

The Queensland approach: fundamental legislative principles

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Introduction

In Queensland, bills and subordinate legislation are required to have 'sufficient regard to fundamental legislative principles'.

Introduced in 1992, fundamental legislative principles have provided a statutory framework for legislative scrutiny by parliamentary committees since 1995. Following an extensive restructure of the system of committees operating in the Legislative Assembly, a better understanding of the principles will be necessary on the part of Members of Parliament and the people of Queensland as portfolio committees will review bills and subordinate legislation more actively. They will examine all legislation for two purposes: as to policy and consistency with fundamental legislative principles (and subordinate legislation as to lawfulness).

This paper examines a distinctly Queensland approach to legislative scrutiny; that is, a statutory requirement that legislation have 'sufficient regard' to 'the principles which underlie a parliamentary democracy based on the rule of law'. In an era of convenience, fundamental legislative principles continue to provide a consistent, yet rigorous and effective framework for the technical scrutiny of bills and subordinate legislation.

Legislative history of 'fundamental legislative principles'

In 1989, the *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald report), was tabled in the Queensland Parliament.¹ It contained recommendations directed to ensuring that Queensland's permanent institutions and systems would operate in the ways intended in a democratic society. Resultant reforms included mechanisms to ensure high quality laws, public participation in the legislative process and the preservation and enhancement of individual rights and liberties.

In respect of legislative scrutiny, two post-Fitzgerald reviews influenced a subsequent framework for the examination of legislation by parliamentary committees. The reviews related respectively to:

- 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'.² The review was undertaken by the

¹ 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)

² 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

Electoral and Administrative Review Commission (EARC) in 1990-91. The principal focus of the review was:³

... 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.

Accordingly, EARC and the Parliamentary Committee for Electoral and Administrative Review (PCEAR, the parliamentary committee with responsibility to examine EARC recommendations) consulted the people of Queensland about these matters. One outcome was recommendations for enactment of principles directed to:⁴

- upholding the sovereignty of Parliament and democratic principles;
- preserving where possible fundamental political, civil, and legal rights established in common law and by statute law; and
- providing for appropriate review of administrative decisions and ensuring that legislation did not deny appropriate access to the courts.

The intended role of the principles was described by EARC in the following way:⁵

While these principles may not be absolute, it is important that proper regard be had to them in the drafting and Parliamentary consideration of legislation. Where it is considered necessary to depart from them, the departure should be explained and justified.

In 1992, when the Legislative Standards Bill was introduced, it established the office of the Parliamentary Counsel and set out a list of fundamental legislative principles to be observed in the drafting of legislation. In respect of the latter, section 4 of *the Legislative Standards Act* enacted and defined 'fundamental legislative principles'.

The explanatory notes to the Legislative Standards Bill provided the following information about section 4:

Clause 4 defines fundamental legislative principles. 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 constantly be assessed.

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.

While these principles may not be absolute, it is important that proper regard be paid to them in drafting legislation.

For the first time in any jurisdiction, recognition is given to the need to acknowledge the tradition of the Indigenous peoples of Queensland and to have sufficient regard to the impact that legislation might have on their rights and interests.

In his second reading speech to the Legislative Standards Bill, the Hon WK Goss MLA (Premier, Minister for Economic and Trade Development and Minister for the Arts) explained the initial role of the fundamental legislative principles:⁶

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

³ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.20]

⁴ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [2.5]

⁵ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [2.1]

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

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.

The second relevant review, into parliamentary committees, 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. EARC's report stated:⁷

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.

The EARC recommendation was endorsed by the PCEAR.⁸

In 1995, the Scrutiny of Legislation Committee was established under the *Parliamentary Committees Act*, which provided for a system of committees of the Legislative Assembly. Under that Act, and its replacement *Parliament of Queensland Act 2001*, the Scrutiny of Legislation Committee was conferred with two limbs of responsibility: to examine legislation and to monitor aspects of the legislative process.

First, the committee was to consider, by examining all bills and subordinate legislation:

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

Second, the committee was required to monitor generally the operation of provisions of the *Legislative Standards Act 1992* and the *Statutory Instruments Act 1992* regarding the meaning of 'fundamental legislative principles' and 'subordinate legislation', explanatory notes, guidelines for regulatory impact statements, procedures after the making of subordinate legislation, staged automatic expiry of subordinate legislation and forms authorised by legislation.

In respect of the two limbs of responsibility, the explanatory notes to the *Parliament of Queensland Bill 2001* stated (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.

In 2011, the *Parliament of Queensland (Reform and Modernisation) Amendment Act* amended the *Parliament of Queensland Act* to:

- confer individual portfolio committees, to be established under Standing Orders, with the two limbs of responsibility previously conferred on the Scrutiny of Legislation Committee; and
- disestablish the Scrutiny of Legislation Committee on 1 July 2011.

⁷ Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.25]-[1.26]

⁸ Parliamentary Committee for Electoral and Administrative Review, *Report on Office of Parliamentary Counsel*, Report No. 19 (1991)

Section 4 of the *Legislative Standards Act*

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) provides that the principles include requiring legislation have sufficient regard to:

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

The explanatory notes to the Parliamentary Committees Bill stated:⁹

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.

The *Legislative Standards Act* has examples of what it means to have sufficient regard to human rights and democratic principles. In accordance with recommendations by EARC and the PCEAR, the inclusive list of examples represented in the table below was designed to continue to adapt and develop over time.

	Bills and subordinate legislation	
<i>Rights and liberties of individuals</i>	<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 • don't 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 	
<i>Institution of Parliament</i>	<p>Bills</p> <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 	<p>Subordinate legislation</p> <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.

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Parliamentary Committees Bill 1995, www.legislation.qld.gov.au/Bill_Pages/BilL47_95

Section 4 is complemented by requirements, also in the *Legislative Standards Act*, for explanatory notes to include information regarding the consistency of proposed provisions with fundamental legislative principles (sections 23 and 24). Implementing a recommendation of the Scrutiny of Legislation Committee, the *Parliament of Queensland (Reform and Modernisation) Amendment Act* amended the *Legislative Standards Act* to require the preparation and tabling of explanatory notes for all subordinate legislation (section 24). This new obligation is in addition to a previous requirement for explanatory notes regarding all bills (section 23).

Legislative scrutiny for consistency with fundamental legislative principles

Informing public and parliamentary debate

In *Bell v Beattie & Others* [2003] QSC 333 at [24], Mackenzie J in the Supreme Court of Queensland described the operation of the *Legislative Standards Act* and, in particular, section 4 (and section 23 regarding the content of explanatory notes for bills):

Section 4(1) of the Legislative Standards Act states that for the purposes of the Act fundamental legislative principles are those relating to legislation that underlie a parliamentary democracy based on the rule of law. Section 4(2) states that the principles include requiring that legislation has sufficient regard to:

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

Section 4(3) sets out a number of examples of criteria for determining whether legislation has sufficient regard to rights and liberties of individuals... However, since they are only examples, the categories are not closed.

Two things may be said about the Act. One is that it is not an entrenched piece of legislation. Legislation inconsistent with it may therefore, as a matter of ordinary principle, be passed by Parliament. The second is that s 23(1)(f) of the Act clearly implies that Parliament is not prohibited from considering a Bill inconsistent with fundamental legislative principles. All that is required is a statement in an Explanatory Note for the Bill explaining the reason for the inconsistency with fundamental legislative principles. In other words, if there is a departure from fundamental legislative principles, the Minister who presents the Bill to the Legislative Assembly must bring that fact to the notice of the House. The way prescribed for doing that is in the Explanatory Note.

In *Statutory Interpretation in Australia*, it is explained that:¹⁰

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.

Similarly, the Scrutiny of Legislation Committee interpreted the requirement in section 4 of the *Legislative Standards Act* that legislation have 'sufficient regard' to fundamental legislative principles to mean consistency with fundamental legislative principles was not mandatory.

Any potential inconsistency of legislation with fundamental legislative principles was examined by the committee, including the sufficiency of any explanation or justification provided in the second reading speech, explanatory notes or other material. The committee's examination was informed by legal and administrative principles derived

¹⁰

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

from a variety of domestic and international legal sources, including human rights principles recognised in law.

However, the committee's approach was that it was for the Legislative Assembly as a whole to determine whether the legislation had 'sufficient regard' to fundamental legislative principles and, where it might not, whether sufficient justification existed for the enactment of the legislation. Accordingly, in carrying out its legislative scrutiny function, generally the committee report did not state a determination as to whether an interference with a fundamental legislative principle was justified. Instead, the committee drew the attention of the Parliament to relevant and real issues.

For such issues, the committee often received written public submissions and these were authorised for tabling and publication at the same time as the relevant Legislation Alert. A recent example is provided by public submissions regarding legislation prohibiting the carrying of weapons in Queensland schools. Submissions received stated that the legislation might be inconsistent with practices required by people following the Sikh religion.

Where relevant and real issues arose, the committee's report on the legislation drew the attention of the Legislative Assembly to the issue and, where determined to be necessary, invited the responsible minister to provide further information to assist scrutiny of the legislation by both the committee and the Parliament. In this way, the committee sought to ensure all relevant information was provided to the Parliament, to inform and to facilitate debate by the Legislative Assembly about whether the legislation had 'sufficient regard' to fundamental legislative principles.

Sufficient regard to rights and liberties of individuals

As noted above, the provision for fundamental legislative principles in section 4 of the *Legislative Standards Act* was not intended to be prescriptive or exhaustive. Accordingly, section 4 does not prescribe particular rights and liberties of individuals to which legislation must adhere, but provides examples or indicia of legislation that may have sufficient regard to rights and liberties of individuals.

As a general guide, the Scrutiny of Legislation Committee referred to the *Queenslander's Basic Rights* handbook published by the Legal, Constitutional and Administrative Law Committee.¹¹ The rights of Queenslanders addressed in the handbook are outlined in the figure below.

Civil and political rights

¹¹

Available at: www.parliament.qld.gov.au/work-of-committees/former-committees/LCARC

	<p>Right to life, liberty and security of the person</p> <p>Right to freedom of speech and freedom of expression</p> <p>Right to freedom of thought, conscience, belief and religion</p> <p>Right to freedom of movement, residence and association</p> <p>Right to freedom of peaceful assembly and peaceful protest</p> <p>Right to bear arms</p> <p>Right to legal recognition and equality, equal treatment, equal opportunity, equal application and equal protection of the law</p> <p>Right to freedom from discrimination, harassment, vilification and victimisation</p> <p>Right to vote, stand for election and participate in elections</p> <p>Right to fair and just treatment in police custody and criminal investigation of offences</p> <p>Right to a fair trial and fair and just legal process</p> <p>Rights of victims of crime</p> <p>Rights of prisoners</p> <p>Right to freedom from slavery</p> <p>Right to freedom from torture, experimentation and inhumane treatment</p> <p>Right to privacy</p> <p>Right to natural justice, procedural fairness and due process</p> <p>Right to access/amend government held personal information</p> <p>Right not to be detrimentally affected by retrospective legislation</p> <p>Right of self determination</p> <p>Rights of the people</p> <p>Rights of people who are not Australian citizens</p> <p>Rights of children, teenagers and young persons</p> <p>Rights and responsibilities of parents</p> <p>Rights of particular groups and people with special needs</p>
Economic, social and cultural rights	
welfare	<p>Right to adequate standard of living and housing and reasonable access to social</p> <p>Right to adequate health care and medical treatment</p> <p>Right to work and work-related rights</p> <p>Right to legal assistance</p> <p>Right to a safe society</p> <p>Right to acquisition of property only on just terms</p> <p>Right to education</p> <p>Right to freedom of family structure and family life</p> <p>Right to adequate childcare</p> <p>Right to a person's identity and bodily rights</p>
Group and community rights	
	<p>Right to collective and individual development</p> <p>Rights of Aboriginal people and Torres Strait Islanders</p> <p>Rights of an author or creator</p> <p>Right to environmental, cultural and heritage protection and conservation</p> <p>Right to ecologically sustainable development for current and future generations</p> <p>Right to freedom from war and invasion</p>

Sufficient regard to the institution of Parliament

The Scrutiny of Legislation Committee adopted an expansive approach to matters regarding the 'institution of Parliament'. Generally, this principle was interpreted in light of the references in section 4(1) to 'parliamentary democracy' and 'the rule of law', as well as the reference in the explanatory notes to 'parliamentary sovereignty'.¹²

Accordingly, legislation examined for sufficient regard to the institution of Parliament raised issues including:

- appropriations;
- constitutional validity;
- contempt proceedings;
- incorporation by reference of non-statutory instruments;
- judicial independence and judicial power;
- legislative power to abrogate legal and property rights;
- legislative power in respect of extra-territorial matters;
- manner and form provisions;
- national scheme legislation; and
- the reserve powers of the Governor.

Example of the Queensland approach: Queensland Reconstruction Authority Bill

On 16 February 2011, the Hon AM Bligh MP, Premier and Minister for the Arts introduced the Queensland Reconstruction Authority Bill. Later that day, under *Standing Order 159 of the Standing Rules and Orders of the Legislative Assembly*, the bill was declared an urgent bill. It was to be considered immediately and passed with unusual expedition through all its stages. As the bill was to receive assent and become an Act prior to the tabling of the Scrutiny of Legislation Committee's next *Legislation Alert* on 7 March 2011, the committee prepared an extraordinary report on the bill to assist examination of the bill by the Legislative Assembly. The report of the Scrutiny of Legislation Committee on the bill was tabled on 17 February 2011.¹³

The main purpose of the bill, as stated in clause 2, was to provide appropriate measures to ensure Queensland and its communities recovered effectively and efficiently from the effects of disaster events. Accordingly, the legislation was to enable a Queensland Reconstruction Authority to coordinate and manage rebuilding and recovery in communities affected by floods in December 2010 and January 2011, severe tropical cyclone Yasi and any other prescribed disaster event. The legislation was to expire two years after commencement.

From the committee's examination of the bill, the committee's report identified the following issues.

In respect of the application of fundamental legislative principles to the bill as a whole, the committee noted that the explanatory notes provided general information which stressed the extraordinary nature of the circumstances to be addressed by the legislation. The explanatory notes stated:

While the breaches of fundamental principles within the Bill are acknowledged, it is considered in the broader public interest for the Authority to be provided with these powers in order to allow the Authority to effectively undertake its function of reconstructing Queensland. These powers are considered justified in view of the extraordinary circumstances of the current scale and devastation of disaster events which have affected the majority of the State.

¹² See, for example, Report no 26, December 2002, *Scrutiny of Bills for Constitution Validity*, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/SLC

¹³ Report no 45, February 2011, *Queensland Reconstruction Authority Bill 2011*, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/SLC

It is also important to note that many equivalent powers already exist in Queensland legislation, and may be exercised by the Coordinator-General, or their delegate, under the State Development and Public Works Organisation Act 1971.

Finally, the Bill includes a sunset clause of two years. Therefore, although the Bill will confer significant powers on the Authority, these powers will only be maintained for the period required to manage reconstruction and recovery after the disaster events, and will be repealed once the Authority has completed its functions of post-disaster reconstruction and recovery.

In relation to whether the bill had sufficient regard to rights and liberties of individuals, the committee drew the attention of the Parliament to:

- clauses 54, 92 and 149 which might affect rights of individuals otherwise available under statute;
- clauses 88, 100, 115 -119, 127, 146 and 161 creating new offences;
- clause 153 which might have required the chief executive officer of the authority to provide the integrity commissioner and relevant minister with personal information;
- part 1 delegating to the Queensland Reconstruction Authority significant administrative powers;
- clause 61 excluding the operation of parts 3 and 5 of the *Judicial Review Act 1991* in respect of certain decisions made under the legislation;
- clause 101 allowing registration of a public utility easement without the signature of the registered owner of the relevant land;
- clauses 104 and 121-3 assisting the proof of certain matters in proceedings;
- clause 105 conferring powers of entry without warrant or consent, and post-entry powers, on authorised persons;
- clauses 127-8 which might have modified common law and statutory protections of the right to silence;
- clause 146 which might have had the potential to adversely affect the rights and liberties of, or impose obligations on, individuals retrospectively;
- clauses 129 and 133 conferring immunity from proceeding or prosecution; and
- clauses 99-104 providing for the taking of land by the authority or a local government.

In relation to whether the bill had sufficient regard to rights and liberties of individuals, the committee drew the attention of the Parliament to:

- clauses 6, 43, 63, 150-1 and 161 which might have delegate legislative power in inappropriate cases; and
- clauses 42, 45, 106-7 and 135 which might not have provided for appropriate parliamentary scrutiny of delegated legislative power.

The committee invited the minister to provide information about whether clause 105 had sufficient regard to rights and liberties of individuals.

In its report, the Scrutiny of Legislation Committee examined each of the issues above in greater detail, referring to information in the second reading speech and the explanatory notes relevant to consistency with fundamental legislative principles. Clause 101(3), for example, was examined under both the headings of 'Natural justice' and 'Compulsory acquisition of property'. In relation to natural justice, the committee's report stated:

Section 4(3)(b) of the Legislative Standards Act provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

Clause 101 would allow registration of a public utility easement without the signature of the registered owner of the relevant land.

Under clause 101(3), the easement could be registered without the document having been signed by the owner. Accordingly, the legislation would override expressly section 83(1)(b)(i) of the Land Title Act which states that an easement may be registered only if it is signed by the registered owner of the lot to be burdened.

The principles of natural justice require that a person whose interests might be affected by a decision be given a fair hearing and an opportunity to present his or her case, that a decision be made by an unbiased and disinterested decision-maker and be based on logically probative evidence. At common law, a person denied 'procedural fairness' may seek review of an administrative decision affecting his or her interests.

The explanatory notes provide (at 45) the following information regarding clause 101(3):

Clause 101 provides for the Authority's power to take public utility easements. The clause states that the Authority's power under clause 99 to take land for a purpose mentioned in clause 99(1), includes the power to create, by registration, a public utility easement over the land under the *Land Title Act 1994*, part 6, division 4...

If the document creating the easement states any relevant guidelines made by the Authority have been complied with to the extent they are relevant for the taking of the easement, the easement may be registered under the *Land Title Act 1994* without the document having been signed by the owner of the land to be burdened by the easement. Further, this provision applies despite the *Land Title Act 1994*, section 83(1) (Registration of easement).

The committee's report was tabled prior to the resumption of the second reading debate and was referred to during the debate. The Premier tabled her response to the matters raised in the committee's report during the speech in reply.¹⁴

Collaboration and support throughout the legislative process

At all times, the committee sought to work collaboratively and supportively with all those involved in the legislative process. The committee met with the Parliamentary Counsel at least once each Parliament¹⁵ and provided information relevant to implementation of Government initiatives, such as recently developed guidelines regarding the content of explanatory notes.

When issues of general application arose and were not currently the subject of a committee review, the committee wrote to the Premier and, if relevant all Ministers. At the end of 2010, for example, the committee wrote to the Premier and all Ministers regarding legislation conferring powers of entry other than with consent or a warrant. The committee suggest an additional general legislative safeguard; namely, a requirement for written notice of entry to be provided to a resident at the time of entry being made to a residential property. This safeguard appears to have made its way into common legislative drafting practice in Queensland.

A collaborative and supportive approach was also one reason for the introduction by the committee of the 53rd Parliament of 'Legislation Alert Awards'.¹⁶ These commended outstanding assistance provided to facilitate the committee meeting its statutory responsibilities. The awards were intended to strengthen channels of communication between the committee and government departments and the office of the Opposition, including about the meaning of fundamental legislative principles.

The contemporary meaning of 'fundamental legislative principles'

'Our principles': background to review

¹⁴ See *Record of Proceedings (Hansard)*, 17 February 2011, 228-310, available at: www.parliament.qld.gov.au/work-of-assembly/sitting-dates/dates/2011/2011-02-17

¹⁵ The Office of Parliamentary Counsel publishes, *Fundamental Legislative Principles: The OQPC Notebook*, available at: www.legislation.qld.gov.au/Leg_Info/info_publications.htm

¹⁶ See Scrutiny of Legislation Committee, report no 44, November 2010, *Legislation Alert Awards 2010*, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/SLC

In November 2010, the Scrutiny of Legislation Committee commenced a review of the contemporary meaning of 'fundamental legislative principles'.

In its issues paper and call for public submissions regarding its 'Our Principles' review, the committee noted that the principles had been developed following recommendations in the Fitzgerald Report urging opportunities for the people of Queensland to know about and influence public policy, including legislative policy.¹⁷

The issues paper explained that Parliament examined whether proposed legislation had sufficient regard to fundamental legislative principles, and that this exercise might include balancing different and possibly competing principles. Examples provided were legislation relating to:

- adoption;
- dangerous prisoners;
- recognition in a preamble to the Constitution of Queensland 2001 of people who identify as Aboriginal and Torres Strait Islander; and
- non-commercial surrogacy.

It was noted that, in the context of the possible introduction of human rights legislation, consultations had taken place in a number of Australian jurisdictions into shared understandings of rights and liberties.

In Queensland in 1997, the Legal, Constitutional and Administrative Review Committee reported on a *Review into the Preservation and Enhancement of Individual's Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?*¹⁸ The committee examined the systems and mechanisms operating in Queensland to protect rights, recognised that a bill of rights would be one way to further enhance individuals' rights, but did not recommend the adoption of a bill of rights in Queensland at that time.

The committee highlighted the need for awareness of, and compliance with, fundamental legislative principles by public officers in all decision making processes. It concluded further enhancement of a rights culture was required at State and local government levels and, in particular, because the *Legislative Standards Act* could not be used as a sword by individuals to assert rights.

The committee's publication, *Queenslanders' Basic Rights*, was issued to provide information about rights and liberties of Queensland people.¹⁹

A further review by the Legal, Constitutional and Administrative Review Committee examined the engagement of Aboriginal people and Torres Strait Islanders in democratic processes. Recommendations made at the conclusion of the *Hands on Parliament* review included two directed to ensuring appropriate scrutiny of legislation for sufficient regard for Aboriginal tradition and Island custom.

The issues paper stated that the committee hoped its review would generate a new round of conversations about the basic democratic values of the people of Queensland and the rights and freedoms they valued. Accordingly, the committee had planned to hold 'our principles' conversations with the people of Queensland, including in Aboriginal and Torres Strait Islander communities in Far North Queensland, the Gulf of Carpentaria and Torres Strait.

¹⁷ Our principles: review of the meaning of 'fundamental legislative principles', Issues paper and call for public submissions, November 2010, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/SLC

¹⁸ Report no 12, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, tabled November 1998, 54, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/LCARC

¹⁹ Available at: www.parliament.qld.gov.au/work-of-committees/former-committees/LCARC

'Our principles': report

The committee's report, tabled in June 2011 shortly before the committee was disestablished, followed the close of public submissions but preceded the commencement of the 'our principles' conversations.²⁰

The report noted that submissions received had stressed the critical importance of fundamental legislative principles. A submission from the Prisoners' Legal Service Inc (Queensland) indicated:

As part of the international community, we believe Queensland should embrace this opportunity to ensure its legislation is of the highest standard. The Queensland Government has an obligation to ensure that the human rights of all people in Queensland are realised.

In its submission, the Queensland Law Society stated:

Upholding the rule of law, the rights and responsibilities of individuals and the provision of natural justice are the cornerstones of parliamentary democracy. It is therefore important that these principles, which are benchmarked beside proposed legislation, be regularly reviewed and updated to ensure the rights of individuals continue to be adequately protected as well as to ensure good governance.

A submission from the Queensland Government incorporated contributions from all departments and the Office of the Queensland Parliamentary Counsel. It said:

The enunciation of FLPs in the Act is a core part of Queensland's legislative framework. The Act guides the development of draft legislation by the Executive arm of Government-as described below-requiring the Executive to ensure that its policy proposals are balanced against critical democratic principles and values in our society. Concurrently, the Act guides the scrutiny of legislation by Parliament...

The Queensland Government reaffirms its commitment to the continued existence of such legislated principles. The Act contains a message of the highest order. It puts individuals' rights and liberties-and the institution of Parliament-at the heart of the legislative development process, through Parliament effectively advising the Executive arm of Government of a set of fundamental principles, upon which legislation should not encroach without explanation and justification.

In respect of legislative scrutiny within the framework provided by fundamental legislative principles, the Queensland Government provided the following evaluation:

The work of the Committee in advising Parliament about the operation of FLPs in legislation makes a critical contribution to the quality of Queensland legislation. The Committee's role corresponds with OQPC's functions of advising its clients on the operation of FLPs, as part of OQPC's role of ensuring the Queensland statute book is of the highest standard under section 7(j) of the Act.

OQPC draws considerable value from the high quality research carried out by the Committee in relation to legal issues relevant to FLP issues arising in legislation. The Committee frequently deals with new or emerging rights and obligations issues, for example, rights relating to information and privacy. It is frequently the case that the research carried out by the Committee, and opinion on new and emerging issues developed by the Committee, is the only source of legal or associated research directly on a legislative issue that is easily accessible to drafters and instructing officers. This research feeds directly into the training given by OQPC to its drafters and into advice given by OQPC drafters to OQPC's clients. It is also considered directly by instructing officers.

The work of the Committee has a high level of acceptance by OQPC drafters and instructing officers (both for Government legislation and Private Members' Bills), despite the fact that Committee membership and governments change. This means that the Committee's work

²⁰ Report no 47, *Our principles: review of the meaning of 'fundamental legislative principles'*, June 2011, available at: www.parliament.qld.gov.au/work-of-committees/former-committees/SLC

has an ongoing direct beneficial effect on the development of legislation, and ultimately the quality of legislation being passed by the Parliament.

The general reports produced by the Committee on frequently occurring FLP topics are of particular value to OQPC, which considers that it would be valuable if more of these general reports were produced, as a 'clearing house' for the large number of individual Committee comments. The Committee's report on Henry VIII clauses is an example of how a general report can provide a vital guide for ongoing convenient reference, eliminating the need to refer to a multitude of past individual Committee comments. OQPC suggests that general reports might facilitate a more in depth examination of serious issues arising from the general flow of legislation over a period.

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

Legislative scrutiny in Queensland in the future

It was noted above that the *Parliament of Queensland (Reform and Modernisation) Amendment Act* conferred individual portfolio committees, to be established under Standing Orders, with the legislative scrutiny responsibilities exercised by the Scrutiny of Legislation Committee until 1 July 2011.

The submission of the Queensland Government to the Scrutiny of Legislation Committee's 'Our Principles' review referred to the then anticipated reform of the parliamentary committee system in Queensland and stated:

The historic reform of the Queensland parliamentary committee system will change the way in which the Parliament and its committees as scrutineers at first instance considers FLPs in legislation introduced into the Assembly. Functions in relation to examination of FLPs will, in future, be considered by all portfolio committees rather than centrally through the Committee. The Government notes that, given the scrutiny of FLPs will be carried out across all portfolio committees, members of new committees will need to receive appropriate training on these matters. The Government is confident that the new portfolio committees will discharge their responsibilities for considering FLPs in legislation to the same high standard of the Committee. Furthermore, this presents an opportunity to significantly increase the number of Members of Parliament with expertise in considering FLPs. The Government also remains committed to full and rigorous application of FLPs during the preparation of the legislation that it puts to Parliament.

Conclusion

In Queensland in 1989, the Fitzgerald Report stated that 'Parliament is meant to be the forum in which the necessity and worth of proposed laws ... can be debated', and that 'If Parliament is to perform this vital role, procedures which allow it to obtain and analyse information are essential'.²¹

Since 1995, legislative scrutiny in Queensland has proceeded with reference to fundamental legislative principles. Those explicit principles have allowed both the specialist scrutiny committee and the Legislative Assembly to obtain and analyse information so as to resolve the many varied and often complex issues which require the Legislative Assembly to strike the right balance between competing principles or rights.

The fundamental legislative principles have played an important role, prescribing a statutory framework within which the Legislative Assembly has considered the effect upon fundamental rights or parliamentary sovereignty of individual legislative measures

²¹ 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

to which it gave its consent on behalf of the people of Queensland. Throughout the intervening years, and even when disaster has abounded, fundamental legislative principles have provided a consistent yet rigorous framework for legislative scrutiny.