



Scrutiny of Legislation Committee

SCRUTINY OF LEGISLATION COMMITTEE

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**Committee System Review
Committee**

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28 June 2010

Hon Judy Spence MP
Chair
Committee System Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Hon Spence

Review of the committee system of the Queensland Parliament - submission

I refer to your letter dated 8 April 2010 inviting submissions to the Committee System Review and to my letter dated 21 May 2010 requesting an opportunity for the Scrutiny of Legislation Committee to make a submission after the close of submissions.

The submission of the committee is **enclosed**.

Yours sincerely

Mrs Jo-Ann Miller MP
Chair

Submission of Scrutiny of Legislation Committee to Committee System Review Committee

INTRODUCTION

Parliaments within the Westminster tradition confer one or more parliamentary committees with responsibility to examine the consistency of legislation with broad principles, generally relating to human rights and/or the rule of law.

In Queensland, the Scrutiny of Legislation Committee has met these responsibilities since its establishment in 1995.

This submission provides information about the Scrutiny of Legislation Committee to assist the select committee's consideration of all three of its terms of reference:

- the role of parliamentary committees in both Australian and international jurisdictions in examining legislative proposals, particularly those within unicameral parliaments;
- timely and cost effective ways by which Queensland parliamentary committees can more effectively evaluate and examine legislative proposals; and
- the effectiveness of the operation of the committee structure of the 53rd Parliament following the restructure of the committee system on 23 April 2009.

For 35 years, the committee and its predecessor have operated effectively. The committee has met its statutory responsibilities effectively and efficiently. It has also ensured the incremental benefits which flow from principled scrutiny of legislation.

RECOMMENDATIONS

This submission recommends it is essential for the Scrutiny of Legislation Committee to:

1. remain in its current form with existing responsibilities retained –
 - examination of bills and subordinate legislation for consistency with fundamental legislative principles; and
 - the monitoring of certain statutory provisions regarding legislation;
2. adopt a more active role in two particular areas –
 - examination of subordinate legislation; and
 - greater and more effective public engagement regarding matters within committee responsibilities; and
3. in view of recommendations 1 and 2 together with sustained growth in the committee's workload, be assured of additional and sufficient resources to ensure it is able to continue to carry out committee responsibilities in a timely and effective way.

OVERVIEW

This submission is divided into five parts:

1. Role of parliamentary committees conducting scrutiny of legislation
2. The Scrutiny of Legislation Committee
3. Examination of legislation
4. Monitoring of the operation of certain statutory provisions
5. Future scrutiny of legislation in timely and cost effective ways

1. ROLE OF PARLIAMENTARY COMMITTEES CONDUCTING SCRUTINY OF LEGISLATION

The meaning of 'scrutiny'

For parliaments within the Westminster tradition, the 'scrutiny' of legislation may take a number of different forms, as identified by Professor Dawn Oliver:¹

The very term 'scrutiny' covers a wide range of processes, some less structured than others. The Departmental Select Committees in the UK House of Commons 'scrutinise' in the sense of 'monitor' the expenditure, administration and policy of Departments. Standing committees 'scrutinise' bills in the sense of debating and amending them at the committee stage of a bill, after second reading. Both of these kinds of scrutiny are not confined by any stable or set criteria, whether related to constitutionality or not.

'Scrutiny' of bills can however take a more concrete form than that which takes place at second reading or committee stage in the two Houses. Feldman suggests that one usage of the term scrutiny, and an important one in relation to bills, is in reference to a principled activity.

Even if conducted in a somewhat unconstructive way, [scrutiny] has its own disciplines. The scrutineer tests the provisions of a measure against certain standards which are independent of the terms or subject-matter of the measure itself, and can and should be applied consistently to all measures which are scrutinised. The standards can be, and should be, chosen and applied so as to be largely unaffected by political, or at any rate party political, considerations.

The focus of this submission is the 'principled' scrutiny described. It involves the examination of legislation in relation to identified principles, generally those relating to human rights law and/or the rule of law. In Queensland, the identified principles are prescribed in the *Legislative Standards Act 1992*.

A comparative table of the responsibilities of parliamentary committees conducting scrutiny of legislation is **attached** (appendix A).

Aims

Scrutiny of this nature may be regarded as having twin aims:²

- to produce better laws as committee reports on the consistency of legislation with the identified principles:
 - inform parliamentary debate; and
 - influence drafting of legislation; and
- to raise the political costs for a government wishing to pass laws which may be inconsistent with the identified principles.

Accordingly, scrutiny serves to 'alert' Members of Parliament and the public to inconsistencies with the identified principles and to assist the resolution, within parliaments rather than courts, of issues requiring a balancing of competing principles or rights. Importantly, scrutiny facilitates the operation of the 'principle of legality'. This requires that a parliament state clearly the effect upon fundamental rights of the legislative measures to which it is giving its consent on behalf of the community.³

In a unicameral parliament, the aims of legislative scrutiny may become more important as, ordinarily, the second House is a House of scrutiny, review and debate.

Experience over some decades within parliaments in the Westminster tradition has demonstrated that the aims of scrutiny of legislation are achieved most effectively when the principles against

¹ D Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 *Macquarie Law Journal* 33, 36

² MC Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 47

³ *Coco v The Queen* (1994) 179 CLR 427, 437

which legislation is examined are explicit, when the committee is able to operate with a sufficient degree of non-partisanship and where it exercises and/or accesses relevant expertise.⁴

Benefits

Research by the committee has identified a large number of benefits accruing from principled scrutiny of legislation by a parliamentary committee. First, scrutiny of legislation is a key component of the protection of rights in our system of representative democracy:⁵

For a people believing in a free society under a representative democracy, scrutiny committees are vital, albeit still unremarked at large. Their contribution to liberty may be modest overall, but the constant nature of their principled advice has been invaluable to those seeking to stiffen resistance to abuse of power or excessive power.

Legislative scrutiny effects a cultural change.⁶ It has been central to efforts to build human rights and respect for the rule of law into legislative and political processes,⁷ embedding a respect for these principles at the pre-legislative and legislative stages. In practice, scrutiny of legislation instills in both law-makers and policy-makers a self-regulatory approach to their work such that they automatically consider the human rights implications of what they do, and act accordingly.⁸

A wider consequence of this protective role was described in the following way by former Senator Andrew Murray, a long time member of the Senate Scrutiny of Bills Committee:⁹

[T]he preservation of rights and safeguards makes for a calmer more settled more civil society; and ... there is a clear link between soundly based legislation and regulation, accountability transparency and openness, and better governance and improved social and economic outcomes.

Second, scrutiny of legislation strengthens the rule of law, providing reinforcement in respect of the enduring tension between executive power and the rule of law. In a speech about executive power, the Chief Justice of the High Court said the tension is not confined to the circumstances of war or civil strife.¹⁰

It may arise in politically sensitive areas of executive decision-making or whether the executive government has a program of action including the implementation of legislation and limited time to put it in place between elections. The tension between the imperatives of executive government and the rule of law is sometimes manifested in official impatience with legal processes and the view that they are an interference with and impose unnecessary transaction costs on good government.

However, scrutiny of legislation is an important counterbalance to the power of the executive. A committee with responsibility to examine the consistency of proposed legislation with the rule of law provides the parliament with information regarding the effect the legislation would have on public power. Accordingly, it assists the parliament to make a fully informed decision about the proper balance and distribution of power between the executive, the legislature and the judiciary. To provide an example, a scrutiny of legislation committee provides the parliament with information regarding the delegation of administrative or legislative power, including to quasi-independent bodies. In respect of nationally consistent legislation, the delegation of public power

⁴ D Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 *Macquarie Law Journal* 33, 54

⁵ A Murray, 'The contribution specialist legislative scrutiny committees can make to better governance' Australia-New Zealand Scrutiny of Legislation Conference, 7 July 2009, Canberra

⁶ M Tate, Submission to Senate Scrutiny of Bills Committee, *Inquiry into the future direction and role of the Scrutiny of Bills Committee*, www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010, 6

⁷ MC Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 43

⁸ D Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead [1999] *Public Law Review* 252, 254

⁹ A Murray, 'The contribution specialist legislative scrutiny committees can make to better governance' Australia-New Zealand Scrutiny of Legislation Conference, 7 July 2009, Canberra

¹⁰ RS French, 'The Executive Power', Inaugural George Winterton Lecture, Sydney Law School, The University of Sydney, 18 February 2010, 7-9

in this way can have implications for the institution of the parliament and parliamentary committees consistently draw attention to possible problems.¹¹

Third, independent and objective information is provided to parliaments by scrutiny of legislation committees. The information is developed independently of both the executive and the courts,¹² comprising an objective examination of the consistency of proposed legislation with identified principles and an examination of matters relating to its effect on the institution of parliament. Further, a scrutiny of legislation committee presents an opportunity for individuals to provide submissions to inform the parliamentary debate about relevant matters. This allows the parliament to be informed about the 'human aspect' of proposed legislation.

Similarly, scrutiny committees generally produce unanimous, authoritative and non-partisan reports to parliaments. As they do not evaluate the policy of legislative proposals, but focus on scrutiny according to identified principles, parliamentary scrutiny committees are able to operate in all-party way. Such committees tend not to divide on party lines.¹³ Former Senator Murray described the operation of the Senate Scrutiny of Bills Committee in the following way:¹⁴

One question asked in the abstract is how scrutiny can work when by definition every politician is partisan; partisan meaning to take one side, to be biased.

One answer is that scrutiny on rights and safeguards in our society is often less partisan than scrutiny on policy. There is generally much common ground on rights and safeguards. Our politicians share many democratic ideals and principles, and accept most.

Another answer is that every elected member I've ever met has known their duty and their mission. Their duty is to serve the people as best they can, and their mission is to leave their nation better for their service. Most politicians on scrutiny committees can therefore be expected to diligently address their given terms of reference.

A further answer is that experience and wisdom has been used to lessen partisan impulses – wisdom in creating scrutiny committees and processes; wisdom in designing their terms of reference; wisdom in adopting a non-partisan principles-based style; and the wisdom of using practical learned legal advisers to ensure a continuity of purpose and performance.

The virtue of the Senate Committee's terms of reference is that it requires every bill to be tested against set principles. It requires the Committee to take the high ground in protecting rights and liberties covered by the terms of reference, and to advise the Senate in regular timely public reports of its views on every bill.

Finally, scrutiny committees play an important legislative tidying role.¹⁵ With the close scrutiny of bills there is inevitably a role for these committees in identifying:

- errors within a bill or a regulation, including typographical errors and oversights; and
- discrepancies between separate legislative instruments.

In this regard, the committee refers to the address by the Chief Justice of the High Court to the 2009 Australia and New Zealand Scrutiny of Legislation Conference. Chief Justice French told delegates that their work 'added value to law making'. He said:¹⁶

The importance of pre-enactment scrutiny by reference to criteria relevant to the form of legislation, its intelligibility and its impact on rights and liberties cannot be underestimated. It is obviously far better to address problems of unintended legislative overreach, doubtful expression or impact on basic rights and freedoms at the pre-enactment stage, than to rely upon the mitigating effects of judicial interpretation.

¹¹ G Carney, *The Constitutional Systems of the Australian States and Territories* (2006) 20-21

¹² MC Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 44

¹³ D Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 *Macquarie Law Journal* 33, 40

¹⁴ A Murray, 'The contribution specialist legislative scrutiny committees can make to better governance' Australia-New Zealand Scrutiny of Legislation Conference, 7 July 2009, Canberra

¹⁵ MC Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 43

¹⁶ RS French, 'Adding Value to Law Making' Australia-New Zealand Scrutiny of Legislation Conference, 6 July 2009, Canberra, 5

2. ROLE OF SCRUTINY OF LEGISLATION COMMITTEE OF QUEENSLAND PARLIAMENT

History of parliamentary scrutiny of legislation committees

Overview

In Queensland, scrutiny of legislation has been undertaken by a committee since 1975. Currently, the statutory Scrutiny of Legislation Committee (established in 1995) examines bills and subordinate legislation. Its predecessor, the Committee of Subordinate Legislation (established in 1975) examined subordinate legislation.

Establishment of Committee of Subordinate Legislation

In November 1975, the Committee of Subordinate Legislation was established by resolution. It had responsibility to examine all subordinate legislation subject to disallowance by resolution. The genesis of that committee was described in the following way in its final report:¹⁷

Following the Constitution Act Amendment Act 1922, the Legislative Council was abolished and Queensland Parliament became a unicameral body with no Upper House or House of Review. Thus, until 1975, there existed no formal mechanism to review the actions of the Executive and its exercise of delegated powers.

The sheer volume of increasing amounts of legislation and the corresponding reduction in time that individual Members had available to review subordinate instruments precluded the effective control by the Parliament over the subordinate legislation being tabled before it.

It was the recognition of this deficit in terms of scrutiny that led to the introduction of the resolution to establish the Committee in 1975.

The Committee of Subordinate Legislation met for the first time on 11 February 1976. Two reports of that committee, tabled on 30 September 1976 and 27 September 1977, identified its terms of reference and contained information regarding its early proceedings (**attached** as appendix B).

Until 1995, each parliament re-established the Committee of Subordinate Legislation. The enactment of the *Parliamentary Committees Act 1995* provided for the replacement of the Committee of Subordinate Legislation by a Scrutiny of Legislation Committee.

Establishment of Scrutiny of Legislation Committee

The Scrutiny of Legislation Committee was established as a statutory committee following reviews of recommendations made in the *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald report), tabled in the Queensland Parliament on 3 July 1989. Two relevant reviews were regarding:¹⁸

- legislative drafting; and
- parliamentary committees.

In relation to the first review, the Fitzgerald report contained a recommendation to 'review the role and functions of the Parliamentary Counsel'.¹⁹ The review was undertaken by the Electoral and Administrative Review Commission (EARC) in 1990-91. The principal focus of the review was:²⁰

¹⁷ Parliamentary Committee of Subordinate Legislation, *Final Report of the Committee of Subordinate Legislation – A Retrospective* (1995) 11

¹⁸ GE Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989)

¹⁹ GE Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 371

²⁰ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.20]

...the drafting and advisory functions of the OPC, particularly in relation to the OPC's role in providing independent advice on matters involving fundamental legislative principles, that is, principles relating to the maintenance of rights and liberties, the provision of adequate redress to citizens aggrieved by administrative decisions and the maintenance of effective parliamentary sovereignty over delegated legislation.

In its report to parliament, EARC also identified a need for a parliamentary scrutiny of legislation committee with broad responsibility to examine the application of 'fundamental legislative principles' to both bills and subordinate legislation:²¹

In the course of the review, it became apparent to the Commission that no system of checks and balances in the making of legislation would be complete without an effective role for Parliament in drawing attention to bills before the Legislative Assembly that appeared to infringe fundamental principles.

Accordingly, the scope of the review was extended by the Commission to examine the adequacy of present Parliamentary procedures for reviewing bills and subordinate legislation for impact on rights and liberties, and principles of parliamentary sovereignty. The recommendation in this Report for the establishment of a new Parliamentary Committee responsible for scrutinising bills and subordinate legislation in terms of these matters is a significant outcome of this review. This recommendation will require additional resources to be made available to Parliament in order to provide the proposed Committee with effective research and administrative support.

The EARC recommendation for a parliamentary scrutiny committee to examine both bills and subordinate legislation was endorsed by the Parliamentary Committee for Electoral and Administrative Review (PCEAR).²²

When the Legislative Standards Bill 1992 was introduced, it established the office of the Parliamentary Counsel and set out a list of fundamental legislative principles to be observed in drafting legislation. In respect of the latter, the Hon WK Goss (Premier, Minister for Economic and Trade Development and Minister for the Arts) stated:²³

The Office of the Parliamentary Counsel is required to advise its clients on these principles. My Government will also require the Office of the Parliamentary Counsel to advise the parliamentary business and legislation committee of any departures from these principles and other concerns. The Attorney-General as first law officer of the State similarly advises the parliamentary business and legislation committee, and this measure will greatly strengthen the role of the committee in ensuring the preparation of high-quality legislation.

However, the bill did not enact the recommendation to establish a parliamentary scrutiny of legislation committee to replace the existing Subordinate Legislation Committee. In his second reading speech to the bill in May 1992, the Hon WK Goss explained:²⁴

I understand that EARC's report on the review of parliamentary committees is to be released in August/September. The Government considers that it would be sensible to consider the question of the parliamentary scrutiny of legislation committee after this report and the report of the parliamentary committee are released. However, I wish to reassure members that the role envisaged by EARC for this committee in scrutinising legislation for breaches of fundamental legislative principles will be very effectively carried out by the Office of the Parliamentary Counsel, in addition, of course, to the scrutiny already undertaken by my colleague the Attorney-General.

In relation to the second relevant post-Fitzgerald review, in respect of the relationship between parliament and the executive in Queensland, the Fitzgerald report stated that a lack of accountability arose partly from executive dominance of both the legislature and all aspects of

²¹ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.25]-[1.26]

²² Parliamentary Committee for Electoral and Administrative Review, *Report on Office of Parliamentary Counsel*, Report No. 19 (1991)

²³ *Queensland Parliamentary Debates (Hansard)*, 6 May 1992, 5003

²⁴ *Queensland Parliamentary Debates (Hansard)*, 6 May 1992, 5003

government. A role for parliamentary committees in making parliament accountable to the people was emphasised.²⁵

Parliament is meant to be the forum in which the necessity and worth of proposed laws ... can be debated. It should also serve as an inquest in which all or any aspects of public administration can be raised...

The operation of the party system in an unicameral assembly, the continuing growth in the scale and extent of Government activity, and the increasing complexities of policy making affect the ability of Parliament to review the Government's legislative activity or public administration.

If Parliament is to perform this vital role, procedures which allow it to obtain and analyse information are essential.

Elsewhere, the effective and efficient operation of Parliament has been enhanced by the setting up of all-party policy and investigatory committees. The committees have become a vital and energetic part of giving effect to the democratic process particularly in respect of complex issues. They serve as Parliament's research arm and as an independent source of information to aid proper Parliamentary debate.

Scrutiny of Government legislative activity and of public administration is more effective as a consequence.

More specifically, in relation to legislative scrutiny by parliamentary committees, a recommendation was that committees should have:²⁶

... the power to conduct public hearings, as well as the power to investigate and obtain information and documents and, where appropriate, accept and report on petitions and complaints. The legislative process should allow sufficient time for the involvement of parliamentary committees, having regard particularly to members' general parliamentary duties, including attending to their constituencies.

The skills individual members bring to Parliament are often inadequate for the analysis of complex public accounts and transactions and scrutiny of major legislation. A Parliamentary Committee at times may need, and must be able to obtain, independent expert staff and consultants.

To advise parliament on the implementation of a 'comprehensive system of parliamentary committees to monitor the efficiency of Government',²⁷ in 1992, EARC published a report containing recommendations for legislation establishing a new system of parliamentary committees.²⁸ Generally, the EARC recommendations regarding committees were supported by PCEAR, but the latter body recommended a system of six specialist committees rather than the generalist committees proposed by EARC. PCEAR reported to the parliament that the committee system it proposed would 'be focused more on scrutiny and accountability rather than general policy inquiry'.²⁹

In September 1995, the Queensland Parliament passed the *Parliamentary Committees Act*, establishing a new system of committees for the Legislative Assembly. One was the Scrutiny of Legislation Committee.

Since 2001, when the provisions of the *Parliamentary Committees Act* were largely re-enacted in the *Parliament of Queensland Act 2001* (passed to complement a new *Constitution of Queensland 2001*), the committee has been established under section 80 of that Act and its responsibilities are set out in section 103.

²⁵ GE Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 123

²⁶ GE Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 124-5

²⁷ *Electoral and Administrative Review Act 1989* (Qld) s 2.10 and schedule

²⁸ Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (1992)

²⁹ Parliamentary Committee for Electoral and Administrative Review, *Report on Review of Parliamentary Committees* (1993)

Statutory responsibility

Parliament of Queensland Act

Section 103 of the *Parliament of Queensland Act* confers the committee with an area of responsibility that can be divided into two limbs: scrutiny and monitoring. Both limbs relate to the legislative power of the parliament.

First, section 103(1) confers responsibility to consider, by examining all bills and subordinate legislation:

- the application of fundamental legislative principles to particular bills and particular subordinate legislation; and
- the lawfulness of particular subordinate legislation.

Second, section 103(2) requires the committee to monitor generally the operation of specific provisions of the:

- *Legislative Standards Act 1992*—
 - section 4 (meaning of 'fundamental legislative principles');
 - part 4 (explanatory notes); and
- *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); and
 - part 8 (forms).

In respect of section 103, the explanatory notes to the Parliament of Queensland Bill 2001 indicated (at 43):

Thus, the committee's role is to monitor legislation. The committee may raise issues (such as breaches of fundamental legislative principles) with the responsible Minister, or with a Member sponsoring a Private Member's Bill, prior to pursuing issues, where appropriate, in the Assembly.

By way of resolution, the 50th, 51st and 52nd Parliaments conferred an additional responsibility on the Scrutiny of Legislation Committee; namely, to examine the application of fundamental legislative principles to amendments to bills, whether or not the bill amended had received Royal Assent. The 53rd Parliament has not passed a similar resolution.

Examination of legislation

Consistent with section 103(1) of the *Parliament of Queensland Act*, the committee examines all bills introduced into the Legislative Assembly, together with all subordinate legislation tabled.

First, in accordance with section 103(1)(a), the committee examines legislation to consider the application of 'fundamental legislative principles'. Section 4(1) of the *Legislative Standards Act* states that 'fundamental legislative principles' are 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. Section 4(2) then provides that the principles include requiring that legislation have sufficient regard to:

- rights and liberties of individuals; and
- the institution of Parliament.

The explanatory notes to the legislation establishing the committee state:³⁰

³⁰ Parliamentary Committees Bill 1995, www.legislation.qld.gov.au/Bill_Pages/Bill_47_95

The principles generally require that sufficient regard be given to the institution of Parliament and to preserving individual rights and freedoms when drafting Bills and subordinate legislation.

A list of considerations relevant to whether legislation has 'sufficient regard' to fundamental legislative principles is provided by section 4:

- section 4(3), requiring sufficient regard to rights and liberties of individuals, relates both to bills and subordinate legislation;
- section 4(4), requiring sufficient regard to the institution of Parliament, relates to bills only; and
- section 4(5), also requiring sufficient regard to the institution of Parliament, relates to subordinate legislation only.

The list of examples is represented in the table below.

Rights and liberties of individuals	Bills and subordinate legislation	
	<ul style="list-style-type: none"> • make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review • are consistent with the principles of natural justice • allow the delegation of administrative power only in appropriate cases and to appropriate persons • do not reverse the onus of proof in criminal proceedings without adequate justification • confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer • provide adequate protection against self-incrimination • does not adversely affect rights and liberties, or impose obligations, retrospectively • does not confer immunity from proceeding or prosecution without adequate justification • provide for the compulsory acquisition of property only with fair compensation • have sufficient regard to Aboriginal tradition and Island custom • are unambiguous and drafted in a sufficiently clear and precise way 	
Institution of Parliament	Bills	Subordinate legislation
	<ul style="list-style-type: none"> • allow the delegation of legislative power only in appropriate cases and to appropriate persons • sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly • authorise the amendment of an Act only by another Act 	<ul style="list-style-type: none"> • is within the power that allows the subordinate legislation to be made • is consistent with the policy objectives of the authorising law • contains only matter appropriate to subordinate legislation • amends statutory instruments only • allows the subdelegation of a power delegated by an Act only – <ul style="list-style-type: none"> – in appropriate cases to appropriate persons – if authorised by an Act.

Monitoring the operation of certain provisions

As provided in the section 103(2) of the *Parliament of Queensland Act*, the committee's responsibility includes monitoring generally the operation of:

- the meaning of 'fundamental legislative principles';
- explanatory notes;
- the meaning of 'subordinate legislation';
- guidelines for regulatory impact statements;

- procedures after the making of subordinate legislation;
- staged automatic expiry of subordinate legislation;
- forms; and
- transitional provisions in part 10 of the *Statutory Instruments Act*.

The explanatory notes to the legislation establishing the committee state:³¹

The Committee will also oversee the operation of provisions of the Legislative Standards Act 1992 and the Statutory Instruments Act 1992 to determine whether these provisions are contributing as intended to the maintenance of a proper standard of legislation.

Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly* contains an instruction to the committee to include in its *Legislation Alerts* information about compliance with part 4.

³¹ Parliamentary Committees Bill 1995, www.legislation.qld.gov.au/Bill_Pages/Bill_47_95

3. EXAMINATION OF LEGISLATION

Examination of bills

All bills examined

The committee's practice is, in effect, to conduct an independent inquiry of the consistency of every bill with fundamental legislative principles.

Standing Order 128(8) provides:

After the member who presented a Bill completes their second reading speech further debate on the question "That the Bill be read a second time" shall be adjourned for a period of at least 13 whole calendar days.

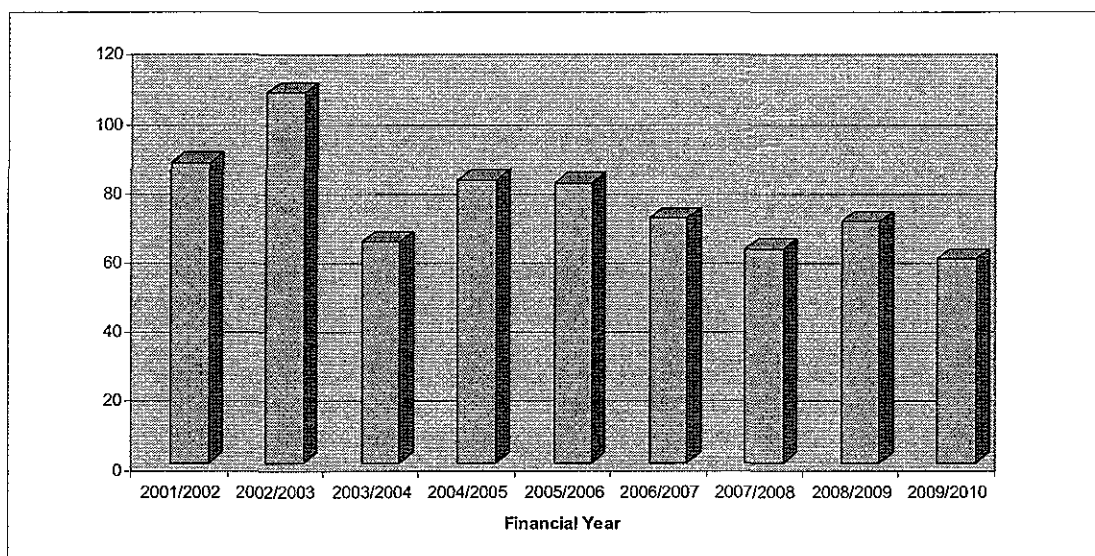
During the adjournment of the second reading debate, the committee examines the bill, together with any submissions received and other relevant information. A report on the bill in a *Legislation Alert* is tabled on the Tuesday morning of the next sitting week. Accordingly, the committee's *Legislation Alert* provides the Legislative Assembly and the people of Queensland with information regarding any proposed provisions which may have insufficient regard to fundamental legislative principles. The information is intended to facilitate debate on bills.

To this end, either responsible ministers are invited to respond to the committee's examination of bills or the committee may request information regarding a specific matter. The further information received is included in a subsequent *Legislation Alert*. Generally, with the exception of urgent bills discussed below, the committee's report and additional information from the minister are provided to the Legislative Assembly before the resumption of the second reading.

The importance of the committee's role in ensuring the Legislative Assembly is provided with all relevant information may be illustrated by a concern regarding the *Health Practitioner Regulation National Law Act 2009* (Qld). In *Legislation Alert* 10/09 (tabled on 27 October 2009), the committee drew the attention of the parliament to clause 7 of the bill which excluded the operation of the *Statutory Instruments Act*. However, the committee did not receive a response from the responsible minister prior to the bill receiving its third reading on 29 October 2009, nor was a response tabled in the Legislative Assembly and the bill passed through all readings without amendment. As the template legislation for nationally consistent legislation, the National Law was subsequently enacted by parliaments in other participating jurisdictions. Recently it became apparent, however, that the National Law does not require the tabling of subordinate legislation made under it in the parliaments of participating jurisdictions. Accordingly, the committee has written to the Deputy Premier and Minister for Health regarding section 7 (and related provisions) which remove, without replacement, the requirement in section 49 of the *Statutory Instruments Act* that subordinate legislation be tabled in the Legislative Assembly once made. In addition, the committee drew to the attention of other ministers, the Queensland Parliamentary Counsel and also scrutiny committees in other Australian jurisdictions the importance of including tabling requirements in nationally consistent legislation.

In practice, the committee examines approximately 60 to 80 bills each financial year. The table below indicates the number of bills examined since the 2001-02 year (by the committees of the 50th, 51st, 52nd and 53rd Parliaments).

Figure 1: Number of bills examined each financial year since 2001-02



Urgent bills generally not reported on

The *Legislative Standards Act* defines 'bill' to mean a bill for an Act proposed for enactment by the parliament.

Where a bill is declared urgent and Standing Orders are suspended to allow the bill to pass quickly through the Legislative Assembly, the committee will not usually have an opportunity to examine the bill. This is because, despite SO 128(8), a bill introduced into the Legislative Assembly declared an urgent bill under SO 159 may be considered immediately and passed with unusual expedition through all its stages. An urgent bill, therefore, will receive Assent prior to the commencement of the next parliamentary sitting week and, upon receiving Assent, will become an Act. At this point the committee considers its responsibility to cease, even if it has not had opportunity to examine and report to parliament on the legislation.

In September 2009, the committee reported to the Legislative Assembly on an urgent bill, the Criminal Code (Medical Treatment) Amendment Bill 2009. The bill was introduced on 1 September 2009 and declared an urgent bill the following day. The committee's report was tabled on 3 September 2009, prior to resumption of the second reading. The bill passed through the Legislative Assembly later that day and received Assent on 5 September 2009.

Consistency with fundamental legislative principles

The committee interprets the requirement in section 4 of the *Legislative Standards Act* that legislation have 'sufficient regard' to fundamental legislative principles to mean that consistency with fundamental legislative principles is not mandatory. In *Statutory Interpretation in Australia*, it is explained that:³²

Queensland has an Act entitled the Legislative Standards Act 1992 which sets out certain rights and liberties. However, the Act is exhortatory only and imposes no limits on the content of legislation.

Any potential inconsistency of legislation with fundamental legislative principles is examined by the committee, including the sufficiency of any explanation or justification. In addition, the committee examines the second reading speech and explanatory notes for information regarding any inconsistency.

³² DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 164

The committee has always adopted the approach that it is for parliament to determine whether the legislation has 'sufficient regard' to fundamental legislative principles and, where it does not, whether sufficient justification exists for the enactment of the legislation. Accordingly, in carrying out its legislative scrutiny function, the committee does not say definitely whether an interference with a fundamental legislative principle is justified. Based on its understanding of the principles underlying a parliamentary democracy based on the rule of law, the committee draws the attention of the Parliament to issues in respect of whether the proposed legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. The committee's examination is informed by legal and administrative principles derived from a variety of domestic and international legal sources, including human rights principles recognised in law.

Where issues arise from the committee's examination of legislation, the committee draws the attention of parliament to the issue and may invite the responsible minister to provide further information to assist the scrutiny of the legislation by both the committee and the parliament. As all relevant information is provided to the parliament, the decision whether legislation has 'sufficient regard' to fundamental legislative principles may then properly be taken by the parliament.

The committee's approach is consistent with, and facilitates, the 'principle of legality' which requires that parliament be clear about the effect of legislative measures to which it is giving its consent on behalf of the community:³³

The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Timeliness and cost effectiveness

The committee and its secretariat have a large number of mechanisms in place to ensure that the committee's examination of bills occurs within the time available during the adjournment of the second reading. Continuous improvement in this area is always an objective.

During the 53rd Parliament, for example, the committee has streamlined the formatting and publication of its *Legislation Alert*. In addition to making the *Legislation Alert* more accessible and readable, it has allowed the committee to concentrate on key issues.

The committee has a small panel of advisers who are able to provide expert legal advice about issues which commonly arise during the examination of bills. Submissions are invited also, within the period available to the committee for the examination of a bill. Where appropriate, these submissions are tabled with the *Legislation Alert*. Accordingly, within a relatively short space of time, the committee is able to collate and provide to the Legislative Assembly a significant amount of relevant information to assist debate on a bill.

As the committee relies significantly upon the expertise of Government departments and agencies (and for private members' bills, staff in relevant offices), the committee has initiated 'Legislation Alert Awards'. Launched in November 2009, the awards aim to:

- recognise and commend assistance provided to the committee by Government departments and agencies and regarding private member's bills; and
- affirm the importance to the parliamentary scrutiny of legislation of the valued assistance provided.

³³ In *Evans v NSW* [2008] FCAFC 130, the Full Federal Court referred to the following description of the principle in the judgment of Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

The awards have been designed to establish a strong, mutually supportive relationship with the executive, based on a better understanding of the committee's responsibilities and a shared commitment to ensuring the purposes of the *Legislative Standards Act* and *Statutory Instruments Act* are met. Further, as departments are encouraged to nominate for awards, the initiative will encourage them to evaluate compliance with the Acts in an on-going way.

For purposes of current awareness about 'the principles which underlie a parliamentary democracy based on the rule of law', professional development and ongoing research and community engagement are vital for both the committee and its secretariat. Activities of this nature are directed to identifying and responding to emerging issues and strengthening existing approaches to the examination of legislation. For individual members, professional development of this nature has many wider benefits; for example:

- discussion with the people of Queensland about the meaning of fundamental legislative principles, such as sufficient regard for 'Aboriginal tradition and Island custom';
- legal research conducted by the secretariat, for example, regarding developments in the law as to the balance that must be struck by State legislation which may be inconsistent with the *Racial Discrimination Act 1975 (Cth)*;³⁴
- attendance of committee members at conferences such as the annual *Protecting Human Rights* conferences and biannual conferences of scrutiny of legislation committees; and
- visits of committee members to observe the activities of committees with similar responsibilities, such as a recent visit to the New Zealand Parliament following an invitation from the Regulations Review Committee.

Consideration of the cost effectiveness of committee activities must include consideration of the benefits of parliamentary scrutiny of legislation identified above, together with more specific benefits accruing from the activities of Scrutiny of Legislation Committee in Queensland. These benefits result from the committee's dual role:

- supporting the executive to ensure that legislation has 'sufficient regard' to fundamental legislative principles and that the provisions of the *Legislative Standards Act* and *Statutory Instruments Act* are observed; and
- ensuring that the executive is accountable to the parliament in respect of these matters, by providing all relevant information to the parliament.

The committee has made an integral contribution to the purpose in section 3 of the *Legislative Standards Act* that, 'Queensland legislation is of the highest standard'. The principled scrutiny by the committee in this way encourages a consistent approach across Queensland legislation. While ministers and their departments are required by the *Legislative Standards Act* to observe these principles, the committee strives to work supportively to ensure 'sufficient regard'. The committee has an important educative function;³⁵ for example, senior officers in the Office of the Queensland Parliamentary Counsel meet weekly to discuss each *Legislation Alert* so as to perform the role of advising ministers, government entities and Members of Parliament about the application of fundamental legislative principles to legislation.

Over time, awareness and understanding of section 4 of the *Legislative Standards Act* has increased; for example, generally, safeguards regarding powers of entry exercisable by authorised officers and regulation-making powers are included now in legislation as a matter of course. In practice, where legislative provisions may not have sufficient regard to fundamental legislative principles, the Office of the Queensland Parliamentary Counsel will provide advice that the proposed provision would almost certainly cause the Scrutiny of Legislation Committee to alert the Legislative Assembly to the committee's view that the provision may be inconsistent with section 4 of the *Legislative Standards Act*.

³⁴ See, for example: *Aurukun Shire Council v Chief Executive, Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37

³⁵ A Shearan, 'The role of the Legislation Review Digest in the NSW Parliament' Australia-New Zealand Scrutiny of Legislation Conference, 6 July 2009, Canberra, 5

Importantly, scrutiny of legislation by the committee provides dual benefits:

- the people of Queensland are able to have a voice, within the legislative process, about issues regarding rights and liberties and democratic principles; and
- submissions provide the parliament with information about the 'human' aspect of legislation.

A recent example was the committee's report on its examination of the Valuation of Land Amendment Bill 2010. Eighteen submissions were received and examined by the committee and tabled in the Parliament. These identified significant concerns about the likely operation of the proposed amending bill.

Examination of subordinate legislation

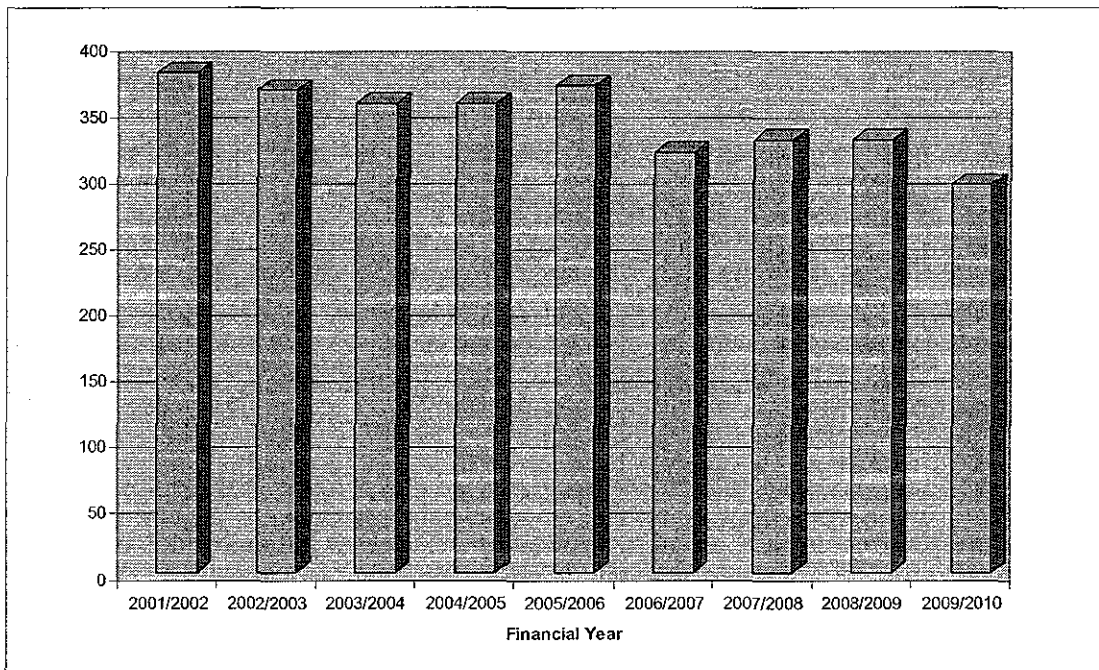
All subordinate legislation examined

The committee examines all subordinate legislation once it is tabled in the Legislative Assembly. The purpose of the examination is to inform the Legislative Assembly about:

- the lawfulness of the subordinate legislation; and
- its consistency with fundamental legislative principles.

Each financial year, the committee examines well in excess of 300 statutory instruments. The table below indicates the number examined since the 2001-02 (by the committees of the 50th, 51st, 52nd and 53rd Parliaments).

Figure 2: Subordinate legislation considered since 2001/2002



It is unusual for the committee's examination of subordinate legislation to be assisted by explanatory notes or a regulatory impact statement. Although some departments provide the committee with information regarding instruments when they are tabled, the examination is often confined to the instrument alone.

The committee's examination of subordinate legislation has two immediate purposes:

- to inform decisions by individual members regarding motions for disallowance of statutory instruments (section 50 of the *Statutory Instruments Act*); and
- to inform any debate in the Legislative Assembly following such a motion.

Where issues arise from the examination of subordinate legislation, as for bills, these are included in the *Legislation Alert*. Where possible, the committee's report on a statutory instrument is included in the *Legislation Alert* immediately following the tabling of the instrument. As for bills, the committee may draw an issue to the attention of the Legislative Assembly and may invite the minister to provide further information. Responses received from ministers are included in subsequent *Legislation Alerts*.

The committee may also resolve to:

- table a report to the Legislative Assembly regarding a statutory instrument; or
- move to disallow subordinate legislation in accordance with section 50 of the *Statutory Instruments Act*.

Reports on subordinate legislation to the Legislative Assembly by the committee of the 52nd Parliament included:

- Report 36, Legal Profession (Transitional) Amendment Regulation (No.1) 2007 (tabled 29 April 2008);
- Report 35, Transport Operations (Road Use Management - Driver Licensing Transitional) Regulation 2007 (tabled 6 December 2007); and
- Report 33, Local Government Amendment Regulation (No. 2) 2007 (tabled 12 October 2007).

Lawfulness

In practice, when examining the lawfulness of subordinate legislation, the committee examines the subordinate legislation to ensure it was made in accordance with the power delegated by the parliament. A determination by a court of these matters is a question of law. Four steps are involved:³⁶

- determining the meaning of the words used in the Act of Parliament to describe the subordinate legislation which the body is authorised to make;
- determining the meaning of the subordinate legislation itself;
- deciding whether the subordinate legislation complies with the description; and
- determining the true scope of the measure and its legal effect.

Subordinate legislation may be legally invalid for a number of reasons. In Australia, the reasons are approached as branches of the general legal doctrine of *ultra vires*.³⁷ The principal grounds of unlawfulness are:

- failure to comply with formal requirements for making the legislation (for example, section 32 of the *Nature Conservation Act* provides that a regulation to revoke 'protected areas' may be made only if the Legislative Assembly has, on a motion of which at least 28 days notice has been given, passed a resolution requesting the Governor in Council to make the revocation);³⁸
- dealing with a subject –
 - beyond the scope of the regulation-making power in the empowering Act; or
 - within the regulation-making power, but exceeding the prescribed limits within which the legislation must fall;³⁹
- inconsistency with, or repugnancy to, the Act under which it is made, another Act or the general law;

³⁶ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 113

³⁷ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 114

³⁸ See *Legislation Alert* 03/10, 10.

³⁹ See report 33, *Local Government Amendment Regulation (No. 2) 2007* (2007)

- exercise of the regulation-making power not for the purpose set out in the empowering Act but for another purpose;
- legislation so unreasonable in effect that it cannot be regarded as falling within the contemplation of the legislature when it passed the Act enabling the making of the legislation or not reasonably proportionate to the empowering provisions of the Act;
- uncertainty in the operation of the subordinate legislation in relation to –
 - the obligation imposed; or
 - the people affected;⁴⁰ and
- failing to make provision for the subject with which the subordinate legislation is to be concerned, but sub-delegating that power to legislate to another body.

The lawfulness of each statutory instrument tabled in the parliament is examined by the committee. Often, detailed fact-finding exercises are necessary to inform the parliament fully about the lawfulness of a statutory instrument.⁴¹

Consistency with fundamental legislative principles

As for bills, the committee examines whether subordinate legislation has 'sufficient regard' to fundamental legislative principles. For subordinate legislation, the *Legislative Standards Act* provides different examples of 'sufficient regard for the institution of Parliament'. The examples reflect the fact that subordinate legislation is made under legislative power delegated by the parliament.

Timeliness and cost effectiveness

As for the examination of bills, the committee and its secretariat have a large number of mechanisms in place to ensure that the committee's examination of subordinate legislation occurs prior to the expiry of the time within which a disallowance motion must be moved.

On 8 May 2002, the Legislative Assembly passed a resolution requiring the committee to table regular reports on its scrutiny of particular subordinate legislation. The resolution requested the committee to report to the Assembly on the form and content such reports would take. In report no 22, *Scrutiny of Legislation Committee reports on Subordinate Legislation*, tabled on 20 June 2002, the committee of the 50th Parliament reported that it had resolved to expand its *Alert Digest* to include the relevant information and documents.

In the 53rd Parliament, the committee has implemented changes to the information provided to the Legislative Assembly regarding examination of subordinate legislation. The information is more consistent with the information provided regarding the examination of bills and is more comprehensive and, consistent with the reports on bills, more accessible and readable.

Again, as for the examination of bills, consideration of the cost effectiveness of committee examination of subordinate legislation must include consideration of the benefits resulting from committee activities in this regard. The benefits reflect those identified in relation to the examination of bills. In addition, the committee plays an important role regarding parliamentary oversight of legislation made under delegated power.⁴²

Delegated legislation involves the Parliament entrusting the Executive with the power to make legislation, without requiring that it be passed by the Parliament. The key mechanism for ensuring that the Executive does the right thing is the legislative scrutiny process and the role of parliamentary committees such as the Senate's Regulations and Ordinances Committee. Australia has, for seventy years, led the world in legislative scrutiny.

⁴⁰ See report 36, *Legal Profession (Transitional) Amendment Regulation (No.1) 2007* (2008)

⁴¹ The same issues arise for courts determining validity, see *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 291-2 per Dixon CJ and *Gerhardy v Brown* (1985) 159 CLR 70.

⁴² S Argument, 'Delegated Legislation' in M Groves and HP Lee (eds) *Australian Administrative Law* (2007) 134, 142

4. MONITORING THE OPERATION OF CERTAIN STATUTORY PROVISIONS

The meaning of 'fundamental legislative principles'

In conjunction with its examination of legislation, the committee monitors the meaning of 'fundamental legislative principles', as defined in section 4 of the *Legislative Standards Act*. Where relevant, matters are drawn to the attention of the parliament in the *Legislation Alert* or a committee report.⁴³ Two matters arise regularly.

First, section 4 is not absolute. Although it requires that legislation have 'sufficient regard' to fundamental legislative principles, a proposed provision inconsistent with fundamental legislative principles may nevertheless have 'sufficient regard' to those principles. There may be circumstances which require existing rights and liberties to be qualified in order to achieve a legitimate social objective, as stated in the second reading speech to the *Legislative Standards Bill*.⁴⁴

Providing a statutory basis for fundamental legislative principles is a significant step in the preservation and enhancement of individual rights and liberties...

These [principles] and the other principles outlined in the Bill, are widely recognised in all democratic societies.

Honourable members should note, however, that these principles are not absolute because in Westminster jurisdictions, these are governed, for example, by parliamentary convention, common law rules and presumptions, evolving doctrines associated with the field of administrative law, and international conventions and treaties on human rights.

Accordingly, the committee examines proposed legislative provisions together with justification and explanation as to 'sufficient regard' in the legislation or the extrinsic materials (which may be used in interpretation of a provision of an Act, as provided in section 14B of the *Acts Interpretation Act 1954*). Recently, for example, the committee considered what 'sufficient regard' for 'Aboriginal tradition and Island custom' may require in contemporary Queensland.⁴⁵

Second, section 4 is not exhaustive.⁴⁶

Basic democratic values, as well as common law presumptions and increasingly international law contain a number of principles which underpin much legislation and against which legislation must be constantly assessed.

Therefore, it is possible that the examples in the Act can be expanded upon to allow for legislation which may have had regard to the rights and liberties of individuals or the institution of Parliament, in a way not specifically set out in the Act.

The matters identified by EARC included matters not expressly included in the examples provided in section 4, such as:⁴⁷

- confidentiality; and
- inconsistency with international instruments concerning human rights.

In respect of international human rights principles, EARC stated that Queensland legislation should pay appropriate regard to international human rights identified in conventions to which Australia is a party. Despite this statement, the committee initially adopted a narrower 'civil liberties' approach to fundamental legislative principles.⁴⁸ However, in recent years, as the

⁴³ See, for example, report 26, *Scrutiny of Bills for Constitution Validity* (2002)

⁴⁴ See also EARC, *Report on Review of the Office of the Parliamentary Counsel* (1991) [2.4] and [2.76] and PCEAR, *Report on Office of Parliamentary Counsel* (1991) [3.2.6]

⁴⁵ See *Legislation Alert* 01/10, 1.

⁴⁶ *Legislative Standards Act*, explanatory notes

⁴⁷ EARC, *Report on Review of the Office of the Parliamentary Counsel* (1991) [2.60]

⁴⁸ C Evans and S Evan, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 (3) *Human Rights Law Review* 545

meaning of 'rights' recognised by law has moved to incorporate the international human rights identified by EARC, the committee's approach to 'rights and liberties' has expanded also.

Explanatory notes

Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly* instructs the committee to include in the *Legislation Alert* compliance with requirements in part 4 of the *Legislative Standards Act*. Part 4 relates to explanatory notes. Section 22 requires the tabling of explanatory notes with bills or significant subordinate legislation. Sections 23 and 24 respectively set out requirements as to the content of explanatory notes for bills and subordinate legislation.

Accordingly, the committee considers explanatory notes to ensure:

- explanatory notes have been produced for all subordinate legislation which is 'significant'; and
- explanatory notes produced for bills and subordinate legislation comply with the content requirements in sections 23 and 24.

In part 1 of the *Legislation Alert*, the committee provides the Legislative Assembly with information regarding compliance with section 23 of explanatory notes to bills. Should explanatory notes fail to include necessary information, the minister may be invited to provide the information.⁴⁹

In part 2 of the *Legislation Alert*, the committee identifies the subordinate legislation for which an explanatory note was prepared. In respect of issues regarding the consistency of subordinate legislation with fundamental legislative principles or the lawfulness of subordinate legislation, the committee often observes that, as explanatory notes were not prepared regarding a statutory instrument, insufficient information is available for parliament to determine whether there is 'sufficient regard'.

In addition, the committee monitors the effectiveness and appropriateness of the part 4 mechanisms and recommends reform where necessary. Relevant reports have included:

- report no 18, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System* (tabled 9 August 2001); and
- interim report and call for public submissions, *Review of part 7 of the Statutory Instruments Act* (tabled 8 October 2009).

The meaning of 'subordinate legislation'

Section 9(1) of the *Statutory Instruments Act* identifies statutory instruments which are 'subordinate legislation' and section 9(2) identifies those that are not. The meaning of 'subordination legislation' is central to parliamentary scrutiny of delegated legislative power, including committee examination of subordinate legislation. This is because section 49 of the *Statutory Instruments Act* requires that 'subordinate legislation' be tabled in the parliament. Under section 50, the tabled subordinate legislation is then subject to possible disallowance by the parliament.

In this context, in its examination of bills, the committee draws to the attention of parliament proposed provisions allowing the making of instruments, apparently legislative in character, which do not fall within the meaning of 'subordinate legislation'. These instruments, which may be called 'guidelines', 'policies' or 'directives', need not be tabled in the parliament and are not subject to possible disallowance.

⁴⁹ See, for example, *Legislation Alert* 04/10, 44-45

Guidelines for regulatory impact statements

Section 43 of the *Statutory Instruments Act* requires that a regulatory impact statement be prepared if subordinate legislation 'is likely to impose appreciable costs on the community or a part of the community'. However, section 41 states that failure to comply does not affect the legislation's validity.

Part 5, division 2 of the *Statutory Instruments Act* provides guidelines for regulatory impact statements. The guidelines address:

- when a regulatory impact statement must be prepared;
- its content;
- notice required regarding its making; and
- its availability.

When examining subordinate legislation, the committee monitors compliance with part 5 requirements to determine whether they are contributing as intended to the maintenance of a proper standard of legislation. In part 2 of the *Legislation Alert*, the committee lists the subordinate legislation for which a regulatory impact statement was prepared.

The operation of part 5 has also been examined during a number of reviews by the committee. See:

- report no 9, *Report on the Operation of the RIS Process under Part Five of the Statutory Instruments Act 1992* (tabled 23 April 1998); and
- interim report and call for public submissions, *Review of part 7 of the Statutory Instruments Act* (tabled 8 October 2009).

Procedures after the making of subordinate legislation

Part 6 of the *Statutory Instruments Act* provides for certain procedures after the making of subordinate legislation. In brief, the procedures require:

- subordinate legislation be notified in the Government Gazette - either by full publication (for exempt subordinate legislation) or by notice;
- advice to be included in the notification regarding where copies of the legislation are available;
- tabling of the subordinate legislation in the Legislative Assembly within 14 sitting days after it is notified in the Gazette, otherwise the legislation will cease to have effect; and
- notice of motion to disallow a piece of subordinate legislation given by any member of the Legislative Assembly within 14 sitting days of tabling.

When examining bills, the committee considers whether the legislation makes appropriate provision for instruments made under delegated legislative power to be subject to parliamentary scrutiny. Recently, for example, the committee wrote to the Deputy Premier and Minister for Health regarding section 7 and schedule 1, sections 245 to 247, of the *Health Practitioner Regulation National Law Act 2009* (Qld) which removed, without replacement, the requirement in section 49 of the *Statutory Instruments Act* that subordinate legislation be tabled in the Legislative Assembly once made.

The committee examines the Government Gazette to monitor compliance with the requirements of part 6. Certain matters are reported regularly in the *Legislation Alert*, such as the date on which subordinate legislation is tabled.

Staged automatic expiry of subordinate legislation

Part 7 of the *Statutory Instruments Act* requires the staged automatic expiry of subordinate legislation to ensure:

- reduction in the regulatory burden;
- relevance of subordinate legislation to the people of Queensland; and
- a statute book of the highest standard.

The essential features of the part 7 scheme are that:

- in most cases, subordinate legislation automatically expires after 10 years;
- it expires on the 1 September first occurring 10 years after it was made; and
- one year extensions to the expiry period may be made by regulation.

Different arrangements exist for subordinate legislation made under 'national scheme legislation' and some subordinate legislation is exempted from the operation of part 7. The provisions of part 7 are monitored during the examination of subordinate legislation. Where relevant, matters regarding the operation of part 7 are reported by the committee in the *Legislation Alert*; for example, the committee has noted an increase in the information provided by ministers regarding exemptions from automatic expiry.⁵⁰ Further, the committees of the 52nd and 53rd Parliaments have conducted an inquiry into part 7. It is likely that a final report regarding that review will be tabled shortly.

Transitional provisions

Part 10 provides for transitional arrangements regarding:

- expiry of amendments to subordinate legislation made prior to 1 July 1994;
- exemptions from automatic expiry.

These provisions are monitored during the examination of subordinate legislation. As for concerns regarding part 7, matters regarding the operation of part 7 are reported by the committee in the *Legislation Alert* and are the subject of a current review of the operation of part 7.

Forms

Section 103 of the *Parliament of Queensland Act* confers responsibility to monitor the operation of part 8. The committee monitors all forms approved or made under an Act or subordinate legislation and reports to the parliament on the operation of part 8.

Section 58 of the *Statutory Instruments Act* states requirements for forms that, under an authorising law, are to be approved or made available by an entity. The requirements for forms include that:

- the form has a heading stating the authorising law and briefly indicating the form's purpose;
- the form be numbered using a system that gives each form a unique number;
- in each of its versions, the form be numbered consecutively using a system giving each version its own number;
- the form or new form be notified in the Government Gazette by publishing a notice about the form's approval or availability, heading, number and version number and of places where it is available, or the notice itself; and
- the form be available on the day, or as soon as practicable after, it is notified in the Government Gazette.

⁵⁰ See *Legislation Alert* 07/09, 22

Section 58(8) of the *Statutory Instruments Act* provides that failure to comply with section 58 does not affect a form's validity. However, consistent with its responsibility under the *Parliament of Queensland Act*, where a form may not meet the requirements of section 58, the committee writes to the person authorised to make the form, drawing his or her attention to concerns regarding possible non-compliance.

5. FUTURE SCRUTINY OF LEGISLATION IN TIMELY AND COST EFFECTIVE WAYS

Statutory responsibility of committee

It is submitted that the Scrutiny of Legislation Committee should remain in its current form with its existing responsibilities. Despite being in existence for 35 years, the committee and its predecessor have adapted to changes and increases in legislative programs and parliamentary and public expectations.

In the 53rd Parliament, the committee continues to operate effectively, meeting its statutory responsibility and ensuring the incremental benefits which flow from principled scrutiny of legislation. Although it is extremely rare for the committee to recommend amendment of a bill or move the disallowance of subordinate legislation, the inherent ability of the committee to take these steps is an important element in our system of parliamentary democracy.

It is clear that the strength of the committee is its bipartisanship. The committee members have a common purpose of principled legislative scrutiny. In 2010, it is possible to re-affirm the statements of the members of the former Committee of Subordinate Legislation:⁵¹

At the time of the introduction of the resolution setting up the Committee, concerns were voiced by the (then) Labor Opposition that the weighting of the membership of the Committee in favour of the Government (five government members to one opposition) would result in it operating along party lines. After some sixteen months of Committee operation, however, in 1977 the opposition member on the Committee re-assured the Parliament that the Committee had operated in a non-party-political manner.

Nearly twenty years later the Committee is able to proudly re-affirm this assurance.

The committee notes earlier submissions to the Committee System Review Committee which have accorded with this position. Emeritus Professor Colin A Hughes stated:

[G]iven that the possibility continues to be remote of either Queensland or the Commonwealth adopting a Bill of Rights additional to that of 1689, I would wish to say that the Scrutiny of Legislation Committee should be maintained and that more publicity should be given to its responsibilities.

Similarly, Dr Bob Such MP said in his submission that he strongly recommended the continuation of the Scrutiny of Legislation Committee.

These submissions are consistent with the findings of a recent review of the Western Australian Parliament's committees in respect of that parliament's Delegated Legislation Committee and the Legislation Committee. These were 'noted to be very effective and efficient, particularly in view of the volume and type of legislation'.

Recommendation 1: The Scrutiny of Legislation Committee should remain in its current form with existing responsibilities:

- examination of bills and subordinate legislation for consistency with fundamental legislative principles; and
- the monitoring of certain statutory provisions regarding legislation.

During this parliamentary term and, in particular, in relation to the committee system review, the Scrutiny of Legislation Committee has given considerable thought to future requirements for effective scrutiny of legislation. These are outlined below.

⁵¹ Parliamentary Committee of Subordinate Legislation, *Final Report of the Committee of Subordinate Legislation – A Retrospective* (1995) 12

Public engagement

The committee is examining ways in which it might be more publicly aware and publicly engaged in meeting its responsibilities. In relation to fundamental legislative principles generally, the committee has traditionally adopted an approach to 'rights and liberties' which has mirrored a 'civil liberties' approach.⁵² However, the *Legislative Standards Act* was drafted with the flexibility to allow for changed public understandings of 'the principles which underlie a parliamentary democracy based on the rule of law'. As public and legal approaches to 'rights and liberties of individuals' have developed, the committee has adapted its approach to section 4 of the *Legislative Standards Act*. Now, it is common for reference to be made to human rights principles recognized in law, including international human rights instruments to which Australia is a signatory. As a result, Queensland has continued to be recognised as leading the way for other scrutiny of legislation committees.⁵³

Similarly, in respect of examination of legislation for sufficient regard to the institution of Parliament, a contemporary understanding of democratic principles and of public expectations is important, as described by former Senator Andrew Murray:⁵⁴

Those who sit on and serve scrutiny committees need to have a good sense of history. History tells us that the one arm of government most feared for its actions has been the executive – whether tribal, monarchic, theocratic, dictatorial, or parliamentary. Beware a system or a parliament that raises the executive above all else, and diminishes the checks and balances explicit in the separation of powers.

It helps committees to have a healthy and practical suspicion of the executive and its handmaiden the bureaucracy.

One of the traps executives set for parliaments is the 'trust me' argument – that they and their colleagues will never use their full new powers, and will never abuse them. That may indeed be the case for some who want to be taken on trust, but what about their successors, or the public servants who actually use those laws? ...

Power needs to be in your mind. The separation of powers, assessing how power is acquired or grown, how restrained, who has power over what, how money is raised and spent, and by whom. Scrutiny means examining the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

The key to the future effectiveness of the Scrutiny of Legislation Committee will be the extent to which the debate within the parliament and the wider dialogue (including between the people, the courts and the executive) is informed and meaningful.⁵⁵ The committee is conscious that its role in this regard is vital.

In the 53rd Parliament, the committee has implemented ways in which to facilitate public submissions and public awareness of committee activities, such as a media release now issued about the tabling of a *Legislation Alert*. These have resulted in a steady increase in the number of submissions received, which may indicate a growing community awareness in the role of the committee and the avenue it provides for a say in the parliamentary legislative process.

Recently, committee members visited the New Zealand Parliament and examined a range of matters including:

⁵² C Evans and S Evan, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 (3) *Human Rights Law Review* 545

⁵³ D Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead [1999] *Public Law Review* 252, 254, where the fundamental legislative principles are described as a 'mini Bill of Rights'.

⁵⁴ A Murray, 'The contribution specialist legislative scrutiny committees can make to better governance' Australia-New Zealand Scrutiny of Legislation Conference, 7 July 2009, Canberra

⁵⁵ MC Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 53

- the scrutiny of -
 - bills by select committees in the New Zealand Parliament, including on human rights matters and by way of the hearing of evidence; and
 - subordinate legislation by the Regulation Review Committee, including by hearing evidence about complaints; and
- public engagement by committees, by way of -
 - select committee hearings on bills, such as on matters affecting Maori people, and
 - the *Regulations Review Committee Digest*, an annual publication of that committee's 'jurisprudence'.

Consideration will be given to the appropriate implementation of these mechanisms in Queensland.

Further, the committee has given particular thought to the way in which it informs itself about whether legislation has sufficient regard to 'Aboriginal tradition and Island custom'. The committee has resolved to take a number of steps on this issue and is in the early stages of implementing these initiatives.

Recommendation 2: The Scrutiny of Legislation Committee should adopt a more active role in two particular areas:

- examination of subordinate legislation; and
- greater and more effective public engagement regarding matters within committee responsibilities.

The committee notes the importance of adequate budgetary provision for such committee activities.

Resources

The committee works tirelessly in examining the fundamental legislative principle implications of proposed legislation. However, it is heavily reliant upon its secretariat staff and, where time and budget permits, its legal advisers.

First, in respect of external legal advice to the committee, the committee draws attention to a statement in a submission made by the Rev Prof Michael Tate AO to a review of the future of the Senate's Scrutiny of Bills Committee:⁵⁶

The practice of appointing ANU professors as legal advisors ... has proved wonderfully successful... Whatever the call on the Federal budget on that score, the cost would be miniscule compared with the cost of Commonwealth participation in litigation and of the extra workload in the Federal Court system should an enhanced judicial role [regarding human rights] be favoured.

In respect of assistance provided to the committee by secretariat staff, the committee notes that it would be impossible for it to meet the existing timeframes without the benefit of experienced and knowledgeable staff. Critically, although members of the committee are all legislators, few have legal qualifications. For this reason in particular the committee relies upon the knowledge of experienced secretariat staff and legal advisers of administrative law, constitutional law, human rights law and criminal law and procedure. Additionally, it relies upon their statutory interpretations skills, for reasons similar to those stated (although in dissent) by Justice McHugh in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

⁵⁶ M Tate, Submission to Senate Scrutiny of Bills Committee, *Inquiry into the future direction and role of the Scrutiny of Bills Committee*, www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010

A submission to the Committee System Review Committee from the Clerk of the Western Australian Legislative Council provided a report on the committee system in that House. In respect of the work of the Delegated Legislation Committee, the report stated (at 3-4):

The amount of time required to consider local laws was significant and for this reason the services of two Advisory Officers was considered highly desirable. The ability to utilise the services of Articled Clerks was noted as being most useful.

More generally, the committee notes also the following statement in *Australian Administrative Law*:⁵⁷

There is a certain irony that one of the answers to the evils of delegated legislation is for Parliament to entrust the task of scrutinising delegated legislation to a committee and for the committee then (in effect) to entrust an expert with the responsibility of providing it with technical advice as to the content of the legislation and whether or not it might offend against a series of established (but nevertheless highly subjective) principles. The committee also has to be able to trust the legal adviser not to go off on a campaign or frolic of his or her own.

Recommendation 3: The Scrutiny of Legislation Committee should, in view of recommendations 1 and 2 and sustained growth in the committee's workload, be assured of additional and sufficient resources to ensure it is able to continue to carry out committee responsibilities in a timely and effective way.

CONCLUSION

The committee trusts that the information provided in this submission will assist the select committee in its review of the committee system and, in particular, its consideration of the role and on-going importance of the Scrutiny of Legislation Committee.

The committee concludes with final words of wisdom from former Senator Andrew Murray.⁵⁸

Scrutiny on rights and safeguards has to be a habit, a mindset, worked at consistently. Effective scrutiny is long-term, a campaign not a skirmish.

⁵⁷ S Argument, 'Delegated Legislation' in M Groves and HP Lee (eds) *Australian Administrative Law* (2007) 134, 142

⁵⁸ A Murray, 'The contribution specialist legislative scrutiny committees can make to better governance' Australia-New Zealand Scrutiny of Legislation Conference, 7 July 2009, Canberra

SCRUTINY OF LEGISLATION COMMITTEES IN AUSTRALIAN and NEW ZEALAND PARLIAMENTS

Examination of bills				
Parliament & Committee	Committee membership	Committee responsibility	Method of reporting	Committee staff
Parliament of Australia Senate Standing Committee for the Scrutiny of Bills	6 Senators (3 nominated by Leader of Government Business, 3 nominated by Leader of Opposition in Senate)	To assess legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety	<i>Alert Digest</i> and the <i>Report</i> (containing ministerial response to <i>Digest</i> and further committee comment) presented to the Senate on the Wednesday afternoon of each sitting week	Committee secretary; administrative officer; legal adviser
Australian Capital Territory Standing Committee on Legal Affairs	3 members (nominated respectively by the Government, Opposition and crossbench)	To perform the duties of a scrutiny of bills ... committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services	Report to the Legislative Assembly on the Monday of each sitting week	Legal adviser (part-time) Secretary Assistant Secretary
New South Wales Legislation Review Committee (joint statutory committee)	8 members (5 from Legislative Assembly, 3 from Legislative Council)	To scrutinise all bills introduced to Parliament and all regulations subject to disallowance according to the criteria set out in sections 8A and 9 of the <i>Legislation Review Act 1987</i> . For bills, the criteria include (but are not limited to) whether a bill unduly trespasses on 'personal rights and liberties'.	<i>Legislation Review Digest</i> usually published on the Monday of each sitting week	Committee manager; two senior committee officers; committee officer; and assistant committee officer
Queensland Scrutiny of Legislation Committee	7 members (4 nominated by the Leader of the House, 3 nominated by the Leader of the Opposition)	Examine consistency of all bills with 'fundamental legislative principles' (section 4 of <i>Legislative Standards Act</i>)	<i>Legislation Alert</i> tabled on Monday of each sitting week	Research director, principal research officer, executive assistant
South Australia Legislative Review Committee (joint standing committee)	6 members (3 from Legislative Assembly, 3 from Legislative Council)	To investigate matters relating to legal, constitutional and parliamentary reform and matters concerned with inter-government relations.	Report to Parliament on the Wednesday of each sitting week	Secretary, research officer
Victoria Scrutiny of Acts and Regulations Committee (joint House committee)	8 members (4 from Legislative Assembly, 4 from Legislative Council)	To examine all bills for consistency with principles of scrutiny and, as required by the Charter of Human Rights and Responsibilities Act 2006, report to the Parliament whether a bill is incompatible with human rights. An Act may be reported on within 10 days of the Act receiving Royal Assent.	<i>Alert Digest</i> tabled each sitting week	Senior legal adviser; legal adviser, regulations; business support officer; office manager; committee administrative officer; human rights consultant

Examination of bills				
Parliament & Committee	Committee membership	Committee responsibility	Method of reporting	Committee staff
Western Australia Standing Committee on Legislation	5 members (from Legislative Council)	To consider and report on any bill referred by the Legislative Council as to feasibility, clarity and technical competence	As required by reference	Advisory officer (legal); committee clerk
Western Australia Uniform Legislation and Statutes Review Committee	4 members (from Legislative Council)	To review the form and content of the statute book; and to inquire into and report on any proposal to reform existing law that may be referred by the Legislative Council or a minister	As required by reference	Advisory officer (legal); committee clerk
New Zealand Select committees (up to 13 subject-area select committees)	7 members (proportional to representation of parties in Parliament)	When considering bills, to consider application of <i>Bill of Rights Act 1990</i> (NZ) and <i>Human Rights Act 1993</i> (NZ)	Report to Parliament on inquiry into bill	Up to three staff members

Examination of subordinate legislation				
Parliament & Committee	Committee membership	Committee responsibility	Method of reporting	Committee staff
Parliament of Australia Senate Standing Committee on Regulations and Ordinances	6 Senators (3 nominated by Leader of Government Business, 3 nominated by Leader of Opposition in Senate)	To scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety	<i>Delegated Legislation Monitor</i> produced at the end of each sitting week	Committee secretary; research officer; administrative officer; legal adviser
Australian Capital Territory Standing Committee on Legal Affairs	3 members (nominated respectively by the Government, Opposition and crossbench)	To perform the duties of a ... subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services	Report to the Legislative Assembly usually on the Monday of each sitting week	Secretary; assistant secretary and legal adviser (part-time)
New South Wales Legislation Review Committee (joint statutory committee)	8 members (5 from Legislative Assembly, 3 from Legislative Council)	To scrutinise all bills introduced to Parliament and all regulations subject to disallowance according to the criteria set out in sections 8A and 9 of the <i>Legislation Review Act 1987</i> .	<i>Legislation Review Digest</i> usually published on the Monday of each sitting week	Committee manager; two senior committee officers; committee officer; and assistant committee officer
Northern Territory Subordinate and Tabled Papers Committee	5 members (3 Government, 2 non-Government)	To examine and report on all papers required to be presented to the Assembly; and to check whether any proposed determination is legal, does not take away citizens' rights and complements the Act it is intended to effect	Report if of the opinion that an instrument ought to be disallowed or disapproved	Director
Queensland Scrutiny of Legislation Committee	7 members (4 nominated by the Leader of the House, 3 nominated by the Leader of the Opposition)	Examine lawfulness and consistency with 'fundamental legislative principles' of all subordinate legislation	<i>Legislation Alert</i> tabled on Monday of each sitting week	Research director, principal research officer, executive assistant
South Australia Legislative Review Committee (joint standing committee)	6 members (3 from Legislative Assembly, 3 from Legislative Council)	To consider all sub-ordinate legislation (regulations, rules and by-laws)	Reports to Parliament on the Wednesday of each sitting week	Secretary, research officer

Examination of subordinate legislation				
Parliament & Committee	Committee membership	Committee responsibility	Method of reporting	Committee staff
Tasmania Subordinate Legislation Committee (joint standing committee)	6 members (3 from House of Assembly, 3 from Legislative Council)	To examine the provisions of every regulation	Such reports and recommendations as thought desirable	Secretary; research officer (casual)
Victoria Scrutiny of Acts and Regulations Committee (joint House committee)	8 members (4 from Legislative Assembly, 4 from Legislative Council)	To scrutinise regulations and conduct inquiries related to regulations	<i>Alert Digest</i> tabled each sitting week	Senior legal adviser; legal adviser; regulations; business support officer; office manager; committee administrative officer; human rights consultant
Western Australia Delegated Legislation Committee (joint committee)	8 members (4 from Legislative Assembly, 4 from Legislative Council)	To consider and report to Parliament on any instrument that is subsidiary legislation as defined by section 5 of the <i>Interpretation Act 1984</i>	Reports regarding disallowance motions and matters of concern	Committee clerk; 3 advisory officers (legal)
New Zealand Regulations Review Committee	7 members (proportional to representation of parties in Parliament)	To: scrutinise all regulations; consider draft regulations referred by Ministers of the Crown and report back to them; examine regulation-making powers in bills before other committees; investigate complaints about the operation of regulations; and conduct inquiries into any matters related to regulations.	Reports to House and to other committees; annual activities report	Up to three staff members



1976

REPORT
OF THE
COMMITTEE
OF
SUBORDINATE LEGISLATION

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REPORT
OF THE
COMMITTEE OF SUBORDINATE LEGISLATION

COMMITTEE MEMBERS

R. A. ARMSTRONG, M.L.A. (Chairman)
G. T. CHINCHEN, M.B.E., D.F.C., M.L.A.
J. W. GREENWOOD, B.A., LL.B., M.L.A.
E. C. ROW, M.L.A.
P. R. MCKECHNIE, M.L.A.
K. W. WRIGHT, B.A., A.Ed., M.A.C.E., M.L.A.

The Queensland Parliament's first Parliamentary Committee of Subordinate Legislation was established by Resolution of the House on 26th November, 1975.

The Committee met for the first time on Wednesday, 11th February, 1976 to appoint a Chairman and Mr. R. A. Armstrong was elected.

The terms of reference for the Committee are:

- "(1) That this House do appoint a Committee to be called the Committee of Subordinate Legislation.
(2) That the Committee shall consist of six members.
(3) That the following Members shall comprise the Committee:—

Roy Alexander Armstrong, Geoffrey Talbot Chinchin, M.B.E., D.F.C., John Ward Greenwood, B.A., LL.B., Peter Richard McKechnie, Edward Charles Row and Keith Webb Wright, B.A., A.Ed., M.A.C.E.

- (4) That it shall be the duty of the Committee to consider all Regulations, Rules, By-laws, Ordinances, Orders in Council, or Proclamations (hereinafter referred to as the Regulations) which under any Act are required to be laid on the Table of this House, and which are subject to disallowance by resolution.

If the Regulations are made whilst the House is sitting, the Committee shall consider the Regulations before the end of the period during which any motion for disallowance of those Regulations may be moved in the House.

If the Regulations are made whilst the House is not sitting, the Committee shall consider the Regulations as soon as conveniently may be after the making thereof.

- (5) The Committee shall, with respect to the Regulations, consider—
- (a) whether the Regulations are in accord with the general objects of the Act pursuant to which they are made;
 - (b) whether the Regulations trespass unduly on rights previously established by law;
 - (c) whether the Regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament;
 - (d) whether for any special reason the form or purport of the Regulations calls for elucidation;
 - (e) whether the Regulations unduly make rights dependent upon administrative and not upon judicial decisions.
- (6) If the Committee is of the opinion that any of the Regulations ought to be disallowed—
- (a) it shall report that opinion and the grounds thereof to the House before the end of the period during which any motion for disallowance of those Regulations may be moved in the House;
 - (b) if the House is not sitting, it may report its opinion and the grounds thereof to the authority by which the Regulations were made.
- (7) If the Committee is of the opinion that any other matter relating to any of the Regulations should be brought to the notice of the House, it may report that opinion and matter to the House.
- (8) A report of the Committee shall be presented to the House in writing by a member of the Committee nominated for that purpose by the Committee.
- (9) The Permanent Head of the relevant Department shall forthwith upon any Regulation, which is required to be tabled in Parliament, being approved

by the Governor in Council, forward sufficient copies to the Clerk of the Parliament for the use of the members of the Committee.

- (10) The Committee shall have power to send for persons, papers and records provided that a Minister or members of the Public Service shall not be obliged to provide information, oral or written, which has been—
- (a) certified by a Crown Law Officer to be information which, if it were sought in a Court, would be a proper matter in respect of which to claim Crown privilege; or
 - (b) certified by the responsible Minister, which the approval of the Crown in Cabinet assembled, to be against the public interest to disclose.
- (11) The Committee shall have power to act and, subject to paragraph (10), send for persons, papers and records and to examine witnesses whether the House is sitting or not.
- (12) The proceedings of the Committee shall, except wherein otherwise ordered, be regulated by the Standing Orders and Rules of the Legislative Assembly relating to Select Committees."

It was decided that the Committee should interview Subordinate Legislation Committees in the other States and in Canberra to acquaint itself with the methods that are used in those areas. We received the utmost in co-operation and assistance from the various Committees we met with and had discussions with.

The Committee then had a further meeting and requested the aid of a legal counsel. Mr. Baston from the Crown Law Office was appointed on a trial basis. The Committee had twelve meetings in all and dealt with approximately 320 Regulations, several of which were found to require further attention by the various Government Departments.

The Committee was beginning to function properly and efficiently when Parliament was prorogued and consequently, the authority of the Committee was terminated, the effect of termination of such authority meaning that no further examination of Subordinate Legislation was undertaken.

The Committee would like to express its concern at the difficulties that may arise through subordinate legislation becoming operative from the date of gazettal. This means that Regulations can be effective for some months before they come under the scrutiny of Parliament.

Members of this Committee share the concern of the Privileges Committee at the long period of prorogation of our Parliament each year, during which time this Committee ceases to function and meetings must be informal. Members of the Committee are strongly concerned that it is not satisfactory for a Parliament to be without a Subordinate Legislation Committee for lengthy periods during the year.

Accordingly, the Committee strongly feels that it should be constituted on a more permanent basis and recommends that the matter be considered with regard to special legislation to overcome this problem and allow the Committee to meet formally during periods of prorogation of the House.

The Committee felt the need for Departments to supply explanatory notes with copies of Regulations that were sent to the Committee. The Committee acknowledges the fact that Departments co-operated in this respect and wishes to place on record the value of these explanatory notes for they saved the possibility of much misunderstanding between the Committee and Departments.

The Committee would like to place on record its appreciation of the assistance and co-operation of Ministers and their Departmental Officers, the services of Mr. Baston and members of the staff at Parliament House.

R. A. ARMSTRONG, Chairman.

September 29, 1976



1977

REPORT

OF THE

COMMITTEE

OF

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REPORT
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COMMITTEE OF SUBORDINATE LEGISLATION

COMMITTEE MEMBERS

R. A. ARMSTRONG, M.L.A. (Chairman)
G. T. CHINCHEN, M.B.E., D.F.C., M.L.A.
L. E. HARTWIG, M.L.A.
H. B. LOWES, M.L.A.
P. R. MCKECHNIE, M.L.A.
K. W. WRIGHT, B.A., A.Ed., M.A.C.E., M.L.A.

The Queensland Parliament's second Parliamentary Committee of Subordinate Legislation was established by Resolution of the House on 8th September, 1976.

The first meeting was held on 23rd September, 1976, when Mr Armstrong was re-elected as Chairman.

The terms of reference for the Committee are:—

"That it shall be the duty of the Committee to consider all Regulations, Rules, By-laws, Ordinances, Orders in Council or Proclamations (hereinafter referred to as "the Regulations") which under any Act are required to be laid on the Table of this House, and which are subject to disallowance by resolution.

If the Regulations are made whilst the House is sitting, the Committee shall consider the Regulations before the end of the period during which any motion for disallowance of those Regulations may be moved in the House.

If the Regulations are made whilst the House is not sitting, the Committee shall consider the Regulations as soon as conveniently may be after the making thereof.

The Committee shall, with respect to the Regulations, consider—

- (a) whether the Regulations are in accord with the general objects of the Act pursuant to which they are made;
- (b) whether the Regulations trespass unduly on rights previously established by law;
- (c) whether the Regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament;
- (d) whether for any special reason the form or purport of the Regulations calls for elucidation;
- (e) whether the Regulations unduly make rights dependent upon administrative and not upon judicial decisions.

If the Committee is of the opinion that any of the Regulations ought to be disallowed—

- (a) it shall report that opinion and the grounds thereof to the House before the end of the period during which any motion for disallowance of those Regulations may be moved in the House;
- (b) if the House is not sitting it may report its opinion and the grounds thereof to the authority by which the Regulations were made.

If the Committee is of the opinion that any other matter relating to any of the Regulations should be brought to the notice of the House, it may report that opinion and matter to the House.

A report of the Committee shall be presented to the House in writing by a member of the Committee nominated for that purpose by the Committee.

The Permanent Head of the relevant Department shall forthwith upon any Regulation, which is required to be tabled in Parliament, being approved by the Governor in Council, forward sufficient copies to the Clerk of the Parliament for the use of the members of the Committee.

The Committee shall have power to send for persons, papers and records, provided that a Minister or members of the Public Service shall not be obliged to provide information, oral or written, which has been—

- (a) certified by a Crown Law Officer to be information which, if it were sought in a Court, would be a proper matter in respect of which to claim Crown privilege; or
- (b) certified by the responsible Minister, with the approval of the Ministers of the Crown in Cabinet assembled, to be against the public interest to disclose.

The Committee shall have power to act and, subject to paragraph 10, to send for persons, papers and records and to examine witnesses whether the House is sitting or not.

The proceedings of the Committee shall, except wherein otherwise ordered, be regulated by the Standing Orders and Rules of the Legislative Assembly relating to Select Committees."

Mr D. F. Connolly from the Parliamentary Counsel's Office was appointed Legal Counsel to the Committee.

Mr M. M. Newberry acted as Secretary until he was appointed Committee Clerk on 24th March, 1977.

Since it was appointed, the Committee has met on 14 occasions.

During the year, the Committee dealt with approximately 630 Regulations, several of which were found to require further attention by the various Government Departments. The Committee is concerned with the delay by some Departments in dealing with a number of these matters.

In order to allow the Committee to continue beyond the prorogation of Parliament, the *Parliamentary Committee Transitional Act 1977* was passed by Parliament and was assented to on 21st April, 1977.

However, the Committee strongly recommends the enactment of special legislation to enable the Committee to function for the life of the Parliament.

The Committee is of the view that its charter should extend so as to cover all subordinate legislation, and for this reason believes that section 28A of the *Acts Interpretation Act 1954-1971* should be amended so as to include all those forms of subordinate legislation other than regulations.

In making this recommendation, the Committee is aware of the increased volume of work which will be incurred but considers this is justified.

It is the Committee's view that as a matter of principle, statutes should not provide for their own amendment by subordinate legislation. Substantive legislation should be made only by Parliament or by some subordinate body whose specific powers so to do are listed by Parliament in the enabling Act.

The Committee acknowledges the fact that Departments have continued to co-operate in supplying explanatory notes with copies of regulations that were sent to it. These explanatory notes have assisted the Committee in its work.

The Committee would like to place on record its appreciation of the assistance and co-operation of Ministers and their Departmental officers, the services of its Legal Counsel, Mr Connolly, its Secretary, Mr Newberry, and members of the staff at Parliament House.

R. A. ARMSTRONG, Chairman.

September, 1977.