



# **LEGISLATIVE ASSEMBLY OF QUEENSLAND**

## **Scrutiny of Legislation Committee**

### **OUR PRINCIPLES: REVIEW OF THE MEANING OF 'FUNDAMENTAL LEGISLATIVE PRINCIPLES'**

**REPORT NO. 47**

**JUNE 2011**

# Scrutiny of Legislation Committee

## 53rd Parliament

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Copies of Scrutiny of Legislation Committee publications are available on the committee website via the address above.

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## Recommendation

The 'our principles' review of the meaning of 'fundamental legislative principles' should be conducted and concluded by another committee of the Legislative Assembly, and the conduct of the review should include 'our principles' conversations with the people of Queensland. The committee refers the continuation of the review to another committee of the Legislative Assembly for their consideration.

# 1 The committee's review

## The committee

The Scrutiny of Legislation Committee is a statutory committee of the Queensland Parliament, established under (former) section 80 of the *Parliament of Queensland Act 2001* (the Act). The Act provided that the committee's area of responsibility is to consider, by examining all bills and subordinate legislation:

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

The Act also gave the committee responsibility for monitoring generally the operation of:

- provisions of the *Legislative Standards Act 1992*—
  - section 4 (meaning of 'fundamental legislative principles');
  - part 4 (explanatory notes); and
- provisions of the *Statutory Instruments Act 1992*—
  - section 9 (meaning of 'subordinate legislation');
  - part 5 (guidelines for regulatory impact statements);
  - part 6 (procedures after making of subordinate legislation);
  - part 7 (staged automatic expiry of subordinate legislation);
  - part 8 (forms); and
  - part 10 (transitional).

The explanatory notes to the legislative amendments which conferred the committee with responsibility to monitor the operation of these provisions state:<sup>1</sup>

*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.*

The *Parliament of Queensland (Reform and Modernisation) Amendment Act 2011* amended the *Parliament of Queensland Act 2001* to provide that the committee will cease on 1 July 2011.

## Background

In November 2010, the committee of the 53<sup>rd</sup> Parliament commenced a review of the meaning of 'fundamental legislative principles'. Consistent with its responsibility under the *Parliament of Queensland Act 2001* to oversee the operation of section 4 of the *Legislative Standards Act 1992*, the committee's review was to examine the contemporary meaning of 'fundamental legislative principles'.

Section 4 is set out in **appendix A**.

## Review process

In November 2010, the committee tabled and published an issues paper, *Review of the meaning of 'fundamental legislative principles' – Call for submissions*.<sup>2</sup>

The committee hoped its review would generate a new round of conversations about basic democratic values in Queensland and the rights and freedoms valued by the people of Queensland; that is, conversations about 'our principles'.

Accordingly, the issues paper invited discussion and submissions about all relevant matters, including a number of questions asked by the committee. The questions are included in chapter 2.

The proposed timetable for the review was:

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<sup>1</sup> Parliamentary Committees Bill 1995, explanatory notes, 5 at: [www.legislation.qld.gov.au](http://www.legislation.qld.gov.au).

<sup>2</sup> [www.parliament.qld.gov.au/view/committees/SLC.asp?SubArea=inquiries](http://www.parliament.qld.gov.au/view/committees/SLC.asp?SubArea=inquiries)

Submissions invited:	November 2010
'Our principles' art conversations:	Commencing early 2011
'Our principles' conversations with people of Queensland:	Commencing early 2011
<b>Last date for submissions:</b>	<b>29 April 2011</b>
Report to Legislative Assembly:	October 2011

In December 2010 however, the report of a Select Committee reviewing the committee system recommended the cessation of the Scrutiny of Legislation Committee.<sup>3</sup> Due to the uncertainty about its future, the committee did not begin the 'our principles' art conversations or the 'our principles' conversations with the people of Queensland. It had been intended that the latter would include conversations with people on Saibai Island, Coconut Island, Thursday Island, Horn Island, Kowanyama, Kuranda and Cairns.

Ten submissions were received and are listed at **appendix B**. They were authorised for tabling and publication and are available from the committee's website.<sup>4</sup>

## This report

This report of the committee on its review of the meaning of 'fundamental legislative principles' precedes the cessation of the committee. It is tabled therefore in respect of an incomplete review.

The report's only recommendation is that the review be conducted and concluded by another committee of the Legislative Assembly. Accordingly, the report is brief and refers to a small number of matters only.

The following chapter provides an overview of some of the matters canvassed in the review to date. The committee suggests that the submissions, and in particular the oft-stated view that the people of Queensland should have an opportunity to discuss and communicate their views about 'our principles', indicate the importance of the continuation and conclusion of the review.

## Ministerial response required

Section 107 of the *Parliament of Queensland Act 2001* requires a minister to respond to parliamentary committee reports setting out:

- any recommendations to be adopted and the way and time within which they will be carried out; and
- any recommendations not to be adopted and the reasons for not adopting them.

The response must be tabled within three months of the tabling of the committee's report. If for some reason that is insufficient time, an interim response must be tabled within three months and must explain the delay. A final response must then be tabled within six months of the tabling of the committee's report.

Responses from ministers to the recommendations in this report will be required to be tabled in September 2011 or, at the latest, in December 2011.

<sup>3</sup> *Review of the Queensland Parliamentary Committee System Report*, tabled 5 December 2010 at 12, at: [www.parliament.qld.gov.au/view/committees/CSRC.asp](http://www.parliament.qld.gov.au/view/committees/CSRC.asp).

<sup>4</sup> [www.parliament.qld.gov.au/view/committees/SLC.asp?SubArea=submissions](http://www.parliament.qld.gov.au/view/committees/SLC.asp?SubArea=submissions).

## 2 'Our principles'

### 'Fundamental legislative principles'

'Fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law' (section 4 of the *Legislative Standards Act 1992*). The principles include that legislation have sufficient regard to:

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

A submission from the Prisoners' Legal Service Inc (Queensland) (submission 8) 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 (submission 2) 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.*

Similarly, the Queensland Government (submission 7) said in its submission:

*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.*

The *Legislative Standards Act* has examples of what it means to have 'sufficient regard' to human rights and democratic principles. The inclusive list of examples, in the table below, was designed to continue to develop over time.

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

In its issues paper, the committee asked whether there are any new examples which reflect contemporary standards in our society.

The Queensland Government (submission 7) indicated that few changes should be made:

*The Government considers that the manner in which the Act expresses FLPs is appropriate: FLPs are expressed as a relatively short list of examples of what is otherwise a non-exhaustive definition. Consideration might be given to changing the wording of the examples or to the inclusion of some new examples (with due wariness, since a list too long will tend to diminish the significance of all the examples), but the specific FLPs are best considered as examples only. All rights and liberties, including those sourced from the common law and international law, should not be encroached without explanation and justification...*

*The inclusive nature of the definition of FLPs provides flexibility and allows currency, even in the absence of explicit legislative change to the FLP examples.*

The Minister for Disability Services, Mental Health and Aboriginal and Torres Strait Islander Partnerships (submission 9) proposed that the existing example of 'sufficient regard to Aboriginal tradition and Island custom' should be amended. In order to better accommodate the need to address all aspects of the impact of legislation and government decision-making on Aboriginal and Torres Strait Islander peoples, section 4 of the *Legislative Standards Act* should require legislation to have 'sufficient regard for the impact on Aboriginal and Torres Strait Islander peoples' tradition, custom, rights and interests'.

In relation to the institution of Parliament, the Queensland Law Society (submission 2) suggested that some expansion of the principles should be contemplated in respect of the separation of powers:

*Our proposal is to:*

- *Ensure that legislation has due regard to the division of the legislative, executive, and judicial functions of government; and*
- *Ensure that legislation involves the justified exercise of executive power.*

Further the Queensland Law Society urged amendment to section 4 regarding good governance:

*The Society recommends that a further principle be adopted which seeks for legislation to adhere to good governance standards. This may include consideration to:*

- *Ensure legislation does not unduly place high levels of administrative burden on individuals in order to access Government services or funding support; and*
- *Ensure that legislation has expeditious but practical timeframes for action for both individuals and Government with respect to applications and reviews of administrative decisions.*

## Legislative history

Fundamental legislative principles developed from Fitzgerald Report recommendations and the post-Fitzgerald reform process.<sup>5</sup> The Electoral and Administrative Review Commission and the Parliamentary Committee for Electoral and Administrative Review consulted Queensland people and recommended enactment of principles directed to:<sup>6</sup>

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

The intended role was to be that:<sup>7</sup>

*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.*

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<sup>5</sup> Commission of Inquiry pursuant to Orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989.

<sup>6</sup> Respectively, *Report on Review of the Office of Parliamentary Counsel*, 2.5, and *Office of the Parliamentary Counsel*, 10.

<sup>7</sup> *Report on Review of the Office of Parliamentary Counsel*, 2.1.

In 1992, the fundamental legislative principles were included in the *Legislative Standards Act* when it was enacted. The Scrutiny of Legislation Committee was established in 1995 and conferred with responsibility to examine legislation and report to the Legislative Assembly on its consistency with the principles.

A submission from the Queensland Government (submission 7), incorporating contributions from all departments and the Office of the Queensland Parliamentary Counsel, provided the following overview of the committee's examination of legislation for consistency with fundamental legislative principles:

*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 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.*

The Queensland Government submission referred to 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.*

## Understanding of fundamental legislative principles

### Rights and liberties of individuals

In 1997, the Legal, Constitutional and Administrative Review Committee (LCARC) reported on a *Review into the Preservation and Enhancement of Individual's Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?* That 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.<sup>8</sup>

What LCARC also did was to highlight the need for awareness of, and compliance with, fundamental legislative principles by public officers in all decision making processes. It concluded further enhancement of

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<sup>8</sup> 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/LCARC](http://www.parliament.qld.gov.au/LCARC).

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.<sup>9</sup>

That committee's publication, *Queenslanders' Basic Rights*, was issued to provide information about rights and liberties of Queensland people.<sup>10</sup>

The rights of Queenslanders identified in *Queenslanders' Basic Rights* are outlined in the figure below:

Civil and political rights	Economic, social and cultural rights	
<ul style="list-style-type: none"> <li>• Right to life, liberty and security of the person</li> <li>• Right to freedom of speech and freedom of expression</li> <li>• Right to freedom of thought, conscience, belief and religion</li> <li>• Right to freedom of movement, residence and association</li> <li>• Right to freedom of peaceful assembly and peaceful protest</li> <li>• Right to bear arms</li> <li>• Right to legal recognition and equality, equal treatment, equal opportunity, equal application and equal protection of the law</li> <li>• Right to freedom from discrimination, harassment, vilification and victimisation</li> <li>• Right to vote, stand for election and participate in elections</li> <li>• Right to fair and just treatment in police custody and criminal investigation of offences</li> <li>• Right to a fair trial and fair and just legal process</li> </ul>	<ul style="list-style-type: none"> <li>• Right to adequate standard of living and housing and reasonable access to social welfare</li> <li>• Right to adequate health care and medical treatment</li> <li>• Right to work and work-related rights</li> <li>• Right to legal assistance</li> <li>• Right to a safe society</li> <li>• Right to acquisition of property only on just terms</li> <li>• Right to education</li> <li>• Right to freedom of family structure and family life</li> <li>• Right to adequate childcare</li> <li>• Right to a person's identity and bodily rights</li> </ul>	
<ul style="list-style-type: none"> <li>• Rights of victims of crime</li> <li>• Rights of prisoners</li> <li>• Right to freedom from slavery</li> <li>• Right to freedom from torture, experimentation and inhumane treatment</li> <li>• Right to privacy</li> <li>• Right to natural justice, procedural fairness and due process</li> <li>• Right to access/amend government held personal information</li> <li>• Right not to be detrimentally affected by retrospective legislation</li> <li>• Right of self determination</li> <li>• Rights of the people</li> <li>• Rights of people who are not Australian citizens</li> <li>• Rights of children, teenagers and young persons</li> <li>• Rights and responsibilities of parents</li> <li>• Rights of particular groups and people with special needs</li> </ul>	<th data-bbox="807 965 1441 1023">Group and community rights</th> <ul style="list-style-type: none"> <li>• Right to collective and individual development</li> <li>• Rights of Aboriginal people and Torres Strait Islanders</li> <li>• Rights of an author or creator</li> <li>• Right to environmental, cultural and heritage protection and conservation</li> <li>• Right to ecologically sustainable development for current and future generations</li> <li>• Right to freedom from war and invasion</li> </ul>	Group and community rights

In its issues paper, the Scrutiny of Legislation committee invited ideas about what could be done to improve the understanding of the people of Queensland about individual rights and liberties.

The submission from the Human Rights Law Centre (submission 3) provided the following information:

*Education is an integral component of building a culture that understands, respects, and is committed to upholding human rights for all members of society. Consistent with this, the National Human Rights Consultation Committee recommended that "education be the highest priority for improving and promoting human rights in Australia".*

<sup>9</sup> *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, 69 and 77.

<sup>10</sup> Available at: [www.parliament.qld.gov.au/LCARC](http://www.parliament.qld.gov.au/LCARC).

*There is clear evidence that the legislative articulation and entrenchment of human rights standards and principles is a significant factor contributing to the extent and effectiveness of human rights education. Entrenching human rights considerations in the FLP would underpin and reinforce human rights education.*

*Under international law, Australia has a duty to commit to providing human rights education. The specific content of the education to be provided to all persons is not prescribed by international law. However, international law does set down principles that must guide the content of such education.*

*The UN has emphasised that human rights education comprises of two necessary components:*

- (a) the teaching of human rights laws and norms through curriculum, and*
- (b) the imparting of human rights values through the experience of education.*

*The first component, human rights education as a curriculum subject, requires the teaching of key United Nations documents so that all people are aware of their rights (and responsibilities) as citizens of the world. The second component, human rights education as an experience, requires that teaching and learning 'are oriented towards human values allowing the realisation of peace, social cohesion and the respect for human dignity'.*

*The HRLC submits that in order for the Queensland Government to comply with Australia's international obligations it must ensure that all primary and secondary school students receive education about human rights. The HRLC recommends that the following initiatives be implemented in order to ensure such compliance:*

- (a) The Queensland Government must provide clear directives that human rights education is an essential component of the state curriculum, and also state where human rights education fits within the curriculum.*
- (b) All pre-service and in-service teachers should be provided with human rights education training.*
- (c) Building on the publication Queenslanders' Basic Rights, further human rights education materials should be developed by Queensland government departments or organisations and disseminated widely through the Queensland community.*

Professor Patrick Keyzer of the Centre for Law, Governance and Public Policy, Bond University (submission 5) suggested that the Queensland Government should commission an independent organisation to conduct detailed, qualitative research to determine what Queenslanders know about their human rights.

A submission from the Minister for Disability Services, Mental Health and Aboriginal and Torres Strait Islander Partnerships (submission 9) drew attention to the fact that, while significant information about rights and liberties of individuals is accessible on the internet, Indigenous people may have limited access to that information, particularly people who live in remote communities. Accordingly, alternative ways must be adopted, including community and school-based education programs.

The submission of the Queensland Government (submission 7) stated:

*The Australian Government's Australia's Human Rights Framework emphasises the importance of human rights education across the community including primary and secondary schools. The framework commits to funding for community education and engagement programs to promote greater understanding of human rights.*

*The current Queensland curriculum in Studies of Society and Environment for years 1 to 9 describes the essential learnings in civics and citizenship through the political and economic systems, for example Australia's legal system and its laws to protect personal rights and responsibilities of young people; Australia's connection with other nations through international agreements; and the responsibilities of global citizenship and shared commitments to security and environmental treaties. The Year 10 Guidelines for History, Geography and Business also describe expectations for students to learn about active citizenship, the development of Australia's democracy and how the Government regulates the economy, with further civics education provided in Years 11 and 12 through subjects including Economics, Legal Studies, Modern History and Study of Society. Further, a Civics and Citizenship curriculum is being developed in Phase 3 of the Australian Curriculum beginning in September 2011 and concluding in May 2013.*

*The Government notes that in 1997, the former Legal, Constitutional and Administrative Review Committee produced the report 'Queenslander's Basic Rights', aimed at improving Queenslanders' understanding of their rights. The Government believes there would be benefit in review of this document, concurrent with the current review of FLPs, which could be released in a succinct form which would be accessible across the population, including to school children. In this regard, the Victorian Equal Opportunity and Human Rights Commission publishes a simple brochure that explains the rights contained in the Victorian Human Rights Charter (refer to [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)). The Government also notes that the advent of the new parliamentary committee system provides an opportunity for the new committees to produce educational material or other reports which could contribute to greater community understanding of the operation of Parliament generally, and of FLPs specifically.*

*The process of considering FLPs in the drafting of legislation within Government has been detailed above. The Government will continue to examine measures to improve understanding of FLPs by officers within the public service, in particular those officers involved in instructing on the drafting of legislation.*

## Institution of Parliament

The committee has always adopted an expansive approach to matters regarding the 'institution of Parliament'. Generally, this principle is interpreted in light of the references in section 4(1) to 'parliamentary democracy' and 'the rule of law'.

Accordingly, legislation examined for 'sufficient regard' to the institution of Parliament has 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.

The Queensland Law Society (submission 2) stated in its submission:

*Legislation is the tool of the Parliament and also the Executive Government to exercise its constitutional power. The separation of powers inherent in our Westminster system of Government is to ensure that there is some balance between the various arms of the State. Legislation is a key area where due regard should be had to ensure that this balance is maintained.*

## **Application of fundamental legislative principles to legislation**

Fundamental legislative principles are applied throughout the process for developing and enacting legislation. The submission of the Queensland Government (submission 7) provided an overview in respect of the drafting process:

*To perform its statutory role, OQPC invests considerable time and effort in discussing FLPs with instructing officers and assisting instructing officers to develop legislation that achieves the required policy objectives in a way that is consistent with the FLPs and minimises any FLP infringement. In this process, OQPC relies heavily on the work of the Committee, particularly the Legislation Alerts published by the Committee. Where drafting instructions propose a policy which would breach FLPs, OQPC refers the instructing officer to research conducted on the issue by the Committee.*

Parliament, as 'the forum in which the necessity and worth of proposed laws ... can be debated' examines whether proposed legislation has sufficient regard to the principles.<sup>11</sup> This may include balancing, in given circumstances, different and possibly competing principles.

Mr Kevin Cocks AM, Anti-Discrimination Commissioner Queensland (submission 1), noted that:

*The Parliament of Queensland Act 2001 requires the Parliamentary Scrutiny of Legislation Committee to examine all Bills and subordinate legislation for the application of fundamental legislative principles. The Committee may consider, report on, and make recommendations on the application of fundamental legislative principles contained in a Bill to the Legislative Assembly. The Committee can recommend a Bill be amended because, in the Committee's opinion, it does not have sufficient regard to fundamental legislative principles. However, there is no mandatory requirement for the Member promoting the Bill to provide a response to the Committee's recommendation.*

*Aside from the provisions in the Legislative Standards Act 1992 and the Parliament of Queensland Act 2001, which have a limited impact on the protection of rights, there are no other formal or legislative requirements requiring the Queensland Legislative Assembly to have regard to the rights and liberties of individuals before passing legislation.*

*Neither Act has any applicability once legislation has been considered by the Legislative Assembly. The provisions have no ongoing or broad purpose of protecting individuals from breaches of human rights.*

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<sup>11</sup> Fitzgerald Report, 123.

A submission from the Prisoners' Legal Service Inc (Queensland) (submission 8) indicated, however, that Queensland legislation should not be enacted following 'blanket derogation' from fundamental legislative principles on the basis of terrorism or crime control. The submission states, 'It is a well established principle of human rights law that rights cannot be automatically discounted because of crime control measures.'

Australians for Native Title and Reconciliation (submission 4) drew attention to unintended consequences of legislation discovered when a bill is in draft form or when legislation has been in use and is reviewed:

- a) *all legislation must be carefully scrutinised for "unintended consequences" in particular if it is likely to impact negatively on certain groups - such as Aboriginal and Torres Strait Islanders.*
- b) *all recommendations made by bodies such as the CMC should be very carefully examined and the Scrutiny of Legislation Committee should champion any necessary changes to the existing laws*

*A good example of the need for these two clauses are the Move On Powers. They were meant to lessen the number of people imprisoned under the Gaming and Vagrancy Act, but they seem to be a significant cause of a rise in the number of imprisoned Aboriginal and Torres Strait Islander people.*

The issues paper invited submissions about how explanatory notes could be improved to explain compliance with, or deviation from, fundamental legislative principles.

The submission from Mr Kevin Cocks AM, Anti-Discrimination Commissioner Queensland (submission 1), stated:

*A common feature of both constitutional and statutory human rights Acts or charters is that at the legislation making level, the appropriate process is for proposed legislation to be reviewed, before debate in Parliament, for compliance or otherwise with the protected human rights, with such review being the subject of a report.*

*Given that Queensland already has the framework for the scrutiny of legislation, and in the absence of a Queensland Charter or Human Rights Act, the Commission recommends strengthening the protection of human rights in the law making process by amending the relevant legislation to:*

- *incorporate human rights into the meaning of 'fundamental legislative principles';*
- *require a statement of compatibility with fundamental legislative principles that includes reasons for any departure; and*
- *require the Member promoting a Bill to respond to any recommendations or concerns raised by the Scrutiny of Legislation Committee.*

The Queensland-Northern NSW Branch of Amnesty International Human Rights in Law Group (submission 6) stated:

*We also propose that a human rights compatibility statement be prepared to identify the human rights impact of proposed legislation. If relevant, the statement should also justify the decision to introduce legislation that may be in breach of Australia's international human rights obligations.*

Similarly, a submission from the Human Rights Law Centre (submission 3) stated:

*The HRLC submits that the efficacy of explanatory notes can be improved by amending the Legislative Standards Act 1992 (Qld) to require notes to provide greater [explanation] about how proposed law complies with, or deviates from, FLP. The HRLC proposes amending section 23(f) of the Act to this effect as follows:*

- (f) *an assessment of:*
  - (i) *whether the Bill is consistent with fundamental legislative principles, and, if so, how it is consistent; and*
  - (g) *if the Bill, or any part of the Bill, is not consistent with fundamental legislative principles-*
    - (i) *the nature and extent of the inconsistency; and*
    - (ii) *why the Bill should nevertheless be considered by the Legislative Assembly.*

*More expansive explanatory notes of the nature described above would have the benefits of:*

- (a) *ensuring human rights are properly considered when legislation is developed;*
- (b) *enhancing transparency and accountability in the development and purposes of legislation;*
- (c) *informing and thereby improving parliamentary dialogue, scrutiny and debate; and*
- (d) *promoting evidence-based development of policy and legislation.*

## The contemporary meaning of ‘fundamental legislative principles’

In its issues paper, the committee noted that, in the context of the possible introduction of human rights legislation, consultations had taken place about our shared understanding of rights and liberties in a number of Australian jurisdictions.

The issues paper posed a question as to whether any other rights and liberties needed to be observed.

The Queensland Law Society (submission 2) suggests additions based on the Terms of Reference of the Victorian Parliament’s Scrutiny of Acts and Regulations Committee.

Australians for Native Title and Reconciliation (submission 4) suggested that all bills and subordinate legislation must be consistent with the Universal Declaration on the Rights of Indigenous People and all human rights treaties ratified by Australia. The ANTaR submission stated that Article 13.2 of the Declaration on the Rights of Indigenous Peoples was particularly important to the committee’s review:

*Section 13.2 highlights that how the law is implemented of any law needs to be carefully thought through and that if this is neglected or insufficiently resourced, there can be many unintended consequences.*

*For example, the lack of competent interpreters well before a case comes to court can lead to people pleading ‘guilty’ with little knowledge of what they are admitting to, nor the consequences of this action.*

*Laws passed to improve the experience and skills of urban and regional drivers may make it very difficult for Aboriginal or Torres Strait Islanders on remote communities to fulfill the specific requirements let alone find the money to pay the necessary fees.*

Most other submissions also suggested that section 4 of the *Legislative Standards Act* does, or should, require all legislation to comply with international human rights instruments that Australia has ratified. The Queensland-Northern NSW Branch of Amnesty International Human Rights in Law Group (submission 6) stated:

*Our submission is that all Bills introduced to the Queensland Parliament should be scrutinised for compliance with international human rights. To achieve this the ‘Fundamental Legislative Principles’ (FLPs) should include the human rights which are recognised in the core international human rights instruments to which Australia is a signatory (outlined below). Specifically, we propose that section 4(3) of the Legislative Standards Act 1992 (Qld) (LSA), should be amended to include reference to these human rights instruments...*

*Our group acknowledges that the Committee has consistently adopted an expansive interpretation of the phrase ‘rights and liberties’ in section 4(2) of the LSA. In particular, the Committee has interpreted the reference to ‘rights and liberties’ in the LSA to include human rights that arise out of Australia’s international treaty obligations. Our submission supports this practice of the Committee, and recommends the inclusion of international human rights standards within the meaning of ‘rights and liberties of individuals’ through our proposed amendment of section 4(3) of the LSA.*

In its submission, the Queensland Law Society (submission 2) said that an additional principle should be directed to ensuring that legislation and practices accord with national and international human rights standards and promote respect for the principles of equality and non-discrimination as recommended by the Human Rights Council’s Working Group on the universal periodic review of Australia.

The Human Rights Law Centre (submission 3) observed that, currently, ‘fundamental legislative principles’ include ‘human rights’:

*The principle that Queensland legislation has sufficient regard to and is consistent with Australia’s international human rights obligations (‘Human Rights Principle’) should be included in sections 4(2) and (3) of the definition of FLP in the Legislative Standards Act 1992 (Qld) because:*

- (a) the Queensland Parliament is subject to Australia’s international human rights obligations and these rights reflect minimum legislative standards expected by the community;*
- (b) such an amendment will assist to reflect the intention, and codify the current practice of, the Queensland Parliament that FLP do include Australia’s international human rights obligations; and*
- (c) scrutiny by reference to human rights principles and standards will enhance legislative and policy development.*

The Human Rights Law Centre’s submission provided a detailed examination of the consistency of the incorporation of human rights principles into the meaning of ‘fundamental legislative principles’ with the current statutory framework and current practice. The submission stated, in part:

*The requirement to consider FLP exists at a number of different stages of the lawmaking process in Queensland, including the development and consideration of proposed Bills and subordinate legislation by the Executive, the*

*advisory function of the Office of the Queensland Parliamentary Counsel, and the scrutiny of Bills and subordinate legislation by the Scrutiny of Legislation Committee.*

*The HRLC notes that the original intention of the Legislative Standards Act 1992 (Qld) was that FLP include Australia's obligations under international law. The explanatory note to the Act states in respect of the definition of FLP that '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 HRLC further notes that the existing practice of the Queensland Parliament's Scrutiny of Legislation Committee is to consider the Human Rights Principle when determining whether proposed law has sufficient regard to FLP.*

The submission from the Anti-Discrimination Commissioner (submission 1) urged adoption of the proposed federal model for scrutiny of legislation for consistency with 'human rights', with the latter defined inclusively as:

*... the rights and freedoms recognised or declared by the seven core United Nations human right treaties, as those treaties apply to Australia.*

Australian Lawyers for Human Rights (submission 10) urged a more expansive approach:

*In addition to formal treaties and International agreements, the sources of public international law, as it relates to the rights and liberties of the individual, include customary international law and human rights jurisprudence developed in international courts and tribunals. In the case of customary international law, states may be considered bound by these rules at International law even if they do not form part of a formal treaty or agreement to which the State is a signatory.'*

*In this regard, ALHR considers that the framework of fundamental legal principles as they relate to human rights should be extended to include not only those international agreements and treaties to which Australia is a signatory but also to any 'rights and liberties of the individual' as recognised in customary international law and human rights jurisprudence developed in international courts and tribunals.*

*To give this effect, ALHR recommends that the proposed amendment to section 2 of the Legislative Standards Act 1992 contained in the AI HRLG submission be adopted with the additional references above to be included in the definition of 'international human rights standards.'*

The Human Rights Law Centre (submission 3) provided the following information regarding 'human rights':

*Human rights derive from the inherent dignity of people. According to the Universal Declaration of Human Rights, all people are free and equal and have fundamental human rights. These rights enshrine the civil, political, economic, social and cultural minimum standards that must be respected, protected and fulfilled to enable people to live with dignity. They apply irrespective of class, gender, race, age, religion, opinion or social status. Human rights are indivisible and interdependent, representing a comprehensive scheme of core minimum standards that conceptually should not - and practically cannot - exist in isolation. Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation. Effective protection of all rights is necessary to ensure the conditions necessary for all people to live with dignity and participate fully and equally in the community.*

Some submissions (see submissions 1 and 7) identified the sources of Australia's human rights obligations.

Other submissions stated that Queensland law should provide people with an opportunity to challenge legislation for consistency with human rights principles (see, for example, submission 5). The submission from the Prisoners' Legal Service Inc (Queensland) (submission 8) indicated that:

*People affected by Queensland bills and subordinate legislation need effective access to justice in order to realise their human rights. Australia has ratified the International Covenant on Civil and Political Rights (ICCPR). As a State of the Commonwealth of Australia, Queensland is obliged to adhere to its principles. Enshrined in Article 2 paragraph 3 of the ICCPR is the right to an effective remedy for a violation of a right guaranteed in the Covenant. Queensland is in breach of this provision every time legislation is passed or applied that violates a Queenslanders' human rights without an effective remedy.*

Finally, the submission from Australian Lawyers for Human Rights (submission 10) stated:

*... while ALHR welcomes any move to promote the consideration of human rights in the law-making process, ALHR remains committed to establishing further legislative recognition and protection of positive rights both in Queensland and across Australia more broadly. We would urge the Parliament to consider passing a formal Charter of Rights of the kind which has been adopted by the Victorian and ACT Parliaments and is currently under consideration in Tasmania.*



### 3 Conclusion

#### Recommendation

The 'our principles' review of the meaning of 'fundamental legislative principles' should be conducted and concluded by another committee of the Legislative Assembly, and the conduct of the review should include 'our principles' conversations with the people of Queensland. The committee refers the continuation of the review to another committee of the Legislative Assembly for their consideration.

#### 'Fundamental legislative principles' – a continuing conversation

The committee notes that the submissions it received uniformly welcomed the opportunity to provide views about the principles which underlie our parliamentary democracy based on the rule of law. Australian Lawyers for Human Rights (submission 10), for example, said that they were 'pleased to see ... positive steps to ensure the protection and promotion of human rights in Queensland'. A submission from ANTaR (submission 4) urged:

*Please act to ensure that future and current legislation adhere to the UN Declaration on the Rights of Indigenous Peoples and also do not have negative unintended consequences.*

The submission from the Queensland Government (submission 7) stated:

*The Queensland Government looks forward to receiving any suggested improvements to the legislative articulation of FLPs that the Committee might make in its eventual report, particularly since the Committee's review process involves engagement with the public on the meaning of FLPs.*

The committee has recommended the continuation of this review by another parliamentary committee as the committee will cease 1 July 2011.

The committee is concerned to ensure that:

- the people of Queensland be provided a continuing opportunity to discuss and communicate views and information about 'fundamental legislative principles';
- in particular, the committee had hoped to commence the 'our principles' conversations with people in Far North Queensland, including Torres Strait Island communities and the committee draws attention to the importance of providing people in these communities with an opportunity to meet with members of a parliamentary committee who will listen to and act upon their views;
- outcomes eventuate from the invaluable submissions provided to the committee's review;
- as 'fundamental legislative principles' were designed to be flexible, with the capacity to develop and change over time as individual and community values changed, regular reviews of s.4 of the *Legislative Standards Act* should be undertaken by a committee of the Legislative Assembly; and
- respect for the human rights of others and the valuing of democratic principles continues and grows via discussion and practice of 'our principles'.

The committee commends this important review to the Parliament and the people of Queensland.

## Appendix A: Section 4

### 4 Meaning of *fundamental legislative principles*

- (1) For the purposes of this Act, ***fundamental legislative principles*** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

*Editor's note—*

Under section 7 (Functions of office), a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

- (2) The principles include requiring that legislation has sufficient regard to—
- (a) rights and liberties of individuals; and
  - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
  - (b) is consistent with principles of natural justice; and
  - (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
  - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
  - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
  - (f) provides appropriate protection against self-incrimination; and
  - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
  - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (i) provides for the compulsory acquisition of property only with fair compensation; and
  - (j) has sufficient regard to Aboriginal tradition and Island custom; and
  - (k) is unambiguous and drafted in a sufficiently clear and precise way.
- (4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—
- (a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
  - (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (c) authorises the amendment of an Act only by another Act.
- (5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—
- (a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and
  - (b) is consistent with the policy objectives of the authorising law; and
  - (c) contains only matter appropriate to subordinate legislation; and
  - (d) amends statutory instruments only; and
  - (e) allows the subdelegation of a power delegated by an Act only—
    - (i) in appropriate cases and to appropriate persons; and
    - (ii) if authorised by an Act.

## Appendix B: List of submissions

Sub #	Name
1	Mr Kevin Cocks AM, Anti Discrimination Commissioner, Queensland
2	Mr Bruce Doyle, President, Queensland Law Society
3	Human Rights Law Centre
4	Ms Monique Bond, ANTaR Qld Association Inc
5	Professor Patrick Keyser, Centre for Law, Governance and Public Policy, Bond University
6	Ms Kate Ogg, Group Convenor, Human Rights in Law Group, Amnesty International Queensland-northern NSW Branch
7	The Honourable Anna Bligh MP, Premier of Queensland
8	Ms Matilda Alexander, Coordinator/Solicitor, Prisoners' Legal Services Inc
9	The Honourable Curtis Pitt MP, Minister for Disability Services, Mental Health and Aboriginal and Torres Strait Islander Partnerships
10	Mr Stephen Keim SC, President, Australian Lawyers for Human Rights