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Of parliament, pigs and lipstick (Slight Return): A defence of the work of legislative scrutiny committees in human rights protection

Stephen Argument*

Introduction

The spur for this paper

At the 2010 National Administrative Law Forum, held in Sydney, Edward Santow, then a Senior Lecturer in Law at the University of New South Wales, gave a paper entitled "Enhanced scrutiny of rights: Of parliament, pigs and lipstick".[1] In large part, the paper was about the Commonwealth Government's response to the September 2009 report of the National Human Rights Consultation[2] and the proposal to establish a Parliamentary Joint Committee on Human Rights.[3]

The paper also discussed the existing mechanisms for parliamentary scrutiny of legislation. Without wishing to put words into Mr Santow's mouth, it seems fair to say that he was unimpressed with the existing mechanisms. In the context of "problems" that he said existed in the current system, Mr Santow said:

> For instance, the parliamentary committees are given no instruction as to *which* human rights should be taken into account. Just as importantly, the current system does not set out *how* draft laws should be assessed against human rights standards. Human rights are rarely absolute, and it is often necessary to reconcile competing rights or rights that compete with other compelling interests. Such defects can contribute to a situation in which scant attention is given by Members of Parliament to the human rights impact of even draconian laws.[4]

I was in the audience for Mr Santow's presentation and was somewhat agitated by the "scant attention" proposition. It moved me to make a comment

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* Stephen Argument is a Canberra lawyer who has worked for and with parliamentary committees for over 25 years. Any views expressed in this paper are his own.

1 At the time of writing, Mr Santow's article was available only on the AIAL website (see http://www.aial.org.au/NationalForum/ANFIndex.html).

2 See http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report.

3 See http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,title;page=0;query=Dataset_Phrase%3A%22billhome%22%20ParliamentNumber%3A%2243%22%20Portfolio_Phrase%3A%22attorney-general%22;rec=12;resCount=Default.

4 Santow (note 1), at page 3 (footnotes omitted).

at the end of the presentation, to the effect that every (academic) analysis that I had seen paid (in my opinion) "scant attention" to the good work of legislative scrutiny committees in the protection of rights. This paper is intended, at least in part, as my response to the general proposition that Australian parliaments pay "scant attention" to human rights issues in legislation.

What this paper sets out to do

This paper sets out to do 4 things. First, it sets out to disagree with Mr Santow's "scant attention" comment. In so doing, the paper also refers to other academic material that assesses the work of the legislative scrutiny committees of the various Australian parliaments in protecting human rights.

Second, the paper sets out to demonstrate my strong view (demonstrated, in part, by what is stated in a significant amount of the academic work on this subject) that the good work of the legislative scrutiny committees of the various Australian parliaments in protecting human rights is much-underestimated. The paper does this by referring to the existing mechanisms for legislative scrutiny, in various jurisdictions.

Third, as part of the second point, the paper discusses the (unseen and largely unrecognised) impact that legislative scrutiny committee have on legislation as a result of the attention that legislative drafters, in most (if not all) Australian jurisdictions, pay to the concerns of legislative scrutiny committees. The paper demonstrates the proposition that legislative drafters draft with one eye on the relevant parliamentary committee.

Finally, the paper makes a (probably trite) point about the possible relevance of parliamentary supremacy to some of the issues discussed in the paper.

Declaration of interest

I should note at the outset (as I did in my comment on Mr Santow's paper at the time) that I might be seen as having an interest in defending the work of parliamentary committees in scrutinising legislation for "human rights issues". I have been working in and around legislative scrutiny by parliamentary committees) for over 20 years. I am a former Secretary of the Senate Standing Committee for the Scrutiny of Bills. I am currently a legal adviser to the ACT Legislative Assembly's legislative scrutiny committee.[5] Next week, I will give a paper at the biennial conference of Australasian legislative scrutiny committees. So, I'm "an insider". Against that background, having read what I set out in the paper, you might rightly say "well he would say that, wouldn't he?"[6] That may be so. But at least I've declared my particular interest in this issue.

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5 The Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

6 For a lengthy dissertation on how well (in the author's opinion) Australian legislative scrutiny committees perform, see Argument, S, "Legislative scrutiny in Australia: wisdom to export?" *Statute Law Review,* June 2011, pages 1-32.

Recent academic studies in relation to the work of legislative scrutiny committees

The Legislatures and Human Rights project

The extract from Mr Santow's paper that I quote above – and the "scant attention" sentence that so excited my attention – footnotes work connected to another academic study into the work of legislative scrutiny committees. The study in question is the "Legislatures and Human Rights Project" and is principally the work of Professor Carolyn Evans and Professor Simon Evans (who, for convenience, I will refer to as "the Project authors"), of the University of Melbourne's Centre for Comparative Constitutional Studies.

The Centre for Comparative Constitutional Studies website offers this background on the project:

> This project, funded by the Australian Research Council, was conducted between 2005-2008. While the grant period is now finished, the researchers continue to undertake some work in this field and this webpage will be updated periodically with related publications and conference information.
>
> The Legislatures and Human Rights project aimed to provide a comprehensive and empirical analysis of the adequacy of the methods that parliaments employ to ensure the protection of human rights in the various Australian jurisdictions. Through a comparative study it aims to compare their performance with world's best practice. It also contributed to the debate over whether Victoria and Australia needed statutory bills of rights, the shape that such bills should take, and the way that they should be applied.[7]

I do not propose to go too far into the detail of the project. The Centre for Comparative Constitutional Studies website contains a wealth of information on the project, including list of publications generated by the project. Not currently listed on the website, however, is a publication that I understand to be, in essence, the culmination of the work undertaken, a chapter by the Project authors in a 2011 publication, *The Legal Protection of Human Rights: Sceptical Essays*.[8] The Project authors' chapter is entitled "Messages from the Front Line: Parliamentarians; Perspectives on Rights Protection".

I do not propose to deal here with the detail of the chapter (an advance copy of which Professor Carolyn Evans kindly provided to me, for the purposes of this paper) but I would roughly summarise the import of the chapter as follows:

- The data and analysis in the chapter is based on interviews with 55 Australian parliamentarians, conducted between 22 February 2006 and 24 January 2007, with each Australian jurisdiction is represented in the sample.

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7 See http://cccs.law.unimelb.edu.au/go/research-and-publications/major-research-projects/legislatures-and-human-rights-project/index.cfm.

8 Campbell, T, Ewing, KD and Tompkins, A (editors) (2011, Oxford University Press, Oxford).

- The sample was obtained by writing to, and following up with telephone interviews, parliamentarians who were members of a parliamentary committee that had some role in scrutinising legislation. The sample included representatives of the 5 main political parties in Australia and representatives of every Australian parliament. It also included parliamentary officers.
- The overwhelming majority of those who agreed to be interviewed had been members of a parliamentary scrutiny committee. As a result, the sample – on the assessment of the individual members of the sample – were more informed about and more likely to be interested in rights issues than most parliamentarians, with several members of the sample advising that their time on the committee had raised both their awareness of and their commitment to rights issues.
- On the basis of the interviews, the Project authors concluded:
    - parliamentarians have diverse conceptions of human rights;
    - many regard deliberation on human rights implications of proposed legislation as an important aspect of their role;
    - however, the non-legislative dimensions of parliamentarians' role and the complexity and volume of legislation produce pressures on their time and capacity to engage in effective scrutiny;
    - the result is that effective scrutiny is more tied to legal expertise than is usually acknowledged;
    - an ongoing challenge for any who want legislatures to be at the heart of the rights-protection project is to identify how legal expertise can serve legislative deliberation on human rights issues, rather than define its parameters.

My disagreement with Mr Santow's "scant attention" proposition

I will begin by dealing directly with my disagreement with Mr Santow. As I have already indicated, Mr Santow's paper footnotes an earlier product of the Legislatures and Human Rights Project – a paper published by the Project authors as part of the Department of the Senate's *Papers on Parliament* series, entitled "Australian Parliaments and the Protection of Human Rights"[9] (**the Project authors' Senate paper**). The sentence of Mr Santow's paper immediately before the extract that I have quoted at the start of my paper refers to another paper that Mr Santow has published (in the *UNSW Law Journal*) on a similar topic.[10] That paper also contains the "scant attention" proposition, also footnoted to the Project authors' Senate paper.

When I embarked on writing this paper, I began by re-examining the Project authors' Senate paper, in the context of the "scant attention" proposition. I quickly came to the view that (unless I was missing something) the Project authors' Senate paper did not, in fact, demonstrate the "scant attention"

9 Available at http://www.aph.gov.au/Senate/pubs/pops/pop47/australian_parliaments.htm.

10 Santow, E, "The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform", Volume 33 (1) *UNSW Law Journal* 8.

proposition. In short, among other things, the Project authors' Senate paper examined a series of examples, from various Australian jurisdictions, of legislation being considered by the relevant parliament. The Project authors then offered their views on that consideration, with a focus on the extent to which (on their reading of the situation) human rights issues were taken into account. It was my view that, even on the harshest analysis, what was demonstrated, in the various examples, did not justify the conclusion that "scant attention" had been paid to "the human rights impact of even draconian laws".

As a matter of courtesy, in preparing this paper, I raised this issue with Mr Santow directly. We subsequently had an e-mail discussion about the issue. The end result of the discussion was that I agreed to include in my paper the following statement from Mr Santow:

> Following a discussion with Mr Argument, I have come to the view that "scant attention" might not have been the most appropriate form of words. My point was intended to be that the current parliamentary committee system fosters the consideration of human rights in an ad hoc way, at least when compared with jurisdictions that have a dedicated parliamentary committee that is responsible for human rights matters. Such committees generally receive far greater guidance, from legislation and the courts, as to what rights they should consider, and how they should deal with human rights questions. The consequence, in my view, is that the Australian Parliament's attention to the human rights impact of legislation is *inconsistent*, in the sense that some Bills, which clearly have a significant human rights impact, are not as carefully scrutinised on this issue as would be desirable.[11]

I am grateful to Mr Santow for this statement, which assuages my agitation in relation to his "scant attention" proposition.

In the light of Mr Santow's statement, I do not propose to discuss the Project authors' Senate paper in the same sort of detail that I had originally intended. I agree with Mr Santow that the Project authors' Senate paper can fairly be interpreted as demonstrating that how the various parliaments deal with human rights issues in legislation lacks an obvious consistency. I do not agree, however, with Mr Santow's further propositions in the statement that I have quoted. I will deal with the points of disagreement as they arise, in the discussion that follows.

The Project authors' Senate paper

The Project authors' Senate paper begins by discussing "two problem cases", being a Victorian Act and a NSW Act. In the case of the Victorian Act, the *Serious Sex Offenders Monitoring (Amendment) Act 2006*, the issue seems to have been that it was "pushed through" both Houses of the Victorian Parliament in a single day and that it was "not opposed by any speaker in either [H]ouse". In the case of the NSW Act, the *Law Enforcement Legislation Amendment (Public Safety) Act 2005*, the issue seems to be that "[t]here was virtually no opposition to the passage of this legislation". The Project authors' Senate paper states:

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11 E-mail to the author, dated 15 July 2011.

> There was very little discussion of the rights impact of this bill. Although the police minister, Carl Scully, did acknowledge potential civil liberties concerns in general terms, he argued that the bill struck the appropriate balance between civil liberties and the protection of the community. He referred to oversight by the Ombudsman, the bill's sunset provision and the limitation on the number of police that can exercise these powers, as elements of this balance. Democrats member, Dr Arthur Chesterfield-Evans noted the potential of the enhanced police powers to violate civil liberties, however, he did not discuss the rights impact of these provisions in any detail. Greens member, Ian Cohen, was the only member to identify specific human rights that would be (or might be) infringed by the bill.[12]

The Project authors' Senate paper goes on to say:

> As with the Victorian Act, this Act may well be an appropriate response to a real problem. But again, the attention given to human rights issues does not appear to be proportionate in its specificity and depth to the seriousness of those issues.

Does this merely mean that the NSW Parliament *may* have acted appropriately but the Project authors do not agree with the way that the Parliament went about it? The answer to this question is not clear to me.

In the next part of the Project authors' Senate paper, the Project authors report on initial analysis that had been undertaken, as part of their project, of (unspecified) Bills introduced into various Australian parliaments, over a 3 year period. The analysis focussed on Bills that "burdened" or "protected" human rights, whether rights issues were considered by the relevant parliament and whether the relevant legislation was enacted. There is then some further analysis of whether any human rights issues were considered in explanatory memoranda, scrutiny committee reports or in parliamentary debate. I will not go into the detail of the figures presented. I note that the analysis is premised on the fact that "the overwhelming majority of the Bills introduced in each of these years did not limit rights contained in the [International Covenant on Civil and Political Rights] and did not set out to protect rights contained in the [International Covenant on Civil and Political Rights]"). I also note that, while the percentages representing consideration of human rights issues are not necessarily high, I see no obvious justification, in this part of the Project authors' Senate paper a conclusion that Members of Parliament paid "scant attention" to human rights issues in legislation.

The Project authors' Senate paper then goes on to discuss 2 Bills considered by the Scrutiny of Bills Committee in 2003:

> The Protection of Australian Flags (Desecration of the Flag) Bill 2003 was introduced by Mrs Draper as a private member's bill. The Scrutiny of Bills Committee summarized the effects of this bill: 'The bill applies criminal sanctions against a person who desecrates or otherwise dishonours or, without legal authority, burns, mutilates or otherwise

12 The Project authors' Senate paper (note 9), footnotes omitted. The succeeding references to this paper are not footnoted, as the on-line version is not paginated.

> destroys the Australian National Flag or an Australian Ensign.' The bill clearly engages the right to freedom of expression and there is room to debate whether it is a justified limit on that right. Similar debates have taken place in other countries, including the USA and New Zealand. But the Scrutiny of Bills committee expressly declined to comment on the bill. (footnotes omitted)

The Project authors' Senate paper then says:

> Now, there might have been good reasons for not reporting on this bill. The Committee has limited resources, both time and human capital. It might make a strategic decision not to report at length on a private member's bill that has limited chances of obtaining time for debate and more limited chances of being passed. Nonetheless, it is striking that there isn't even a one sentence report of the kind commonly made, drawing the restriction on freedom of expression to the attention of the Senate for its consideration.

If what is presented by the Project authors is correct then, perhaps, it demonstrates that, from a human rights perspective, what happened with this Bill demonstrates that the Scrutiny of Bills Committee's consideration of the Bill was not all that it could be. But the Project authors' Senate paper also offers its own (possible) explanation for this.

The Project authors' Senate paper then moves on to the second example:

> Another striking example is the ASIO Legislation Amendment Bill 2003 which (among other things) required persons in relation to whom a questioning warrant under s 34D of the *Australian Security Intelligence Organisation Act 1979* (Cth) was issued to surrender their passport and prohibited them from leaving Australia. This engages the right to freedom of movement under international human rights law. The Scrutiny of Bills Committee commented on a strict liability provision in the Bill but did not mention the freedom of movement issue. Government and Opposition speakers addressed a discrimination issue (potentially longer questioning periods when an interpreter was used) but only a Greens member noted the freedom of movement issue, relying on published comments by an international law academic. The Committee's analysis of civil liberties and parliamentary and judicial control of administration is a strength; but it leave significant gaps in coverage of even civil and political rights, let alone economic, social and cultural human rights. (footnotes omitted)

Again, if what is presented by the Project authors is correct then, perhaps, it demonstrates that, from a human rights perspective, the Scrutiny of Bills Committee's consideration of this Bill was also not all that it could be. But I do not consider that this example, either on its own or in conjunction with the previous example, demonstrates that Members of Parliament paid "scant attention" to human rights issues in the Bill.

The Project authors' Senate paper then goes on to discuss a third Bill from 2003:

> Sometimes rights issues are engaged at multiple stages in the parliamentary process. The Australian Protective Service Amendment Bill 2003 burdens several ICCPR rights (including arts 17, 9(1), 10(1) and 21) in the course conferring additional powers on protective service officers (to request personal identification details and information; to stop, detain and search certain persons for security purposes, and to seize things found during such a search). The Explanatory Memorandum argued that the burdens were justified as striking the appropriate balance between security and rights and freedoms. The Scrutiny Committee's *Alert Digest* noted issues about the search and seizure provisions and asked the Minister whether ... its guidelines had been taken into account. The Minister responded that those guidelines had been taken into account. The Committee later reported on amendments made in the House of Representatives that removed limitations on the APS powers and narrowed the grounds on which a person could assert that they had a reasonable excuse for failing to provide information to an APS Officer. The Senate Legal and Constitutional Legislation Committee considered the extent of the powers conferred by the bill fairly closely and concluded that they were justified. The Parliamentary Library's *Bills Digest* noted the lack of limits on length of detention for purposes of a search and the absence of a limit on detention times. There was substantial discussion of rights implications of the bill in the course of parliamentary debate.

The Project authors' Senate paper then goes on to say:

> The progress of the bills discussed here present useful illustrations of the strengths and weaknesses of parliamentary human rights scrutiny. Parliament has a rich set of existing processes for considering human rights issues — committees, correspondence with Ministers, parliamentary deliberation and so on. However, as we have already noted, each of these processes has shortcomings.

Note that the reference is to "strengths" *as well as* "weaknesses" and that there is an assessment that there are "shortcomings" in the process, not that "scant attention" was paid to human rights issues.

The Project authors' Senate paper then goes on to discuss an example of a Victorian parliamentary committee producing an "excellent report" on a Bill raising "serious human rights issues" (the Bill for what was enacted as the *Serious Offenders Monitoring (Amendment) Act 2006*), stating that the report was "a remarkable achievement given the limited time available. The fact that the committee report was evidently not mentioned in debate on the Bill, even by members of the relevant committee, may tend to undermine the value of the committee's work. But, again, I do not consider that it demonstrates that

the Victorian parliament paid "scant attention" to any human rights issues in the Bill. The committee is, after all, a part of the Victorian Parliament.

Consideration of legislation "in the language of human rights"

I will make some final points by reference to the Project authors' Senate paper. Without reference to any particular legislation, the Project authors' Senate paper goes on to discuss the work of the Senate's Legal and Constitutional Affairs Legislation Committee. This Committee scrutinises Bills specifically referred to it but, unlike the Scrutiny of Bills Committee, is not generally required to undertake its scrutiny function by reference to principles such as those applying to the Scrutiny of Bills Committee or the Regulations and Ordinances Committee.

The Project authors' Senate paper states:

> The Legal and Constitutional Legislation Committee's approach to bills appears to be influenced by the number and tenor of the submissions it receives. Human rights oriented submissions inflect the reports it makes. But even when the Committee receives numerous substantial submissions examining human rights issues, which it faithfully recounts in its report, the Committee rarely expresses its own reasoning and conclusions *in the language of human rights*. (emphasis in original)
>
> In short, just as human rights issues are considered in a largely unsystematic fashion at early stages of the policy process in most Australian jurisdictions, presenting the risk that decisions about how to pursue policy objectives are taken without adequate analysis of their human rights implications, parliamentary analysis is also largely unsystematic, with sporadic and limited contributions by scrutiny committees and specialised committees like the Senate Legal and Constitutional Committee.

In reading this passage, I was caused to wonder whether the problem with the way that the Commonwealth Parliament dealt with the legislation that is considered by the Project authors' Senate paper is, in fact, related to the emphasised phrase of the passage that I have just quoted. Is the problem not that the Commonwealth Parliament failed to consider relevant human rights issues but that it failed to regularly express its reasoning and conclusions *in the language of human rights*? Is it just the case that the problem is not with what the Commonwealth Parliament did but is that it failed to carry out its function in a way that made the human rights lawyers happy? Is the problem that the Commonwealth Parliament failed to express itself in a way that human rights lawyers might be more comfortable with? A mischievous proposition, perhaps.

The answer, clearly, is that we need more input from "human rights lawyers"

In a 2006 *Public Law* article, the Project authors state:

> ...it is notable that [the New South Wales Legislation Review Committee], which uses a panel of external experts to assist it in its analysis of particular legislation, tends to produce better quality legal analysis than some of the other committees. While the Senate Scrutiny

> [of Bills] Committee, in particular, has had some very fine legal advisers, they have often been experts in government administration or administrative law rather than human rights – this may provide some explanation for the focus of the committee.[13]

Leaving aside, for the time being, the first part of the passage that I have just quoted, I would simply like to demonstrate that the proposition that the Scrutiny of Bills Committee's advisers have "often been experts in government administration or administrative law rather than human rights" is, at best, misleading.

An important source document relating to the work of the Scrutiny of Bills Committee, readily available on the Committee's website, is the Committee's *Ten years of Scrutiny* report.[14] That report contains the proceedings of a conference held in 1991, to mark the tenth anniversary of the Scrutiny of Bills Committee's operation. Appendix II to the report lists the Committee's legal advisers. Professor Dennis Pearce is listed as having been the Committee's legal adviser between December 1981 (ie the commencement of the Committee's operation) and July 1983. Professor Jim Davis is listed as having been the Committee's legal adviser from August 1983 until the time of the report (ie 1991), save for a 12 month period in 1990 to 1991, when Professor Davis was on sabbatical. The late Emeritus Professor Douglas Whalan was the legal adviser for the intervening 12 month period. Professor Davis continued to serve the Scrutiny of Bills Committee as its legal adviser until he retired in 2008 (ie after the Project authors' *Public Law* article was published).

There seems little scope for argument that Professor Pearce is "an expert in government administration or administrative law".

It is difficult to sum up in a few words what sort of a lawyer the late Professor Whalan (who taught me Land Registration, as part of my undergraduate degree) was. But he was not "an expert in government administration or administrative law", other than, perhaps, as a result of his long years of service, as legal adviser, with (in addition to the Scrutiny of Bills Committee) the Senate Regulations and Ordinances Committee and with the scrutiny committee of the ACT Legislative Assembly. If pressed, I would have said that (his legislative scrutiny work aside) Professor Whalan was an eminent Property lawyer, with a particular emphasis on the law relating to the Torrens Title system. But if you don't believe me, you can examine Professor Whalan's obituary.[15]

This leaves Professor Davis, who (if you do the sums), at the time of publication of the Project authors' *Public Law* paper, had been the Scrutiny of Bills Committee's legal adviser for over 22 of the Committee's 25 years of operation. Professor Davis' entry on the ANU College of Law website states:

Qualifications	BA LLB (NZ), LLM DipCompLegStud (Camb), Barrister & Solicitor NZ, Vic. & ACT

13 Evans, C and Evans, S, "Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights", [2006] *Public Law Review*, Winter, 785, at page 804.

14 Available at http://www.aph.gov.au/Senate/committee/scrutiny/10_years/index.htm.

15 See http://oa.anu.edu.au/obituary/whalan-douglas-john-1025.

Biography	Professor Jim Davis joined the Law Faculty in 1968 as a Senior Lecturer. He was promoted to Reader in 1971, and appointed a Professor in 1989. He retired in 2001, and on retirement was appointed an Emeritus Professor of the University and a Visiting Fellow in the Faculty. He teaches in the areas of contract, tort and the conflict of laws in the Faculty's post-graduate program. He was the Legal Adviser to the Senate Standing Committee for the Scrutiny of Bills from 1983 to 2008, and was the Legal Adviser to the Senate Standing Committee for Regulations and Ordinances from 1997 to 2000.
Scholarly Interests	Contract, Tort, Conflict of Laws
Recent Publications	*Law of Torts* (with Rosalie Balkin), fourth edition (LexisNexis Butterworths, 2009)[16]

There is no mention of anything that suggests that (other than through his work with the Senate committees mentioned), Professor Davis could properly be described as "an expert in government administration or administrative law". I have spoken to Professor Davis about this issue and he does not consider himself to be "an expert in government administration or administrative law" (though, surely, he must be flattered by the suggestion).

So, out of the 3 legal advisers who had served the Scrutiny of Bills Committee from its establishment to the time of the Project authors' *Public Law* article, only one, Professor Pearce, could fairly be described as "an expert in government administration or administrative law". Professor Pearce was legal adviser for only 2½ years out of the 25 year history available at the time of the Project authors' *Public Law* article. That being so, it is difficult to see how the proposition that the legal advisers to the Scrutiny of Bills Committee "have **often** been experts in government administration or administrative law rather than human rights" can be maintained. Though, of course, I accept that (other than through their work with the various Committees) it is unlikely that any of the 3 professors could be considered "experts in ... human rights".

The bigger issue (for me), however, is what's *wrong* with being an expert in government administration or administrative law?? What's *wrong* with *not* being an expert in human rights?? The obvious import of the proposition is that (in the view of the Project authors) the work of the Scrutiny of Bills Committee has not been all that it could be because the Committee has not been advised by experts in human rights. As an adviser to a legislative scrutiny committee who would not hold himself out as an expert on human rights (other than through my work with the various parliamentary committees with which I have worked), and who, presumably, would not be considered (by the Project authors) to be an expert in human rights, I find the proposition more than a little insulting.

There is also more to what is said, in the Project authors *Public Law* article, about the New South Wales Legislation Review Committee (**LRC**) than meets

16 See http://law.anu.edu.au/scripts/staffdetails.asp?StaffID=20.

the eye. It is true that the LRC has, since its establishment, appointed a panel of external experts, to assist in its analysis of legislation. The external experts have included Professor Simon Bronitt, Dr Steven Churches and Professor George Williams.[17] It is evidently also true that the LRC has used those experts. It should not be assumed, however, that the LRC has used experts on *every* Bill considered by the LRC. Indeed, it should not necessarily be assumed that, in every year of its operation, the LRC has used the experts at all.

In the LRC's first *Annual Review*, covering the period from its commencing operation, in September 2003, to the end of its first financial year of operation (June 2004), the LRC stated:

> In September 2003, the LRC of the New South Wales Parliament began its scrutiny of bills function.
>
> Since then, the LRC has, in accordance with its responsibilities under the *Legislation Review Act 1987,* reported to Parliament on 143 Bills. These reports have been in 16 editions of the *Legislation Review Digest*.[18]

The LRC went on to say:

> 1.8 In many cases the assessment of a given bill is quite straightforward. However, the Committee retains a panel of expert legal advisers to assist in the consideration of bills when preparing reports for Parliament in relation to more complex bills and areas of law.
>
> 1.9 The Committee's report on any given bill is based on the bill itself, the Minister or Private Member's second reading speech, and, where necessary, on expert legal advice.[19]

In its *Annual Review* for the 2004-2005 financial year, the LRC advised (at page iii) that, in the reporting period, it had reported on 132 Bills in total. As to the use of the expert legal advisers, the LRC had this to say:

> 1.10 The Secretariat to the Committee advises the Committee in its consideration of most bills and regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on bills and complex areas of law. Over the last 12 months, the Committee has sought advice from these experts in relation to 10 bills.[20]

In its *Annual Review* for the 2005-2006 financial year, the LRC advised (at page v) that, in the reporting period, it had reported on 128 Bills in total. As to the use of the expert legal advisers, the LRC had this to say:

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17 See Legislation Review Committee, *Legislation Review Digest*, No 10 of 2005, page ii.

18 Legislation Review Committee, *Operation, issues and future directions, September 2003-June 2004* (available at http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/C13947F5B97D1DD8CA256EBD007E97E0?open&refnavid=CO5_2), page v.

19 Ibid, at page 2.

20 Available at http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/DB2F2A406148E98FCA25707B001BAE7D?open&refnavid=CO5_2, at page 2.

> 1.8 The Secretariat to the Committee advises the Committee in its consideration of most Bills and Regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on Bills and complex areas of law. Over the last 12 months, the Committee has sought advice from these experts in relation to 8 Bills.[21]

In its *Annual Review* for the 2006-2007 financial year, the LRC advised (at page vi) that, in the reporting period, it had reported on 104 Bills in total. As to the use of the expert legal advisers, the LRC had this to say:

> 1.8 The Secretariat to the Committee advises the Committee in its consideration of most Bills and Regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on Bills and complex areas of law. Over the last 12 months, the Committee has sought advice from these experts in relation to two Bills.[22]

Finally, in its most recently published *Annual Review*, for the 2007-2008 financial year, the LRC advised (at page iv) that, in the reporting period, it had reported on 172 Bills in total. As to the use of the expert legal advisers, the LRC had this to say:

> 1.8 The Secretariat to the Committee advises the Committee in its consideration of most Bills and Regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on Bills and complex areas of law. **The Committee did not seek outside legal advice during this review period**.[23] (emphasis added)

I concede that the drop-off in the use of external experts by the LRC was clearly more significant *after* the Project authors' *Public Law* article was published. However, even on the basis of the *Annual Review* for 2004-2005 (which was published on 13 September 2005), when the LRC reported that the advice of expert legal advisers had been obtained only in relation to 10 Bills out of 132, some greater analysis (or explanation) is required if readers (or, at least, sceptical readers such as myself) are to accept the proposition that the mere existence of a panel of external experts "tends to produce better quality legal analysis than some of the other committees".

That said, I would not quibble with the proposition that the quality of the legal analysis that is demonstrated in the reports of the various Australian legislative scrutiny committees is "variable". In my view, that is largely explicable, however, by the disparity in the resources available to the various committees. It is a fact that some committees seem to have more resources available to them than others. But the clear inference from the passage that I

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21 Available at http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/41426394131242A8CA2572250002A92F?open&refnavid=CO5_2, at page 2.

22 Available at http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/0985845A4EC9410BCA2574720022394C?open&refnavid=CO5_2, at page 2.

23 Available at http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/65A8E0721384EA7BCA257657001918CC?open&refnavid=CO5_2, at page 2.

have quoted from the Project authors' *Public Law* paper is that the LRC produces better quality advice because it has a panel of external experts. Even though the LRC (recently, at least) doesn't seem to actually use the panel very much. And leaving aside that both of the Senate's legislative scrutiny committees *and* the ACT legislative scrutiny committee have always used external experts, and (at least) the Queensland, Victorian and (I think) Tasmanian legislative scrutiny committees have also used external experts at some time.

While I mean no disrespect to the good work of the LRC, as an external expert adviser to a legislative scrutiny committee *other than* the LRC, again, I find the proposition – certainly the proposition as it is presented, without any supporting analysis – that because of its particular set-up of external experts, the LRC "tends to produce better quality legal analysis than some of the other committees", more than a little insulting.

Scrutiny of legislation by Australian parliamentary committees for human rights issues – The current situation

A legal revolution?

I now turn to the existing arrangements for the scrutiny of legislation, by various Australian parliamentary committees, for human rights issues.

In 2007, a senior government lawyer said:

> The advent of statutory bills of rights in Australia heralds a legal revolution. State and territory legislatures shall be obliged to state whether legislation is compatible with human rights, and, if not, to explain why.[24]

A similar point was made, at about the same time, by Lord Robert Walker, of the UK House of Lords, who stated, at a seminar in Melbourne:

> So can a Human Rights Charter make a difference? Undoubtedly it can. It can and does focus the legislature on the human rights implications of every single piece of proposed legislation.[25]

Does this amount to a "legal revolution"? As I observed in a paper that I delivered in July 2008, to the 5th Australasian Drafting Conference, I don't think so. As I also observed at that time, the proposition that a human rights charter focuses the legislature on the human rights implications of every single piece of proposed legislation, seems to assume that there are no existing mechanisms for providing this focus. Again, I said, I don't think so.[26]

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24 Del Villar, G, "Implications for the Commonwealth of state and territory bills of rights", paper presented to AGS Constitutional Law Forum, 27 September 2007.

25 Lord Robert Walker, "What difference can a human rights charter make?", paper delivered to joint seminar of the Human Rights Law Resource Centre and the Victorian Equal Opportunity and Human Rights Commission, 15 August 2007, available at www.hrlrc.org.au, at page 19.

26 Argument, S, "The (largely unrecognised) work of legislative scrutiny committees in human rights protection", paper delivered to 5th Australasian Drafting Conference, Brisbane, 23-5 July 2008 (unpublished), p 1.

What both of these comments (seemingly) fail to consider is that, in all Australian jurisdictions, legislative scrutiny committees have, for many years, been required to consider whether or not legislation is compatible with (among other things) "human rights". The Senate Standing Committee on Regulations and Ordinances (**Regulations and Ordinances Committee**), for example, has being doing so since 1932. It's just that, unlike bills of rights and human rights charters, the work of legislative scrutiny committees receives little (or no) recognition, because (unlike bills of rights, etc) the work of legislative scrutiny committees is not "sexy".

It is my view that the academic discussion that I have already referred to tends to support this proposition.

That being so, this part of the paper sets out some information about the work of these committees. It is my view that the good work of these committees is largely unrecognised by the wider population. It is also my view that the academic discussion of the work of the committees (which I will also discuss) also under-estimates the value of these committees.

Similarly unrecognised is the role of legislative drafters, who must draft legislation with one eye on the legislative scrutiny committees that, in a practical sense, oversee their work. This is a point that I will come to, in due course.

Legislative scrutiny committees

It may be useful to start with a quick survey of the legislative scrutiny committees in the Australian jurisdictions. As set out below, all Australian jurisdictions have legislative scrutiny committees that examine subordinate (or delegated) legislation:

> **Commonwealth – Regulations and Ordinances Committee – established 1932**
>
> **South Australia – Legislative Review Committee – established 1938**[27]
>
> **Victoria – Scrutiny of Acts and Regulations Committee – established 1956**[28]
>
> **NSW – Legislation Review Committee – established 1960**[29]
>
> **Northern Territory – Subordinate Legislation and Tabled Papers Committee – established 1969**
>
> **Tasmania – Subordinate Legislation Committee – established 1969**

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27 While the Legislative Review Committee was, in fact, established in 1992, a Joint Committee on Subordinate Legislation was established in 1938. The LRC performs the role originally performed by that committee in relation to subordinate legislation.

28 While the Scrutiny of Acts and Regulations Committee was, in fact, established in 1992, a Subordinate Legislation Committee was established in 1956. The SARC performs the role originally performed by that committee in relation to subordinate legislation.

29 While the Legislation Review Committee was, in fact, established in 2003, a Committee of Subordinate Legislation was established in 1960. The LRC performs the role originally performed by that committee in relation to subordinate legislation.

Queensland – Scrutiny of Legislation Committee – established 1975[30]

Australian Capital Territory – Standing Committee on Justice and Community Safety – (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee) – established 1989[31]

The following jurisdictions also have legislative scrutiny committees that examine primary legislation:

Commonwealth – Senate Standing Committee for the Scrutiny of Bills – established 1981

Australian Capital Territory – Standing Committee on Justice and Community Safety – (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee) – established 1989

Victoria – Scrutiny of Acts and Regulations Committee – established 1992

Queensland – Scrutiny of Legislation Committee – established 1995

NSW – Legislation Review Committee – established 2003

The situation in relation to the Queensland Committee is, in fact, more complicated than I set out above, since the role of the Scrutiny of Legislation Committee was recently, in effect, devolved to 7 "portfolio committees", in response to the recommendations of a 2010 review of the parliamentary committee system in Queensland.[32]

Clearly, legislative scrutiny committees have been around for a significant period of time. In that time, they have developed a significant body of experience in dealing with human rights-type issues in legislation.

Legislative scrutiny committees and human rights

I do not propose to discuss, in detail, the terms of reference of each of the various legislative scrutiny committees. Instead, I will refer to the proposed "uniform terms of reference" that the various Australian legislative scrutiny committees have had under consideration since (at least) the mid-1990s.[33] While the proposed uniform terms of reference have been generated in the context of scrutinising "national scheme" legislation, they are instructive in that they represent a consensus view in relation to what sorts of legislative scrutiny principles should be applied to primary and to subordinate legislation.

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30 While the Scrutiny of Legislation Committee was, in fact, established in 1995, a Subordinate Legislation Committee was established in 1975. The SLC performs the role originally performed by that committee in relation to subordinate legislation.

31 While the Standing Committee on Justice and Community Safety was, in fact, established in 2008, a Scrutiny of Bills and Subordinate Legislation Committee was first established in 1989. The SCJACS performs the role originally performed by that committee in relation to subordinate legislation.

32 See Legislative Assembly of Queensland, Committee System Review Committee, *Review of the Queensland Parliamentary Committee System* (December 2010) (available at http://www.parliament.qld.gov.au/work-of-committees/former-committees/CSRC/inquiries/past-inquiries/QldParlCtteeSystemReview), recommendations 6 and 7, page 12.

33 See, for example, *Scrutiny of National Schemes of Legislation - Position Paper by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia* (October 1996).

For primary legislation, the proposed uniform terms of reference include requirements that legislative scrutiny committees consider:

- whether a Bill trespasses unduly on personal rights and liberties;
- whether a Bill makes rights, freedoms or obligations unduly dependent upon administrative decisions which are not subject to appropriate external review; and
- whether a Bill inappropriately delegates legislative powers.[34]

For subordinate legislation, the proposed uniform terms of reference include requirements that legislative scrutiny committees consider:

- whether subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;
- whether subordinate legislation trespasses unduly on personal rights and liberties;
- whether, having regard to the expected social and economic impact of the subordinate legislation, it has been assessed according to the *Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies*[35] or other equivalent guidelines; and
- whether the subordinate legislation makes rights, freedoms or obligations unduly dependent upon administrative decisions which are not subject to appropriate external review.[36]

What does "trespass unduly on personal rights and liberties" encompass?

It has always been my view that the scope of the legislative scrutiny committees' term of reference relating to trespassing unduly on personal rights and liberties is wide enough to allow legislative scrutiny committees to engage in legislative scrutiny by reference to the protection of "human rights". Indeed, it is my view that legislative scrutiny committees have, for many years, been undertaking scrutiny by reference to human rights-type principles. It's just that no-one has noticed.

In support of this proposition, I'd like to point to recent work of some legislative scrutiny committees in non-human rights charter jurisdictions.

NSW Legislation Review Committee – "Rights and liberties"

The first thing to note is that there is no definition of what "personal rights and liberties" a legislative scrutiny committee is charged with protecting. The Legislation Review Committee of the NSW Parliament (**LRC**) has expressly addressed the issue, by publishing a document entitled *Information Paper - "Rights and Liberties" considered by the Legislation Review Committee*.[37] In the Information Paper, the LRC states:

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34 See Position Paper (note 33), at pages 24-5.
35 Available at www.coag.gov.au.
36 See Position Paper (note 33), at pages 33-4.
37 Available at www.parliament.nsw.gov.au.

4. In the absence of any defined set of personal rights and liberties applicable under the law or constitution of New South Wales, the Committee, in the discharge of its functions, has regard to a range of sources in determining which rights and liberties proposed legislation might impact upon.

5. In particular, the Committee considers Australian law and international law, which recognise a wide range of personal rights. These rights have been set out in a range of statutes and instruments and defined and explained in specific contexts by national and regional courts and by other bodies whose views are highly persuasive (eg, UN Human Rights Committee).

6. Although an extensive range of rights is recognised under Australian law, a significant number of these rights are not directly enforceable. However, the Committee has regard to recognised rights whether or not they are enforceable under existing law.

7. The Committee is mindful that it is not sufficient for it merely to consider what rights are already protected by New South Wales law as:

- neither statute or common law was made in an attempt to define or protect general rights and liberties but only to address particular behaviours or situations (eg, there is no general "right to free speech" in NSW law, just an assumption that speech is not restricted except as otherwise provided by law); and
- both statute and common law have been the source of laws that are now seen as oppressive and contrary to human rights norms (eg, denial of property rights to married women and the criminalising of homosexual acts).

8. In light of this, the Committee looks to a number of sources in identifying any rights or liberties that a bill may trespass. These include, but are not limited to, Australian law. Principally, the Committee considers:

- 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.

It is clear from the extract above that the LRC considers that its jurisdiction in relation to personal rights and liberties is both extremely wide and also very similar to the sort of jurisdiction that one would expect for a committee operating in relation to a human rights charter. One of the reasons for the establishment of the LRC was to address the sorts of issues that a human rights charter might otherwise address. Indeed, it was established *instead* of enacting a bill of rights or a human rights charter.[38]

38 See, generally, NSW Standing Committee on Law and Justice report, *A NSW Bill of Rights* (October 2001), available at www.parliament.nsw.gov.au.

This wide view of the scope of the LRC's operation is confirmed by an examination of the kinds of issues reported on by the LRC, under its terms of reference. In its most recently published general report, the *Annual Review – 2007/2008*,[39] the LRC reported on the types of issues that had arisen under the various elements of its terms of reference. In relation to trespassing on personal rights and liberties, the LRC identified the following broad issues as having arisen:

- the right to a fair trial;
- retrospectivity;
- excessive punishment;
- the right to privacy;
- strict liability offences;
- the reversal of the onus of proof;
- powers of search or seizure or entry, without warrant
- the denial of compensation;
- lack of procedural fairness;
- interference with the rule of law;
- the privilege against self incrimination and the right to silence;
- oppressive official powers;
- interference with the double jeopardy rule
- the right to liberty of movement; and
- the right to personal physical integrity.[40]

Some of the particular issues that the LRC has dealt with include:

- excluding persons from World Youth Day venues for failure to submit to searches;[41]
- invasive drug and alcohol testing requirements for workers;[42]
- the matching of DNA profiles;[43]
- a presumption against bail for serious firearms and weapons offences;[44]
- prohibiting smoking in vehicles;[45]

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39 *Report No 3*, 6 June 2009, available at www.parliament.nsw.gov.au.
40 See pages 6-7 of the Annual Review.
41 See comments in *Legislation Review Digest* No 8 of 2007 (4 December 2007), in relation to the World Youth Day Amendment Bill 2007
42 See comments in *Legislation Review Digest* No 2 of 2007 (24 September 2007), in relation to the Security Industry Amendment (Patron Protection) Bill 2007.
43 See comments in *Legislation Review Digest* No 9 of 2008 (24 June 2008), in relation to the Crimes (Forensic Procedures) Amendment Bill 2008.
44 See comments in *Legislation Review Digest* No 4 of 2007 (23 October 2007), in relation to the Bail Amendment Bill 2007.

- the registration of sex offenders;[46] and
- sex discrimination issues in relation to breastfeeding.[47]

Clearly, even without a charter of rights, the LRC has an extremely wide area of operation in relation to human rights-type issues.

Queensland

As already indicated, the Queensland situation is complicated by the recent changes to the committee system of the Queensland Parliament. That aside, Queensland is, in any event, a special case in relation to legislative scrutiny, in that an additional legislative scrutiny mechanism operates, as a result of the "fundamental legislative principles" that are applied, under the *Legislative Standards Act 1992* (**LS Act**).[48]

Section 4 of the LS Act defines the concept of "fundamental legislative principles":

> **4 Meaning of fundamental legislative principles**
>
> **(1)** For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.5
>
> **(2)** The principles include requiring that legislation has sufficient regard to--
>
> (a) rights and liberties of individuals; and
>
> (b) the institution of Parliament.
>
> **(3)** Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation--
>
> (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
>
> (b) is consistent with principles of natural justice; and
>
> (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
>
> (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
>
> (e) 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; and

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45 See comments in *Legislation Review Digest* No 3 of 2008 (1 April 2008), in relation to the Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008.

46 See comments in *Legislation Review Digest* No 8 of 2007 (4 December 2007), in relation to the Child Protection (Offenders Registration) Amendment Bill 2007.

47 See comments in the *Legislation Review Digest* No 3 of 2007 (12 October 2007), in relation to the Anti-Discrimination Amendment (Breastfeeding) Bill 2007.

48 It should be noted that the meaning of "fundamental legislative principles" was recently the subject of a review, by the Scrutiny of Legislation Committee of the Queensland Parliament (see http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/past-inquiries/fundamental_leg_principles).

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill--

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation--

(a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only--

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

Under section 103 of the *Parliament of Queensland Act 2001*, one of the functions of the Scrutiny of Legislation Committee of the Queensland Parliament is to consider “the application of fundamental legislative principles to particular Bills and particular subordinate legislation”. Section 103 of the Parliament of Queensland Act provides:

103 Area of responsibility of Scrutiny of Legislation Committee

(1) The Scrutiny of Legislation Committee's area of responsibility is to consider--

(a) the application of fundamental legislative principles to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation.

(2) The committee's area of responsibility includes monitoring generally the operation of--

(a) the following provisions of the Legislative Standards Act 1992--

- section 4 (Meaning of fundamental legislative principles)
- part 4 (Explanatory notes); and

(b) the following provisions of the Statutory Instruments Act 1992--

- section 9 (Meaning of subordinate legislation)
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)
- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 10 (Transitional).

Under the recent changes, this role of the SLC is to be carried out by the 9 portfolio committees.

Like the LRC in NSW, the SLC evidently regarded itself as having a fairly expansive jurisdiction, in terms of scrutiny of legislation by reference to "human rights" principles. The SLC's 2005-2006 annual report contained the following statement in relation to the SLC's scrutiny of legislation by reference to the rights and liberties of individuals:

> 2.13 The committee, appropriately in its view, takes an expansive approach in identifying "rights and liberties". These of course include traditional common law rights, but the committee considers they can also encompass, for example, rights which are only incompletely recognised at common law (such as the right to privacy), and rights (especially human rights) which arise out of Australia's international treaty obligations.[49]

In the 2005-2006 annual report, the SLC also gave the following summary of the sorts of issues to which it had drawn attention:

> **Rights and liberties of individuals (general)**
>
> 2.12 The issues raised by the committee under this heading (*Does the legislation have sufficient regard to the rights and liberties of individuals?*) are primarily those issues which concern rights and liberties of individuals, but which do not fall within the specific examples listed in s.4(3) of the *Legislative Standards Act*. As previously mentioned, the s.4(3) list is not exhaustive and numerous issues are considered by the committee under this general heading. During the financial year, they included:

49 Scrutiny of Legislation Committee, *Report No 32 - Annual Report – 1 July 2005 to 30 June 2006* (November 2006), available at www.parliament.queensland.gov.au, page 6.

- A bill authorising court orders staying current legal proceedings by, and prohibiting the future institution of legal proceedings by, persons considered to be vexatious litigants
- Provisions authorising police dog handlers, without warrant, to use drug detection dogs to carry out drug detection in a range of public and semi-public places, which involves some intrusion on the personal space of individuals in these places
- Provisions authorising the impounding of motorbikes used off-road, which cause noise problems to nearby residents
- A provision exempting the State and government-owned corporations from the operation of a bill governing the preparation and sale of food
- A bill providing for the detention of persons suspected of terrorism-related activities, without charge or trial, for a maximum period of 14 days
- A bill providing for the imposition of restrictions in relation to the circumstances in which children can be employed
- A bill authorising the exercise, in relation to prisoners, of a range of powers which are highly physically intrusive or intrude on privacy.[50]

The SLC concluded this discussion by stating:

> 2.14 Given its inherent broadness, it can be expected that this particular principle will continue its dominance in terms of issues raised by the committee.[51]

A dissenting view

As I indicated earlier, it is my view that the terms of reference of legislative scrutiny committees are wide enough to allow them to look at human rights-type issues. This view is supported by the discussion above about the work of the legislative scrutiny committees in NSW and Queensland. Others would probably disagree, however. In evidence to the NSW Standing Committee on Law and Justice, in the context of that committee's inquiry into and report on *A NSW Bill of Rights*, Professor George Williams said (by reference to the terms of reference of the Senate Standing Committee for the Scrutiny of Bills) that the terms of reference of legislative scrutiny committees were "meaningless", because they did not adequately define the rights that committees are looking at.[52]

The discussion above of the work of the NSW and Queensland committees speaks for itself. I leave you to form your own views.

How do these principles compare with what is set out in human rights charters, etc?

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50 Ibid, pages 5-6.
51 Ibid, page 6.
52 See *A NSW Bill of Rights* (note 20), at pages 127-8.

It is useful at this point to compare (briefly) the scope of the principles utilised by legislative scrutiny committees (as exemplified by the work of the NSW and Queensland legislative scrutiny committees) with the rights, etc that the existing (Australian) human rights charters set out to protect.

ACT *Human Rights Act 2004*

In Australia, the Australian Capital Territory led the way on human rights charters, by enacting the *Human Rights Act 2004* (**HR Act**). The Preamble to the HR Act states (in part):

> *Human rights are set out in this Act so that individuals know what their rights are*
>
> *Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation*

"Human rights" are defined, in section 5 of the HR Act as "the civil and political rights set out in Part 3 [of the Act]". Part 3 of the HR Act then sets out various civil and political rights, including:

- Recognition and equality before the law (section 8);
- Right to life (section 9);
- Protection from torture and cruel, inhuman or degrading treatment (section 10);
- Protection of the family and children (section 11);
- Right to privacy and reputation (section 12);
- Freedom of movement (section 13);
- Freedom of thought, conscience, religion and belief (section 14);
- Peaceful assembly and freedom of association (section 15);
- Freedom of expression (section 16);
- Taking part in public life (section 17);
- Right to liberty and security of person (section 18);
- Humane treatment when deprived of liberty (section 19);
- Rights of children in the criminal process (section 20);
- Right to a fair trial (section 21);
- Rights in criminal proceedings (section 22);
- Right to compensation for wrongful conviction (section 23);
- Right not to be tried or punished more than once (section 24);
- Retrospective criminal laws (section 25);
- Freedom from forced work (section 26); and
- Rights of minorities (section 27).

Victorian *Charter of Human Rights and Responsibilities Act 2006*

Victoria followed the ACT's lead, by enacting the *Charter of Human Rights and Responsibilities Act 2006* (**CHRR Act**). The CHRR Act contains a similar list of rights to the HR Act:

- Recognition and equality before the law (section 8);
- Right to life (section 9);
- Protection from torture and cruel, inhuman or degrading treatment (section 10);
- Freedom from forced work (section 11);
- Freedom of movement (section 12);
- Right to privacy and reputation (section 13);
- Freedom of thought, conscience, religion and belief (section 14);
- Freedom of expression (section 15);
- Peaceful assembly and freedom of association (section 16);
- Protection of families and children (section 17);
- Taking part in public life (section 18);
- Cultural rights (section 19);
- Property rights (section 20);
- Right to liberty and security of person (section 20);
- Humane treatment when deprived of liberty (section 22);
- Rights of children in the criminal process (section 23);
- Right to a fair hearing (section 24);
- Rights in criminal proceedings (section 25);
- Right not to be tried or punished more than once (section 26); and
- Retrospective criminal laws (section 27).

It should be noted that the Victorian CHRR Act is currently the subject of a review, by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.[53]

What's the difference?

It has always been my view that the kinds of issues dealt with under bills or charters of rights are (already) able to be dealt with by legislative scrutiny committees. I can identify no issue specified in either the ACT HR Act or the Victorian CHRR Act that could not be dealt with by a legislative scrutiny committee. Indeed, it is my view that, in many respects, the issues dealt with by the NSW and Queensland legislative scrutiny committees mirror the sorts of issues specified in the HR Act and the CHRR Act.

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53 See http://www.parliament.vic.gov.au/sarc.

The Commonwealth approach to legislative scrutiny

An obvious point to make at this stage of the discussion is that I have not dealt with the situation in the Commonwealth jurisdiction. Here goes …

Senate Standing Committee for the Scrutiny of Bills

In its most recent general report, *The Work of the Committee during the 41st Parliament, November 2004 – October 2007*, the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**) provided the following indication of the types of issues addressed under the term of reference relating to trespass on rights and liberties:

> Legislation may trespass **unduly** on personal rights and liberties in a number of ways. For example, it might:
>
> - have a retrospective and adverse effect on those to whom it applies;
> - not only operate retrospectively, but its proposer (invariably the Government) might treat it as law before it is enacted – usually from the date the intention to legislate is made public; this is often referred to as **legislation by press release**;
> - abrogate the common law right people have to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved;
> - reverse the common law onus of proof and require people to prove their innocence when criminal proceedings are taken against them;
> - impose strict liability on people when making a particular act or omission an offence;
> - give authorities the power of search and seizure without requiring them to obtain a judicial warrant prior to exercising that power; or
> - abrogate legal professional privilege.[54]

While unremarkable, the list above nevertheless demonstrates that the Scrutiny of Bills Committee has dealt with a wide range of issues under the term of reference relating to trespass on personal rights and liberties. The equivalent report by the Regulations and Ordinances Committee demonstrates a similar approach by that committee.[55]

Some specific examples

That said, I would like to discuss some older examples of human rights-type issues dealt with by the Scrutiny of Bills Committee. I acknowledge that these are relatively old examples, taken from the period when I was the Secretary to the Scrutiny of Bills Committee. Nevertheless, the examples demonstrate that these are not merely issues of recent-discovery for the Scrutiny of Bills Committee.

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54 Available at www.aph.gov.au, at page 15.

55 See Regulations and Ordinances Committee, *40th Parliament Report - 112th Report* (June 2005), available at www.aph.gov.au, at pages 41-51.

Migration Amendment Act 1991

The Scrutiny of Bills Committee has a long history of referring specifically to human rights-type issues in its consideration of legislation. In 1991, for example, the Committee referred to various Articles of the International Covenant on Civil and Political Rights (**ICCPR**), a seminal human rights document, in its comments on the *Migration Amendment Act 1991*.

The relevant Act made amendments to the *Migration Act 1958* in relation to the detention of "boat people". The amendments applied directly to people who were in boats, in the Australian territorial sea, during a specified time period.

The Scrutiny of Bills Committee suggested that this may be contrary to Article 2, paragraph 2 of the ICCPR, which relates to discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The amendments made by the relevant Act also prevented courts from ordering the release of persons affected by the Act. The Scrutiny of Bills Committee suggested that this may be in breach of Article 9, paragraph 4 of the ICCPR, which relates to persons in detention having access to the courts. The Scrutiny of Bills Committee also suggested that the detention provisions could also be contrary to Article 10, paragraph 1 of the ICCPR, which gives persons deprived of liberty a right to be treated with humanity and respect for their inherent dignity and Article 14, paragraph 1, which gives persons a right to equal treatment before the courts.

It should be noted at the outset that, in making these comments, there was not much the Scrutiny of Bills Committee could do, as the legislation had already been passed by both Houses of the Parliament and assented into law. Despite this, the Scrutiny of Bills Committee noted that part of its role was to ensure that the Parliament thought about these sorts of issues before passing legislation.[56]

The amendments in question were challenged in the High Court. In *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs*,[57] the High Court ruled that one of the amendments referred to by the Scrutiny of Bills Committee was invalid (because of the purported limitation on the power of courts).

Political Broadcasts and Political Disclosures Bill 1991

Also in 1991, the Scrutiny of Bills Committee referred to Article 19 of the ICCPR in its comments on the Political Broadcasts and Political Disclosures Bill 1991. This Bill prohibited the broadcasting of political advertisements. Article 19 of the ICCPR deals with freedom of expression. In its comments, the Scrutiny of Bills Committee noted that the Article 19 protection of freedom of speech was subject to "necessary" restrictions. The Scrutiny of Bills Committee stated that it was a matter of public policy as to what was

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56 See discussion in *Report on the operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament – May 1990-February 1993*, at pages 27-9.

57 (1992) 176 CLR 1.

"necessary" and that this was a matter that was more appropriate for the Parliament to decide than the Committee.[58]

The Parliament enacted the Bill as the *Political Broadcasts and Political Disclosures Act 1991*. The Act was then subject to High Court challenge.

In *Australian Capital Television Pty Ltd and New South Wales v Commonwealth*,[59] the High Court found invalid the limitations on political broadcasting imposed by the Act. In the course of his judgment, Chief Justice Mason stated:

> There being no reasonable justification for the restrictions on freedom of communication imposed by Pt IIID, the Part is invalid. In the light of my conclusion as to the indivisibility of freedom of communication in relation to public affairs and political discussion, the prohibitions in connection with all forms of election and referenda must fail.[60]

What do these 1991 examples demonstrate?

It might be thought that the examples that I have just given demonstrate precisely the opposite of the second point that I seek to make in this paper (ie that legislative scrutiny committee committees do much good work). It might be thought that the examples given demonstrate precisely that we need a bill of rights in the Commonwealth. Without wishing to traverse that particular point, it is my view that the examples given demonstrate a fundamental feature of Australian democracy. I return to this issue below.

The proposed Parliamentary Joint Committee on Human Rights

I stated at the outset that one of the topics dealt with in Mr Santow's paper was the proposal to establish, in the Commonwealth Parliament, a Parliamentary Joint Committee on Human Rights. While I do not propose, in this paper, to deal with the substance of that proposal, I note that the legislation required to implement the proposal is currently still before the Senate.[61] Since Mr Santow's paper was written, the relevant legislation has been the subject of an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee, which reported on 28 January 2011. Subject to some recommendations for various changes to the relevant legislation, the Committee recommended that the Senate pass the legislation.[62]

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58 See discussion in *Report on the operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament – May 1990-February 1993*, at pages 29-32.

59 (1992) 177 CLR 106.

60 Ibid, at [58].

61 See http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,title;page=0;query=Dataset_Phrase%3A%22billhome%22%20ParliamentNumber%3A%2243%22%20Portfolio_Phrase%3A%22attorney-general%22;rec=12;resCount=Default.

62 See recommendation 12 of the Committee's report (available at http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills_43/report/index.htm).

The unseen effect of legislative scrutiny committees

The role of legislative drafters and legislative drafting offices in protecting human rights

Part of my unease with the academic discussion that I have seen in relation to the effectiveness of existing parliamentary mechanisms (including legislative scrutiny committees) in protecting human rights is that my experience is that a significant part of the good work done by legislative committees is unseen. The most obvious of these "unseen" effects is the effect that legislative scrutiny committees have on legislative drafters and legislative drafting offices.

It is my firm opinion, based on my experience on both sides of the legislative scrutiny "fence", that legislative drafters play a significant role in supporting and augmenting the role of legislative scrutiny committees. That role, like the role of legislative scrutiny committees, is under-appreciated. The roles are also intertwined, in the sense that the role of the legislative drafter relies on the work of the legislative scrutiny committees. Quite properly, legislative drafters refer to (and rely on) the reports of the legislative scrutiny committees in advising their clients of the potential pitfalls of pursuing certain legislative options.

Legislative drafters as "the first bulwark"

In its *Eighty-seventh Report*, the Regulations and Ordinances Committee published a Special Report by its (then) Legal Adviser, Professor Douglas Whalan, on subdelegation of powers. In that Report, Professor Whalan suggested that the Senate Scrutiny of Bills Committee was "the first bulwark" in certain aspects of legislative scrutiny.[63]

As I have previously stated,[64] I believe that, in fact, it is legislative drafters (and, by that, I mean persons employed in the offices of the various parliamentary counsel around Australia) who are the first bulwark in legislative scrutiny.

In making this assertion, I concede that it is neither a novel nor a revolutionary proposition. I note, for example, that Rowena Armstrong QC, (then) Victoria's Chief Parliamentary Counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that

> … it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed – you know what the Committee will say if you try that one.[65]

The point here is not the role of the legislative scrutiny committee but the fact that the legislative drafter would both refer to the committee and rely upon it

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63 Senate Standing Committee on Regulations and Ordinances, *Special report on subdelegation of powers - Eighty-seventh Report* (November 1990), at page 4).

64 See Argument, S, "Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher", *The Loophole*, Issue No 3 of 2007 (October 2007), 66.

65 Armstrong, RM, "Drafting: Should delegated legislation be drafted by a specialist drafting office?", at page 4.

for authority in advising client agencies that legislation might offend the legislative scrutiny principles that the various legislative scrutiny committees seek to uphold.

A similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said:

> I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.[66]

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices … to the legislative equivalent of Siberia".[67]

Is this still the case?

It must be conceded that the views quoted above are relatively dated.

The Project authors have referred (indirectly) to the role of legislative drafters in another paper produced as part of the Legislatures and Human Rights project. In a 2006 paper, entitled "The effectiveness of Australian parliaments in the protection of rights", the Project authors stated:

> The value of scrutiny then is the medium- and long-term impact on policy officers and drafters – Commonwealth drafters have long been said to draft in the shadow of Senate scrutiny. This is an area that we are particularly interested in continuing to explore.[68]

In preparing this paper, I asked the Project authors whether, in fact, they had explored this issue. Professor Carolyn Evans advised that the Project authors had not produced any written conclusions in relation to this issue.

This being so (and exploiting the fact that I am currently employed as a legislative drafter), I decided to explore the matter myself, be seeking the views of the parliamentary counsel in the various Australian jurisdictions. Though there were some relatively minor caveats, the response of the various parliamentary counsel confirmed that the views of Ms Armstrong and Mr Turnbull still resonated with Australian drafting offices.

The Chief Parliamentary Counsel of Victoria, Gemma Varley, stated:

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66 Turnbull, I, in *Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills*, held on 25 November 1991, available at http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf), at page 62.

67 Vanstone, A, in *Ten years of Scrutiny* (note 43), at page 57.

68 Paper delivered at the Legislatures and the Protection of Human Rights Conference, Melbourne Law School, 20-22 June 2006, available at http://cccs.law.unimelb.edu.au/index.cfm?objectId=9E06B76A-1422-207C-BA4984A6D3073318, pages 8-9.

> It is true to say that in Victoria drafters are very aware of the concerns of our Scrutiny of Acts and Regulations Committee [**SARC**] when we draft Bills and settle subordinate legislation. We receive the SARC alert digests on Bills and discuss them at drafter's meetings and similarly discuss SARCs reports on subordinate legislation. When settling drafting instructions for a Bill and in the course of drafting a Bill or settling regulations, we pass on to instructing departments matters about which SARC may raise concerns. SARC has produced practice notes for explanatory memoranda and other matters which we disseminate to Departments. Section 17 of the *Parliamentary Committees Act 2003* sets out SARC's functions. SARC has a significant function in reporting on the impact of legislation on human rights conferred by the Victorian Charter of Human Rights and Responsibilities. In addition to this, SARC has had for many years a role of reporting on the impact of legislation on rights and freedoms and we paid close attention to its pre-Charter reports as well.[69]

It is important to note that Ms Varley then adds:

> This does not mean that provisions that impact adversely on rights and freedoms will never be drafted. It means that if a provision is to have an adverse impact it should be the result of informed policy-making, taking into account the Charter and the concerns that SARC is likely to raise.[70]

Walter Munyard, the Parliamentary Counsel for Western Australia, indicated that he generally agreed with the views of Ms Armstrong and Mr Turnbull. He then stated:

> Clearly drafters wishing to dissuade instructors from requiring them to write law that offends against legal principle will often resort to the threat of unfavourable comment when the legislation comes before parliament.
>
> Committees play an important part in identifying and reporting to the House offensive provisions. The WA parliament has a Joint Standing Committee on Delegated Legislation and sometimes refers Bills to a Legislation Committee for scrutiny. National scheme legislation is automatically referred to a Uniform Legislation and Statutes Review Committee of the Legislative Council.[71]

Mr Munyard also adds an important rider to the general point:

> Inevitably [the Parliamentary Counsel's Office] does not always agree with points taken by a parliamentary committee, but the potential for adverse comment from a committee can be useful to influence the policy that draft legislation must reflect.
>
> Where the balance lies between respecting civil rights and pursuing legitimate policy objectives that might require transgressing those rights

69 E-mail to the author, dated 29 June 2011.
70 E-mail to the author, dated 29 June 2011.
71 E-mail to the author, dated 27 April 2011.

> is obviously a matter of policy. However, a part of a drafter's role is to suggest less invasive means of achieving the client's policy objective.
>
> Parliamentary committees often work under difficult time constraints and with limited resources. I am not sure that their critics make sufficient allowance for that.[72]

Finally, the Commonwealth's First Parliamentary Counsel, Peter Quiggin PSM, stated:

> I think that it is hard to untangle the policy of the Government and the approach of the Scrutiny of Bills Committee on many issues. By this I mean that the policies of the Government on review of decisions, protections where powers are granted and other issues (mainly administered by [the Attorney-General's Department]) often mirror those of the Committee. Consequently, when we draft with "one eye to the relevant committee", we also are drafting with one eye to the relevant Department responsible for the whole of Government policy.[73]

The point that Mr Quiggin makes above is an important one (and echoes a point made by both Ms Varley and Mr Munyard). While it may be the case that legislative drafters draft "with one eye on the relevant parliamentary committee", I do not mean to suggest that legislative drafters draft only in terms of what is likely to please or displease the relevant committee. Clearly, the instructions of the client agency (and the policies of the Government) are the legislative drafter's primary responsibility. Legislative drafters may advise a client agency that "this will probably not go down well with the parliamentary committee" but, equally, legislative drafters might advise "if you go about it this way then you'll have to put up a good explanation, as the parliamentary committee will not like it". In my view, this is all about legislative drafters providing good client service. It's about advising client agencies about the pros and cons of different approaches and about alerting client agencies about the potential pitfalls of certain options (as well as offering suggestions about how those potential pitfalls might be managed).

Turning to matters of practicality, Mr Quiggin added:

> You may be interested to know that there are 19 references to the Senate Scrutiny of Bills Committee in our Drafting Directions and most of these are alerting drafters to issues that the Committee is likely to raise.[74]
>
> We also get copies of the Alert Digests and the Reports loaded on to our internal network so that drafters have access to them. When they arrive in the office, one of our staff sends an email that lists the Bills that have been commented upon.[75]

On the drafting directions point, I can simply note that, similarly, the Office of Legislative Drafting and Publishing (in which I work), which drafts subordinate legislation for the Commonwealth, similarly refers to the reports of the

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72 E-mail to the author, dated 27 April 2011.
73 E-mail to the author, dated 27 April 2011.
74 The Office of Parliamentary Counsel drafting directions are available at http://www.opc.gov.au/about/draft_directions.htm.
75 E-mail to the author, dated 27 April 2011.

Regulations and Ordinances Committee in its manuals, drafting directions and (importantly) in the training it provides to instructors.

The Queensland Premier's views

Coincidentally, my attention has also recently been directed to some relevant comments by the Premier of Queensland, the Hon Anna Bligh MP, made in the context of a submission to the Queensland Scrutiny of Legislation Committee's Review of the meaning of "fundamental legislative principles":

> The work of the [Scrutiny of Legislation Committee] in advising Parliament about the operation of FLPs [fundamental Legislative principles] in legislation makes a critical contribution to the quality of Queensland legislation. The [Scrutiny of Legislation Committee's] role corresponds with [the Office of the Queensland Parliamentary Counsel]'s functions of advising its clients on the operation of the FLPs, as part of OQPC's [Office of the Queensland Parliamentary Counsel's] role of ensuring the Queensland statute book is of the highest standard under section 7 (j) of the [*Legislative Standards Act 1992*].
>
> OQPC draws considerable value from the high quality research carried out by the [Scrutiny of Legislation Committee] in relation to legal issues relevant to FLP issues arising in legislation. The [Scrutiny of Legislation Committee] frequently deals with new or emerging rights and obligations issues, for example, rights relating to information and privacy. It is frequently the case that research carried out by the [Scrutiny of Legislation Committee], and opinion on new and emerging issues developed by the [Scrutiny of Legislation Committee], is the only source of legal or associated research directly on a legislative issue that is easily accessible to drafters and instructing officers. This research feeds directly into the training given by OQPC to its drafters and into advice given by OQPC drafters to OQPC's clients. It is also considered directly by instructing officers.
>
> The work of the [Scrutiny of Legislation Committee] has a high level of acceptance by OQPC drafters and instructing officers (both for Government legislation and Private Members' Bills), despite the fact that the [Scrutiny of Legislation Committee] membership and governments change. This means that the [Scrutiny of Legislation Committee's] work has an ongoing direct beneficial effect on the development of legislation, and ultimately on the quality of legislation being passed by the Parliament.
>
> The general reports produced by the [Scrutiny of Legislation Committee] on frequently occurring FLP topics are of particular value to OQPC, which considers that it would be valuable if more of these general reports were produced, as a 'clearing house' for the large number of individual [Scrutiny of Legislation Committee] comments. The [Scrutiny of Legislation Committee's] report on Henry VIII clauses is an example of how a general report can provide a vital guide for ongoing convenient reference, eliminating the need to refer to a multitude of past individual committee comments. OQPC suggests that

general reports might facilitate a more in-depth examination of serious issues arising from the general flow of legislation over a period.

The current FLP system is almost 2 decades old. This means there are literally hundreds comments in the [Scrutiny of Legislation Committee's] *Alert Digests* and *Legislation Alerts* that relate to particular ongoing as they arise in a multitude of circumstances. OQPC monitors these comments on an ongoing basis and believes they deserve to be generally analysed and synthesised into general commentary that can be used in the development of legislation.[76]

Another unseen effect

Dr John Uhr, a former Senate officer and a former Secretary to both the Senate Regulations and Ordinances Committee and the Senate Scrutiny of Bills Committee, has suggested that, in the Commonwealth at least, the Senate's legislative scrutiny committees have an effect on the wider bureaucracy. In the context of identifying 5 factors that help explain the "remarkable success" of the Regulations and Ordinances Committee, Dr Uhr has stated:

G*urus within Government*

Fifth, and I accept that this might surprise some, the role of the Attorney-General's Department cannot be underestimated. Similar comments can be made about the Attorney-General's Department in relation to the later Scrutiny of Bills Committee and indeed to the Finance department in relation to the estimates process. Effective scrutiny committee can get considerable support from interested central agencies of government which can broadcast and defend the Committee's standards across government. This seems to have begun around 1937 at the urging of the Senate Committee. Legislative drafting units within specific agencies look to central agency direction on evolving standards and policy. Scrutiny committees might be excellent articulators of such standards but much of the hard work of implementing those standards falls to central agencies within government, to the extent that the evolving system of governance looks to them for centralizing and standardizing functions. Those days might be declining now but the historical explanation for the effective scrutiny role performed by the Regulations and Ordinances Committee involves the support of legislative drafting units within executive government.[77]

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76 Submission to Scrutiny of Legislation Committee Review of the meaning of "fundamental legislative principles", dated 29 April 20ll (available at http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/past-inquiries/fundamental_leg_principles), pages 3-4.

77 Uhr, J, "The Role of Australian Legislatures in Protecting Rights", in *Protecting Rights Without a Bill of Rights*, Campbell, T, Goldsworthy, G and Stone, A (editors) (2006, Ashgate, United Kingdom), 41, at page 54.

And (in relation to the role of legislative drafters) the Federal Court seemingly agrees!!

I was heartened in 2008 by the Federal Court's (apparent) recognition of the role of legislative drafters in ensuring that legislation is drafted in accordance with "fundamental principles".

In *Evans v State of New South Wales*,[78] the Full Federal Court (French, Branson and Stone JJ) considered a challenge to regulations made by the NSW Government in the context of the recent World Youth Day. The challenge was based on arguments that (among other things) the regulations in question interfered with fundamental rights and freedoms.

The Full Federal Court stated (at [68]):

> It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms. That principle dates back to the statement in *Potter v Minahan* (1908) 7 CLR 277 in which O'Connor J, quoting from the fourth edition of Maxwell PB, *On the Interpretation of Statutes* (Sweet & Maxwell, London, 1905) (at 304):
>
> > It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.
>
> See also *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18 and *Coco v R* (1994) 179 CLR 427. In the latter case the High Court said (at 437):
>
> > The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

Having set out this background to the approach of the courts to laws that interfere with "fundamental principles", the Full Federal Court stated (at [70]):

> … we observe that the legislature, **through the expert parliamentary counsel who prepare draft legislation**, may be taken to be aware of the principle of construction in *Potter* 7 CLR 277 and later authorities such as *Bropho* 171 CLR 1 and *Coco* 179 CLR 427, and the need for clear words to be used before long established (if not "fundamental") rights and freedoms are taken away. (emphasis added)

This suggests to me that at least the Federal Court appreciates the role of legislative drafters in the protection of "fundamental principles".

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78 [2008] FCAFC 130 (15 July 2008).

The role of legislative scrutiny committees in assisting the parliament

The Chair's Foreword to the NSW Standing Committee on Law and Justice's report on *A NSW Bill of Rights* states:

> The most important recommendation in this report concerns the establishment of a Scrutiny of Legislation committee. In the words of one of the witnesses to the inquiry, the Houses of Parliament themselves have a continuing duty and power to debate and decide upon important matters such as the kind of rights which should be enjoyed within NSW. The Committee believes a scrutiny committee can greatly assist Parliament in this regard.

Legislative scrutiny committees help parliaments perform this "continuing duty" and inform parliamentary debate on "important matters" such as human rights. In some cases, they have been doing so for over 75 years. This important work should not be either ignored or underestimated. Apart from anything else, there is a great deal more "jurisprudence" in relation to legislative scrutiny by parliamentary committees than there is in relation to human rights scrutiny by reference to bills of rights or human rights charters.

While bills of rights and human rights charters may have their value in protecting human rights, they are not the only method of protecting human rights. While the existing mechanisms are little understood (and entirely *un*sexy), they should not be ignored, as they have much to offer.

Parliamentary supremacy and parliaments doing "bad things"

Parliaments can pass legislation that is contrary to human rights principles

As I have stated previously,[79] it is not my contention that the existence of legislative scrutiny committees *guarantees* that legislation does not get made or passed that could be considered to offend against human rights principles. Indeed, the 2 Senate Scrutiny of Bills Committee examples from 1991 that I discussed above demonstrate precisely the opposite. The real point, however, is that parliaments can do such things. Parliaments can pass legislation that is contrary to human rights principles.

In my view, to deny this latter proposition is to deny the concept of the supremacy of parliament. If one accepts this concept (as I do), one also has to accept that, at times, parliaments – **all parliaments** – can pass legislation that is unpalatable (at least to some). In my view, this is something that is both a product of, and something governed by, the democratic process. At the risk of seeming trite, parliaments reflect the will of the electorate. If the electorate is subsequently unhappy with something that the parliament does, the electorate can demonstrate that unhappiness at the ballot box.

A similar point has been made by a former Premier of NSW, the Hon Bob Carr, who stated (in 2000):

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79 See Argument, S, "Civil rights watchdogs already barking", *Lawyers Weekly*, 22 April 2005, page 13.

> Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgement is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition.
>
> A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy making functions to the judiciary. I do not accept that we should make such a fundamental change just because other countries have bills of rights. The culture of litigation and the abdication of responsibility that it engenders, is something that Australia should try and avoid at all costs. A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.[80]

A vaguely similar view from the UK

I was pleased to recently discover some vaguely similar sentiments being expressed by the United Kingdom's Master of the Rolls, Lord Neuberger of Abbotsbury. Though looking at the question of parliamentary supremacy from a different perspective (ie in the context of the relationship between the parliament and the courts), Lord Neuberger stated:

> .... we live in a world where democratic accountability is of the essence. For appointed judges to claim the right to override the will of the democratically elected legislature, when they cannot claim to have been accorded that right by popular mandate, whether directly or through Parliament, seems to me to be unmaintainable unless they have been expressly given that right by the people acting through their democratically elected representatives.[81]

Though, of course, the United Kingdom legal and parliamentary system, largely as a result of the absence of a written constitution, operates in a way that is very different to any of the Australian jurisdictions, I consider that the importance of "democratic accountability" is equally relevant here in Australia. In the sorts of matters that can excite discussions about human rights, it is the views of the electorate that are the most important, not those of the judges (or the human rights lawyers).

Lord Neuberger went on to offer this quite alarming quote from *Bradlaugh v Gossett* (which is, I confess, one of my favourite UK authorities):

> There is no legal remedy .... for oppressive legislation, though it may reduce men practically to slavery.[82]

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80 Carr, B, submission to inquiry into whether or not NSW should have a Bill of Rights. See http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8569EDDF131DA5DBCA256AD90082A3D3.

81 Lord Neuberger of Abbotsbury, Master of the Rolls, "Who are the masters now", Second Lord Alexander of Weedon Lecture, 6 April 2011 (available at http://www.judiciary.gov.uk/media/speeches/2011/whos-the-master-now), para 17.

82 (1884) 12 QBD 271, at 285.

While I accept that this proposition does not *quite* hold in 21st century Australia (noting that there are all sorts of "oppressive legislation" in relation to which Australian courts would almost certainly provide a legal remedy), I consider that the point is well made.

Another learned and eloquent offering

Since the inaugural AIAL National Lecture was given, last night, by the Chief Justice of the Federal Court of Australia, the Hon Patrick Keane, it is appropriate that I also refer to some words of the Chief Justice, on a similar point. In a 2008 speech, entitled "In celebration of the *Constitution*", the Chief Justice (who was then Chief Justice of the Queensland Court of Appeal) said:

> … our [Constitutional] Framers' choice not to fetter legislative experimentation by a Bill of Rights enforced by the unelected judiciary, was not a slip of the pen, but a deliberate choice to embrace an ideal of democracy which reposes a great responsibility on the citizenry to act justly towards their fellows, and confides in the intelligence and decency of that citizenry as the best guarantee that this responsibility will be discharged.[83]

I have no interest in discussing the issue of the role of an "unelected judiciary" in relation to bills of rights. I believe, however, that the Chief Justice makes a valid point about the role of all of those who participate in the democratic process – including those of us who are electors – in ensuring that our fellow citizens are dealt with justly (including in a manner that is consistent with human rights principles).

Chief Justice Keane went on to say:

> In Australia, there are, of course, serious differences between societal groupings; and there are injustices to individuals which may go unremedied. Our political processes may not be as sensitive to the plight of disadvantaged groups or individuals as many of us would like. And, most seriously perhaps, we must acknowledge that it is only in this generation that we have recognised our indigenous citizens as citizens.
>
> But our constitutional arrangements mean that we must, as a community, recognise our problems and accept that solving them is the responsibility of all of us because we can't look to pronouncements from on high to solve our political differences. And that is all to the good because, as citizens, we are all called to work to remedy political injustices. Since Aristotle, citizenship worthy of the name has involved no less: it encompasses both individual privilege and civic responsibility.[84]

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83 Speech presented at the Banco Court, Brisbane, on 12 June 2008, available at www.naa.gov.au, at page 5.

84 Ibid, at page 10.

Limitations on human rights

In this context, I note that it may be thought that there is something unusual about parliaments legislating in ways that obviously contravene human rights principles and that the introduction of bills or rights and human rights charters are a way of putting an end to this. That is not so. It is important to note that, even under the ACT and Victorian Acts, laws can be made that are not strictly in accordance with the rights set out and protected by those Acts.

Section 28 of the HR Act provides:

> **28 Human rights may be limited**
>
> **(1)** Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
>
> **(2)** In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;
>
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Similarly, subsection 7 (2) of the CHRR Act provides:

> **(2)** A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This is a significant point. It should not be forgotten that, even under the ACT and Victorian Acts, laws can be made that interfere with the rights set out and protected by those Acts. More importantly, it should be noted that, as is presently the case with the recommendations of legislative scrutiny committees as to what is an "undue" trespass on personal rights and liberties, it is the legislature that makes the decision as to what limits on human rights are "reasonable" and what can be "demonstrably justified". In my view, the situation under the ACT and Victorian Acts (in terms of overriding human rights) is little different to what presently occurs with the various legislative scrutiny committees.

Concluding comments

Don't get me wrong ….

I should make it clear at this point that I do not mean to suggest that bills of rights or human rights charters have no value in protecting rights. Indeed, as a person who currently advises a legislative scrutiny committee in a jurisdiction that has a Human Rights Act, it would be perverse of me to suggest such a thing.

In that context, it is useful for me to say a couple of things about working with the HR Act in the ACT.

The ACT Standing Committee on Legal Affairs (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee) (**ACT Scrutiny Committee**) has a role under the HR Act as a result of section 38 of the HR Act, which provides:

> **Consideration of bills by standing committee of Assembly**
>
> **(1)** The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.
>
> **(2)** In this section:
>
> "relevant standing committee "means—
>
> (a) the standing committee of the Legislative Assembly nominated by the Speaker for this section; or
>
> (b) if no nomination under paragraph (a) is in effect—the standing committee of the Legislative Assembly responsible for the consideration of legal issues.

There is no requirement for the ACT Scrutiny Committee to examine *subordinate legislation* against the HR Act. In some ways, this is a blessing for the Legal Adviser (Subordinate Legislation).

That said, a good Legal Adviser (Subordinate Legislation) would, of course consider human rights issues in scrutinising subordinate laws. Apart from any other reason, the rights set out in the HR Act provide a useful guide as to the sorts of rights that might be considered to exist within the concept of the "personal rights and liberties" that must not be unduly trespassed upon.

A further reason for considering the HR Act in relation to subordinate legislation is that the ACT Supreme Court has referred to the HR Act in the context of finding subordinate legislation to be invalid.[85] So the HR Act must be taken into account in relation to subordinate legislation, despite the fact that the HR Act does not explicitly refer to subordinate laws.

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85 See the decision of the ACT Supreme Court in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's Human Rights Act 2004 to determine the proper limits of certain legislation.

But don't just take my word for it ….

Again, points similar to those that I have made immediately above have been more eloquently (and authoritatively) made by someone else. In his Alice Tay Lecture on Law and Human Rights 2007,[86] the (then) Commonwealth Ombudsman, Professor John McMillan, suggested that the value of human rights charters was that they "change the way that government is undertaken". According to Professor McMillan, human rights charters "crystallise human rights standards in a clear and accessible way".

Professor McMillan went on to say:

> … the explicit endorsement of human rights standards by Australian legislatures connects Australia directly to an international human rights movement that is influential around the globe. For the legislatures of the world to affirm rights charters in similar terms is to establish a new foundation for public and political life. Principles that form the pillars of that foundation include that human rights are universal, they are binding upon governments, and they set a minimum standard of acceptable behaviour for governments.

Professor McMillan also said:

> … a rights charter, depending upon its terms, can introduce new procedures stipulating how decisions are to be reached within government.

I should also point out that Professor McMillan also issued (what I would regard as) a note of caution. Referring to the fact that section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* provides that a public authority acts unlawfully if its action is incompatible with a human right, or if proper consideration was not given to a human right (unless the law did not permit the public authority to act differently), Professor McMillan stated:

> The meaning of this provision in the Victorian Charter will become clearer over time. It may that it does little more than echo an established principle of administrative law, that a discretionary power conferred upon an government agency must be exercised with due regard to relevant considerations and to the impact of any decision.

So, it may be that provisions such as this do little more than re-state the existing common law.

What's the point?

The point of the discussion above is that I accept that a greater spelling-out of what rights the various Australian legislative scrutiny committees consider to be encompassed by the "trespass on personal rights and liberties" term of reference might go some way towards ensuring a greater consistency of treatment of human rights issues in legislation. It might tend to make committees' treatment of human rights issues less "*ad hoc*". It might also tend to promote a greater degree of transparency, in giving the promoters of

86 Delivered in Canberra on 3 October 2007 (unpublished).

legislation a greater degree of certainty as to what issues are likely to attract the relevant committees' attention.

That said, I should also note that the NSW Legislative Review Committee (which the Project authors state "tends to produce better quality legal analysis than some of the other committees") seems to operate perfectly well, without reference to a defined set of rights and liberties.

I simply do not accept that the work of legislative scrutiny committees is in some way inferior, simply because it is not expressed "in the language of human rights". While I would not deny that human rights law (and human rights lawyers) has a potential role in the work of these committees, so too does the history and the experience and (for want of a better word) the *jurisprudence* of these committees.

In my view, a large part of the legislative scrutiny committees' problem is that their work goes largely unnoticed. As I suggested earlier, this is (in my view) because the work of legislative scrutiny committees is not "sexy". This point was made (in a much more staid way) in a 2003 editorial in *Statute Law Review*, where the editors stated that an obstacle to the greater involvement of parliamentary committees in the UK in legislative scrutiny was

> … certainly … that technical scrutiny of legislation is more demanding and less politically rewarding for parliamentarians than evaluation of its underlying policy.[87]

In my view, it is clear that part of the challenge for legislative scrutiny committees, is to do more to publicise their good work. At present, scant attention is paid to that good work.

87 *Statute Law Review*, 24 (3), p iv.