NSW parliament’s oversight of human rights in the first year of the COVID-19 pandemic

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Abstract
New South Wales (NSW) relies on a robust application of the Westminster system of government for its human rights protection. In 2020, the system was subjected to a major stress test via the COVID-19 pandemic, with new public conditions imposed on previously unregulated individual freedoms. The author examines the extent to which human rights featured in NSW parliament’s oversight of the 2020 pandemic response and finds it inadequate. The author concludes that the case study demonstrates a need for the state’s human rights protection model to be reconsidered.

Keywords
Human rights, New South Wales, parliament, parliamentary committees

The spread of COVID-19 has significantly impacted lives globally, with over 180 million cases and four million deaths as at early July 2021. Yet, at least in 2020, Australia’s management of the pandemic was lauded as one of the best examples to follow, with its suppressed case numbers relative to other countries noted as a ‘triumph’ that prevented tens of thousands of deaths.

When asked about his thoughts on the reasons for Australia’s success, the Commonwealth Health Minister, Greg Hunt, offered several factors including: border closures, rigorous testing and contact tracing, and the general willingness of the public to comply with new social distancing protocols. The observation reflects well in New South Wales (NSW), where six Acts, 46 Regulations and 70 Public Health Orders were introduced in 2020 to implement the factors identified by Minister Hunt. These legislative and regulatory changes have brought about significant changes to the lives of individuals in NSW. Indeed, in introducing the health measures necessary to contain and suppress the novel virus, government controls were introduced to hitherto largely private areas. For example, a person’s ability to associate with others, pursue economic, social and cultural activities, and navigate public and private space have all been made subject to significant government control.

While the NSW community overall accepted the expansion in executive power as a result of expert health advice and necessity, there has been awareness from the beginning of its human rights trade-off. For example, the Australian Human Rights Commission has publicly articulated its concerns regarding aspects of the NSW government’s COVID-19 response, while the Human Rights Law Centre and other civil society groups called for NSW parliament – adjourned due to the pandemic – to reconvene and oversee executive action.

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1Stephen Duckett and Anika Stobart, ‘4 ways Australia’s coronavirus response was a triumph, and 4 ways it fell short’, The Conversation (4 June 2020) https://theconversation.com/4-ways-australias-coronavirus-response-was-a-triumph-and-4-ways-it-fell-short-139845.
2Anastasia Tsirtsakis, ‘Australia’s COVID-19 response may have saved more than 16,000 lives’, newsGP (online, 7 October 2020) https://www1.racgp.org.au/newsgp/clinical/australia-s-covid-19-response-may-have-saved-more.
3Phil Mercer, ‘Covid: Melbourne’s hard-won success after a marathon lockdown’, BBC News (online, 26 October 2020) https://www.bbc.com/news/world-australia-54654646.
4‘What is the Commission’s view on limiting human rights during COVID-19?’, Australian Human Rights Commission (Web page) https://humanrights.gov.au/about/covid19-and-human-rights/what-commissions-view-limiting-human-rights-during-covid-19.
5Human Rights Law Centre, Civil society groups call on NSW Parliament to resume (Media Release, 5 May 2020) https://www.hrlc.org.au/news/2020/5/5/civil-society-call-on-nsw-parliament-to-resume.
These events remind us that state governments, although often overshadowed by the federal government and the judiciary in terms of human rights, still retain significant influence. It also brings attention to the role of NSW parliament, as the state – without a constitutional or legislative bill of rights – relies on a robust application of the Westminster system of government for its human rights protection. Accordingly, this article will explore NSW parliament’s consideration of human rights as part of its oversight of the state government’s COVID-19 response in 2020. This article will first canvass the nature of human rights protected in the state and the understanding of NSW parliament’s role. The article will then consider the extent to which human rights featured in NSW parliament’s oversight of the executive’s response to the pandemic in 2020.6

Human rights protection in NSW

Human rights recognised and protected in Australia and NSW can be traced to several sources.7

To begin, several rights are identified in the Commonwealth Constitution. These include the right to vote,8 religious freedoms,9 right against compulsory acquisition of property,10 right to a fair trial,11 protection from discrimination based on place of residence12 and protection against executive encroachment on judicial power.13 Furthermore, the High Court has found an implied right of freedom of political communication under ss 7 and 24.14

There are also specific rights protected under federal and state legislation. These include federal legislation such as the Sex Discrimination Act 1984, Disability Discrimination Act 1992, Racial Discrimination Act 1975, Human Rights and Equal Opportunity Commission Act 1986, Privacy Act 1988, Freedom of Information Act 1982, Evidence Act 1995 and the Family Law Act 1975.11–13 NSW legislation, such as the Anti-Discrimination Act 1977, Disability Services Act 1993, Privacy and Personal Information Act 1998 and the Freedom of Information Act 1989 also provide protections in the state.16

Additional to these constitutional and legislative rights are protections under common law and international treaties.17

In 1999 the NSW Legislative Council’s Standing Committee on Law and Justice, at the request of the then Attorney General, conducted an inquiry into whether the state should adopt a bill of rights. As part of the inquiry, the committee considered and confirmed the above rights as applicable and protected in the state.18

The inquiry was also instructive in two other respects. First, while the committee recognised that rights protection in NSW, with its lack of a single constitutional or legislative basis for rights, was unusual among democratic peers, it recommended against adopting a bill of rights.19 The primary reason for this recommendation was the recognition of NSW parliament’s role as the rights protector in the state, and the committee’s concern over a bill of rights’ potential ramifications on the established roles of the judiciary and the legislature.20

The inquiry’s conclusion echoed sentiments previously expressed by supporters of the status quo. As Prime Ministers, Robert Menzies and John Howard had each fielded questions on a possible bill of rights and asserted that the robust workings of Australian democracy rendered such a change redundant.21 Similarly, the jurist Owen Dixon noted that the framers of Australia’s Constitution believed a bill of rights would serve no useful purpose and merely ‘place fetters upon legislative action’.22 The current system of human rights protection in Australia and NSW, then, reflects the liberal constitutionalist principle of parliamentary supremacy in protecting individuals against executive overreach,23 and the view that human rights would be better protected by parliament as a majoritarian institution subject to elections, rather than the unelected judiciary.24

The second legacy of the inquiry is NSW parliament’s current use of committees to protect human rights.25 The inquiry found that NSW parliament would benefit from emulating the Australian parliament’s use of committees in rights protection, and its subsequent recommendation led

6This article was first developed during the author’s participation in the 2020 Parliamentary Law, Practice and Procedure Course – administered by the University of Tasmania and Australia and New Zealand Association of Clerks-at-the-Table – under NSW Parliament sponsorship.
7Standing Committee on Law and Justice, Legislative Council, Parliament of NSW, A NSW Bill of Rights (Parliamentary Paper No 893, October 2001) para 2.20.
8Australian Constitution s 41.
9Australian Constitution s 116.
10Australian Constitution s 51(XXXI).
11Australian Constitution s 80.
12Australian Constitution s 117.
13Australian Constitution Ch 3.
14Louise Chappell, John Chesterman and Lisa Hill, Politics of Human Rights in Australia (Cambridge University Press, 2009) 29.
15Standing Committee on Law and Justice (n 7) 12.
16Ibid 13.
17Ibid 13–14.
18Gareth Griffith, ‘The Protection of Human Rights: A Review of Selected Jurisdictions’ (Briefing Paper No 3, Parliamentary Library Research Service, Parliament of NSW, June 2000) 3.
19Standing Committee on Law and Justice (n 7) Ch 3.
20Ibid 110.
21Brian Galligan and Ted Morton, ‘Australian Exceptionalism: Rights Protection Without a Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia (Routledge, 2006) 27; Brian Galligan and Emma Larking, ‘Rights Protection: The Bill of Rights Debate and Rights Protection in Australia’s States and Territories’ (2007) 28(1) Adelaide Law Review 177.
22Robert French, ‘Protecting human rights without a bill of rights’ (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010) https://www.hcourt.gov.au/asset/publications/speeches/current-justices/frenchc/frenchcj26jan10.pdf.
23John Uhr, ‘The Performance of Australian Legislatures in Protecting Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia (Routledge, 2006) 46–7.
24Galligan and Larking (n 21) 191.
25Standing Committee on Law and Justice (n 7) 129.
to the creation of the Legislation Review Committee (LR Committee) and the committee-based rights protection system in use today.26

Modelled on the Australian senate’s scrutiny of Bills and delegated legislation committees, the LR Committee is intended to aid NSW parliament in undertaking its human rights protection function by reviewing Bills and regulations under sections 8A and 9 of the Legislation Review Act 1987 (NSW).27 Under s 8A, the LR Committee reviews each Bill introduced to determine if it unduly ‘trespasses on personal rights and liberties’, and whether it allows for sufficient oversight of delegated legislative powers regarding ‘individual rights, liberties or obligations’. Similar criteria are applied to regulations under s 9, with additional checks to ensure the regulation’s necessity, efficiency and effectiveness, and consistency with legislative intent.28 While the LR Committee is required to report on all Bills introduced before parliament, it can exercise discretion regarding regulations. The key terms of the Act – ‘personal rights and liberties’ and ‘rights, liberties or obligations’ – are not defined and confer on the committee a traditional common law scrutiny mandate.29

Ultimately, the role of the LR Committee is to advise parliament regarding human rights, and its advisory nature is apparent in its limitations. For instance, the committee cannot question the policy or legislative intent of legislation or delegated legislation before it, conduct hearings, or receive public submissions. The LR Committee’s digests, through which its findings are conveyed to members, are independent of the parliament’s legislative program. That is, where necessary, Bills can be considered in parliament irrespective of whether the LR committee’s review has taken place, and there is no requirement for members to follow or consider its advice. Even for non-urgent Bills, the LR committee is typically given the five-calendar day adjournment – including weekends – between the second reading speech and debate for its review.30 The committee is also government-dominated by design. In 2020, five of the LR committee’s eight members were from the lower house, and the same number of members were from the government.

Two other scrutiny committees in NSW parliament operate independently and parallel to the LR committee: the Legislative Council’s Selection of Bills Committee and the Regulation Committee.

The Selection of Bills Committee was established on a trial basis in 2018, and re-established on an ongoing basis in 2019, to allow the NSW upper house to play a greater role in the review of Bills.31 The committee holds a meeting every sitting week to consider all Bills introduced into the Legislative Council, and then decides whether each Bill should be referred to one of the standing committees for inquiry. The resolution appointing the committee provides that the committee consist of three government members, two opposition members and one member from each crossbench party, and any independent member.32 This meant that, in 2020, the committee comprised 11 members and the government did not hold a majority.

Established as a standing committee in 2019, the Regulation Committee is another relatively new addition to the Legislative Council. The committee inquires into, and reports on, any instruments of a legislative nature, including policy intent and any other issues it considers significant.33 Established in part due to dissatisfaction by members of the Legislative Council with the scrutiny of delegated legislation,34 the Regulation Committee seeks to complement rather than replicate the work of the Joint Legislative Review Committee by ‘focusing on the substantive policy issues regarding a small number of regulations of interest’.35 The Committee consists of four government members, and two members each from the opposition and the crossbench.36

**NSW government’s COVID-19 response**

In order to ascertain how human rights featured in NSW parliament’s oversight of the COVID-19 response, the activities of the committees and broader debates that took place in parliament will need to be considered.

**Human rights oversight by committees**

As mentioned earlier, the NSW government implemented measures to contain and suppress the pandemic through numerous Bills, Regulations and Public Health Orders.37 Together, these instruments implemented lockdowns, embedded social distancing, and offered support for the economic hardships resulting from the changes.

In terms of legislation, six Bills were introduced to parliament for consideration on three occasions – in March, May and August 2020. The first two were the COVID-19

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26New South Wales, Parliamentary Debates, Legislative Council, 25 September 2002, 5288 (Ian MacDonald); Laura Grenfell and Sarah Moulds, ‘The Role of Committees on Rights Protection in Federal and State Parliaments in Australia’ (2018) 41(1) UNSW Law Journal 41.
27New South Wales, Parliamentary Debates, Legislative Assembly, 18 June 2002, 3256 (Paul Whelan); Government Response to Standing Committee on Law and Justice: A NSW Bill of Rights (23 October 2002) https://www.parliament.nsw.gov.au/ic/docs/inquiries/1737/Govt%20response.pdf.
28Legislation Review Committee, Parliament of New South Wales, Inquiry into the operation of the Legislation Review Act 1987 (2018) 3–4.
29Grenfell and Moulds (n 26) 47.
30Allan Shearan, ‘The Role of the Legislation Review Digest in NSW’ (Speech, Australia-New Zealand Scrutiny of Legislation Conference, Parliament House, Canberra, 6-8 July 2009) https://www.aph.gov.au/About_Parliament/Parliamentary_Papers/Senate/Public/parliamentary-papers/shearan.
31David Blunt and Stephen Frappell (eds), New South Wales Legislative Council Practice (Federation Press, 2nd ed, 2021) 733; Selection of Bills Committee, Parliament of New South Wales, Evaluation of the Selection of Bills Committee Trial (2018) 1.
32New South Wales, Parliamentary Debates, Legislative Council, 8 May 2019, 125 (Don Harwin).
33Legislation Review Committee (n 28) 44–48.
34Blunt and Frappell (n 31) 641.
35Select Committee on the Legislative Council Committee System, Parliament of NSW, Legislative Council Committee System, No 3 (2016) 4.
36NSW Legislative Council, Committees – Sessional and Temporary Orders, Resolutions and Membership (Web Page) https://www.parliament.nsw.gov.au/ic/rules/Documents/Resolutions/Committees%20Sessional%20and%20Temporary%20Orders%20Resolutions%20and%20Membership%20as%20at%2024%20June%202021.pdf.
37See the NSW legislation website for the latest list of Orders, Acts and Regulations: https://www.legislation.nsw.gov.au/information/covid19-legislation.
Legislation (Emergency Measures) Bill 2020, which brought in the changes needed to grant public agencies the flexibilities needed to implement social distancing in their operations; and the Treasury Legislation Amendment (COVID-19) Bill 2020, which sought to alleviate financial pressures on businesses. Both Bills passed the two houses on their day of introduction and were assented the next day.38

The second tranche comprised the COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Bill 2020; the COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Bill 2020; and the COVID-19 Legislation Amendment (Emergency Measures—Treasurer) Bill 2020. These Bills enabled further flexibilities in government and court operations to minimise physical interactions and aided tenants experiencing hardship due to the pandemic. Like the March 2020 Bills, the consideration of these Bills was expedited, passing the Legislative Assembly on the day of introduction and the Legislative Council the next day.39

The last of the 2020 COVID-19 response Bills was the State Revenue Legislation Amendment (COVID-19 Housing Response) Bill 2020 (Housing Response Bill). As a Bill designed to support post-pandemic economic recovery, this was the only 2020 COVID-19 response Bill not to be fast-tracked, with the standard adjournment of 5 days applied between debates.

The fact that five of the six Bills were expedited meant that all except the Housing Response Bill were assented to before the LR Committee’s review. Even the LR Committee’s report for the Housing Response Bill was published after the Bill had passed the lower house, being made available to upper house members for only a few hours before the debate commenced. This meant that, ultimately, the LR Committee’s work was only used once in considering the six Bills, in the context of a negatived amendment to the Housing Response Bill.40 Further, none of the explanatory notes and second reading speeches for the six Bills included any reference to human rights, liberty, freedoms or the Legislative Review Act 1987 (NSW).

Nevertheless, Hansard reveals that some of the rights issues were apparent to members, even without the benefit of the LR Committee’s digests available to them. For instance, in considering the COVID-19 Legislation Amendment (Emergency Measures) Bill 2020, the Shadow Attorney General Paul Lynch remarked that it contained ‘extraordinarily broad’ powers,41 a sentiment echoed in the Legislative Council by Mark Latham, who described the Bill as something ‘beyond the normal perspective and workings of a democracy’.42

Despite this, the opposition and crossbench cooperated with the government in light of the public health emergency. The approach adopted was demonstrated by Adam Searle, opposition leader in the Legislative Council. In voting against an amendment moved by the crossbench, he explained his decision as a ‘matter of practicality’, noting that, in another time, he would have found the motion for amendment ‘compelling’.43

It should be noted that the LR Committee reported on the Bills retrospectively and identified issues under the Legislative Review Act. The issues identified included potential trespass on personal rights and liberties; depending rights on insufficiently defined administrative powers and inappropriately delegating legislative powers.44 However, along similar lines to the debates in parliament, the LR Committee digests also cited the public health context of the Bills as a reason for not commenting on the matter further.45

In support of the six Acts, a total of 46 COVID-19 regulations were gazetted in 2020, combining to deliver assistance to those adversely impacted by the lockdown and social distancing measures; allow penalties to be enforced for contravening public health orders and make the changes needed for public agencies to continue operations while minimising physical contact between persons. For example, Local Government (General) Amendment (Covid-19) Regulation 2020 removed the requirement for councils to make certain documents available for physical inspections by the public, while the Residential Tenancies Amendment (COVID-19) Regulation 2020 limited landlords’ ability to terminate leases. The Public Health Amendment (Penalty Notices) Regulation 2020 worked to enforce social distancing and lockdown by allowing penalties to be issued for non-compliance with ministerial directions to isolate, quarantine and lockdown.

While none of the regulations introduced was subject to the regulatory impact assessment process,46 the LR Committee did consider all 2020 COVID-19 regulations within their respective disallowance periods.47 The LR Committee’s report on the regulations reveals a pragmatic approach similar to that adopted in consideration of Bills. Indeed, while 16 of the regulations were found to have issues under s 9 of the Legislation Review Act 1987 (NSW), the LR Committee noted the public health context in which the regulations were created.48 As such, the LR Committee chose not to make any further comment regarding the regulations. Unsurprisingly, then, none of the regulations was subject to a disallowance.

Additional to the Acts and regulations, and under the authority granted to him by the state’s Public Health Act 2010 (NSW), the NSW Health Minister made 70 public health orders in 2020 to institute lockdown and social distancing measures. While the Acts and regulations have

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38 ‘Current Session Bills’, Parliament of New South Wales (Web Page) https://www.parliament.nsw.gov.au/bills/Pages/current-bills.aspx.
39 Ibid.
40 New South Wales, Parliamentary Debates, Legislative Council, 4 August 2020, 58 (Abigail Boyd)
41 New South Wales, Parliamentary Debates, Legislative Assembly, 24 March 2020, 7 (Paul Lynch)
42 New South Wales, Parliamentary Debates, Legislative Council, 24 March 2020, 42 (Mark Latham)
43 New South Wales, Parliamentary Debates, Legislative Council, 24 March 2020, 48 (Adam Searle)
44 Legislation Review Committee, Parliament of New South Wales, Compilation of Reports on COVID-19 Related Bills and Regulations, Volume II: Reports (2020) 1–67.
45 Ibid.
46 ‘Regulatory Impact Statement’, NSW Department of Communities and Justice (Web Page) https://www.justice.nsw.gov.au/justicenow/Pages/lpclrd/lpclrd_consultation/lpclrd_statements.aspx.
47 Interpretation Act 1987 (NSW) s 47.
48 Legislation Review Committee, Parliament of New South Wales, Compilation of Reports on COVID-19 Related Bills and Regulations, Volume II: Report (2021) 72–132.
focussed on changes that allowed for and supported social distancing and quarantine protocols, the restrictions on freedoms and liberties made under the orders were socially transformative. For instance, restrictions on private life brought about by the health orders included:

- mandatory quarantine for persons entering NSW via sea or air;\(^49\)
- closure of premises deemed non-essential;\(^50\)
- restrictions on public gatherings;\(^51\)
- restricted access to aged care facilities;\(^52\)
- authorisation of government agencies to collect and disclose personal and health information;\(^53\)
- requirement for persons to stay at home except where ‘reasonable excuse’ exists;\(^54\)
- mandatory self-isolation or hospitalisation for persons diagnosed with COVID-19;\(^55\)
- lockdown of specific areas in the state.\(^56\)

The significant loss of individual freedoms stemming from these orders was reflected by the level of public commentary on the Public Health Orders vis-à-vis the Acts and Regulations.\(^57\) However, the opposite was the case in terms of NSW parliamentary committees, with the LR Committee lacking the mandate to review the Public Health Orders as they are not a ‘statutory rule’ tabled in parliament for disallowance. Subsequent debate made clear that this was not a foreseen or intended scenario. Indeed, David Mehan, as a member of the LR Committee, remarked in the Legislative Assembly:

> Keen readers of the Legislation Review Digest will note that none of the public health orders made by the Minister for Health and Medical Research are included in the digests. The Legislation Review Committee does not have the power under the Legislation Review Act to scrutinise public health orders. This is an interesting and important matter that the House should be aware of.\(^58\)

In terms of other scrutiny of legislation committees, the Legislative Council’s Selection of Bills Committee considered each of the six COVID-19 response Bills but chose not to refer any further inquiry and report.\(^59\) The Regulation Committee also did not inquire into the delegated legislation introduced in response to the COVID-19 pandemic in 2020.\(^60\)

Significantly, another committee – the Legislative Council’s Public Accountability Committee – used its self-referral power to begin an inquiry into the NSW government’s management of the COVID-19 pandemic on 27 March 2020. The inquiry, which is ongoing as of 1 July 2021, adopted a broad term of reference considering the entirety of the NSW government’s pandemic response. However, as a committee tasked with examining public accountability, financial management, regulatory impact and service delivery of NSW government agencies, the committee’s inquiry naturally focussed on such matters rather than human rights.\(^61\) That is, the 11 hearings held to date as part of the Public Accountability Committee’s inquiry have not considered the LR Committee’s work or human rights as a basis of inquiry. This contrasts with Victoria, where the Public Accounts and Estimates Committee Inquiry into the Victorian government’s Response to the COVID-19 Pandemic saw the Victorian Equal Opportunity and Human Rights Commission give evidence specifically concerning the human rights ramifications of the pandemic.\(^62\)

Similarly, Hansard shows that parliament discussed the pandemic and the NSW government’s response to it in relation to a number of topics, but that none of these centred on the work of the LR Committee or human rights.

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\(^49\)Public Health (COVID-19 Quarantine) Order 2020 (NSW); Public Health (COVID-19 Maritime Quarantine) Order 2020 (NSW); and Public Health (COVID-19 Air Transportation Quarantine) Order 2020 (NSW).

\(^50\)Public Health (COVID-19 Gatherings) Order (Nos 1–3) 2020 (NSW).

\(^51\)Public Health (COVID-19 Mass Gatherings) Order (Nos 1–3) 2020 (NSW) and Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (NSW).

\(^52\)Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (NSW).

\(^53\)Public Health (COVID-19 Gatherings) Order (Nos 2+3) 2020 (NSW).

\(^54\)Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (NSW).

\(^55\)Public Health (COVID-19 Self-Isolation) Order 2020 (NSW).

\(^56\)Public Health (COVID-19 Lord Howe Island) Order 2020 (NSW) and Public Health (COVID-19 Northern Beaches) Order 2020 (NSW).

\(^57\)See, eg, Paul Gregoire, ‘Closures of Parliament are Unwarranted: An Interview with NSWCCCL President Nicholas Cowdery’, Sydney Criminal Lawyers (Blog Post, 15 April 2020) https://www.sydneycriminallawyers.com.au/blog/closures-of-parliament-are-unwarranted-an-interview-with-nswcccl-president-nicholas-cowdery/; Kate Allman, ‘Police state or safety net? How NSW entered a strange “new normal”’ (2020) 66 Law Society of NSW Journal 32; Jack McNally, ‘Accountability, discretion and the rule of law: Issues in pandemic policing’, AUSPUBLAW (Blog Post, 15 July 2020) https://auspublaw.org/2020/07/accountability-discretion-and-the-rule-of-law-issues-in-pandemic-policing/.

\(^58\)New South Wales, Parliamentary Debates, Legislative Assembly, 3 June 2020, 37 (David Mehan).

\(^59\)Parliament of NSW, Report No 30, Selection of Bills Committee (Report, 24 March 2020) 2; Parliament of NSW, Report No 31, Selection of Bills Committee (Report, 12 May 2020) 2; Parliament of NSW, Report No 34, Selection of Bills Committee (Report, 4 August 2020) 2.

\(^60\)Regulation Committee, NSW Legislative Council, Reports and Government Responses (Web Page) https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=252#tab-reportsandgovernmentresponses.

\(^61\)Public Accountability Committee, NSW Legislative Council, Resolution Appointing the Committee (Web Page) https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=255#tab-resolutionestablishingthecommittee.

\(^62\)Public Accounts and Estimates Committee, Parliament of Victoria, Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic: Round two hearings, transcripts and questions on notice (VEOHRC, 26 August 2020) https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Transcripts_Round_2/VEOHRC_26_August_verified_transcript.pdf.
Instead, the discussions of the NSW government’s response to the pandemic were in regard to mobile testing clinics, 63 education, 64 frontline workers, 65 members’ electorates, 66 hospitals, 67 women’s employment, 68 small business, 69 racism, 70 animal welfare, 71 young people, 72 arts and culture, 73 right to attend religious celebrations 74 and the economy. 75 There was one occasion on 4 August 2020 where the Minister for Planning and Public Spaces, Rob Stokes, made a private members statement entitled ‘COVID-19 and freedom’. However, the statement was essentially a defence of the NSW government, justifying the suspension of individual freedoms in the face of a public health crisis. 76

Lessons from the pandemic

In summary, it could be said that human rights featured very lightly in the questions, debates and hearings comprising the NSW parliament’s auspice of the government’s pandemic response in 2020. Furthermore, the pandemic demonstrated the limitations of the LR Committee, and a general willingness in NSW parliament to support the government’s agenda in times of crisis despite its human right consequences.

While there is no reason to doubt the sincerity of the government’s public health agenda, nor NSW parliament’s willingness to support the government in good faith, it should be noted that 2020 was not the first example where urgent necessity rendered human rights considerations secondary.

For example, the rights debate was particularly limited in NSW during the introduction of the anti-bikie Bills in 2009, 2012 and 2013. 77 These Bills had significant human rights implications, restricting the movement of members of bikie groups and even making it an offence to consort with convicted members. Like the COVID-19 response Bills, the three Bills were fast-tracked, meaning that the LR Committee could not report on the 2009 and 2013 Bills. Even when available for the 2012 Bill, the LR Committee’s digest was not used by government or opposition members in debate. 78

In their examination of the role of committees in rights protection in Australian parliaments, Grenfell and Moulds used the example of the bikie Bills to contend that the LR Committee lacks ‘weight and legitimacy’ in the NSW parliament. 79 This assessment is echoed by McNamara and Quilter who, in a study of NSW criminal Bills, found little evidence that the LR Committee’s views held sway in parliamentary debate and suggested that little would be achieved under the current system. 80

While the discussions of this article seem to reinforce the above conclusions, it is also worth noting that the issues have also been recognised and recommended for change by the NSW Parliamentary committees. The need for change is articulated in the LR Committee’s 2018 inquiry into the operation of the Legislation Review Act 1987 81 and the Regulation Committee’s 2020 inquiry into the making of delegated legislation in NSW. 82 The LR Committee’s 2018 inquiry made a number of recommendations to improve its ability to scrutinise human rights, including a formal articulation of rights and liberties; and mandating of response to the LR Committee’s findings. 83 In its inquiry, the Regulation Committee recommended that the Attorney General refer the NSW Law Reform Commission to consider ‘the option of expanding the statutory provisions regarding disallowance to all instruments of a legislative character’ – in effect, expanding the scope for the LR Committee’s review to include public health orders. 84

Hypothetically, had the above proposals been accepted and implemented before the pandemic, the public health orders would have been scrutinised and consideration specific to human rights would have taken place in NSW parliament, as has occurred in the Victorian and Queensland

63New South Wales, Parliamentary Debates, Legislative Assembly, 24 March 2020, 24 (Robyn Preston).
64New South Wales, Parliamentary Debates, Legislative Council, 2 June 2020, 29 (Wes Fang and Sarah Mitchell); New South Wales, Parliamentary Debates, Legislative Assembly, 17 September 2020, 43–4 (Julia Finn).
65New South Wales, Parliamentary Debates, Legislative Assembly, 24 March 2020, 24 (Jenny Atchison); New South Wales, Parliamentary Debates, Legislative Assembly, 3 June 2020, 82 (Kate Washington).
66Multiple members spoke about their electorates over March – November 2020. See, eg, New South Wales, Parliamentary Debates, Legislative Assembly, 12 May 2020, 2080 (Gabrielle Upton, Chris Minns and Jihad Dib).
67New South Wales, Parliamentary Debates, Legislative Assembly, 17 June 2020, 36 (Ryan Park).
68New South Wales, Parliamentary Debates, Legislative Assembly, 16 June 2020, 58 (Liesl Tesch).
69New South Wales, Parliamentary Debates, Legislative Assembly, 18 June 2020, 63–64 (Tania Mihailuk).
70New South Wales, Parliamentary Debates, Legislative Assembly, 18 June 2020, 67–68 (Jenny Leong).
71New South Wales, Parliamentary Debates, Legislative Council, 2 June 2020, 28–29 (Emma Hurst and Bronnie Taylor).
72New South Wales, Parliamentary Debates, Legislative Council, 16 June 2020, 65–66 (Abigail Boyd).
73New South Wales, Parliamentary Debates, Legislative Council, 16 September 2020, 22–23 (Shayne Mallard and Don Harwin).
74New South Wales, Parliamentary Debates, Legislative Council, 4 August 2020, 92–93 (Fred Nile).
75New South Wales, Parliamentary Debates, Legislative Council, 2 June 2020, 40 (Mark Buttigieg).
76New South Wales, Parliamentary Debates, Legislative Assembly, 4 August 2020, 65–66 (Rob Stokes).
77Grenfell and Moulds (n 26) 57–60.
78Ibid.
79Ibid 59.
80Luke McNamara and Julia Quilter, ‘Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales’ (2015) 27(1) Current Issues in Criminal Justice 33.
81Legislation Review Committee (n 28).
82Regulation Committee, Parliament of NSW, Making of Delegated Legislation in New South Wales (2020).
83Legislation Review Committee (n 28) v7.
84Regulation Committee (n 82) ix–x.
parliaments.85 In contrast to NSW, the Commonwealth parliament saw the Parliamentary Joint Committee on Human Rights – a committee devoted to reviewing Bills according to a rights-focused criteria – produce reports on human rights implications of federal COVID-19 legislation.86 However, the reality in NSW is that the LR Committee’s 2018 recommendations were only responded to on 14 September 2021,87 and a response to the Regulation Committee’s report, provided in April 2021, did not support the potential extension of disallowance and committee scrutiny to all instruments of a legislative character.88 It is hoped that NSW parliament’s recent difficulties in undertaking its role as a rights protector – during the significant stress test of the COVID-19 pandemic – will add further weight to the calls for change and can highlight the need for NSW parliament’s rights protection system to be reconsidered.

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