wisdom to export?’ (2011) 32 *Statute Law Review*, 9 June 2011, p 5.

⁷ L Grenfell, “An Australian spectrum of political rights scrutiny: ‘Continuing to lead by example?’” (2015) 26 *Public Law Review* 19, p 20; S Argument, ‘Legislative scrutiny in Australia: Wisdom to export?’ (2011) 32 *Statute Law Review*, 9 June 2011, pp 5-6.



- Queensland – 1995
- New South Wales – 2002.⁸

What are some of the different committee structures?

Scrutiny of legislation committees in Australia and other comparable countries adopt various structures for carrying out their functions. Some key features of these different structures include:

- Separate committees for scrutinising Bills, delegated legislation and compatibility of legislation with human rights – such as the Commonwealth of Australia and the United Kingdom
- Separate committees for scrutinising Bills, delegated legislation and a committee dedicated to examine uniform legislation – such as Western Australia
- A single committee which reviews both Bills and delegated legislation – such as New South Wales
- A single committee for scrutinising Bills and delegated legislation with an additional function to scrutinise Bills against human rights legislation – such as the Australian Capital Territory and Victoria
- A series of portfolio committees which review Bills and delegated legislation – such as Queensland
- A single committee which only reviews delegated legislation – such as South Australia, the Northern Territory, Tasmania and New Zealand
- A single committee which reviews delegated legislation, including in relation to its compatibility with Charters and Bill of Rights – such as Canada.

Comments and observations on different committee structures

From my perspective, a key advantage of having a dedicated committee to scrutinise legislation is that it can develop specialist expertise in this particular role or function. This should hopefully lead to a certain level of consistency in approaching the same or similar issues in the future.

If one particular committee is responsible for considering legislation (either Bills, delegated legislation or both), it can potentially develop a body of research over time relating to different issues that have arisen and the approach taken to those issues. This may also assist in identifying, understanding and responding to potential issues more quickly and easily in the future.

The Commonwealth style of structure, with separate committees for reviewing Bills, delegated legislation and human rights obligations could allow for an even greater degree of

⁸ S Argument, 'Legislative scrutiny in Australia: Wisdom to export?' (2011) 32 *Statute Law Review*, 9 June 2011, p 6.



specialisation. By having separate scrutiny committees with particular specialities, you could also have additional staff or experts to assist each committee.

I question whether there could be an issue regarding consistency in interpreting, applying and reporting on the scrutiny principles where you have different committees performing scrutiny functions using the same principles. I would be interested to know from my colleagues in Queensland whether this issue has arisen in your new committee structure.

By contrast, I think the portfolio committee structure for scrutinising legislation can have an advantage in allowing each committee to develop expertise in legislation that relates to its subject area. In New South Wales, we sometimes come across potential issues where it would be helpful to have a more comprehensive understanding of the portfolio to better understand the relevant context and possible scope or ramifications of the issue.

Some jurisdictions could be seen as lacking if their relevant scrutiny committee only reviews delegated legislation and not Bills. However, it can be difficult to make a judgment call on this without considering whether the jurisdiction in question has other processes whereby scrutiny principles are applied to Bills, such as before they are introduced into Parliament. In some cases, it may also be unclear as to the level of consultation, collaboration and advice that may have taken place between government departments and other organisations, but not the public, before a Bill is finalised.

Likewise, one could argue that scrutiny committees can play a particularly important role with respect to delegated legislation. This is because Bills will usually be subject to rigorous debate in the Parliament itself. A Bill may be referred to a parliamentary committee for further and more detailed consideration. Bills that have potential rights and liberties issues are also likely to be subject to public debate, such as in the media or by advocacy organisation that may make submissions to the Government.

In contrast, delegated legislation rarely attracts the same visibility and debate either in the Parliament itself or the broader community. Generally, in order to trigger more substantial debate about a Regulation, a Member will need to move a motion in Parliament to have a Regulation disallowed. In my view, scrutiny committees can therefore play a particularly important function in drawing the Parliament's attention to possible issues in delegated legislation which may have a higher chance of otherwise remaining unnoticed.

Comparison of scrutiny principles

There are a lot of similarities between the language used in Australian Parliaments with respect to defining the scrutiny principles. I would like to talk about the origins of the scrutiny principles in Australia and provide some examples of how those original principles have been adapted in several jurisdictions.

Commonwealth

Associate Professor Grenfell has referred to the original principles from the Commonwealth Senate Standing Committee on Regulations and Ordinances as the 'cornerstone principles'



which form the basis of models adopted by other Australian jurisdictions.⁹ These kinds of principles are not wholly unique to Australia. Scrutiny committees overseas, such as the Canadian Standing Joint Committee for the Scrutiny of Regulations, also have broadly similar criteria to us.¹⁰

The Commonwealth Senate Standing Committee on Regulations and Ordinances is presently required to examine delegated legislation to ensure that:

- it is in accordance with the statute;
- it does not trespass unduly on personal rights and liberties;
- it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- it does not contain matter more appropriate for parliamentary enactment.¹¹

The scrutiny principles which the original Commonwealth committee relied on in the 1930s have changed little since that time.¹²

Some of the language used probably looks very familiar to Members and Staff from scrutiny committees in other jurisdictions.

The Senate Standing Committee for the Scrutiny of Bills has adopted broadly similar principles. That Committee examines all Bills which come before Parliament and reports to the Senate on whether such Bills:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.¹³

In contrast, the functions of the Parliamentary Joint Committee on Human Rights include, among other things, examining Bills for Acts and legislative instruments that come before

⁹ L Grenfell, "An Australian spectrum of political rights scrutiny: 'Continuing to lead by example?'" (2015) 26 *Public Law Review* 19, p 24.

¹⁰ Parliament of Canada, *Standing Joint Committee for the Scrutiny of Regulations: About*, viewed 3 June 2016, <<http://www.parl.gc.ca/Committees/en/REGS/About>>.

¹¹ Parliament of Australia Senate, *Standing Orders*, Standing Order 23, viewed 25 May 2016, <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standing-orders/b00/b05#standing-order_c05-023>.

¹² L Grenfell, "An Australian spectrum of political rights scrutiny: 'Continuing to lead by example?'" (2015) 26 *Public Law Review* 19, p 24.

¹³ Parliament of Australia Senate, *Standing Orders*, Standing Order 24, viewed 25 May 2016, <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standing-orders/b00/b05#standing-order_c05-024>.



Parliament, for compatibility with human rights and reporting to the Parliament on any issues.¹⁴

'Human rights' are taken to refer to the rights and freedoms recognised in the international human rights instruments which Australia is a party to:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities.¹⁵

New South Wales

The Legislation Review Committee in New South Wales has functions with respect to Bills and delegated legislation.¹⁶

The scrutiny principles that the NSW Legislation Review Committee applies to Bills are similar to those adopted by the Commonwealth Senate Standing Committee for the Scrutiny of Bills.¹⁷

However, Associate Professor Grenfell believes the mandate of the Legislation Review Committee is wider than that of any other Australian scrutiny committee, based on the Committee's public interpretation of its role.¹⁸

In 2004, the Legislation Review Committee publicly reported that, when exercising its scrutiny functions, it takes into account:

- the common law, as developed by the courts;
- statutory rights, liberties and traditions;
- international conventions ratified by Australia;
- rights recognised in other jurisdictions;
- academic and public debate; and
- the Committee Members' views.¹⁹

¹⁴ See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹⁵ See section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹⁶ See Part 3 of the *Legislation Review Act 1987* (NSW).

¹⁷ See section 8A of the *Legislation Review Act 1987* (NSW).

¹⁸ L Grenfell, "An Australian spectrum of political rights scrutiny: 'Continuing to lead by example?'" (2015) 26 *Public Law Review* 19, pp 31-32.

¹⁹ New South Wales Legislation Review Committee, *Operation, issues and future directions September 2003 – June 2004*, report no 1, Parliament of New South Wales, 24 June 2004, p 3.



While the composition of the Committee is now different from 2004, we certainly do apply a broad interpretation to our scrutiny principles and are happy to consider possible new sources of rights and liberties which we may not have considered previously.

Queensland

Queensland is unique not only with respect to approaching scrutiny of legislation through a series of portfolio committees but also in its detailed list of scrutiny principles.

One of the key functions of the committees with respect to Bills and subordinate legislation is to consider the application of fundamental legislative principles to the legislation, among other things.²⁰

Fundamental legislative principles are those which 'underlie a parliamentary democracy based on the rule of law,' and include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.²¹

The Queensland scrutiny principles provide quite detailed analysis of how to determine whether legislation has sufficient regard to rights and liberties and the institution of Parliament. While this includes reference to the cornerstone-type principles, the Queensland terms of reference also refer to certain specific rights such as whether legislation:

- does not reverse the onus of proof in criminal proceedings without adequate justification;
- confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer;
- provides appropriate protection against self-incrimination;
- provides for the compulsory acquisition of property only with fair compensation; and
- has sufficient regard to Aboriginal tradition and Island custom.²²

Victoria

Victoria has one Committee which examines all Bills and delegated legislation. The Scrutiny of Acts and Regulations Committee's (the SARC) major areas of responsibility include the scrutiny of Bills and regulations and the review of redundant, unclear or ambiguous legislation. Three main pieces of legislation govern the functions of the SARC:

- *Parliamentary Committees Act 2003*
- *Charter of Human Rights and Responsibilities Act 2006*
- *Subordinate Legislation Act 1994*

Like similar committees, the *Parliamentary Committees Act 2003* adopts the cornerstone principles for the scrutiny of Bills and regulations.²³ In addition, and distinct from some other

²⁰ See section 93(1) of the *Parliament of Queensland Act 2001* (Qld).

²¹ See section 4 of the *Legislative Standards Act 1992* (Qld).

²² See section 4 of the *Legislative Standards Act 1992* (Qld).

²³ See section 17 of the *Parliamentary Committees Act 2003* (VIC)



jurisdictions within Australia, the *Parliamentary Committees Act 2003* (VIC) requires the SARC to consider if any Bill is incompatible with the human rights set out in the Victorian *Charter of Human Rights and Responsibilities*.

The Victorian *Charter of Human Rights and Responsibilities* (the Charter) contains a number of human rights that Parliament specifically seeks to protect and promote such as freedom from movement; freedom of thought, conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association, just to name a few.

In addition to the above scrutiny of rights through a dedicated Committee, the Executive must also examine a Bill against the rights contained in the Charter. The Charter provides that a Member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared and laid before the House.²⁴ This is similar to what occurs in the United Kingdom and New Zealand. Under the UK *Human Rights Act*, Ministers must report to Parliament, at the time a Bill is introduced, on any human rights implications that arise from the Bill. Similarly, New Zealand's *Bill of Rights Act* requires the Attorney General to report to Parliament on any provision in a bill that appears to be inconsistent with any rights and freedoms in the Act.

Of note, the United Kingdom has an additional level of scrutiny of human rights through the Joint Committee on Human Rights which is tasked with scrutinising every Bill introduced into parliament for its compatibility with human rights.

Western Australia

In Western Australia scrutiny of bills and delegated legislation is split over three Committees:

- the Delegated Legislation Committee
- the Legislation Committee
- the Uniform Legislation and Statutes Review Committee

The cornerstone principles are not formally adopted for each of the Committees; however the Delegated Legislation Committee, in its consideration of a statutory instrument, is to inquire into whether the instrument has no unintended effect on any person's existing rights or interests.²⁵

Australian Capital Territory

The Standing Committee on Justice and Community Safety in the Australian Capital Territory adopts the cornerstone-type of principles for scrutinising Bills and subordinate legislation. However, similar to Victoria, the Committee is also required to report to the Legislative Assembly about human rights issues raised by Bills pursuant to the Australian Capital Territory's *Human Rights Act 2004*.²⁶

²⁴ See section 28 of the *Charter of Human Rights and Responsibilities Act 2006*

²⁵ See Schedule 1 of the WA Legislative Council Standing Orders

²⁶ Australian Capital Territory Standing Committee on Justice and Community Safety, *Resolution of appointment*, 27 November 2012, viewed 6 May 2016, <http://www.parliament.act.gov.au/__data/assets/pdf_file/0008/416834/Resolution_of_appointment.pdf>.



The *Human Rights Act 2004* includes both civil and political rights and economic, social and cultural rights.²⁷ The Act also notes that it is not exhaustive of the rights an individual may have under domestic or international law.²⁸ Some examples of civil and political rights include:

- recognition and equality before the law;
- protection from torture and cruel, inhuman or degrading treatment;
- peaceful assembly and freedom of association;
- particular rights relating to criminal proceedings such as the right to be tried without unreasonable delay;
- protection of the cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities.²⁹

Similar to the Australian Capital Territory, the Canadian Standing Joint Committee for the Scrutiny of Regulations reports on whether any regulation or statutory instrument is not in conformity with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights.³⁰

New Zealand

New Zealand's Regulation Review Committee has five main functions concerning regulations which in summary include:

- the examination of all regulations
- consideration of draft regulations referred to the committee by a Minister
- consideration of provisions in Bills which concern regulations, such as regulation-making powers
- inquiring into any matter relating to regulations; and
- investigating complaints about the operation of regulations.³¹

The New Zealand Parliament's Standing Orders specify the grounds upon which the Regulation Review Committee must consider when performing its functions which include, amongst others, the cornerstone principles. Other grounds include that the regulation:

- appears to make some unusual or unexpected use of the powers conferred by the empowering statute
- excludes the jurisdiction of the courts without explicit authorisation; and
- is retrospective where this is not expressly authorised by the empowering statute.

²⁷ See section 5 of the *Human Rights Act 2004* (ACT).

²⁸ See section 7 of the *Human Rights Act 2004* (ACT).

²⁹ See generally Part 3 of the *Human Rights Act 2004* (ACT).

³⁰ Parliament of Canada, *Standing Joint Committee for the Scrutiny of Regulations: About*, viewed 3 June 2016, <<http://www.parl.gc.ca/Committees/en/REGS/About>>.

³¹ See New Zealand Parliament Standing Orders 318



The Regulations Review Committee is mainly concerned with the scrutiny of regulations rather than bills. However, as noted above, Bills are subject to scrutiny against New Zealand's *Bill of Rights Act*. The *Bill of Rights Act* requires the Attorney General to report to Parliament on any provision in a bill that appears to be inconsistent with any rights and freedoms in the Act.

Comments and observations on different approaches to scrutiny principles

It is interesting to note that most Australian jurisdictions have adopted similar cornerstone principles with respect to scrutinising legislation. While there are certainly differences between the language used in the terms of reference for different committees, there are still broad similarities.

The Commonwealth scrutiny of legislation coverage is obviously very comprehensive given that it covers Bills, delegated legislation and compatibility of legislation with human rights.

Although other jurisdictions may not necessarily have a dedicated scrutiny committee in relation to human rights obligations, these issues are still often scrutinised in a different kind of way. For example, the Australian Capital Territory's committee is required to report to the Legislative Assembly about human rights issues raised by Bills under the *Human Rights Act 2004 (ACT)*.³² That Act specifically notes that it is not exhaustive of the rights an individual may have under domestic or international law.³³ As such, one could arguably take an expansive view with respect to human rights.

In New South Wales, although our terms of reference do not specifically refer to Australia's international human rights obligations, our committee nevertheless interprets our mandate broadly and considers these kind of rights in any case.

The Queensland scrutiny principles also refer to not only the cornerstone principles but also a number of specific rights.

While the exact wording of the scrutiny principles used in each Australian jurisdiction is different, and some are more prescriptive than others, I believe ultimately there are more similarities than differences between us in terms of the broad issues which we are considering when reviewing legislation.

Examples of other challenges

I would now like to talk about a couple of challenges that the New South Wales Legislation Review Committee grapples with, which I think some other scrutiny committees may relate to. These challenges are:

- tight timeframes and other competing demands; and
- determining when it is reasonable to limit human rights.

³² Australian Capital Territory Standing Committee on Justice and Community Safety, *Resolution of appointment*, 27 November 2012, viewed 6 May 2016, <http://www.parliament.act.gov.au/__data/assets/pdf_file/0008/416834/Resolution_of_appointment.pdf>.

³³ See section 7 of the *Human Rights Act 2004 (ACT)*.



Tight timeframes and other competing demands

Back in 2007, research by Simon and Carolyn Evans found that scrutiny committee members found it particularly difficult to secure sufficient time to dedicate to this work.³⁴

I think many of us who are members or staff of scrutiny committees are still grappling with this problem today.

Professor David Feldman has previously highlighted that scrutiny of legislation is a part time activity for parliamentarians.³⁵

Parliamentarians have roles and responsibilities relating to their constituents and the broader community including the media, responsibilities to their Party (if they are a member of a political party) and work in the Parliament itself. Staff of scrutiny committees may also be balancing other responsibilities. In New South Wales, the staff of the Legislation Review Committee, like many Members of Parliament, are also balancing work on at least one other parliamentary committee. For scrutiny committees that obtain advice from external consultants, those consultants would normally have other competing demands on their time.

I would like to use my own jurisdiction as an example of this time pressure issue.

In New South Wales, the Legislation Review Committee is required to consider all Bills introduced in Parliament. I will briefly describe the process for introducing a Bill into New South Wales Parliament.

- Members firstly give notice of their intention to introduce a Bill. This is usually published in the relevant business and notice papers of the House.
- On a subsequent occasion, the Minister or Member will move a motion to introduce the Bill and the first and second readings of the Bill generally take place at the same time.
- After the second reading speech, debate on the Bill is usually adjourned for five clear calendar days,³⁶ unless Standing Orders are suspended and the Bill proceeds through its remaining stages straight away, the ramifications of such I will turn to shortly.

As soon as a Bill is introduced into Parliament, the staff and I commence consideration of the Bill immediately with a view to producing a report for the Committee to deliberate on.

³⁴ C Evans, S Evans, *Australian Parliaments and the protection of human rights*, Papers on Parliament No. 47, July 2007, viewed 19 May 2016,
<http://www.aph.gov.au/~/link.aspx?_id=8B6C280930C4453C92CA146B82B01CE6&_z=z>.

³⁵ D Feldman, 'Parliamentary scrutiny of legislation and human rights,' [2002] *Public Law* 323, pp 324-328.

³⁶ For a brief explanation of the legislative process in New South Wales see Parliament of New South Wales, *Legislative process explained*, viewed 8 June 2016,
<<https://www.parliament.nsw.gov.au/bills/pages/legislative-process-explained.aspx>>.



New South Wales Parliament usually sits on Tuesdays to Thursdays for around twenty or so weeks a year. This often occurs in blocks of two or three back-to-back sitting weeks. This is a particular challenge for the Legislation Review Committee as Bills may be introduced right up until the Thursday of a sitting week.

If the following week is also a sitting week then the Committee would usually meet on the Tuesday of that week. At our meeting, we finalise our report on the Bills we have reviewed for that past week and table the report later that day. The report, known as the Legislation Review Digest, also contains any comments the Committee has made on delegated legislation since the Committee's last report. As such, Committee Members and staff often work to very tight deadlines as we regularly only have several days to consider and report on Bills. The Committee usually has a bit longer to consider delegated legislation – fifteen sitting days.³⁷

The New South Wales Parliament can pass a Bill even if the Committee has not reported on it yet.³⁸ However, the Committee aims to consider and report on all Bills before they are passed.

As mentioned above, occasionally the Legislation Review Committee cannot comment on a Bill before it is passed as it may have been declared urgent. In such cases, the Standing Orders would be suspended so that debate on the Bill does not have to wait for five clear calendar days.³⁹ The often short timeframes for scrutiny committees to consider and report on Bills has also been noted by other authors and committees.⁴⁰ For example, at the last Scrutiny of Legislation Conference in 2011, the Jurisdiction Report from the Australian Capital Territory's Standing Committee on Justice and Community Safety noted that reporting time constraints have been an issue for that committee over the years as it is quite common for Bills to be introduced in one sitting period and debated in the next.⁴¹

As Carolyn and Simon Evans have noted, effective scrutiny requires time for analysis and deliberation.⁴² Ideally, one has time to carry out adequate research into the relevant issues and ask questions of the relevant Ministers or Departments.

Some jurisdictions have scope for longer timeframes for reporting. This can allow for more detailed analysis. For example, in Queensland the portfolio committees can potentially have six months from the date a Bill is referred to them to report.⁴³ However, I note that the

³⁷ See section 9 of the *Legislation Review Act 1987* (NSW) and section 41 of the *Interpretation Act 1987* (NSW).

³⁸ See section 8A of the *Legislation Review Act 1987* (NSW).

³⁹ For a brief explanation of the legislative process in New South Wales see Parliament of New South Wales, *Legislative process explained*, viewed 8 June 2016, <<https://www.parliament.nsw.gov.au/bills/pages/legislative-process-explained.aspx>>.

⁴⁰ See for example, C Evans, S Evans, *Australian Parliaments and the protection of human rights*, Papers on Parliament No. 47, July 2007, viewed 19 May 2016, <http://www.aph.gov.au/~/link.aspx?_id=8B6C280930C4453C92CA146B82B01CE6&_z=z>.

⁴¹ Australian Capital Territory Standing Committee on Justice and Community Safety, *Jurisdiction report*, Australian-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p 2.

⁴² C Evans, S Evans, *Australian Parliaments and the protection of human rights*, Papers on Parliament No. 47, July 2007, viewed 19 May 2016, <http://www.aph.gov.au/~/link.aspx?_id=8B6C280930C4453C92CA146B82B01CE6&_z=z>.

⁴³ Parliament of Queensland, *Standing Orders of the Legislative Assembly*, Standing Order 136.

Queensland Parliament's Standing Orders also provide that a committee or the House may fix an alternative reporting timeframe.⁴⁴ So a six month reporting timeframe is certainly not guaranteed. However, where there is scope for a longer timeframe to report on a Bill, a committee's report may be informed by broader evidence, such as submissions from the community and evidence from public hearings. This kind of evidence is not always possible to obtain or adequately analyse in a tighter timeframe.⁴⁵

Determining when it is reasonable to limit rights and liberties

The Honourable Sir Gerard Brennan said in his paper at the last Scrutiny of Legislation Conference that it is the role of the Parliament to ensure that enacted laws do not infringe on rights and liberties without a 'compelling necessity to protect the common good.'⁴⁶

A particular challenge for scrutiny committees is deciding the circumstances in which it is appropriate to limit a right or other liberty.

Some jurisdictions have their own guidance. For example, section 28 of the *Human Rights Act 2004* in the Australian Capital Territory says that human rights may be 'subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.' That section provides some factors to consider in determining whether a limit is reasonable in the circumstances:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose;
- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Canadian Charter of Rights and Freedoms has a similar broad statement with respect to limits on rights and freedoms. It says rights and freedoms should be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'⁴⁷

The Commonwealth Parliamentary Joint Committee on Human Rights has prepared its own guidance in its *Guide to Human Rights*. That publication highlights that human rights law recognises reasonable limits may be placed on most rights and freedoms apart from absolute rights, such as the right not to be subject to torture, or cruel, inhuman or degrading

⁴⁴ Parliament of Queensland, *Standing Orders of the Legislative Assembly*, Standing Order 136.

⁴⁵ See for example a report which has been informed by submissions and evidence from public hearings, Queensland Legal Affairs and Community Safety Committee, *Counter-Terrorism and Other Legislation Amendment Bill 2015*, Report no. 13, Parliament of Queensland, November 2015. Note that this Committee had less than the default period of six months to review this particular Bill.

⁴⁶ G Brennan, *Scrutiny's role in the rule of law*, paper presented at Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p 10.

⁴⁷ See Part 1 of the *Constitution Act 1982* (Canada).

treatment. Some of the criteria to consider when determining whether a limitation is justifiable are:

- **Does the limitation have a clear legal basis?**
For example, is it expressed in legislation or an established common law rule? Is it accessible and precise enough for the community to understand how to comply or authorities to understand how the right is restricted?
- **Is the limitation aimed at achieving a legitimate objective?**
For example, a legitimate objective would be one that is necessary and which deals with an area of public concern important or urgent enough to justify restricting a right.
- **Is there a rational connection between the limitation and the obligation?**
Are the proposed measures likely to be effective in achieving the intended object?
- **Is the limitation proportionate to the objective being sought?**
For example, are there other less intrusive mechanisms to achieve the same goal? Are effective safeguards and controls proposed? To what extent is the human right limited? Do the measures allow for adequate flexibility to deal with matters on a case by case basis, where necessary?⁴⁸

Of course, committees can also draw from human rights commentary and law more broadly.

However, the difficulty often lies in applying all of these principles to each individual situation that a committee is presented with in a Bill or delegated legislation. Sometimes it may be clear cut that a proposed measure is likely to unduly interfere with rights and liberties. Other times it may be more borderline and a delicate balancing act may be required to determine whether or not the provision offends rights and liberties.

Previous decisions of the committee can also be useful for situations where the committee is presented with a similar scenario. However, most scenarios are not identical so a case-by-case analysis is still usually required.

Ultimately, it comes down to the views of the Committee Members and the advice of staff, experts or consultants who assist the committee. Responses from Government Departments or relevant Ministers may sometimes also assist in completing this balancing process along with relevant research. As highlighted previously, some jurisdictions also have the benefit of sufficient time to gather other kinds of evidence, such as calling for submissions or holding public hearings.

Ideally, a scrutiny committee would have enough guidance to make an informed decision when balancing rights and liberties in each piece of legislation, but not so much information that the task becomes overwhelming or too difficult.

⁴⁸ Commonwealth Parliamentary Joint Committee on Human Rights, *Guide to human rights*, June 2015, pp 7-9.



The focus of scrutiny committees is on highlighting possible infringements on rights and liberties by governments and/or parliaments. However, individuals can also infringe on the rights and liberties of other individuals within a society. This is something that, to my understanding, scrutiny committees do not normally consider. However, I question whether parliamentary committees could also be charged with considering obligations of individuals in a society to essentially be good citizens to each other.

To some extent, this issue is already regulated by various laws which encourage or compel individuals to respect the rights and liberties of others. For example, offences discourage individuals from breaching other's rights. Court or administrative review rights can also provide individuals with an avenue to pursue possible infringements of their rights. In addition, the policy-making process can pick up areas where obligations or responsibilities of citizens need to be tightened, for example, through stakeholder consultation on possible improvements to existing laws.

In addition, a Bill of Rights, while usually focused on ensuring legislation does not intrude on human rights, can be a useful document to highlight the rights each individual has, and consequently, the implied responsibilities of everyone not to unreasonably intrude on those rights.

However, our laws are generally focused on deterring negative behaviour towards each other, rather than encouraging positive behaviour. There is a limit to what governments and parliaments can do to regulate the behaviour of individuals. Some rights can also be in conflict with each other at times. For example, freedom of speech, if completely unlimited, may sometimes conflict with the right to privacy or result in discrimination or vilification. At a personal level, there will often be differences of opinion on the point at which an individual has impacted on the rights of someone else. Of course there are various laws which curtail this behaviour once a certain threshold is reached, but there can be shades of grey before you reach this point. I'd be happy to hear the thoughts from my colleagues on this question.

Final remarks/Conclusion

I would like to conclude my presentation today by saying that forums such as this one are great avenues for us to share information and learn from each other. This can allow us to improve the way our own scrutiny committees operate, to the extent that we can.

Some of our committees have evolved over time, since the first scrutiny of legislation committee appeared in Australia and we will no doubt continue to learn and evolve in the future.

While there are many similarities and differences between us, ultimately we are united by shared goals. As a federation of States and Territories, I think it is appropriate that there are similarities and differences between our scrutiny committees. We benefit from being able to adapt our committees to our unique Parliaments and the communities within our individual States and Territories. At the same time, as members of the Australian community, we also



all benefit from the work of the scrutiny of legislation committees in the Commonwealth Parliament.