QUEENSLAND

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

REPORT

ON

REVIEW OF THE OFFICE OF THE PARLIAMENTARY COUNSEL

MAY 1991

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Electoral and Administrative Review Commission

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PREVIOUS EARC REPORTS

90/RI	Review of the Guidelines for the Declaration of Registrable Interests of Elected Representatives of the Parliament of Queensland (August 1990)
90/R2	The Local Authority Electoral System of Queensland (September 1990)
90/R3	Queensland Joint Electoral Roll Review (October 1990)
90/R4	Queensland Legislative Assembly Electoral System (November 1990)
90/R5	Judicial Review of Administrative Decisions and Actions (December 1990)
90/R6	Freedom of Information (December 1990)
91/R1	Public Assembly Law (February 1991)

CONTENTS

LIST OF TABLES

LIST OF APPENDICES

CHAPTER ONE

INTRODUCTION

Background to Review

1.1 The Electoral and Administrative Review Commission ("the Commission" or "EARC") was established by the *Electoral and Administrative Review Act 1989-90* ("the Act"). The Commission's object is to provide reports to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier, with a view to achieving and maintaining:

> *"(a) efficiency in the operation of the Parliament;*
>
> *and*
>
> *(b) honesty, impartiality and efficiency in -*
>
> *(i) elections;*
>
> *(ii) public administration of the State;*
>
> *(iii) Local Authority administration"* (the Act, s.2.9(1)).

1.2 The functions of the Commission are, amongst others, to investigate and report in relation to:

> *"(ii) the operation of the Parliament;*
>
> *(iii) the whole or part of the public administration of the State, including any matters pertaining thereto specified in the Report of the Commission of Inquiry, or referred to the Commission by the Legislative Assembly, the Parliamentary Committee, or the Minister"* (the Act, s.2.10(1)(a)).

1.3 The Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct ("the Fitzgerald Report") recommended that the Commission undertake a *"review of the role and functions of the Parliamentary Counsel"* (Fitzgerald Report, recommendation IIf, p.371).

1.4 In recommending the review, the Fitzgerald Report stated at page 140:

> *"The Parliamentary Counsel traditionally has had primary responsibility for preparing draft legislation giving effect to departmental proposals. In the course of that activity, the nature and wisdom of those proposals is often discussed, and advice provided to the department in question by the Counsel. The Counsel also assists members of Parliament in relation to specific legislation.*
>
> *In Queensland, the Parliamentary Counsel is attached to the Premier's Department, not the Attorney-General's Department as in other states. The office is not established as an independent entity by statute, as in the case of the Commonwealth Parliamentary Counsel.*
>
> *The Parliamentary Counsel obviously should not tailor advice to political expediency or fail to point out fundamental errors in principle or obligation in any proposed course. The present role and functions of the Parliamentary Counsel should be reviewed (in the light of other matters, identified in this report) to ensure its independence."*

Review Process

1.5 The process adopted by the Commission for the review of the Office of the Parliamentary Counsel ("the OPC") was developed to comply with the Commission's statutory responsibilities. In particular, section 2.23 of the Act states:

> *"(1) The Commission is not bound by rules or the practice of any court or tribunal as to evidence or procedure in the discharge of its functions or exercise of its powers, but may inform itself on any matter and conduct its proceedings in such manner as it thinks proper.*
>
> *(2) The Commission -*
>
> *(a) shall act independently, impartially, fairly, and in the public interest;*
>
> *(b) shall make available to the public all submissions, objections and suggestions made to it in the course of its discharging its functions, and otherwise act openly, if to do so would be in the public interest and fair;*
>
> *(c) shall not make available to the public, or disclose to any person, information or material in its possession, if to do so would be contrary to the public interest or unfair;*
>
> *(d) shall include in its reports -*
>
> *(i) its recommendations with respect to the relevant subject matter;*
>
> *(ii) an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations."*

1.6 The Commission commenced the review on 1 September 1990 with the release of Issues Paper No. 7. The Issues Paper in paragraph 7.1, identified the following issues for public comment:

> *"**(A) Drafting of Government Bills:***
>
> *(i) To what extent should the OPC take part or not take part in discussions on policy aspects of proposed legislation?*
>
> *(ii) Are there any fundamental legislative principles to which Cabinet should give particular attention in draft legislation, that have not been identified in the Queensland Cabinet Handbook (see Appendix A to this Paper)?*
>
> *(iii) Should fundamental legislative principles be set forth in statutory guidelines?*
>
> *(iv) What should be the OPC's role in scrutinising legislative proposals for impact on legal principle, including impact on personal rights and freedoms?*
>
> *(v) What should be the respective responsibilities of the OPC and the Attorney-General's Department in this area?*
>
> *(vi) Should a formal mechanism be given to the OPC to advise Cabinet on a) the extent to which draft bills conform to Cabinet decisions and b) procedural and legal difficulties associated with the bill that may be of concern to the OPC?*
>
> *(vii) Should the OPC scrutinise drafting instructions prior to their submission to Cabinet in order to:*

- *ensure that the instructions are clear and adequate;*
- *assist in ensuring that matters of legal principle are appropriately referred to the Attorney-General's Department for advice?*

(viii) Should all bills introduced into the Queensland Parliament and all significant statutory instruments tabled in the Parliament, be accompanied by regulatory impact statements? If so, what should the statements contain; what community consultation should occur; and who should be responsible for monitoring compliance?

(B) Drafting of Private Members' Bills and Amendments to Government Bills:

(i) What is the requirement for access by private Members to drafting assistance for private Members' bills, amendments to Government bills and legislative advice in relation to these?

(ii) Should the OPC be required to provide a drafting service to private Members? If so, should this responsibility be established in statutory form eg. in a Parliamentary Counsel Act (see questions D i and ii)?

(iii) Should the Queensland Parliament be provided with resources to engage its own drafters for private Members?

(iv) If the OPC should be responsible for assisting private Members:

- *to what extent should the OPC be able to determine drafting assistance in individual circumstances without reference to Ministers?*
- *should guidelines be issued concerning the correct relationships that should apply between the OPC, Members of Parliament and Ministers in drafting private Members' legislation? If so, what should these guidelines contain?*
- *should drafting assistance provided by the OPC to private Members be given on the basis of confidentiality?*
- *are additional Parliamentary resources required to assist private Members prepare adequate drafting instructions for the OPC?*

(C) Drafting of Subordinate Legislation:

(i) Should the OPC be responsible for drafting subordinate legislation?

(ii) What are the merits of requiring departments to provide the OPC with drafting instructions for subordinate legislation?

(iii) What specific aspects should the OPC be responsible for in examining the legal implications of proposed statutory instruments?

(iv) Should these responsibilities be statute based? If so, should relevant provisions be contained in a Parliamentary Counsel Act or legislation dealing with subordinate instruments?

(v) Should the Committee of Subordinate Legislation of the Queensland Parliament be advised by legal counsel independent of the Executive?

(D) Control and Management of the Office of Parliamentary Counsel:

(i) Should the OPC be statute based (eg. in a Queensland Parliamentary Counsel Act)?

(ii) What should the statute provide for?

(iii) Should ministerial responsibility for the OPC be exercised by the:

- *Premier*
- *Attorney-General*
- *another Minister?*

(iv) What should be the administrative relationship between the responsible Minister's department and the OPC?

(v) To what extent should Public Service selection, appointment, termination and other Public Service standards apply to the OPC?

(vi) Should any special selection and appointment procedures apply to the OPC?

(vii) What role should the Public Sector Management Commission play in establishing and monitoring selection procedures for the OPC?

(viii) To what extent could training courses or seminars be used to enable the OPC to address ethical issues associated with its role?

(ix) What is the scope for greater co-operation between Commonwealth and State Governments in providing training opportunities for Parliamentary Counsel in Australia?

(x) What could be the advantages and disadvantages of seconding staff from the OPC to other drafting offices in Australia and overseas?

(xi) What are the merits of engaging external consultants to draft Government legislation?

(xii) Should the OPC be required to:

- *approve the engagement of external consultants; and*
- *certify that draft legislation prepared by external consultants meets appropriate standards?*

If so, should this responsibility be defined by statute?"

1.7 On 1 September 1990, an advertisement was placed in *The Australian, The Courier-Mail* and 25 regional newspapers in Queensland (a copy of the advertisement is reproduced in Appendix A). The advertisement:

(a) invited public submissions on the review;

(b) advised that copies of the Issues Paper were available for perusal at Magistrates Courts, Public Libraries and the Commission's Public Reading Room; and

(c) advised that copies of the Issues Paper could be obtained from the Commission.

1.8 In all, 900 copies of EARC Issues Paper No. 7 were distributed to Magistrates Courts, Public Libraries, State Government organisations, community and professional groups and members of the public.

1.9 However, only 10 submissions were received in response to the advertisement. A list of persons and organisations making submissions is contained in Appendix B.

1.10 The Commission considered that the number of submissions received was disappointing, especially as the Issues Paper raised significant issues to do with checks and balances in the making of legislation, protection of legal rights, the quality of legislative drafting, community consultation procedures for legislation, private Members bills, Parliamentary scrutiny of legislation and ethical issues associated with drafting. The Commission was particularly disappointed that no submissions were received from legal professional bodies, civil liberties organisations (with the exception of the Tharpuntoo Legal Service and the Australian Community Action Network), or academics. However, the Commission wishes to express its appreciation to those persons and organisations who made submissions. What the submissions lacked in quantity was made up for in quality, and a careful reading of this Report will reveal how helpful the submissions were in the Commission's deliberations.

1.11 It may be that some people who might otherwise have put in a submission were misled by the title of the review, "Parliamentary Counsel", and did not appreciate that the review raised substantial issues to do with checks and balances in the legislative process. It is also possible that organisations were, at the time of the advertisement, engaged in preparing submissions on other Commission reviews.

1.12 To encourage further public discussion of the matters raised in EARC Issues Paper No. 7, and those emerging in the course of the review, the Commission conducted a Public Seminar on 5 February 1991 entitled *"The Preparation of Acts and Regulations"*. The Seminar had the following sub-themes:

> *"What Checks and Balances are Needed to Ensure that Legislative Drafting Pays Due Regard to Personal Rights and Liberties?*
>
> *Are the Public and Parliament Adequately Informed of the Impact of Proposed Legislation?*
>
> *How Might Acts and Regulations be Made more Accessible?"*

1.13 Speakers and panellists at the Seminar, in order of appearance, were:

Mr Tom Sherman, Chairman of the Commission

Emeritus Professor Douglas Whalan, Advisor to the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances

The Hon. Justice Elizabeth Evatt AO, President, Australian Law Reform Commission

Hon. Dean Wells MLA, Attorney-General of Queensland

Mr Adrian Cruickshank MP, Chairman, Regulation Review Committee, New South Wales Parliament

Mr John Leahy, Parliamentary Counsel, Queensland

Mr Walter Iles CMG QC, Chief Parliamentary Counsel, New Zealand

Ms Hilary Penfold, Second Parliamentary Counsel, Commonwealth of Australia

Mr Michael Consolo, Director Cabinet Office, Victoria

Mr Bill Kidston, Director of Legislation, Department of Primary Industries, Queensland

Ms Theresa Johnson, Lecturer, Faculty of Law, Queensland University of Technology

Mr Matt Foley MLA, Chairman, Parliamentary Committee for Electoral and Administrative Review, Queensland.

The Seminar program is reproduced in Appendix C.

1.14 The Seminar was advertised in *The Courier Mail* and professional journals and also by notice to Government and community organisations. In contrast to the poor response with submissions, approximately 330 participants attended the Seminar from around Queensland and Australia. An additional 60 persons sought registration but were unable to be accommodated.

1.15 At the Seminar, the Chairman announced that the Commission would receive additional submissions in relation to matters raised at the Seminar until the end of February 1991. One submission (S11) was received in response.

1.16 Further public input into the review was obtained from a conference on legislative drafting entitled "Drafting for the 21st Century" held at Bond University immediately after the Commission's Public Seminar. The conference was organised by the Law Reform Commission of Victoria and centred in part on matters raised in EARC Issues Paper No. 7.

Consultations

1.17 While in Sydney, the Commission's Project Officer for the review, Mr Denzil Scrivens, met with the New South Wales Parliamentary Counsel, Mr Dennis Murphy QC, for consultation on aspects associated with the role of Parliamentary Counsel. The Project Officer also had consultations in Canberra with the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Mr Stephen Argument, and the Secretary of the Senate Standing Committee on Regulations and Ordinances, Mr David Creed.

1.18 Consultations were also held in Brisbane with officers of the Legislative Assembly, the Public Sector Management Commission and the Cabinet Office. The Chairman of the Commission also spoke to the staff of the Office of the Parliamentary Counsel about the review.

Additional Sources

1.19 Research was undertaken of published articles and commentaries on legislative drafting in Australia and overseas. Additional information was obtained, by correspondence, from Parliamentary Counsel and Legislative Counsel in all Australian jurisdictions, and in Canada and the United

Kingdom. Information was also obtained, by correspondence, from Parliamentary legislative scrutiny committees around Australia. Copies of this correspondence may be inspected in the Commission's Public Reading Room (EARC File 022).

Scope of the Review

1.20 The principal focus of the review has been 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.

1.21 The review has not addressed drafting techniques in detail, although recommendations are made in the Report with a view to encouraging plain English approaches and the use of non sexist language. The Report also makes recommendations designed to improve the accessibility of statutory reprints.

1.22 The Commission did not, however, examine the operations of the OPC with a view to recommending efficiencies or changes in resource levels. A separate review into these matters has been conducted by the Parliamentary Counsel, Mr John Leahy. As a result of this review, a new organisational structure has been approved for the OPC. A copy of the new structure of the OPC is reproduced in Appendix D.

1.23 The Commission does not anticipate that the recommendations in this Report will, in the short term, result in significant resource requirements for the OPC over and above that identified in the review undertaken by the Parliamentary Counsel. Nor have any recommendations been made that will significantly affect the organisational structure of the OPC.

1.24 In the short term, recommendations that may require some additional resourcing or re-allocation of priorities within the Office are:

(a) the development and promulgation of guidelines on drafting subordinate legislation where such legislation is drafted outside the OPC (para. 3.28(c)); and

(b) the development of training programs in the area of legislative principle (para. 7.30(a)).

PARLIAMENTARY SCRUTINY OF LEGISLATION

1.25 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.

1.26 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 process. This recommendation will require additional resources to be made available to Parliament in order to provide the proposed Committee with effective research and administrative support.

CHAPTER TWO

DEFINING LEGISLATIVE PRINCIPLES

Introduction

2.1 In the course of this review, the Commission considered a number of principles regarded as fundamental to high quality laws. Legislation drafted for, and enacted by, Parliament is only one part of the vast body of laws which regulate the citizen's freedoms and responsibilities.

2.2 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 should be constantly assessed.

2.3 Perhaps the most basic principle is that legislation should not override existing rights and liberties. However, even the most basic of these principles is not absolute. There may be occasions where existing rights and liberties may need to be qualified for a legitimate social objective. For example, during wartime, legislative measures may need to be taken to protect society and some rights may be yielded up in the process.

2.4 While these principles may not be absolute, it is important that proper regard be paid 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.

2.5 For the purpose of this review, "legislative principles" are those principles concerned with:

(i) upholding the sovereignty of Parliament and democratic principle - for example ensuring that Parliament has sufficient scrutiny over delegated legislation and that undue law making powers are not conferred on officials;

(ii) preserving where possible fundamental political, civil, and legal rights established in common law and by statute law - for example, upholding the traditional presumption that the onus of proof rests with the prosecution in criminal proceedings; and

(iii) providing for appropriate review of administrative decisions and ensuring that legislation does not inappropriately deny access to the courts.

2.6 In Westminster jurisdictions, legislative principles are governed by a variety of factors, including parliamentary convention; common law rules and presumptions; evolving doctrines associated with the general field of administrative law; the perspectives of parliamentary scrutiny committees such as the Senate Standing Committee for the Scrutiny of Bills; constitutional bills of rights (where enacted) which guarantee basic human rights; statutory schemes which promote human rights (for example anti-discrimination legislation); international conventions and treaties such as the U.N. Covenant on Civil and Political Rights; and specific legal and administrative policies established by the government of the day.

2.7 Government policy is a particularly significant element in determining the extent to which new legislation may uphold or vary key principles relating to the protection of rights or parliamentary government. Governments may choose to maintain and extend existing rights and presumptions through new legislation; equally they may decide that public policy requires some modification or suspension of these principles. For example, a Government may - subject to any constitutional protections in this area - choose to reverse the burden of proof in criminal proceedings where this is seen as necessary to achieve the overall objectives of the legislation.

2.8 Governments can also overlook or fail to appreciate key legislative principles in devising new regulatory schemes, reasons for which may include ignorance of the principles, the pressures of policy making or political and administrative expediency.

2.9 In many Westminster jurisdictions, Governments have built checks and balances into the administrative process to ensure that adequate attention is given to proposed legislation which varies significant principles - particularly where these seek to negate or reduce traditional rights, or modify principles of parliamentary government.

2.10 A characteristic element in this system is the promulgation of key principles considered to warrant careful attention by departments, Parliamentary Counsel and Cabinet. This occurs through a variety of means, including through drafting guidelines issued by the Parliamentary Counsel, usually on advice of the Attorney-General's Department. For example, the New South Wales Parliamentary Counsel has, in consultation with the New South Wales Attorney-General's Department, issued a series of Drafting Instructions on principles to be considered in relation to penalty provisions, administrative appeals, onus of proof, search warrants and other matters affecting rights and liberties (Murphy 1990, EARC File 022/Folio 34).

2.11 In several jurisdictions (for example the Commonwealth and Victoria) guidance on legislative principles is also provided through Cabinet handbooks or legislation manuals. One advantage of prescribing such principles in Cabinet publications is that it allows these principles to be related to overall legislative review processes established by Cabinet, and to identify the respective responsibilities of departments, Parliamentary Counsel, and other Government agencies in ensuring that proper consideration is given to them. As well, Cabinet handbooks and manuals usually have much wider circulation than drafting guidelines produced by Parliamentary Counsel and, if they are published, are open to public scrutiny.

Queensland Government Guidance on Legislative Principles

2.12 EARC Issues Paper No. 7 noted that the first attempt by a Queensland Government to define legislative principles in a Cabinet handbook occurred in 1986 with the publication of the *Legislation Manual* by the Bjelke-Petersen Government. The *Legislation Manual* outlined new arrangements for review of business related regulations and for the issue of green papers. It also offered the following guidance in the area of legislative principle:

Principles in Respect of Bills:

(a) Effect on Crown: the *Legislation Manual* (p.15) directed departments to advise the OPC whether the provisions of the legislation should bind the Crown - the traditional presumption being that legislation does not bind the Crown unless specific provision is made for this in the legislation. However, the Commission notes that no guidance was given on circumstances where legislation might or might not appropriately bind the Crown. The Commission notes that in some circumstances, exclusion of the Crown from obligations or liabilities associated with a particular statutory scheme might not be justified in terms of equality before the law;

(b) International Conventions and Treaties: the *Legislation Manual* (p.16) required the Solicitor-General to be consulted in respect of provisions relating to international conventions and treaties. The Commission observes, however, that no guidance was provided on general policy in respect of observance of international treaties to which Australia is a party;

(c) Administrative Review: the *Legislation Manual* (p.17) indicated that, where appropriate, an appeal mechanism should be provided for "regulatory requirements". It noted the principle (generally advocated by parliamentary scrutiny committees) that appeal mechanisms should be embodied in the Act and not in subordinate legislation. However, no guidance was provided on general principles of review, whether administrative or judicial. Further, unlike some manuals in other jurisdictions, no cautionary note was sounded regarding the use of "ouster" provisions which seek to displace the jurisdiction of the courts;

Principles in Relation to Subordinate Legislation

(d) The *Legislation Manual* (p.36) drew attention to the position of the Committee of Subordinate Legislation of the Queensland Parliament that discretionary decision-making powers should not be sub-delegated to office-holders by regulation without prescribing objective standards to apply in the exercise of the discretions. The *Manual* noted that, ideally, the standards should be detailed in the principal legislation; and

(e) The *Legislation Manual* also drew attention to the Committee's position that Acts should not be amended by subordinate legislation - by the use of so-called "Henry VIII" clauses. It observed that this practice is regarded as "objectionable in law". The Commission observes that this principle is also generally regarded as inconsistent with principles of parliamentary government. Generally, where Parliament has established a legislative scheme it should not be left to the Executive to make alterations to that scheme by regulation where such alterations go to substantive matters of policy.

2.13 In 1990 the Goss Government replaced the 1986 *Legislation Manual* with the Queensland *Cabinet Handbook*. The *Cabinet Handbook* provides substantial guidance on the new Cabinet system established by the Government (discussed further in Chapter Four). A separate section also provides guidance on the preparation of legislation and provides the following guidance in respect of key principles:

(a) Effect on Crown: the Queensland *Cabinet Handbook* (p.77) requires that proposals for legislation to bind the Crown should be specifically addressed in the Cabinet submission seeking authority to prepare legislation. However, the Commission notes that, as with the 1986 *Legislation Manual*, no guidance is provided on general circumstances where it might be appropriate for the Crown to be bound by a statutory scheme;

(b) Delegation: the Queensland *Cabinet Handbook* (p.79) indicates that:

(i) the class of delegates should be limited having regard to administrative necessity and efficiency;

(ii) important powers should only be delegated to persons of a class nominated in the principal legislation; and

(iii) powers to make regulations (that is subordinate legislative making power) should not be able to be sub-delegated.

The Commission notes that these principles are an important part of parliamentary sovereignty and administrative accountability, the general principle being that it is for Parliament to determine the class and level of persons to whom statutory-based administrative powers and subordinate legislative powers are to be delegated, having regard to the importance and effect of the powers being delegated. This is an area which is closely examined by the Senate Scrutiny of Bills Committee and subordinate legislation committees in State Parliaments;

(c) Retrospectivity: the *Cabinet Handbook* (p.77) makes reference to a key principle not stated in the *Legislation Manual* that *"... caution must be exercised with retrospective legislation which affects rights adversely. Liabilities should not be imposed or operate retrospectively unless exceptional circumstances exist and where Cabinet has given specific prior authority. It is also recommended that where retrospective legislation is being contemplated the advice of the Attorney-General be sought prior to an 'Authority to Introduce a Bill' submission."*;

(d) Onus of Proof - the *Cabinet Handbook* (p.71) notes the general rule that the burden of proving guilt beyond reasonable doubt rests with the prosecution, and directs that reversing the onus of proof in criminal proceedings so that it falls on the defendant, should only be proposed where there are "clear public policy reasons". The *Cabinet Handbook* further notes that the Attorney-General must be consulted in the preparation of a Cabinet submission seeking approval for a bill to be drafted where it is intended to place reverse onus provisions in legislation, and that the submission must specifically address and recommend reversal of the onus;

(e) Conclusive Evidentiary Provisions - the *Cabinet Handbook* (p.71) notes that *"The same considerations apply to conclusive evidentiary provisions, that is, provisions empowering a person to certify conclusively that certain acts exist in a manner which limits or excludes judicial review. Except in unusual cases, such certificates should constitute prima facie evidence, not conclusive evidence."*

This principle relates to the use of conclusive certificates. While a *prima facie* certificate means that the defendant can adduce evidence which overturns the presumption of a certificate, a *conclusive* certificate finalises the issue dealt with in the certificate so that it is removed from the scrutiny of the court entirely;

(f) Powers to Enter and Seek Information - the Queensland *Cabinet Handbook* (p.71) contains warnings about search and entry provisions, stating that provisions giving persons powers to enter premises, inspect documents or require information should be carefully considered in terms of the purpose of requiring the information and protection of the confidentiality of any information required to be given. The *Cabinet Handbook* also notes that powers of entry, for search and seizure purposes, without a warrant, should only be conferred if there are clear public policy reasons for doing so.

However, the Commission notes that no guidance is provided on appropriate safeguards that might reasonably apply in this area such as those referred to in paragraph 2.35(a) of this Report;

(g) Liability of Officers and Employees - the *Cabinet Handbook* (p.71) notes that proposals to include in legislation provisions indemnifying or exempting officers and employees from liability should be referred to the Attorney-General;

(h) Administrative Discretions - the *Cabinet Handbook* (p.71) provides that where proposals to confer discretionary decision-making powers on a person or body are proposed, attention should be focused upon the purposes of conferring the discretion, whether it can be achieved by other means and the most appropriate body to exercise the discretion (eg., Governor in Council, Ministers, Departmental officers, statutory officers, tribunals, etc.). The *Cabinet Handbook* also requires Guidelines for the exercise of discretions, both procedural and substantive, to be developed and, following mandatory consultation with the Attorney-General, to be included in the 'Authority to Prepare a Bill' submission. However, the Commission observes that the *Cabinet Handbook* does not recommend, as did the 1986 *Legislation Manual*, that these guidelines be enunciated in the legislation itself (Queensland *Cabinet Handbook* 1990, pp.71-72).

2.14 A significant feature of the present *Cabinet Handbook* is that it groups together principles (d) to (h) describing them as "fundamental legislative principles" which can only be varied as a result of a specific Cabinet decision and following mandatory consultation with the Department of the Attorney-General.

2.15 The Commission notes, however, that in contrast to the 1986 *Legislation Manual*, the *Cabinet Handbook* does not include reference to international covenants and treaties. It also does not provide guidance on matters to be considered in the drafting of subordinate legislation.

EVIDENCE AND ARGUMENTS

2.16 EARC Issues Paper No. 7 asked whether any legislative principles to which Cabinet should give particular attention in drafting had not been identified in the current *Cabinet Handbook*.

2.17 The Departmental submission (S8) commented that:

> *"Most Departments hold that the Queensland Cabinet Handbook provides acceptable coverage of fundamental legislative principles ..."*

2.18 However, it noted that one (unidentified) Department:

> *"... stated that further consideration should be given to provisions related to confidentiality and any provisions which may be inconsistent with international instruments relating to human rights."*

2.19 The Departmental submission also noted that the requirements of natural justice should be considered as a principle in examining statutory rules.

2.20 The Dirranbandi District Irrigators' Association (S6) commented that the list of principles in the Queensland *Cabinet Handbook* is given more extensive treatment in other jurisdictions:

> *"in particular .. proposals affecting private property rights and principles of justice and fairness are sometimes included as appropriate objects of scrutiny... our Association considers that at least these matters should be the object of scrutiny and that any departure therefrom should only be for compelling reasons of which the Parliament should be made aware."*

2.21 Ms Theresa Johnson (S10) suggested that all the "fundamental legislative principles" as described in the Queensland *Cabinet Handbook*:

> *"... should be retained, although 2 of the principles should be extended and several others added .*
>
> *Extension of principle limiting conclusive evidentiary provisions*
>
> *One principle requiring extension is that limiting the use of conclusive evidence provisions. As presently expressed, the principle is applicable in both criminal and civil law contexts. While it should be retained in the criminal law context, it should be replaced by a more general principle in the civil context, namely, that a person should not be denied access to the courts. It is possible to deny a person access to the courts by a number of statutory formula, only one of which is a conclusive evidence provision ...*
>
> *Extension of principle ensuring confidentiality of information*
>
> *While the confidentiality of information which is compulsorily obtained is one of the 5 fundamental legislative principles set out in the Cabinet Handbook, there is scope for extending the principle to cover information voluntarily obtained. Such an extension would appear to have the support of at least one Queensland Government Department which has been quoted as having stated "that further consideration should be given to provisions related to confidentiality". There are already many examples in Queensland legislation of secrecy or confidentiality provisions dealing with information voluntarily obtained.*
>
> *Relocation of principle limiting retrospectivity*
>
> *As noted in the OPC Issues Paper, the principle relating to retrospectivity adversely affecting rights currently appears in a separate section of the Cabinet Handbook. The Law Council of Australia and the community at large is strongly opposed to all retrospective legislation. Retrospectivity adversely affecting rights falls within one of the Terms of Reference of the Senate Standing Committee for the Scrutiny of Bills in that it "trespass(es) unduly on personal rights and liberties." The location in the Handbook of this important principle should therefore be "upgraded" to the section in which the other "fundamental legislative principles" are located .*

Addition of principle limiting compulsory acquisition without compensation

There is another well-recognised legislative principle to which Cabinet should give particular attention in draft legislation. This is the principle that a person should not be deprived of property rights without adequate compensation. Strong support for this addition may be found in the public submission of the Dirranbandi District Irrigators' Association Inc.

While there is no constitutional requirement for Queensland laws to provide compensation for the compulsory acquisition of property, morality suggests that compensation be provided. Indeed in 1988, the Constitutional Commission acknowledged that:

> *'[i]t is only fair that persons should be justly compensated where their property is acquired by a Government, whether it be Federal, State, Territorial or Local ...'*

There is a common law presumption that the legislature does not intend to deprive a person of property rights without compensation...

Possible additional legislative principles

Other matters which should be considered for elevation to "legislative principle" status are that, in general:

* *the immunities and privileges of the Crown should not be conferred on statutory bodies with a commercial purpose...*

  This principle is consistent with the recent reasoning of the High Court in Bropho v Western Australia (1990) 64 ALJR 374 when introducing a more flexible test for determining whether there is the necessary legislative intention to bind the Crown. At p379, the majority noted that:

  > *'the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents ... to compete and have commercial dealings on the same basis as private enterprise'. ...*

* *if legislation implementing mooted administrative law reforms is enacted (such as legislation providing judicial or merits review of administrative action, legislation imposing an obligation to provide reasons or freedom of information legislation), the operation of such legislation should not be expressly or impliedly excluded except in accordance with strict guidelines;*

* *power should not be given to subordinate legislation to amend primary legislation.*

Consideration should also be given to matters which appear in the cabinet or legislation handbooks of other jurisdictions. For example, in the Commonwealth jurisdiction, the Legislation Handbook outlines many matters which require consideration before finalising drafting instructions. Matters which could be beneficially adopted in Queensland are that:

* *...administrative discretions should be subject to some form of external review on the merits;*

* *legislation should not be inconsistent with international human rights obligations...There is a common law presumption that the legislature does not intend to offend international obligations;*

* *a Minister or department should not be statutorily obliged to consult with, or seek the concurrence of, another Minister or department in the exercise of a power...*

> *Consistent with the rationale behind ... administrative discretions, would be the introduction of the minimum hearing requirement aspect of the rules of natural justice. Where appropriate, this would mean that the relevant legislation would require an administrator to listen to a person's case before exercising administrative discretions to the detriment of that person's interests. Many Queensland statutes already provide for such hearing procedures."*

2.22 The Tharpuntoo Legal Service Aboriginal Corporation (S7) suggests that any guidelines on legislative principle should ensure:

> *"i. That attention is paid to Law Reform Commissions' recommendation (eg. Aboriginal Customary Law)*
>
> *ii. That group human rights (eg Aboriginal human rights) be protected..."*

2.23 In respect of subordinate legislation, Mr Leo Murray QC (S1) suggested that *"the Victorian principles or guidelines for review of subordinate legislation appear desirable and adequate."* As noted in EARC Issues Paper No. 7, the Chief Parliamentary Counsel in Victoria has an obligation under the *Subordinate Legislation Act 1962* to review statutory rules to determine, inter alia, whether they appear, without clear authority in the enabling Act, to have a retrospective effect; to impose any tax, fee fine, imprisonment or other penalty; to shift the onus of proof to a person accused of an offence; or to sub-delegate powers delegated by the Act. Additionally, the Victorian Parliamentary Sub Committee of Subordinate Legislation examines whether the statutory rule contains matters that should properly be dealt with in an Act.

2.24 Further comments on legislative principles were made at the Public Seminar held by the Commission on 5 February 1991.

2.25 The Hon. Justice Elizabeth Evatt referred to the principle alluded to in the 1986 *Legislation Manual*, that legislation should not inappropriately delegate legislative power. Justice Evatt referred to Commonwealth migration legislation which inappropriately delegated legislative power by providing that the regulations could establish a right of review in respect of certain decisions, themselves defined by the regulations:

> *"Of course with regulations, disallowance is the sanction. But in this case, disallowance would be rather ineffective since it was the regulation itself which would create the right of review. So if the regulation was disallowed, there wouldn't be a right of review. One can contrast that result with what happened in regards to the Australia Card. Classes of decisions, in the view of the Administrative Review Council, which are to be reviewable, should be in the [principal] legislation"* (Evatt 1991, p.5).

2.26 Professor Whalan (the Legal Advisor to the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances) at the Public Seminar, listed a wide range of legislative provisions that the Senate Committee on Regulations and Ordinances had successfully sought to eliminate or alter. These included infringements of various principles identified in the submissions. As well, Professor Whalan noted that the Regulations and Ordinances Committee had successfully challenged:

> *"criminal law provisions which reduced a person's right to trial by jury; ...*
>
> *conferral of contempt powers that were greater than those of a Royal Commission; ...*

insufficiently protective extradition rules; ...

licensing decisions affecting business and livelihood;

self-incrimination provisions ...;

powers given to a statutory body to transfer data stored on computers to a government department which would have led to the possibility of building up the private medical histories of almost all Australians;

provisions relating to children where extensive powers were given to police to take actual bodily material ... from the children ..." (Whalan 1991a, p.7).

2.27 Mr Adrian Cruickshank MP at the Commission's Public Seminar gave an example of a New South Wales regulation which inappropriately contained matters that should have been dealt with in the enabling Act. The regulation in question regulated circumstances where prison officers could use firearms against prisoners. The Regulation Review Committee considered that the matter was too important to be left to regulation and convinced the responsible Minister to provide appropriate provisions in the Act (Cruickshank 1991, pp.12-13).

2.28 Mr Cruickshank also noted that the New South Wales Parliament had, on recommendation from the Regulation Review Committee, disallowed parts of a regulation for, among other things, empowering a statutory authority to require the removal of private buildings in a water catchment area without prior notification and subsequent provision of compensation (Cruickshank 1991, pp.9-12).

2.29 Mr Walter Iles QC at the Commission's Public Seminar noted that the New Zealand Legislation Advisory Committee, an independent advisory Committee which reports to the Attorney-General, had produced in 1987 a comprehensive set of guidelines on the preparation of Legislation entitled *"Legislative Change: Guidelines on Process and Content"*. The guidelines were subsequently adopted by Cabinet (Iles 1991b, p.6).

2.30 The New Zealand Guidelines detail a range of matters and fundamental principles to be addressed in drafting including matters relating to administrative and legislative powers, tribunals, subordinate legislation, powers of entry, powers to require and use personal information, powers to give policy directions to tribunals and independent administrative bodies, enforcement provisions, and appeals (New Zealand Department of Justice 1987).

2.31 Mr Iles further noted that a statutory Bill of Rights was enacted in New Zealand in 1990 which affirms, protects and promotes human rights and fundamental freedoms in New Zealand (Iles 1991a, pp.6-7).

2.32 The Queensland Attorney-General at the Commission's Public Seminar referred to occasions when fundamental principles other than those contained in the Queensland *Cabinet Handbook* had been drawn to Cabinet's attention:

"On a few occasions...I have raised concerns on matters relating to other fundamental legislative principles which are not necessarily detailed in the Handbook.

> *... A recent example of a matter being raised ...was a legislative proposal which involved an offence provision where a minimum penalty was set as well as a maximum penalty. My departmental officers provided advice to the effect that the customary practice is to set maximum penalties only. As a matter of policy the setting of minimum penalties is prima facie objectionable as it fetters the discretionary powers of the judicial officers in sentencing and may be seen as contrary to the doctrine of separation of powers. That advice was accepted ...*
>
> *Matters that come to my attention in this manner however, are dealt with as the occasion arises. Generic principles can only be arrived at when the relevant matter is raised and advice given"* (Wells 1991a, pp.8-9).

2.33 In relation to subordinate legislation, the Queensland Attorney-General observed:

> *"As a matter of legal policy subordinate legislation should only address matters of detail - to fine-tune the substantive legislation. On this basis, subordinate legislation should not contain offence provisions or generally make new ground. The usual format for example, might be for the substantive legislation to require that a notice is displayed and the subordinate regulations might thereafter detail the size and extent of the notice. That is the policy objective that my Department is attempting to condense and rationalise.*
>
> *If, however, subordinate legislation does deal with or impinge upon those fundamental legislative principles, it is the obligation of the Chief Law Officer to raise the matter. Indeed, already advice has been given on the content of two important regulations"* (Wells 1991, p.10).

ANALYSIS OF EVIDENCE AND ARGUMENTS

2.34 The Commission believes that it is essential for legislative drafters and instructing officers to be aware of and to understand basic legislative principles relating to the protection of rights, the rule of law and parliamentary government. The Commission agrees with the Queensland Attorney-General that it is probably impractical to state general principles in respect of all legal policy matters that may arise in the course of drafting. However, there would seem to be scope to expand the amount of guidance currently provided in the Queensland *Cabinet Handbook* on these matters.

2.35 The Commission has not made an extensive examination of Queensland legislation to determine how far principles referred to in this Chapter may have been overlooked in the drafting process. However, the Commission was provided by the OPC with examples of statutes from a single year (1989) which contain provisions which at least raise questions in terms of specific principles. Examples, which are not exhaustive, are set out below:

(a) *Banana Industry Protection Act 1989*

Section 26 of the Act limits liability for actions done or omitted to be done for the purposes of the Act by the Crown, the Minister or the Banana Industry Protection Board. Such a limitation could be viewed as inconsistent with the principle that equality before the law is an essential element in the rule of law.

The Act (sections 21-25 and 27-28) also confers very broad powers on officials in relation to entry and search. Although section 22 requires the "authorized person" to obtain a warrant from a Stipendiary Magistrate before entering "a dwelling house", the Act does not contain certain safeguards which are now contained in comparable Commonwealth legislation, for example, provisions which prescribe the class of authorised persons and require the use by such persons of identity cards. Further, the Act by virtue of section 21 provides that a person may be authorised by the Board to enter "any place" but only requires a warrant to be obtained for the purpose of entering a "dwelling house".

(The Commission notes that sections 46, 47, 48, 49 and 116 of the *Dairy Industry Act 1989* and sections 19, 20, 22, 23, 24, 25 and 26 of the *Plant Protection Act 1989* also confer very broadly defined powers on officials for entry and search. As well, the *Plant Protection Act* (sections 13-16) gives discretionary powers to officials without providing objective criteria for the exercise of the power. As with the *Banana Industry Protection Act*, the *Dairy Industry Act* under section 46(2) only requires a warrant to be obtained for entry into a "dwelling-house", yet under section 46(1) power is given to inspectors to enter "any place" for the purposes of the Act. Similarly, section 20 of the *Plant Protection Act* only requires inspectors to obtain warrants before entering a "dwelling-house". Similarly, as with the *Banana Industry Protection Act*, neither of these Acts contain safeguards such as the use by the authorized person or inspector of identity cards.)

Additionally, section 20 of the *Banana Industry Protection Act* enables the Governor in Council (by means of order in council) to impose a levy, but provides no restriction on the amount that can be fixed. The Commission notes the position of the Senate Scrutiny of Bills Committee that statutory provisions authorising the Executive to impose fees, charges or levies in the nature of a tax should only be permitted where an upper limit is set by Parliament in the enabling provision;

(b) *Fauna Conservation Act and Another Act Amendment Act 1989*

Section 72A(1) of the Act makes a principal or employer liable for offences by agents and employees. The liability is vicarious and strict as the Act makes it immaterial that the offence was committed without the authority of the principal or employer, or was committed contrary to the instructions of the principal or employer, and specifically excludes the operation of section 23 of the *Criminal Code* which provides inter alia that, subject to express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident;

(c) *Fair Trading Act 1989*

Sections 89-91 of the Act confer wide powers on "inspectors" who are defined broadly from "the Commissioner" to "an inspector appointed for the purposes of this Act". Section 22 provides that the *"Minister or the Commissioner may from time to time appoint in writing any person who holds for the time being any office under the Crown in the right of the State to act as an inspector for the purposes of this Act."*. The broad powers conferred on

inspectors by sections 89-91 (for example, powers of seizure without payment and power to question persons) suggest that more specific definition of the class of persons eligible for appointment as an inspector should have been provided in the Act. Again, as with the *Banana Industry Protection Act*, the Act, under section 89(2), only requires a warrant to be obtained prior to entry by inspectors to "any part of premises which part is used as a dwelling", yet section 89(1) authorises entry by inspectors to "any premises";

(d) *Plant Protection Act 1989*

The Act authorises the Governor in Council to, inter alia, require by orders in council, the registration of farms or other places growing certain plants and authorizes that an order in council may prescribe a person who shall register the farm or place; the manner in which a person shall register the farm or place; a fee to accompany registration and any other matter necessary or convenient to achieve the objects of the order in council. However, such orders in council are not required to be publicly notified or tabled in the Legislative Assembly. The effect of this is to remove the exercise of significant legislative power from Parliamentary scrutiny.

2.36 The Commission also draws attention to Report 39 of the Queensland Law Reform Commission on "Henry VIII Clauses" issued in 1990. This Report cites a range of Queensland statutes containing provisions enabling the statute to be amended by subordinate legislation. The Law Reform Commission observed:

> *"The Law Reform Commission considers that consideration should be given to enactment of the proposed Law Reform (Statutes) Act as appended to this paper. This measure will remove objectionable provisions in the statute book. So that any statutes which are enacted in the future do not contain any "Henry VIII clauses" it would be necessary for a Cabinet direction that such clauses should be generally omitted from any Bills. Where it should be considered that a "Henry VIII clause" is warranted it should be necessary that Cabinet should be appropriately informed, and that a direction be obtained in this regard."* (Queensland Law Reform Commission 1990, p.17).

2.37 The Commission notes that the recommendations of the Queensland Law Reform Commission have not yet been implemented. The Commission considers that these recommendations should be implemented as soon as practicable.

2.38 As observed in the introduction to this Chapter, the primary legislative principle is that legislation should not trespass on existing rights and liberties. This basic principle is the source of a number of related principles identified in the Queensland *Cabinet Handbook*, in the submissions and in other jurisdictions. The major related principles are as follows.

2.39 Firstly, rights and liberties should not depend on insufficiently defined administrative powers. This principle requires that care should be taken in legislation to ensure that where administrative decisions affect rights and liberties, the criteria and principles for decision making should be clearly set out in the relevant legislation as far as is practicable. Wide discretionary powers tend to conflict with this principle.

2.40 Secondly, administrative decisions which affect the rights, interests or liberties of persons should be subject to mechanisms for external review by a court, or a tribunal independent of the executive government. The inherent supervisory jurisdiction of the Supreme Court of Queensland in judicial review extends to all administrative decisions or actions capable of giving rise to a justiciable dispute, except where a sufficiently explicit legislative provision (commonly known as an "ouster" or "privative" clause) ousts judicial review in respect of a particular area of administration. Judicial review is concerned with the legality of the process of decision-making, and will restrain illegal acts by government, but is not concerned with the merits of government decisions. Specific statutory provisions must be made for merits review by a court or, more usually, an independent tribunal created for the purpose. Merits review involves review of all aspects of the decision-making process with the aim of ensuring that a correct decision is made in the application of statutory criteria, or the preferable decision is made in the exercise of a statutory discretion. The Judicial Review Bill recommended by this Commission in its *Report on Judicial Review of Administrative Decisions and Actions* (Report 90/R5, December 1990) provides a comprehensive framework for judicial review for Queensland. The Commission will consider an appropriate merits review scheme in its forthcoming project on 'Appeals from Administrative Decisions'. The Commission considers, however, that laws coming before the Queensland Parliament should not contain provisions which oust the supervisory jurisdiction of the Supreme Court in judicial review, without very good cause; and that consideration should be given to the provision of a statutory right to seek merits review from an independent body in respect of statutory decision-making powers which affect the rights, interests or liberties of persons to a significant extent.

2.41 The third related principle is ensuring that legislation is consistent with the principles of natural justice (or common law procedural fairness). The principles of natural justice have been under constant development by the courts, and will almost certainly undergo further judicial development. In essence, they require that where a person's rights, interests, status or legitimate expectations may be adversely affected by an administrative decision, the decision-maker must not be biased or have the appearance of bias, and the decision-maker must adopt such procedures as are fair and appropriate in all the circumstances to allow the person concerned an effective opportunity to put a case to the decision-maker as to how the decision-making power should be exercised (in an appropriate case, this might involve a requirement to provide the persons affected with advance notice of the particulars of any adverse material, or of the case against them). There will be instances where there is a clear implication from the nature of the statutory decision-making power that the principles of natural justice should not apply, but the Commission considers that legislation should not make express provision to exclude the principles of natural justice, without very good cause.

2.42 The fourth principle requires that the delegation of administrative powers should be appropriately controlled. This principle is designed to ensure that persons who exercise administrative decision making power should be identified by law.

2.43 The fifth principle protects the presumption of innocence in criminal proceedings. It cautions against provisions which reverse the onus of proof in criminal proceedings and against the use of provisions which enable the prosecution to rely on conclusive or *prima facie* evidentiary provisions.

2.44 The sixth principle is that powers to enter premises and search or seize documents or other property should not be conferred unless authorised by warrant issued by a judge or other judicial officer. The importance of this principle is obvious. There must be independent scrutiny of search and siezure powers.

2.45 The seventh principle requires that laws should recognise and protect the principle against self incrimination. The right to silence is one of the most basic rights developed by the common law.

2.46 The eighth principle is that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. There is a repugnance against laws which make illegal acts which were lawful at the time they were done. The courts carefully scrutinise, and often criticise, such provisions.

2.47 The ninth principle cautions against conferring on the Crown and government agencies immunity from actions, proceedings or prosecution. The historical origins of Crown immunity lie in medieval notions that the Crown should be immune from suits by its subjects. Crown immunity, however, sits uneasily with modern democratic principles and in particular with the principle of equality before the law. Some immunities in public life continue to be important. The protection given to members of Parliament of freedom of speech in Parliament derives from The Bill of Rights 1688 and reflects a higher principle of protection of freedom of speech in parliamentary proceedings. Nevertheless, Crown immunities are not generally appropriate, particularly where government agencies engage in commercial activity and are given protections which are not available to their competitors.

2.48 The tenth principle states that legislation should not provide for the compulsory acquisition of property without fair compensation. Placitum 51 (xxxi) of the Australian Constitution effectively prevents the Commonwealth Parliament making laws providing for such acquisition without just terms. There is no equivalent constitutional provision in Queensland. Nevertheless, the principle is important and should ordinarily be observed.

2.49 There are a number of other legislative principles which do not directly fall within the class of principles discussed above. Although they could be argued as being related to the protection of existing rights and liberties, these principles are more directly concerned with protecting the law making function of the Parliament and its overall supremacy in the exercise of that function. These further principles are that legislation should not:

(a) delegate legislative power inappropriately;

(b) authorise an Act to be amended by subordinate legislation; and

(c) remove the exercise of delegated legislative power from effective scrutiny of Parliament.

2.50 Principle (b) has already been discussed in the context of "Henry VIII clauses" in paragraph 2.12(e) above. The other two principles ((a) and (c)) reflect the importance of control by the Parliament of law making functions. Excessive and uncontrolled delegation of the law making process strikes at the heart of parliamentary democracy. One of the tensions of the Westminster system is the lack of a clear demarcation of legislative and executive power. Legislation which confers undue law making power on the Executive effectively takes from Parliament its proper role.

2.51 Effective scrutiny of delegated legislation is further dealt with in Chapter Four of this Report (paras. 4.71 - 4.73).

2.52 Finally, in relation to fundamental legislative principles, there is the suggestion from the Tharpuntoo Legal Service Aboriginal Corporation (S7) that any guidelines should ensure:

(a) that proper attention be paid to Aboriginal Customary law; and

(b) that group human rights be protected.

2.53 This submission naturally focuses on Aboriginal issues and concerns. The Commission notes, however, that any principles which emerge in this area should also pay regard to the interests of the Torres Strait Islander peoples of Queensland.

2.54 In 1986 the Australian Law Reform Commission ("ALRC") published a comprehensive report on the Recognition of Aboriginal Customary Laws. The Commission notes that the ALRC's terms of reference did not permit it to examine the recognition of Islander customary laws.

2.55 The ALRC reported that there was a need to acknowledge the relevance and validity of Aboriginal customary law for many Aborigines and there was a desire on the part of many Aborigines for the recognition of their law and tradition in appropriate ways. The submission from the Tharpuntoo Legal Service is a reflection of this concern.

2.56 The ALRC report noted that the scope for recognition of Aboriginal customary laws through common law is very limited. The report also noted that there was considerable Aboriginal customary law still in existence although its content was diverse.

2.57 The Commission considers that it is timely for Queensland to give appropriate recognition to the customary laws of its indigenous peoples. This is not to suggest that the laws (either through the courts or in legislation) should specifically recognise Aboriginal customary law. However, the Commission considers it important that proper regard should be paid to Aboriginal and Torres Strait Islander ("ATSI") customary law in legislation, particularly, but not necessarily exclusively, in legislation which may have direct impact on the rights and interests of the indigenous peoples of Queensland. The recognition of such a principle is a modest first step in ensuring legislation takes into account the interests and concerns of indigenous peoples. It will enable the ATSI peoples to bring to attention any concerns they may have with legislation so far as it might affect these rights and interests.

2.58 The Commission suggests that in the context of legislative scrutiny, a more appropriate term to use than Aboriginal and Torres Strait Islander "customary law" may be Aboriginal and Torres Strait Islander "tradition". By this term, the Commission means the body of traditions, observances, customs and beliefs of Aborigines generally and Torres Strait Islanders generally, or of a particular group or community of Aborigines or Torres Strait Islanders.

2.59 The Commission notes the second submission from Tharpuntoo on the question of group human rights, but observes that mechanisms do exist in Federal human rights law which provide a measure of protection for group human rights.

2.60 The Commission also notes the observations made in paragraphs 2.18 and 2.21 above that further consideration should be given to provisions related to confidentiality and any provisions which may be inconsistent with international instruments concerning human rights.

2.61 Confidentiality is closely related to privacy. The Commission notes the Government's intention to introduce privacy legislation for Queensland (see press release of the Minister for Justice, the Hon. G Milliner, dated 16 April 1991). The Commission considers that this area is probably best left to dedicated legislation.

2.62 As to international instruments, the Commission is conscious that Queensland legislation should pay appropriate regard to international human rights which are contained in conventions to which Australia is a party. Further, such a principle will address, at least in part, the concerns of the Tharpuntoo Legal Service that legislative principles should address group human rights.

2.63 There are a number of principles which need to be addressed in relation to delegated legislation. The principles discussed above relate also to delegated legislation but the principles raised below have particular application to delegated legislation.

2.64 Delegated legislation should not exceed the powers conferred by relevant principal legislation. This principle simply expresses the common law *ultra vires* rule. Further, delegated legislation should not be inconsistent with the purposes or objects of the principal legislation.

2.65 An important issue is whether delegated legislation should impose taxes, fees, fines, imprisonment or other penalty. The Commission considers that delegated legislation should not create penalties which involve imprisonment or other deprivation of liberty. Such penalties are sufficiently important to warrant attention in principal legislation. As to the financial imposts mentioned above, the Commission considers that, whilst it would ordinarily be desirable to include such matters in principal legislation, it may be impractical in some cases particularly where there are regular changes to taxes and fees. The Senate Standing Committee for the Scrutiny of Bills has been prepared to accept provisions enabling the setting of fees, fines or other charges in the nature of a tax by regulation where an upper limit is set by the Act, but has reported open-ended provisions. The Commission is hesitant to recommend upper limits as a basic principle at this stage. However, this matter could be reviewed in the light of future experience in the application of this principle.

2.66 The Commission repeats the observation made in the commencement of this Chapter, namely, that none of the above legislative principles is absolute. There will be legitimate exceptions to many of the principles. These principles are sufficiently important, however, to warrant measures to ensure that proper regard is paid to them, and where departures from the principles are proposed, those departures are explained and justified.

2.67 Proper regard to these principles will go a long way towards improving the quality of legislation in Queensland.

2.68 The Commission considers that the Queensland *Cabinet Handbook* should be revised to incorporate the additional principles discussed above. The Commission also considers that these principles should be recognised in statute and that there be appropriate parliamentary scrutiny to monitor compliance with them. These matters are further discussed in Chapter Eight.

2.69 Incorporation of these principles in the *Cabinet Handbook* will achieve a number of important objects. Firstly, it will reflect the commitment of the government of the day to the maintenance of the principles wherever practical and appropriate. Secondly, it will provide guidance to agencies and drafters in the preparation of policy proposals and resultant legislation. Thirdly, it will give support to the Attorney-General and the OPC in the consistent application of the principles. Fourthly, it will ensure that proposed departures from the principles will be considered at an early stage.

RECOMMENDATION

2.70 **The Commission recommends that the Queensland *Cabinet Handbook* should be revised to take into account the additional fundamental legislative principles identified in Chapter Two of this Report.**

Statutory Guidelines

2.71 EARC Issues Paper No. 7 asked whether fundamental legislative principles should be established in statutory guidelines. It was suggested that the guidelines would not be enforceable in legislation but would provide a benchmark against which draft legislation could be reviewed by the Government and by Parliament.

2.72 Since the Issues Paper was published, the Commission has announced its forward program to the end of 1992. Included in this program is a "Human Rights" review. It is anticipated that this project will, among other things, examine options for affirming and protecting rights and freedoms.

2.73 Most of the submissions received directly addressed the issue of statutory guidelines. The Aboriginal and Torres Strait Islander Commission (S3) supported the proposition that legislative principles should be set forth in statutory guidelines. The Tharpuntoo Legal Service Aboriginal Corporation (S7) stated:

> *"Perhaps, then, it will also be possible that some guidelines prescribing legislative drafting principles could be defined under the Act."*

2.74 The OPC submission (S9) whilst having no difficulty in principle with statutory guidelines, cautioned that the principles need to be:

(a) broadly expressed;

(b) stated in non-absolute terms;

(c) non-exhaustive; and

(d) capable of dealing with changing circumstances.

2.75 Notwithstanding the proposed Human Rights review, the Commission considers that an important benchmark for the Parliament and the Government in reviewing draft legislation will be the statutory terms of reference of the proposed Parliamentary Scrutiny of Legislation Committee (para. 8.23). The operation of this Committee will reinforce the obligation on departments, Parliamentary Counsel and Cabinet to be alert to legislative proposals which might infringe rights or negate the sovereignty of Parliament.

2.76 At the risk of repetition, it should be noted that many of the legislative principles identified in this Chapter are not absolute. There may be circumstances where the public interest justifies or even requires that a principle be modified or displaced. For example, the principle relating to the acquisition of property on just terms should not apply to proceeds of crime legislation where the very purpose of such legislation is to strip criminals of their ill-gotten gains. The principles are, however, of sufficient importance that there should exist mechanisms to ensure that departures from the principles are explained or justified.

CHAPTER THREE

DRAFTING FUNCTIONS OF THE OPC

3.1 Currently, the main functions of the OPC are to:

(a) draft proposed legislation for the Government and, where resources permit, for private Members;

(b) draft subordinate legislation and certify that subordinate legislation can be lawfully made;

(c) provide legal advice in relation to proposed legislation;

(d) provide certification on Acts for the Attorney-General to sign prior to their presentation to the Governor for Royal Assent;

(e) prepare all authorised reprints and consolidations of Queensland statutes and subordinate legislation;

(f) develop a computerised database for Acts and subordinate legislation;

(g) prepare statutory annotations other than case notes.

3.2 This Chapter examines the drafting functions of the OPC other than the drafting of private Member's bills which is discussed in Chapter Five.

Responsibility for Drafting Government Bills

3.3 Historically, the primary function of Parliamentary Counsel in Westminster jurisdictions has been to provide a centralised drafting service for Government sponsored bills. EARC Issues Paper No. 7 noted that Parliamentary Counsel offices were established towards the end of the nineteenth century as a means of encouraging consistency and professionalism in legislative drafting and to provide a mechanism for the Government to prioritise the Government's drafting program. (A short history of legislative drafting contained in EARC Issues Paper No. 7 is reproduced in Appendix E).

3.4 The Issues Paper did not ask whether the OPC should or should not continue to draft Government bills. The Commission considers that the OPC would continue to provide a centralised bill drafting service for all Government Ministers and their departments. In fact, no submission indicated that Government bills should not continue to be drafted centrally by the OPC. The consensus was that most bills are best drafted by Parliamentary Counsel, partly because of the perceived speciality of legislative drafting and the fact that the OPC holds most of the drafting expertise in Queensland. As well, the general belief apparent from the submissions that the OPC has a potentially important role in the area of legislative scrutiny, is also based on the assumption that it will continue to draft most Government legislation.

RECOMMENDATION

3.5 **The Commission recommends that the proposed Legislative Standards Act (para. 6.32(a) refers) provide that one of the functions of the OPC be to draft Government bills.**

Drafting of Subordinate Legislation

INTRODUCTION

3.6 Subordinate legislation is legislation enacted not by Parliament, but through a legislative responsibility delegated by Parliament to an authority such as the Governor in Council, local authorities, statutory bodies and the courts by an enabling provision in an Act (Queensland *Cabinet Handbook* para 13.1).

3.7 Responsibility for drafting subordinate legislation was transferred from the Crown Solicitor's Office to the OPC early in 1990. The *Cabinet Handbook* indicates that the OPC is now responsible for drafting all subordinate legislation:

(a) made by the Governor in Council; and

(b) made by any other person or body and required to be published in the Gazette.

3.8 In respect of such subordinate legislation, departments are also required to obtain a certificate from the Parliamentary Counsel before the legislation is presented to the Governor in Council or the Government Printer for publication in the Gazette. The purpose of this certificate is to enable Parliamentary Counsel to certify:

(a) that the legislation has been drafted by the OPC; and

(b) that it can be lawfully made under the terms of the enabling legislation.

3.9 By-laws made by local authorities under the *Local Government Act 1936* and ordinances made by the Brisbane City Council under the *City of Brisbane Act 1924* are not drafted or examined by Parliamentary Counsel but are drafted in-house by local authorities. Local authorities usually refer the instruments to solicitors for legal checking prior to making. As well, all by-laws and ordinances are examined by the Department of Housing and Local Government and formally approved by the Governor in Council under the *Local Government Act* and the *City of Brisbane Act*. The Department also assists local authorities in the development of specific by-laws by providing them with relevant precedents of such by-laws.

EVIDENCE AND ARGUMENTS

3.10 EARC Issues Paper No. 7 asked whether the OPC should have the responsibility for drafting subordinate legislation. It noted that Parliamentary Counsel perform this function in most Australian jurisdictions, a notable exception being the Commonwealth where subordinate legislation is drafted by a separate branch of the Attorney-General's Department - the Office of Legislative Drafting.

3.11 The Departmental submission (S8) commented:

> *"Queensland Government Departments generally prefer that the drafting of Subordinate Legislation should continue to be the responsibility of the Office of the Parliamentary Counsel. This is a recent responsibility of the OPC and one which has the potential to considerably improve the standard of subordinate legislation.*
>
> *The reasons underlying this position are best stated by the Department of the Attorney-General, which holds that:*
>
> > *'Acts and Regulations form part of a single and coherent legislative message. Ideally, the persons involved in drafting an Act should also be involved in drafting the Regulations. This is likely to produce a clear and consistent message. It is also likely to be the most efficient use of resources.*
> >
> > *It is unlikely that adequate quality control could be achieved by Parliamentary Counsel if the function of drafting subordinate legislation and the resources necessary for that function were returned to the decentralised system which existed previously. Such quality control is only likely to be achieved if the function is directly managed ... Poorly drafted Regulations, like poorly drafted Acts, impose large and unnecessary costs on the community. In some cases, the Regulations are the most important part of a legislative scheme.'"*

3.12 The OPC (S9) commented:

> *"Subordinate legislation provides much of the routine, technical and detailed aspects of Queensland law and is therefore an integral and vital part of the State's law. Its importance should not be underestimated as it is that part of the statute law that is most likely to impact, on a day-to-day basis, directly on the activities of Government, business and individuals. Subordinate legislation, therefore, should be drafted to the same standards of consistency, accuracy and certainty as primary legislation. A central subordinate legislation drafting office is arguably the only way in which this can be achieved.*
>
> *Location of subordinate legislation drafting in the Parliamentary Counsel's Office has enabled the development of better career paths and training for subordinate legislation drafting staff and achieved efficiencies through the sharing of scarce resources between primary and subordinate legislation drafting ...*
>
> *It also should assist in raising the standard of drafting of primary legislation by improving the understanding of subordinate legislation issues by the drafters of primary legislation. It will also achieve a more rational division of legislation between the Act and its subordinate legislation.*
>
> *An Act and its subordinate legislation should form part of a single, coherent legislative scheme and provide a clear, consistent legislative statement. As it is important that an Act and its subordinate legislation work together in a legally effective way, there are significant advantages in primary and subordinate legislation being drafted in the same office. In the case of a new legislative scheme that is large or complex, there are particular advantages in the subordinate legislation being drafted by, or in close consultation with, the drafter of the Bill. It would be difficult to achieve this if subordinate legislation were to be drafted elsewhere.*
>
> *The drafting of primary and subordinate legislation in the same office provides advantages from editorial and publication points of view. There is a strong link between the work done by the editorial and publication staff and the drafters. All staff are involved in the production of legislation and there is a continual exchange of information and advice within the Office between drafting, editorial and publication areas. This results in legislation of a much higher quality."*

3.13 Other submissions which commented on this issue also supported the principle of having the OPC draft subordinate legislation.

ANALYSIS OF EVIDENCE AND ARGUMENTS

3.14 There is a general consensus among departments, the Cabinet Office and Parliamentary Counsel that subordinate legislation for which departments are responsible should be drafted by the OPC.

3.15 The Commission agrees with these views for the reasons outlined in the Departmental and OPC submissions. If it is important for Acts to be legally effective, to achieve clarity and consistency in style and to reflect modern drafting standards (such as those associated with the plain English movement), it is equally necessary for subordinate legislation to achieve the same objectives. Separating responsibilities for drafting Acts and subordinate legislation tends to:

(a) fragment scarce drafting resources;

(b) increase inefficiency because the same drafter cannot draft both the Act and the subordinate legislation; and

(c) place pressure on the drafter to leave matters to subordinate legislation which will be the drafting responsibility of someone else.

3.16 More importantly for the purpose of this review, it is essential that the drafting process for subordinate legislation, as for bills, pays due regard to fundamental legal principles of the kind addressed in Chapter Two of this Report. As suggested in Chapter Four, the OPC is in a good position, by virtue of its legislative drafting expertise and its Cabinet responsibilities, to play a prominent role in ensuring that fundamental principles are addressed in the drafting of subordinate legislation as well as bills.

3.17 The Commission has had some difficulty identifying the full range of statutory instruments presently drafted by the OPC, just as the Commission has also encountered difficulty identifying those instruments required to be tabled in the Legislative Assembly. There does not appear to exist any convenient listing of statutory instruments which shows the respective drafting, approval and tabling requirements.

3.18 The Commission considers that, generally speaking, the OPC should have professional drafting responsibility for all subordinate instruments - with the exception of certain categories discussed below - that are required to be published in the Gazette and tabled in the Legislative Assembly. The Commission considers that the proposed Legislative Standards Act should:

(a) amend the *Acts Interpretation Act* in order to define subordinate legislation as:

(i) statutory rules comprising regulations, rules, statutes, by-laws and ordinances (except for by-laws or ordinances made by a local authority including the Brisbane City Council or Aboriginal and Islander Councils) and orders in council and proclamations of a legislative character; and

(ii) any other statutory instrument declared to be subordinate legislation by an Act or by a regulation of the Governor in Council made under the *Acts Interpretation Act*; and

(b) establish that such subordinate legislation will be drafted by the OPC.

3.19 However, the Commission considers that the proposed Legislative Standards Act should allow the Governor in Council to exempt a statutory rule (other than a regulation) from drafting by the OPC where professional drafting by the OPC may not be necessary as in the case of university statutes which are not presently drafted by the OPC. It is recommended that this power be exercised by regulation. This would mean that the regulation would be subject to review by the proposed Parliamentary Scrutiny of Legislation Committee and would be open to disallowance by the Legislative Assembly.

3.20 The Commission considers that the proposed definition of subordinate legislation should exclude local authority by-laws including Brisbane City Council ordinances and Aboriginal and Island Council by-laws. Historically these instruments have not been drafted by the OPC and the Commission does not propose, at this stage, to recommend that they should be. The OPC's central location in Brisbane, compared with the dispersed location of local authorities, would make any drafting by the OPC a difficult, though not impossible, proposition.

3.21 Nevertheless, there could be merit, from the perspective of legislative principle, in having the OPC *examine* local authority by-laws and ordinances submitted to the Department of Housing and Local Government for review prior to their confirmation by the Governor in Council. Although local authority by-laws and ordinances are presently examined by solicitors to determine if they are within power - the intention to make the by-law is also required to be advertised and any public objections advised to the Governor in Council - they are not reviewed by professional drafters to see if they appear to infringe fundamental legal principles.

3.22 The relative lack of scrutiny of by-laws is of concern to the Commission. The *Local Government Act 1936* (presently under review by the Government) delegates substantial legislative making powers which have the potential to significantly affect rights and liberties. Local authorities have power to make by-laws for promoting and maintaining the peace, comfort, culture, education, health, morals, welfare, safety, convenience, food supply, housing, trade, commerce and manufactures of the area; for the general good rule and government of the area; and for the area's planning and development. Furthermore, section 31 of the present Act inter alia permits local authorities by by-law to:

(a) authorise officers, servants or persons appointed by the local authority or a Police Officer to arrest or remove persons offending against the Act or any by-law;

(b) determine the upper limit of liability in respect of injury, loss or damage caused by negligence on the part of the authority or an employee of the authority; and

(c) prescribe rules of evidence to apply in proceedings, to determine the burden of proof and to confer jurisdiction on any court (*Local Government Act*, sections 31 (10),(13),(15)).

3.23 At the same time, no provision is made for by-laws to be tabled in the Legislative Assembly and be open to parliamentary review and disallowance (this matter is discussed further in paras. 8.89 - 8.92).

3.24 The Commission's *Report on Review of Public Assembly Law*, furnished in February 1991, has drawn attention to section 35 of the *Local Government Act* which empowers local authorities to make by-laws for the control and operation of pedestrian malls. The Report noted that regulation of the right of public assembly, whether in pedestrian malls or other public places under local authority jurisdiction, has been contained in the main in subordinate legislation and that there has been little opportunity for parliamentary or public debate on this fundamental issue.

3.25 In the interests of effective scrutiny, the Commission considers that the Government should examine whether local authority by-laws and Brisbane City Council ordinances should be referred to the OPC before their approval by Governor in Council. As this matter may involve significant resource implications, the Commission only recommends that this matter be examined.

Drafting Guidelines

3.26 The Commission considers that where the OPC is not required under the proposed Legislative Standards Act to draft particular subordinate legislation, the Parliamentary Counsel should have authority under that Act to issue guidelines which would lay down standards to be observed in the drafting process. These guidelines should not have any legal sanction but would be intended to assist drafters outside the OPC to observe standards comparable to those required to be followed by Parliamentary Counsel. The guidelines should address drafting style and also provide a check-list of fundamental legislative principles of the kind considered by the OPC in the course of drafting.

3.27 As the proposed Act will exclude local authority by-laws and ordinances from drafting by the OPC, the proposed guidelines would have application to local authorities and the Brisbane City Council.

RECOMMENDATIONS

3.28 **The Commission recommends that:**

(a) the proposed Legislative Standards Act should:

(i) amend the *Acts Interpretation Act 1954* to define subordinate legislation as:

(A) statutory rules comprising regulations, rules, statutes, by-laws and ordinances (except for by-laws or ordinances made by a local authority, the Brisbane City Council or Aboriginal and Island Councils), and orders in council and proclamations of a legislative character;

(B) any other statutory instrument declared to be subordinate legislation by an Act or by a regulation of the Governor in Council made under the *Acts Interpretation Act*;

(ii) and establish that such subordinate legislation will be drafted by the OPC;

(b) the proposed Legislative Standards Act should allow the Governor in Council to exempt a statutory rule (other than a regulation) from drafting by the OPC;

(c) where the OPC does not have statutory responsibility for drafting particular subordinate legislation, the proposed Legislative Standards Act should give authority to the Parliamentary Counsel to issue guidelines to the drafting authority which would lay down standards to be observed in the drafting process. The guidelines should provide guidance on modern drafting style and also provide a list of fundamental legislative principles to be considered in the drafting of subordinate legislation; and

(d) the Government should examine whether by-laws made under the *Local Government Act 1936* and ordinances made under the *City of Brisbane Act 1924* should be referred to the OPC for examination prior to their approval by the Governor in Council.

Use of External Consultants

3.29 The Goss Government has introduced arrangements to permit the drafting of bills by consultants outside the OPC in special circumstances. The Premier has directed that a bill may be drafted outside the OPC where approved by the Parliamentary Counsel who must certify to Cabinet that the draft bill conforms to an acceptable standard.

3.30 EARC Issues Paper No. 7 asked for comment on the merits of engaging external consultants for drafting government legislation, and whether the OPC should approve the engagement of consultants and certify that legislation prepared by them meets appropriate standards.

EVIDENCE AND ARGUMENTS

3.31 The Aboriginal and Torres Strait Islander Commission (S3) commented:

> *"There may be some benefit in engaging external consultants for drafting specific Aboriginal and Torres Strait Islander legislation where areas of special expertise are indicated. If so, O.P.C. should be responsible for monitoring and certification defined by statute".*

3.32 The Departmental submission (S8) observed:

> *"... there may be occasions when specialist expertise is required to draft complex and unusual legislation (although such expertise may be better directed to developing the content of the proposal itself and conveying it to OPC, rather than actually drafting).*
>
> *... the common view [among departments] holds that the use of consultants would need to be closely monitored by the OPC, with standards and 'product quality' the critical factor - again in the interests of consistency and uniformity of interpretation".*

3.33 The OPC (S9) observed:

> *"From time to time, opportunities do exist to engage the services of distinguished former Counsel, such as Mr. Leo Murray C.B., QC. Provided the advantages of centralised drafting arrangements are not lost, there are significant advantages in using the services of such consultants.*
>
> *The increased use of consultants with specialised non-drafting expertise in appropriate cases could considerably assist in improving the quality and timeliness of legislation. Consultants would be particularly useful in the case of complex, novel legislative schemes, especially where the instructing department lacked the necessary technical expertise. Consultants would be used not in preparing drafts, but in assisting the policy development and critically analysing drafts prepared by Counsel...*
>
> *It is submitted that the Parliamentary Counsel's Office should oversee and monitor the drafting of all legislation that it does not draft to ensure the legislation meets appropriate standards. Part of this role should be to approve the engagement of external consultants and review and revise as necessary legislation prepared by them. Such a quality control role is, however, difficult to carry out effectively. Nevertheless, without safeguards, the advantages of centralised drafting arrangements could be lost, drafting resources fragmented and drafting standards lowered."*

ANALYSIS OF EVIDENCE AND ARGUMENTS

3.34 The Commission considers that there should be flexibility to allow particular bills and, in some cases, subordinate legislation to be drafted outside the OPC in special circumstances, for example where the subject matter of the legislation might require specialist input or where a bill might more speedily be drafted outside the OPC during an especially busy period. However, the Commission agrees with submissions that the OPC should maintain control over the drafting arrangements to ensure that appropriate standards are observed in drafting.

RECOMMENDATIONS

3.35 **The Commission recommends that:**

(a) departments should be permitted to approach the Parliamentary Counsel to use a specialist consultant to draft a particular bill, or subordinate legislative instrument for which the OPC is responsible for drafting. The Parliamentary Counsel should have authority to approve or reject the request depending on the availability of appropriate drafting expertise within the OPC;

(b) before a consultant-drafted bill or subordinate legislative instrument is introduced into Parliament or made by the prescribed authority, it should be submitted to the Parliamentary Counsel for examination. Where the Parliamentary Counsel considers that the bill or subordinate legislative instrument does not meet acceptable standards, he or she must advise the Premier as Chair of Cabinet; and

(c) **these arrangements should be established in the proposed Legislative Standards Act.**

Drafting Instructions for Subordinate Legislation

3.36 The Queensland *Cabinet Handbook* requires that instructions conveyed by departments to the OPC for the preparation of bills should, in the first instance, be in the form of written drafting instructions. Drafting instructions assist the drafter to focus on the objectives and intent of the legislation. Generally speaking, departments are discouraged from producing instructions in the form of draft bills as this practice can unnecessarily restrict the drafter's freedom to choose the most appropriate legislative forms.

3.37 However, drafting instructions are not required to be prepared for subordinate legislation drafted by the OPC. It appears that conventional practice is for the department to submit draft instruments to the drafter who then refines or rewrites the instrument as required.

3.38 EARC Issues Paper No. 7 asked whether drafting instructions should be prepared for subordinate legislation as for bills.

EVIDENCE AND ARGUMENTS

3.39 The Aboriginal and Torres Strait Islander Commission (S3) considered that the receipt of drafting instructions for subordinate legislation would be consistent with the procedure for Acts.

3.40 The Departmental submission (S8) commented:

> *"... there are varied views as to whether the time and resources required to prepare such instructions would be worthwhile. It has been suggested that drafting instructions should be prepared only for the more significant items of subordinate legislation. It is recognised that provision of drafting instructions will help ensure objective analysis of the Department's aim at an early stage in the process."*

3.41 The OPC's (S9) views were that:

> *"Subordinate legislation should be drafted on the basis of drafting instructions provided to the Office by the sponsoring department or agency. Lay drafts are not an acceptable substitute for properly prepared drafting instructions for the following reasons:*
>
> *First, the drafter has to check the whole draft through against the policy, and for matters of drafting style. In a complicated matter, this may take almost as long as, and sometimes longer than, it would take to do the actual drafting. Thus, time and effort are largely duplicated ...*
>
> *Secondly, it is extremely difficult, and at times almost impossible, to separate out what are matters of policy in the draft from what are merely the views of the instructing officer. Ascertaining what the policy is becomes a matter of statutory construction.*
>
> *Thirdly, all too frequently, a lay draft uses technical expressions (or more often "legalese") and legal forms without necessarily appreciating their precise legal meaning or effect. In the absence of instructions, the drafter may have no way of determining whether the expressions have been correctly used. Conversely, technical expressions from other disciplines may be used. The drafter may not appreciate their precise meaning or effect in the absence of instructions ...*

These comments are not intended to suggest that lay drafts cannot be useful in appropriate cases; for example, for very simple subordinate legislation. However, they should not be a substitute for detailed instructions."

3.42 Ms Theresa Johnson (S10) commented:

"It is disappointing that the Queensland Government Departments did not unanimously agree that the time and resources required to prepare drafting instructions would be worthwhile. As the late Elmer Driedger, a well-known Canadian authority on drafting, reasoned:

> *'If [the draftsman] receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended. A draftsman who is presented with a draft measure would not be discharging his duties if he assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out; he cannot be expected to confine himself merely to a superficial examination of the outward form of the measure ...'*

The public submission of the OPC provides further compelling reasons why lay drafts should not, except in the simplest cases, be substituted for detailed instructions."

ANALYSIS OF EVIDENCE AND ARGUMENTS

3.43 The Commission considers that written drafting instructions should be prepared for all subordinate legislation drafted by the OPC. These instructions should concentrate on the intention of the legislation rather than the legislative form which is the responsibility of the drafter. Requiring departments and statutory authorities to outline the objectives of proposed legislation in writing is both a useful discipline and a necessary part of the policy development process.

3.44 The Commission does not agree that this procedure will be burdensome. Moreover, much subordinate legislation need only have short simple instructions. Further, instructing departments will no longer have to prepare drafts of subordinate legislation. Indeed the Commission considers that this process is likely to be much more efficient.

3.45 Attention is drawn to the Commission's recommendation (para. 9.27(a)) that subordinate legislation that is tabled in Parliament should be accompanied by an explanatory memorandum. The Commission considers that preparation of drafting instructions for subordinate legislation should assist the sponsoring agency to prepare the required memorandum.

RECOMMENDATION

3.46 **The Commission recommends that written drafting instructions should be prepared for all subordinate legislation required to be drafted by the OPC.**

CHAPTER FOUR

LEGISLATIVE ADVISORY FUNCTIONS OF THE OPC

Introduction

4.1 EARC Issues Paper No. 7, at page 10, observed that in most jurisdictions, Parliamentary Counsel are required, as a matter of principle, to maintain a degree of distance from the policy determination process for legislation. By custom, the primary role of the drafter is to translate policy objectives into legally effective clauses: for the drafter to become involved in debating the policy merits of draft legislation could prejudice his or her ability to give impartial advice on matters of legal principle and interfere with the advisory responsibilities of departments. This approach is also influenced by the fact that Parliamentary Counsel traditionally see themselves as legal professionals acting on instructions.

4.2 However, as submissions received by the Commission have suggested, it is possible to distinguish too rigidly between the "policy" role of departments and the "drafting" role of Counsel. In practice, Counsel exercise, or have the potential to exercise, a significant influence on policy development, among other things by:

(a) providing advice on alternative legislative means of achieving policy objectives and assisting in filling out policy detail;

(b) helping to ensure that legislation is drafted in accordance with Cabinet decisions; and

(c) providing independent advice on legislative principle.

4.3 The OPC's role in each of these areas is addressed in this Chapter.

Advice on Alternative Legislative Means of Achieving Policy Objectives

EVIDENCE AND ARGUMENTS

4.4 In most jurisdictions, traditional practice has tended to restrict contact between Parliamentary Counsel and instructing departments before Cabinet has given approval for legislation to be drafted. Often the first contact between the department and Counsel occurs after Counsel receives detailed drafting instructions from the department following Cabinet approval for the legislation to be drafted.

4.5 This practice has been criticised by some law reform bodies, most notably in Australia by the Law Reform Commission of Victoria ("the LRCV"). In its 1987 Report on *Plain English Drafting*, the LRCV criticised the practice of not involving Parliamentary Counsel in the development of legislative proposals which, it considered, were often developed without the benefit of the drafter's particular expertise. The LRCV was particularly concerned about the tendency of some drafting instructions to over-prescribe the form

in which legislative proposals should be expressed. The LRCV considered that inadequate communication between Counsel and departments contributed to perceived problems in drafting, including lack of clarity in statute construction and expression (see EARC Issues Paper No. 7, para. 3.16).

4.6 In respect of Victoria, the LRCV has advocated that:

(a) greater contact be made between instructing officers and Counsel before Cabinet approval for drafting is sought;

(b) Counsel be given adequate opportunity to advise on the alternative legislative means of achieving the policy; and

(c) before approval is sought for bill drafting, the proposed drafting instructions should be submitted to the Parliamentary Counsel to enable Counsel to advise on whether the instructions are clear and adequate (EARC Issues Paper No. 7, para. 3.17).

4.7 The Victorian Government appears to have adopted the recommended approach. Departments are now required to submit drafting instructions to Parliamentary Counsel prior to their submission to Cabinet. Parliamentary Counsel provides advice as to whether the instructions form an adequate basis for drafting and, in effect, settles the instructions prior to submission.

4.8 At the Bond University Legislative Drafting Conference, several participants stressed the need for good communication between Counsel and instructing officers. The South Australian Parliamentary Counsel, Mr G Hackett-Jones QC, also emphasised the need for Counsel to have the freedom to "deconstruct" drafting instructions to ensure that policy intent is clear and that the best legislative means are chosen to implement the policy:

> *".. the parliamentary counsel must de-construct the client's proposed solution to a particular legislative problem. The client will often see a solution in terms of procedures rather than substance and will not see beyond the confines of the particular problem that has presented itself. This is not a unique failing of those who seek to develop statutory law, but rather a basic stage in the development of legal principle ...*
>
> *The parliamentary counsel needs to subject the legislative brief to a kind of logical reductionism. This function requires one to seek out a conceptual basis for what is proposed and to create as far as practicable a rational legislative structure on that conceptual basis. I say 'as far as practicable' because irrationality and arbitrariness are perhaps inevitable features of the law"* (Hackett-Jones, 1991 pp.7-9).

4.9 The OPC submission (S9) commented:

> *"The process by which legislation is brought into existence inevitably involves the drafter in policy making. The statement of policy that initiates the drafting process (usually a Cabinet decision) will not necessarily deal fully with the policy objectives and their implications, nor will it necessarily deal fully with the means by which the policy objectives are to be given effect. Thus, at the very least, discussions will usually be necessary to ensure, among other things, that the drafter understands the policy, that the policy is stated comprehensively and that the legislative scheme devised by the drafter meets the policy objectives ...*
>
> *The drafter must inquire into the policy, as stated in the Cabinet decision, the drafting instructions and any background papers in order to arrive at a complete understanding of what the Cabinet intends to achieve. This process will often reveal policy issues that need to be addressed by the policy sponsor ...*

> *In addition, although the policy itself is set by the Government, the form of the Bill is usually left to the drafter. The Government relies on the drafter's expertise and accepts the drafter's assurance that the Bill will give effect to the Government's policy objectives. In other words, the Cabinet decides the policy objectives, but the drafter usually chooses the means and words by which the objectives may best be achieved."*

4.10 There was however, a general view at the Bond University Drafting Conference (also reflected in the submissions) that little would be achieved by establishing a formal requirement that Parliamentary Counsel review drafting instructions prior to their submission to Cabinet (although this practice was partially supported by the Departmental submission). This is because instructions often change following initial Cabinet consideration and that to insert an additional review process by Parliamentary Counsel at this stage could cause unnecessary delay.

4.11 The Queensland *Cabinet Handbook*, on page 80, recognises that the OPC has expertise to advise on alternative legislative means of achieving policy objectives and suggests that early consultation between Counsel and instructing officers could be useful. In relation to this directive, Ms Theresa Johnson (S10) noted:

> *"Most drafters and departmental policy officers would themselves support the observations of the Victorian Law Reform Commission that drafters are better placed than departmental officers to work out the details of a legislative scheme and that departmental officers may change aspects of their policy because of practical difficulties in legislative implementation. It is suggested that these observations do not, however, require any change to the current OPC role which is primarily "reactive" with provision for a "proactive" approach where a department considers that a drafter may be able to provide advice on the most appropriate legislative means of implementing a policy."*

ANALYSIS OF EVIDENCE AND ARGUMENTS

4.12 The Commission supports the need for adequate communication to occur between instructing departments and the OPC to enable the drafter to give professional advice about alternative means of achieving the intended policy through legislation. In cases of particularly complex or novel legislation, it may well be prudent for the department to have consultations with the drafter well in advance of Cabinet approval for legislation to be drafted. It is unlikely that such a practice would diminish the independence of the OPC or interfere with the policy responsibilities of departments, provided that both the drafter and the instructing officer are sensitive to each other's roles. However, determining if and when such communication should occur before Cabinet approval for drafting is sought is a matter which could be left to the department.

4.13 To reinforce the principle that Parliamentary Counsel have an expert role to play in advising on alternative legislative means of achieving policy objectives, it is proposed to state this role as an OPC function in the Legislative Standards Act proposed by the Commission.

RECOMMENDATIONS

4.14 **The Commission recommends that:**

(a) the proposed Legislative Standards Act provide that one of the functions of the OPC is to provide advice on alternative legislative means of achieving policy objectives; and

(b) departments continue to be encouraged to seek the advice of the OPC before seeking Cabinet approval for legislation to be drafted where it is considered that the OPC could usefully advise on alternate legislative means of achieving the intended policy.

The OPC as Cabinet "Watchdog"

EVIDENCE AND ARGUMENTS

4.15 In most Westminster systems, ultimate responsibility for the policy content of legislation sponsored by the Government is assumed by the Cabinet, not by individual Ministers. Cabinet rules usually place emphasis on the importance of Cabinet consultation and approval for all new legislation, and usually establish mechanisms to ensure that Cabinet determines significant issues involving legislative proposals.

4.16 The Cabinet system reflects the collective responsibility of Ministers in a Westminster system. It also provides a mechanism for Ministers to prioritise legislative proposals in accordance with the Government's objectives and to subject legislative proposals to scrutiny from a wide range of angles. These include the social, economic, and fiscal impact of the legislation as well as its legal and constitutional implications.

4.17 Maintaining the integrity of the Cabinet system is a responsibility often assigned to a Cabinet Office, usually attached to the Premier's or Prime Minister's Department. Cabinet offices service Cabinet and its committees, ensure that decisions are recorded and monitored and, in various other ways, support the decision-making process.

4.18 EARC Issues Paper No. 7 observed that many systems with a tradition of Cabinet government also confer a role on Parliamentary Counsel to ensure that preparation of legislation conforms to Cabinet decisions. Where the drafting process departs from approved procedures, or matters are included in the legislation that go beyond Cabinet authority, Parliamentary Counsel are required to ensure that Cabinet is adequately informed of the fact (Issues Paper No. 7, pp.16-19).

4.19 Since coming to office in December 1989, the Goss Government has introduced changes designed to enhance the Cabinet system in Queensland. Initiatives include:

(a) the development of the Queensland *Cabinet Handbook* referred to in Chapter Two of this Report;

(b) the establishment of a system of Cabinet committees, including a "Parliamentary Business and Legislation Committee of Cabinet" which oversees the preparation of legislation (this Committee presently comprises the Minister for Police and Emergency Services (Chair); the Minister for Education; the Minister for Business, Industry and Regional Development and the Attorney-General); and

(c) the establishment of a strengthened Cabinet Office (recently re-organised and re-designated as the "Office of the Cabinet").

TABLE 1 1990 QUEENSLAND CABINET HANDBOOK: KEY STEPS IN BILL PREPARATION

PLANNING

1 Ministers requested to submit legislative proposals for next sitting to Leader of the House

2 Priority given to proposals by Parliamentary Business and Legislation Committee of Cabinet*

3 Status ratified by full Cabinet

PREPARATION

4 Departments consult with
- Attorney General on designated legal issues
- Premier's Department on machinery of Government issues
- Parliamentary Counsel on legislative options

5 Responsible Minister takes "Authority to Prepare a Bill" submission to Cabinet together with Preliminary Instructions

6 Cabinet decision approving drafting referred to Parliamentary Counsel

7 Responsible Department forwards Instructions to Counsel

8 Counsel drafts bill

9 Minister approves draft bill

10 Minister consults with Ministerial Policy commitee

11 "Authority to Introduce a Bill" submission submitted to Cabinet together with draft bill

12 Draft bill submitted to Caucus for approval

13 Counsel arrange supply of bill to Legislative Assembly

* **Note - this Committee monitors development of all bills throughout the planning, preparation and passage phases.**

4.20 With respect to legislation, the new arrangements provide that:

(a) preliminary drafting instructions must now be attached to the Cabinet submission seeking approval for a bill to be drafted; that is, Cabinet not only approves that a bill be drafted but also approves the detailed drafting instructions (the principal steps in the preparation of legislation are shown in Table 1, p.41);

(b) the OPC will not accept drafting instructions which go beyond Cabinet authority. Ministers may authorise additional or supplementary instructions but only where the subject matter is incidental to, or consequential upon, proposals which have been approved by Cabinet;

(c) the Parliamentary Business and Legislation Committee of Cabinet is required to inform Cabinet where draft bills exceed Cabinet approvals;

(d) the Parliamentary Counsel will act as an advisor to the Parliamentary Business and Legislation Committee of Cabinet; and

(e) the Parliamentary Counsel has authority to advise that Committee of any "contrary views" (S8) which Counsel may have about a legislative proposal. The Chair of the Committee is obliged to convey such views to the full Cabinet.

4.21 Submissions which addressed the issue were in favour of maintaining the new Cabinet arrangements, in particular the opportunity provided for the Parliamentary Counsel to advise Cabinet. Ms Theresa Johnson (S10) commented:

> *"It is important that a formal mechanism...be given to the OPC allowing it direct access to the Parliamentary Business and Legislation Committee of Cabinet in respect both of a bill's conformity with the Cabinet authority and of any procedural and legal difficulties the OPC perceive are associated with the bill. Not only would such a mechanism promote the status of the Office, but it would enhance its independence.*
>
> *This mechanism would be preferable to the Victorian mechanism of a letter from the Chief Parliamentary Counsel to the Cabinet Office in respect of a bill's conformity with the Cabinet or ministerial authority."*

4.22 The OPC (S9) observed:

> *"In the case of a complex Bill, it is often difficult for anyone except Parliamentary Counsel to determine, in the time available, whether the Bill is in accordance with Cabinet authority or contains matters that should be drawn to the Cabinet's attention for decision. Requiring Parliamentary Counsel to advise on every Bill is a useful safeguard in the legislative process and a discipline on all the participants (Parliamentary Counsel, Ministers, departments and agencies).*
>
> *The practice provides Parliamentary Counsel with a more effective method of tactfully handling instructions that are clearly or arguably beyond the authority given by the Cabinet and of drawing other matters to Ministers' attention. This is because all the participants know that Parliamentary Counsel will be obliged to report to Ministers as a matter of course."*

4.23 At the Commission's Public Seminar, Ms Hilary Penfold, Second Parliamentary Counsel (Commonwealth), described the long standing Commonwealth practice of having the Parliamentary Counsel brief the Cabinet Legislation Committee in that jurisdiction, on departures from approved policy:

"The Legislation Committee of Cabinet is ... responsible for ensuring that Bills are consistent with the original authority for the Bill, as provided by Cabinet decision, decision of the Prime Minister or a decision of another relevant Minister or Ministers. This Committee provides a check on the actions of individual Ministers and on the actions of departmental officers.

Our responsibility to the Legislation Committee is to prepare a memorandum for the Committee's consideration with each Bill that it considers, setting out any departures from that authority. As well, we sometimes raise for their consideration, issues not directly relevant to the questions of authority. They are usually matters of legal policy ...

... the effect of the existence of that Committee is to facilitate the Parliamentary Counsel, and the Department of Prime Minister and Cabinet, in exercising day to day supervision of the contents of legislation. The process of ensuring that legislation remains within the scope of Government authority, or goes outside that original scope only with good reason, is conducted largely by the public servants in the Parliamentary Counsel's office and the Department of Prime Minister and Cabinet. The Legislation Committee tends to be only formally involved.

... Almost always, agreement will be reached between the instructing department and the Department of the Prime Minister and Cabinet, about how to deal with the proposed departure from authority. This may involve dropping or altering the proposal, or it may involve accepting that the departure from authority is sensible and justifiable. If the departure is to be continued with, that decision will be in effect ratified by the Legislation Committee whose chairperson is briefed by the Department of the Prime Minister and Cabinet that basically everything is okay ...

The process is not intended to operate, and it does not operate, to hamper the sensible development of policy after an original decision is made. I'd have to say as an aside, that it's just as well, because there are a lot of cases where the policy as it's originally put to the Cabinet really hasn't been thought through properly, and simply has to be developed further.

It's also worth pointing out, that the Parliamentary Counsel's role in this particular exercise is not to prevent departures from authority, as such. It is simply to bring them to the attention of a Cabinet Committee so that the Cabinet Committee can think seriously...about whether the original Government decision should be varied. In fact we commonly assist in that process, in the consideration of the proposed departure from authority, by including an explanation for the departure in our own memorandum" (Penfold 1991, pp.4-7).

ANALYSIS OF EVIDENCE AND ARGUMENTS

4.24 The Commission considers that the arrangements introduced by the Goss Government to ensure that drafting of legislation conforms to Cabinet authorisations, and that Cabinet is adequately briefed on draft legislation which departs from Cabinet policy, are appropriate in a Westminster system of government.

4.25 In particular, the Commission supports moves by the Government to formalise the Parliamentary Counsel's role in drawing attention to draft legislation which goes beyond Cabinet decisions. However, the Commission draws attention to several matters discussed below.

Cabinet Consideration of Subordinate Legislation

4.26 The Queensland *Cabinet Handbook* requires that before any "significant" regulations for making by Governor in Council are forwarded to Executive Council, a formal submission to Cabinet must be prepared seeking Cabinet's approval. For other subordinate legislation a formal submission to Cabinet is not required.

4.27 The Queensland *Cabinet Handbook* provides no definition of "significant". As well, the definition includes only regulations and not other subordinate legislation such as orders in council.

4.28 The Commission notes that a recent review conducted for the Cabinet Office has recommended that subordinate legislation which significantly affects:

(a) a politically sensitive policy area;

(b) other departments, statutory bodies, or inter-governmental relations;

(c) business operations or the rights of the general public; and

(d) government expenditure or increases in revenue in excess of the CPI rate;

should be considered by Cabinet on the basis of a full Cabinet submission. The Commission agrees with this recommendation, although it is not clear from the review which particular types of subordinate legislation should be covered by this requirement. The Commission considers that the requirement should at least apply to subordinate legislation that is required to be made by the Governor in Council.

4.29 The Commission questions whether it would be necessary for full Cabinet to approve subordinate legislation: the Parliamentary Business and Legislation Committee could be given this role under guidelines approved by Cabinet. The Commission notes that in the Commonwealth, bills are approved by the Legislation Committee of Cabinet and only significant policy decisions are referred to full Cabinet for determination.

4.30 However, consideration could be given to submitting particularly sensitive or substantial proposals for subordinate legislation to full Cabinet for approval *prior* to drafting. In this way, departments, the OPC and the Parliamentary Business and Legislation Committee would have an approved policy framework for preparing and reviewing the proposed legislation.

Parliamentary Counsel Memorandum

4.31 The Queensland *Cabinet Handbook* is unclear on whether the Parliamentary Counsel is formally required to brief the Parliamentary Business and Legislation Committee where a bill departs from Cabinet approvals so that the Committee can advise Cabinet of the fact, although Drafting Instruction No 1 from the Parliamentary Counsel (reproduced in Appendix F) indicates that the Chairman of the Committee has asked for briefing notes to be provided to the Committee in cases where departures occur.

4.32 As the OPC and departmental submissions point out, in reality bills often undergo significant changes after initial Cabinet approvals. It is therefore important that sufficient checks and balances occur at the end of the drafting process to ensure that Cabinet is adequately informed of any significant departures from approved policy. As noted in the OPC submission (S9), the Parliamentary Counsel is in a unique position to fulfil this role as the drafter of the legislation. (Such a role would not prevent the Cabinet office from also monitoring and providing advice to the Committee as appropriate).

4.33 Accordingly the Commission considers that the Queensland *Cabinet Handbook* should clarify that in respect of every bill and subordinate legislative instrument submitted for final approval by Cabinet, the Parliamentary Counsel should submit a formal memorandum to Cabinet (through the Parliamentary Business and Legislation Committee) where Counsel considers that the bill or subordinate instrument departs from Cabinet decisions.

Counsel Should Not Decide Policy

4.34 Where Parliamentary Counsel considers that a drafting instruction significantly exceeds Cabinet authority or raises major difficulty in terms of legislative principle, Counsel's position should be referred to the instructing department, the Department of the Attorney-General and the Parliamentary Business and Legislation Committee as appropriate (the role of the Department of the Attorney-General in this area is discussed in paras. 4.77 - 4.79). However, the OPC should not seek to resolve the issue itself. The drafter's role is to ensure that any departures encountered are adequately raised and referred to the appropriate authority.

4.35 Moreover, where Counsel advises Cabinet of any perceived problems arising from legislative proposals, including concerns in the area of legislative principle, Counsel must in the end defer to the Cabinet decision. As suggested in EARC Issues Paper No. 7, the Parliamentary Counsel and his or her staff are officers of the Government. By tradition they are required to draft in accordance with the Cabinet's decisions. This position is advanced in the OPC submission (S9) and in the submission from Mr Leo Murray QC (S1) and is, according to general custom, the correct one.

4.36 Further, the Commission notes that while the OPC (through the Parliamentary Counsel) should have a right to advise Cabinet on matters of legislative principle (this role is examined in paras. 4.52 - 4.82), it would not be appropriate to give Counsel a role in providing *policy* advice to Cabinet on matters that fall outside this area. Such a role could conflict with the responsibilities of Ministers, departments and the Cabinet Office and, in some future circumstance, could call into question Counsel's independence. In this regard, the provision in the Queensland *Cabinet Handbook* which allows the Parliamentary Counsel to advise Cabinet of any contrary views which Counsel might have about a particular proposal, should not be interpreted to mean that Counsel should be expected to advise on the policy merits of proposed legislation, except in relation to the OPC's professional drafting responsibilities.

4.37 The Commission also draws attention to specific directives given by the Chairman of the Parliamentary Business and Legislation Committee of Cabinet that Parliamentary Counsel's briefing notes to the Committee should include advice on provisions in bills *"that are consistent with what the Cabinet authorised, but could be potentially embarrassing to the Government"* (Appendix F). To the extent that such advice relates to matters of legislative principle or matters for which Counsel has a professional concern, such advice would be appropriate. However, it is considered that matters of a general policy nature should be left to the responsible department or the Cabinet Office to raise where necessary.

Counsel Should Not Seek to Interpret Party Political Platforms

4.38 Counsel's duty to the Government should not extend to ensuring compliance with party political platforms but only with Cabinet approved positions.

4.39 EARC Issues Paper No. 7 indicated that in the 1940s, the Parliamentary Counsel took on the role of scrutinising legislation which appeared to contravene the party political platform of the Government. Correspondence between the then Parliamentary Counsel, J E Broadbent, and the Premier of the time, V C Gair, shows that Broadbent routinely scrutinised bills for departures from the ALP Party Platform and referred any divergencies to the departmental head (Archives Staff File PRE W6 Broadbent 21/11/48).

4.40 It is not clear whether this scrutiny role was conferred on Counsel by Ministers or whether Broadbent himself assumed this role. Mr Leo Murray QC (S1) suggests:

> *"I believe it to be highly likely that the purpose of the checking (and certification) referred to [in the Issues Paper] was to make Parliamentary Counsel a back-stop for the relevant Minister as protection against political critics... The practice may have imposed on Parliamentary Counsel a responsibility that counsel was ill-equipped to discharge although the two counsel involved during the period were more closely associated with the political figures of the time than has later been the case. It must be remembered that in the 30's there was a deep economic depression, which was only relieved by the World War - which was the outstanding feature of the 40's. Both decades were times of great stress."*

4.41 What does appear to be certain is that J E Broadbent had a degree of closeness with the Government of the day that would be inappropriate for any modern Parliamentary Counsel. In Broadbent's case this association extended to attendance as an "unofficial" Government representative at ALP conventions and making contributions to Government policy speeches (Archives Staff File PRE W6 Broadbent 21/11/48).

4.42 The Commission notes the views of Mr Murray QC that subsequent Parliamentary Counsel have maintained a greater distance from the political figures of the time. Certainly, the Commission has not received evidence to suggest that improper influence has been exerted by recent Parliamentary Counsel upon departments in drafting legislation or that improper influence was brought to bear upon the Parliamentary Counsel in the course of drafting.

4.43 However, the Commission considers that the principle is worth stating that Parliamentary Counsel should not, at any time, take on the role of interpreting party platforms or seek to ensure that draft legislation conforms to party policies. The drafter's duty is to the Executive and to give effect to policy determined by Cabinet, not by any political party.

4.44 Government policy does not always reflect party positions; a Parliamentary Counsel who sought to justify particular positions against the party policy could be acting in contravention of Ministerial and Cabinet decisions. It is of course not unusual for departmental officers to consider party platforms in the course of advising Ministers on policy but this is a role which should remain the prerogative of departments and central agencies such as the Cabinet Office.

Counsel Should Not be Used to Provide Alternative Legal Advice

4.45 Parliamentary Counsel should not be called upon to give general legal advice to the Government about proposed courses of action (other than in relation to legislative proposals). The submission from Mr Leo Murray QC (S1) indicates that this was not uncommon practice during the Bjelke-Petersen era and earlier when the Parliamentary Counsel acted as an alternative source of legal advice to the Premier:

> *"During the Bjelke-Petersen era I, as Parliamentary Counsel, was occasionally asked for informal advice on the ramifications in law of propositions being floated before the Premier. The acknowledged reason for this was that the Premier knew the advice would be given honestly and without prevarication, whether or not it was what he might have preferred. The same use was made of my predecessor (O'Callaghan) and his predecessor (Seymour). Such advice has not replaced or over-ridden advice provided in appropriate cases through the Attorney-General. Advice from all sources was considered according to its worth."*

4.46 Notwithstanding the honest intentions of previous Counsel in this matter, the Commission considers that for Parliamentary Counsel to provide general legal advice could, in some circumstances undermine the role of the Attorney-General as First Law Officer. In a Westminister system, the Attorney-General is the principal legal advisor to Cabinet. That role requires the Attorney-General to bring independent judgment to bear, particularly in matters relating to the administration of criminal justice. As to this role, see generally *Law Officers of the Crown* (Edwards 1964).

Publication of Cabinet Handbook

4.47 Finally, the Commission observes that in some other jurisdictions, notably the Commonwealth, the *Cabinet Handbook* is readily available to Government officers and the public through the Government bookshop.

4.48 Although the current Queensland *Cabinet Handbook* has been issued to selected officers in departments, it does not appear to be available to the public.

4.49 The Commission appreciates that Cabinet arrangements have been continuously evolving since the first edition of the Queensland *Cabinet Handbook*. This fact has probably made it difficult to publish the document. However, once Cabinet arrangements have settled (taking into account recommendations of this Report), the Commission considers that the *Handbook* should be accessible to the public.

4.50 The Commission also notes that the *Cabinet Handbook* has become a rather large document which will grow larger if matters recommended in Chapter Two for incorporation in the *Handbook* are included. In the Commonwealth, matters concerning legislation are dealt with in a separate legislation manual. The Commission suggests that consideration be given to following Commonwealth practice and splitting the *Cabinet Handbook* into two publications: one dealing with Cabinet processes generally, the other dealing with all matters to do with the preparation of legislation. If this proposal is ultimately adopted, both documents should be publicly available.

RECOMMENDATIONS

4.51 **The Commission recommends that:**

(a) **subordinate legislation made by the Governor in Council which significantly affects:**

(i) **a politically sensitive policy area;**

(ii) **other departments, statutory bodies, or inter-governmental relations;**

(iii) **business operations or the rights of the general public; and**

(iv) **government expenditure or increases in revenue in excess of the CPI rate;**

should be subject to examination by the Parliamentary Business and Legislation Committee of Cabinet before its making by the Governor in Council;

(b) **consideration be given to submitting particularly sensitive or substantial proposals for subordinate legislation to full Cabinet for approval prior to drafting;**

(c) **the requirement for the Parliamentary Counsel to advise the Parliamentary Business and Legislation Committee of Cabinet where Counsel considers that a bill departs from Cabinet approvals or raises difficulties, should be stated in the *Cabinet Handbook*. The *Handbook* should further clarify that:**

(i) **any advice provided by Counsel should be by written memorandum; and**

(ii) **such advice should be provided in relation to any proposed subordinate legislation considered by the Committee as well as bills;**

(d) **where Parliamentary Counsel consider that a drafting instruction exceeds Cabinet authority or raises difficulties, Counsel's position should be referred to the department or Cabinet as appropriate. The OPC should not seek to resolve the issue itself;**

(e) **where the Parliamentary Counsel advises Cabinet of any concerns arising from legislative proposals, including concerns in the area of legislative principle, he or she must in the end defer to the Cabinet decision;**

(f) **in advising Cabinet (through the Parliamentary Business and Legislation Committee) of any perceived difficulties associated with proposed legislation, the Parliamentary Counsel should not be expected to comment on matters that fall outside the drafter's professional responsibilities;**

(g) **the legislative advisory role of the Parliamentary Counsel should not extend to ensuring that legislation complies with party political platforms but only with Cabinet approved positions;**

(h) the Parliamentary Counsel should not be called upon to give general legal advice to the Government about proposed courses of action other than in relation to legislative proposals; and

(i) consideration be given by the Government to:

(i) splitting the Cabinet Handbook into two volumes: one dealing with Cabinet processes generally, the other with all matters to do with the preparation of legislation; and

(ii) publishing both volumes and making them available for public sale.

The OPC's Advisory Role in Relation to Legislative Principle

4.52 In most Westminster jurisdictions, legislative drafters have a role to play in ensuring that legislation satisfies constitutional and legal requirements, takes into account the existing state of the law and pays due regard to legislative principles.

4.53 As part of the new Cabinet legislative review system, the Goss Government has introduced a number of procedural reforms designed to enhance the attention given to legislative principle. In summary these are:

(a) the Queensland *Cabinet Handbook* defines certain legislative principles to be considered in drafting including several "fundamental" principles which cannot be varied except on the basis of specific Cabinet authority following mandatory consultation with the Department of the Attorney-General (see Chapter Two);

(b) the Department of the Attorney-General now receives copies of all "Authority to Prepare a Bill" submissions and undertakes its own check on legislative proposals going to Cabinet (Wells 1991a, p.8);

(c) the Parliamentary Counsel is able to advise Ministers of any concerns through the Parliamentary Business and Legislation Committee of Cabinet (S8); and

(d) in relation to subordinate legislation that is made by the Governor in Council or required to be published in the Gazette, the Parliamentary Counsel is required to certify that the proposed legislation can be legally made.

EVIDENCE AND ARGUMENTS

4.54 Submissions and speakers at the Commission's Public Seminar and the Bond Legislative Drafting Conference generally supported the right of Parliamentary Counsel to draw attention to proposals affecting legislative principle.

4.55 The Hon Justice Elizabeth Evatt observed:

> *"There is .. an important role for the drafter in protecting rights and promoting lawfulness of Government decision making. Because if Parliament and the courts can only make limited contributions ... this heightens the importance of all those who take part in the preparation of legislation.*

> *... They don't, of course, devise the policy of the law that they draft, but they have to understand the policy objectives, what ill the law is intended to remedy, and how it is intended to operate. They can ask embarrassing questions. They can seek information about exactly what this policy is. Sometimes they find it's pretty raw and undeveloped.*
>
> *They can promote the protection of rights by pointing to policy implications which may have been overlooked and by offering alternative choices. They can ask directly whether the policy is intended to override rights, and can even include in drafts, provisions which expressly state that they override certain rights and freedoms, if that is what seems to be the intention. There are many other questions that they can ask in preparing legislation, all of which will promote the rights and freedoms of the individual, particularly in regard to Government decision making. At what level does this decision need to be made? On what information would a decision be based? Who would have to provide information? Whose interests will be affected? What rights will they have to contribute to the decision? What are the criteria for decisions? Will there be any discretion left to the decision maker? Is this the kind of decision which is reviewable on the merits and shall it be reviewed? Will reasons have to be given and who must be notified of this decision?"* (Evatt 1990, pp.10-11).

4.56 The OPC submission (S9) stated that:

> *"The Parliamentary Counsel's Office is well placed to play a role in scrutinising legislative proposals for impact on 'fundamental legislative principles', including impact on personal rights and freedoms. The extent of this role is a matter for the Government to decide. However, consistent with the role of the professional drafter in relation to clarification, formulation and development of policy ... it is suggested that the role in relation to primary legislation should go no further than drawing attention to, and advising on, the impact of legislative proposals. The Office should, in particular, have no decision making role arising out of its scrutiny of legislative proposals. That role should be reserved to the Government and the Parliament."*

4.57 The Aboriginal and Torres Strait Islander Commission (S3) considered that the OPC *"... should have a major role in scrutinising legislative proposals ..."*.

4.58 A more forthright assertion of the drafter's right to draw attention to provisions which vary fundamental principles was made by the Parliamentary Counsel for South Australia at the Bond University Drafting Conference, Mr Geoff Hackett-Jones QC:

> *"In seeking the solution to a particular problem, the parliamentary counsel should always strive to find the path that does least violence to civil rights and to established principles under which they are protected.*
>
> *Let me illustrate the point by reference to legislation that has been introduced in most Australian jurisdictions allowing for the detection of traffic offences by automatic systems. These usually operate by photographing the number plate of the offending vehicle. They provide no evidence of who was driving the vehicle at the relevant time. This has led traffic authorities to propose a system under which the registered owner is to be presumed guilty of the traffic infringement unless he or she denounces the actual culprit to the authorities or establishes that he or she was not driving the vehicle and is not in a position to know who was. This is an obnoxious system. When such legislation was first proposed in South Australia we did our best to ensure that the Government was aware that it would reproduce some of the worst features of the regime of the Emperor Tiberius. We discovered that Tiberius has some clandestine admirers in South Australia.*

However, we did have one significant victory. It was suggested that our legislation should reflect the policies embodied in section 85B of the Victorian Motor Car (Photographic Detection Devices) Act 1985. This provides that the presumption of guilt has to be rebutted by sworn evidence to the satisfaction of the prosecutor (82 B(3)(c)). We, at least, managed to avoid this extraordinary usurpation of judicial functions by the prosecution.

This illustrates the fact that lay administrators will sometimes come up with solutions that appear quite reasonable and sensible to them, but which are fundamentally at variance with the recognized institutions and principles of civilized society. A parliamentary counsel needs to be constantly alert to the need to ensure a reasonable proportionality between means and ends; to ensure, in particular, that legislation does not unnecessarily encroach upon the civil rights of those affected by it" (Hackett-Jones 1991, pp.12-13).

Respective Responsibilities of Parliamentary Counsel and the Department of the Attorney-General

4.59 Submissions and speakers at the Public Seminar also commented on the respective responsibilities of the OPC and the Department of the Attorney-General in drawing attention to matters of legislative principle.

4.60 The Tharpuntoo Legal Service Aboriginal Corporation (S7) suggested that:

"... the OPC should be able to notify the Attorney-General's Department of imminent issues, and recommend adjustments and amendments to drafted legislation which better caters for those factors which may have been previously overlooked."

4.61 The Departmental submission (S8) commented:

'Where matters of legal principle arise out of the drafting of a Bill, it is recognised that such matters must be referred to those with legal expertise, including the Office of the Parliamentary Counsel, the Crown Solicitor and the Department of the Attorney-General as appropriate. Where issues of fundamental legal principle are involved, the OPC should have recourse to the Attorney-General and his Department or the Cabinet Parliamentary Business and Legislation Committee, as necessary, to, respectively, seek advice and/or to point out any concerns of legal principle which may arise from drafting instructions.

In this context, the Attorney-General's Department's view is that:

> *'Clearly, the Attorney-General as a member of the Executive and as Chief Law Officer of the Crown should have the primary responsibility for legal advice in relation to public administration and government. In the Commonwealth jurisdiction the office of the Parliamentary Counsel has a well established role as a source of independent advice to Cabinet (through the Legislation Committee) on matters where Counsel thinks legislation might offend established principles or otherwise attract criticism in the Parliament.*
>
> *... If one adopts the maxim "there is safety in the multitude of counsellors" there cannot be any philosophical objection in obtaining advice from both the Attorney-General's Department and from the OPC even though it is the role of the OPC to draft legislation. However, where advice given by the Department of the Attorney-General and the OPC differs some dispute resolution mechanism will need to be implemented to resolve conflicts of opinion.'*

4.62 The OPC submission (S9) suggested that:

"The Parliamentary Counsel's Office and the Attorney-General's Department could usefully perform complementary roles in this area. This Office is well placed to scrutinise the impact of legislative proposals and to advise on alternative means of achieving policy objectives. the Attorney-General's department is, on the other hand, better placed to assist generally the Attorney-General in the Attorney-General's role as first Law Officer of the Crown and to advise in general terms on matters of general legal principle.

This Office is keen to perform any role that it is given in this area in a co-operative, helpful manner. Rigid separation of the roles of the department and this office could lead to difficulties that do not presently exist. However, clarification of the respective roles may perhaps be a useful step in ensuring that legislative proposals are fully scrutinised for impact on legal principle and any unnecessary duplication avoided".

4.63 Ms Theresa Johnson (S10) commented:

While the Attorney-General's Department is best placed to give .. advice by virtue of the Department's administration of the policy connected with the legal principles and by virtue of the time constraints which apply to the OPC, contribution from the OPC should be welcomed. Effectively, the OPC would have a review and checking role."

4.64 Ms Hilary Penfold at the Commission's Public Seminar elaborated on the relationship between the Commonwealth OPC and Attorney-General's Department in legislative scrutiny:

"Our office tends to act as a sort of agent for the Attorney-General's Department, and for the Attorney-General, in watching out for the sorts of legal policy issues that have been mentioned by earlier speakers as they come up in legislative proposals. We try to ensure that, if those sorts of issues haven't already been discussed with the Attorney-General's Department, that they will be.

The process of consultation on Cabinet decisions, should mean that most legal policy issues have already been considered by the Attorney-General's Department before going to Cabinet, but as a matter of fact, that tends not to be the case, partly, I suppose, .. because ... proposals tend not to go into what a lot of Departments see as the fine details. Those areas of fine detail are often the areas that raise the important issues of legal policy. The sorts of things I'm talking about are things like issues of human rights policy - whether the legislation being proposed might be inconsistent with Commonwealth anti-discrimination policy or privacy principles; matters of criminal law policy - such things as appropriateness of penalties, acceptability of provisions dealing with the onus of proof, provisions dealing with self incrimination and so on; administrative law policy - including questions as to whether the decisions made under legislation should be subject to any form of administrative review, and if so, what form; and Courts policy - such questions as what is the appropriate court to confer Commonwealth jurisdiction on in a particular case.

We also, of course, have a special role in identifying and resolving issues of Constitutional validity, although as with matters of legal policy, the Attorney-General's Department tends to be the final arbiter on those issues.

Any matters of the sort which I've just mentioned, legal policy or Constitutional validity - if they have not been resolved between the Attorney-General's Department, the instructing department and Parliamentary Counsel before the Bill is submitted to the Legislation Committee [of Cabinet] - will also be raised in the Legislation Committee memorandum [from the OPC]" (Penfold 1991, pp.8-10).

ANALYSIS OF EVIDENCE AND ARGUMENTS

4.65 Submissions and comments made at the Commission's Public Seminar and the Bond University Drafting Conference support the need for Parliamentary Counsel to be alert to proposals which seek to vary fundamental legislative principles and to draw the attention of instructing departments and Ministers to such proposals.

4.66 It is clear from the new Cabinet arrangements that the present Queensland Government also acknowledges this role and has moved to establish it in the Cabinet process, in particular by placing an obligation on the Parliamentary Counsel to brief the Parliamentary Business and Legislation Committee of Cabinet on contentious clauses. Appendix F from the Parliamentary Counsel notes that the Chairman of the Committee has requested the Parliamentary Counsel to provide briefing on cases where provisions infringe "fundamental legislative principles" prescribed in the Queensland *Cabinet Handbook*:

> *"The Chairman of the Committee has mentioned to me that these are cases in which the Committee looks particularly to this Office for advice and expects this Office to play an active role"* (Appendix F).

4.67 The Commission considers that having the Parliamentary Counsel provide independent advice to Cabinet (through the Parliamentary Business and Legislation Committee of Cabinet) on the legal implications of draft bills, particularly from the standpoint of legislative principle, is a significant element in the overall system of checks and balances in the making of legislation. The OPC's duty to the Government as a whole, as well as its professional responsibilities, require Counsel to be alert to danger areas and to ensure that departments and Ministers are adequately briefed about proposals which appear to depart from fundamental legislative principles.

4.68 The Commission notes that any advice provided by the Parliamentary Counsel to the Parliamentary Business and Legislation Committee of Cabinet that is contrary to that of Ministers is required by the Queensland *Cabinet Handbook* to be forwarded to the full Cabinet by the Chair of the Committee.

4.69 While there could be advantages in having Parliamentary Counsel's views conveyed to full Cabinet where a decision of the Committee may be made contrary to Counsel's advice, the Commission notes that a member of the Cabinet Committee is the Attorney-General who carries ultimate responsibility for advising Cabinet on legal matters. It is considered, therefore, that where the Chair of the Parliamentary Business and Legislation Committee of Cabinet conveys any contrary views of the Parliamentary Counsel regarding proposed legislation, the Attorney-General should also be given the opportunity to advise Cabinet as the Attorney considers appropriate.

4.70 The Commission notes that there is a potential for overlap in responsibility between the OPC and the Department of the Attorney-General. However, it would be unwise to try to lay down rigid demarcation rules. The processes for legal advice seem to work well at the Commonwealth level. Those processes are facilitated by the fact that both organisations are responsible to the Attorney-General, work in the same building and share common facilities such as law libraries.

Subordinate Legislation

4.71 The practice of having the Parliamentary Counsel, rather than the Crown Solicitor, certify that subordinate legislation can be legally made is also considered appropriate, not merely because responsibility for drafting subordinate legislation now rests with the OPC, but also because of the OPC's potential role in advising Cabinet where proposed subordinate instruments infringe fundamental legislative principles.

4.72 The Commission observes that Cabinet arrangements are not fully clear on the role for the OPC in advising Cabinet on difficulties arising from the drafting of subordinate legislation. Appendix F requires the Parliamentary Counsel to brief the Parliamentary Business and Legislation Committee of Cabinet where a *bill* authorises the making of subordinate legislation that is not subject to Parliamentary tabling and disallowance, but is silent on whether Parliamentary Counsel has an obligation to report to the Committee in cases where subordinate instruments present difficulties. However, the revised section of the Queensland *Cabinet Handbook* accompanying the Departmental submission (S8) indicates that the Chair of the Committee is obliged to convey to Cabinet any concerns of the Parliamentary Counsel in relation to "regulatory initiatives" as well as legislation.

4.73 This Report (para. 4.51) recommends that subordinate legislation for making by the Governor in Council should be examined by the Parliamentary Business and Legislation Committee of Cabinet. Clarifying that Parliamentary Counsel has an obligation to brief the Committee on difficulties arising from proposed subordinate legislation in terms of legislative principle or points of law, would reinforce both the Committee's scrutiny role in this area as well as that of the OPC.

Statutory Basis for Counsel's Legislative Scrutiny Role

4.74 At the Commission's Public Seminar, the Queensland Attorney-General contended that present Cabinet arrangements designed to scrutinise legislative proposals for impact on principle reflect the Goss Government's fundamental commitment to liberty (Wells 1991a, pp.3-4).

4.75 It is possible, however, that governments, irrespective of their political persuasion, may not have such a commitment to scrutiny. Moreover, even where governments are publicly committed to principles of democracy and the rule of law, these commitments can change over time - or become submerged in the pressures of decision-making and expediency.

4.76 The Government's decision to clarify the OPC's legislative scrutiny role in the Queensland *Cabinet Handbook* has already established the position of the OPC in this area. Recommendations in this Report, if implemented, will further clarify the position and will provide additional authority to the OPC in advising Ministers on contentious clauses. However, as a safeguard, the Commission considers that the OPC's right to advise on matters of legislative principle should be stated in the proposed Legislative Standards Act. This would provide a statutory foundation for the OPC's legislative scrutiny role which could only be altered by recourse to Parliament.

Relationship with the Department of the Attorney-General

4.77 Primary responsibility for advising the Government on the law and legislative principle rests with the Attorney-General as First Law Officer of the Crown, supported by the Department of the Attorney-General.

4.78 While the OPC should have an independent capacity to advise instructing officers and Cabinet on proposals which appear to depart from legislative principles, it should also have regard to any policies or guidelines established by the Attorney-General.

4.79 The Commission notes that an effective liaison system has been established between the Department of the Attorney-General and the Parliamentary Counsel in matters involving legal policy. This system has already led to contentious matters involving legal policy being raised with the Attorney-General who, in turn, has raised them in Cabinet (Wells 1991a, p.8). The system is backed up by directions from the Chair of the Parliamentary Business and Legislation Committee of Cabinet that the OPC is to:

(a) advise instructing officers to seek advice from the Department of the Attorney-General in matters involving fundamental principle; and

(b) inform the Department of the Attorney-General where instructing officers insist on having provisions drafted which might infringe fundamental principles without consultation with that Department (Appendix E).

4.80 The Commission supports the need for close liaison between the OPC and the Department of the Attorney-General in matters which affect the responsibilities of the First Law Officer.

CONCLUSION

4.81 In conclusion, the Commission agrees with the present arrangements which:

(a) enable the Department of the Attorney-General to monitor Cabinet submissions seeking approval for bill drafting to ensure that points of law and legislative principle are adequately addressed;

(b) require the OPC to:

(i) advise instructing officers to seek advice from the Department of the Attorney-General in matters involving fundamental principles; and

(ii) inform the Department of the Attorney-General where instructing officers insist on having provisions drafted which might infringe fundamental principle without consultation with the Department.

(c) provide an opportunity for the Parliamentary Counsel to provide independent advice to Cabinet (through the Parliamentary Business and Legislation Committee) of concerns in the area of legislative principle that arise in the course of drafting bills; and

(d) require the Chair of the Parliamentary Business and Legislation Committee of Cabinet to convey to full Cabinet any views of the Parliamentary Counsel in relation to proposed legislation that are contrary to the Committee's views.

RECOMMENDATIONS

4.82 **The Commission recommends that:**

(a) **the Parliamentary Counsel be given explicit authority in the Queensland *Cabinet Handbook* to advise the Parliamentary Business and Legislation Committee of Cabinet of any concerns involving points of law and legislative principle arising from bills and any subordinate legislation considered by the Committee. This advice should be conveyed by memorandum;**

(b) **where the Chair of the Parliamentary Business and Legislation Committee conveys to full Cabinet any views of the Parliamentary Counsel in connection with points of law or legislative principle that are contrary to those of the Committee, the Attorney-General should also be given opportunity to advise Cabinet as the Attorney considers appropriate; and**

(c) **the function of the OPC to advise Ministers and Members of the Legislative Assembly on fundamental legislative principles should be stated in the proposed Legislative Standards Act.**

CHAPTER FIVE

PRIVATE MEMBERS' LEGISLATION

Opportunity for Private Members' Legislation in Queensland

5.1 EARC Issues Paper No. 7 observed that:

> *"The scope for Opposition and private Members to introduce legislation in Westminster legislatures is effectively limited by precedence given to Government business and the reality of numbers in the House. Nonetheless, Parliamentary practice normally provides some opportunity for Opposition and individual Members to introduce bills.*
>
> *Occasionally, private Members' bills obtain the support of the Government and become law, or are incorporated into Government legislation. In the Commonwealth Parliament, six private Members' bills passed into law between 1970 and 1988.*
>
> *The facility for private Members' bills allows Opposition and individual Members to introduce legislative proposals that are considered to be in the public interest or which transcend political boundaries (eg. conscience issues). Private Members' bills may also serve to stimulate community debate on significant policy issues, even where an Opposition or individual Member perceives that the bill is unlikely to receive Government or majority support. (Between September 1987 and December 1989, 13 private Members' bills were introduced into the House of Representatives, none of which became law. In the Northern Territory Legislative Assembly, an average of 10 to 12 private Members' bills is introduced per year, few if any of which become law.)*
>
> *A more frequent role for Opposition Members involves moving amendments to legislation sponsored by the Government. Such amendments may be small, others quite complex. Depending on the attitude of the Government, the progress of debate and Parliamentary numbers, such amendments may or may not be supported. However, the right of Opposition parties to debate Government legislation and, in the process, to propose amendments is a time honoured one"* (p.29).

5.2 The Issues Paper noted that a private Member's bill had not been introduced into the Queensland Parliament since 1980 - although Opposition Members do exercise their right to propose amendments to Government legislation before the House.

5.3 It has been somewhat difficult, however, for the Commission to ascertain the position of Members on future requirements for drafting assistance for both private Member's bills and amendments to bills before Parliament. This is because only one submission was received from a Member of the Legislative Assembly (the Leader of the Liberal Party) in response to the issues raised in EARC Issues Paper No.7 and the Commission's Public Seminar. The recommendations in this Chapter are based on perspectives contained in those submissions received, and consideration of practice in other jurisdictions.

Access to the OPC

5.4 EARC Issues Paper No. 7 observed:

> *"The level of assistance that Parliamentary Counsel provide to Opposition and individual Members in drafting private Members' bills and amendments to Government legislation has been an issue in some Australian jurisdictions.*

Generally, access to Parliamentary Counsel is granted to Opposition and individual Members but depends heavily on the commitment of Counsel to Government business. In some jurisdictions (eg. the Northern Territory), it appears that Parliamentary Counsel have been able to meet most requests from private Members while in others (eg. the Commonwealth) resources within the Parliamentary Counsel's Office have not always matched the demand...

Some jurisdictions in Australia and overseas have addressed the problem of access to Parliamentary Counsel by engaging consultant drafters for private Members. This applies in cases where:

(a) access to Counsel is not available; and
(b) the bill is of particular difficulty.

The Commonwealth Senate and House of Representatives have adopted this practice, utilising the services of ex-Parliamentary Counsel where drafting assistance is not available from the OPC.

Another solution has been to appoint legal Counsel to the staff of Parliament itself in order to provide a permanent in-house service for Members. The United Kingdom House of Commons, the Canadian Parliament and several Canadian provincial legislatures have been given resources for this purpose...

In Queensland...the Goss Government has indicated that the OPC is available to assist private Members; the 1990 Cabinet Handbook states that:

> *'Government Bills are generally drafted by Parliamentary Counsel. (Parliamentary Counsel may also draft Bills for other Members of Parliament depending on the availability of resources.)' (Queensland Cabinet Handbook 1990, p.79) ...*

Issues for Queensland raised in this Paper include whether the OPC should be required to provide a drafting service for Opposition and private Members or whether Parliament should be given resources to engage its own drafters." (pp.29-31)

5.5 EARC Issues Paper No. 7 also asked whether the Parliamentary Counsel should have authority to determine the level of assistance in individual cases, noting that:

"In a number of States, Parliamentary Counsel have more or less complete autonomy in determining assistance to be provided in individual circumstances. For example, in the Northern Territory, approaches by individual Parliamentarians are made directly to the Office of Parliamentary Counsel. The Chief Minister has no involvement in determining responses, although the Minister is informed of requests so as to avoid any embarrassment that might occur if the Government were to attack the drafting of a bill prepared by Parliamentary Counsel.

In Tasmania, requests for assistance are made to the Chief Executive of the Law Department who consults with the Chief Parliamentary Counsel in making a decision. However, prior to 1989, each request was determined by the Premier who, until the change of Government, was the Minister responsible for Parliamentary Counsel.

In Victoria, the services of Parliamentary Counsel are made available to individual Members with the agreement of the Premier, whose approval is required before drafting" (p.32)

EVIDENCE AND ARGUMENTS

5.6 The Departmental submission forwarded by the Director-General of the Department of the Premier, Economic and Trade Development (S8) enclosed a revised version of the *Cabinet Handbook* which confirms the availability of the OPC to draft Private Members bills and amendments to bills before the House *"when resources permit"*.

5.7 The submission itself suggested that the OPC should draft all private Members legislation; where this was not possible the OPC should be required to certify the quality of the legislation.

5.8 The Leader of the Liberal Party (S5) argued that sufficient access to the drafting services of the OPC should be assured for all Members of Parliament:

> *"The Liberal Party submits that any statute designed to cover this Office [OPC] must incorporate protection of the rights of all Members of Parliament. While it is acknowledged that there are limited opportunities for Opposition and private Members to initiate legislation, it is important that these opportunities not be further curtailed by lack of access to expert advice.*
>
> *Guarded references in the Queensland Cabinet Handbook to the rights of Members are totally inadequate to ensure these are preserved."*

5.9 The OPC submission (S9) considered that a Member should be able to approach the Parliamentary Counsel directly for drafting assistance but the Parliamentary Counsel should refer a request to the Minister in the event that OPC resources were not available.

5.10 Submissions generally considered that there would be insufficient demand for the Legislative Assembly to warrant engaging its own drafters for Members.

ANALYSIS OF EVIDENCE AND ARGUMENTS

5.11 The Commission considers that Members of the Legislative Assembly should have access to the OPC for drafting amendments to government legislation and private Members bills. The right of a Member to request assistance directly from the Parliamentary Counsel, without having to go through a Minister, should be provided in statute.

5.12 Deciding the level of assistance to be provided in each case should be the responsibility of the Parliamentary Counsel. In making a decision, the Parliamentary Counsel should endeavour to meet the request as fully and expeditiously as possible. Further, the drafting requirements of Members should, where possible, be anticipated in forward resource planning for the OPC.

5.13 Given the apparently limited demand from Members for drafting assistance, it is difficult to see that provision of a statutory right for a Member to seek drafting assistance would lead to major problems for the OPC. However, the Parliamentary Counsel should have authority to refuse assistance to a Member where he or she considers that the request would significantly disrupt the OPC's drafting program. This would provide appropriate resource control for the Parliamentary Counsel. It would also, in hypothetical circumstances, prevent an Opposition party delaying the Government's legislative program by seeking to tie up the OPC's drafting capacity.

5.14 The Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should monitor access by Members to OPC drafting resources and report to the Parliament if arrangements recommended by the Commission prove to be unsatisfactory.

RECOMMENDATIONS

5.15 **The Commission recommends that:**

(a) the proposed Legislative Standards Act provide that:

(i) a Member of the Legislative Assembly may request the Parliamentary Counsel to provide assistance from the OPC for the purpose of drafting a private Member's bill or an amendment to a bill before the Legislative Assembly; and

(ii) the Parliamentary Counsel must provide the assistance requested except where he or she considers that the level of assistance required would significantly disrupt the planned drafting program of the Office;

(b) the proposed Parliamentary Scrutiny of Legislation Committee should monitor access by Members to OPC drafting resources and report to the Parliament if arrangements recommended by the Commission prove to be unsatisfactory.

Confidentiality

5.16 EARC Issues Paper No. 7 observed that an:

> *"... issue raised in other jurisdictions is the degree of confidentiality that should exist between Parliamentary Counsel and private Member clients. Until relatively recently, drafting assistance for Opposition and private Members provided by the Commonwealth Parliamentary Counsel was not given on the basis of confidentiality. Parliamentary Counsel were required to inform the Attorney-General of the contents of bills drafted by the Office for Opposition and private Members, and also to report on the substance of conversations between Counsel and Opposition clients.*
>
> *By the early 1970's, the Commonwealth Government had adopted the position that such conditions were inappropriate and withdrew them. Since the early 1970's, assistance provided by the Office of Parliamentary Counsel to Opposition and private Members is provided on a confidential basis.*
>
> *Most Australian jurisdictions appear to follow this convention"* (p.33).

EVIDENCE AND ARGUMENTS

5.17 The position of the present Government is that the OPC is required to advise the appropriate Minister when a private Member's bill is being drafted and the *"nature"* of the proposed bill in accordance with *"Westminster conventions"* (S8). In relation to amendments, Mr Leo Murray QC (S1) noted that, in the past, Members have been:

> *"aware that counsel would inform the relevant department of the proposed amendment and copies would be furnished to the relevant Minister. They have accepted this as proper procedure on the part of counsel who doubtless is seen as an agent of Executive Government. If on any occasion a member did not wish to disclose the intention to move an amendment the member would draft the amendment without approaching the Parliamentary Counsel."*

5.18 Other submissions suggested that confidentiality should be maintained between Counsel and the private Member client.

5.19 The OPC (S9) observed:

> *"If drafting assistance is to be provided by the Office to private Members, it is submitted that the assistance should be given on the basis of strict professional confidentiality. In the provision of the drafting assistance, the Member is the drafter's client to whom the drafter should owe a professional duty. One aspect of that duty is for the drafter to maintain the confidentiality of the relationship. It may be desirable for this confidentiality to be assured by statute."*

5.20 Queensland Government Departments (S8) and the Australian Community Action Network (S4) also considered that OPC services to private Members should be conducted on a confidential basis.

ANALYSIS OF EVIDENCE AND ARGUMENTS

5.21 The Commission considers that any drafting and advisory services provided to a Member of the Legislative Assembly by the OPC - whether for a private Member's bill or an amendment to a bill before the House - should be on the basis of strict confidentiality. Just as Counsel is required to respect the confidentiality of a bill drafted for the Government in accordance with the Government's instructions, so he or she should be required to respect the confidentiality of legislation drafted for a Member having regard to the Member's wishes. The Commission considers that relationships between Counsel and a Member should be governed by legal professional privilege with the client being the private Member concerned.

5.22 The Commission did consider whether Counsel's obligation to preserve confidentiality should cease upon the introduction of a private Member's bill into Parliament. This would permit the Parliamentary Counsel to alert the Attorney-General where a particular bill was thought to infringe legislative principle. However, as any private Member's bill would be subject to review by the proposed Parliamentary Scrutiny of Legislation Committee, the Commission takes the view that this limitation would not be necessary or appropriate.

RECOMMENDATION

5.23 **The Commission recommends that the proposed Legislative Standards Act provide that where the OPC provides drafting assistance to a Member of the Legislative Assembly for the purpose of a private Member's bill or amendment before the House, relations between the drafter and the client should be governed by legal professional privilege. That is, the drafter must ensure that any instructions received from the client, and any advice provided in the form of a draft bill or amendment or other form, are kept confidential in accordance with the wishes of the client. This requirement would continue beyond the legislation's introduction into the Legislative Assembly.**

CHAPTER SIX

ORGANISATION AND CONTROL OF THE OPC

Independence for the Office

6.1 The Fitzgerald Report implies that appropriate independence is required for the OPC to undertake its advisory and drafting functions.

6.2 This Report confirms that the OPC has an important and sensitive role to play in ensuring that legislation meets appropriate standards. As suggested, this role requires a significant measure of independence from those responsible for instructing Counsel in the preparation of legislation, including Ministers.

6.3 There are various ways in which independence can be secured for the OPC. This Report has already touched on the following:

(a) conferring a formal role on the Parliamentary Counsel to advise the Government on whether draft legislation infringes legislative principle or in other ways detracts from good drafting standards;

(b) providing authority for the Parliamentary Counsel to determine whether legislation should be drafted by external consultants; and

(c) providing authority to the Parliamentary Counsel to determine the drafting standards to be observed where subordinate legislation is drafted outside the Office.

6.4 As mentioned in EARC Issues Paper No. 7, additional options include:

(a) establishing the OPC as a statutory office;

(b) ensuring that persons appointed to the position of Parliamentary Counsel are appointed according to merit and have the capacity to fulfil the special responsibilities placed upon them;

(c) providing a degree of independence for the Parliamentary Counsel in controlling the resources of his or her Office; and

(d) providing for appropriate Ministerial responsibility.

6.5 These additional options are explored in this Chapter.

Statutory Basis for the OPC

EVIDENCE AND ARGUMENTS

6.6 In the Commonwealth, the Office of Parliamentary Counsel is established under an Act of Parliament - the *Parliamentary Counsel Act 1970*. Some of the features of this Act are that it:

(a) gives statutory recognition to the role of the Commonwealth Office of the Parliamentary Counsel in drafting legislation;

(b) provides that the Office is under the control of the Parliamentary Counsel (in the Commonwealth referred to as the "First Parliamentary Counsel");

(c) establishes that the First Parliamentary Counsel and certain other senior Counsel are appointed outside the Public Service for renewable terms of up to 7 years; and

(d) gives the First Parliamentary Counsel control over the staff of the Office by providing him or her with the powers of a departmental head.

6.7 EARC Issues Paper No. 7 asked whether Queensland should follow the Commonwealth model and establish the OPC by statute and, if so, what specific matters should be addressed in the statute.

6.8 The Leader of the Liberal Party (S5) stated:

> *"It is vital that the independence of the Office be guaranteed and maintained.*
>
> *Accordingly, the Office should be statute-based, ensuring a similar level of independence to that enjoyed by the Auditor-General.*
>
> *Such legislation could contain provisions to ensure that proper regard is given to the important tasks of drafting legislation and subordinate legislation.*
>
> *Rather than simply being another section of the public service carrying out Government instructions the Counsel and his staff should be free to raise issues of concern which arise in the drafting process. This can only occur if an element of independence is incorporated in legislation.*
>
> *At present there is no guarantee of independence and, consequently, little incentive to raise these issues."*

6.9 The Tharpuntoo Legal Service Aboriginal Corporation (S7) stated:

> *"Support is also given to the OPC being constituted by statute, if this will ensure that [OPC] functions which sometimes conflict with Ministerial agendas would be protected as a legislated role and a duty".*

6.10 The OPC (S9) considered:

> *"... there are reasons for suggesting that the Parliamentary Counsel's Office should be statute based ...*
>
> *First, the Office drafts legislation (both primary and subordinate) for all Ministers, departments and agencies. In performing this function, the Office needs to achieve a proper balance between the interests of its individual instructing clients and the Government as a whole. This may put it at odds with the responsible Minister's department, particularly if that department has a large legislative program. In the end, the duty of the Office must be to the Government as a whole acting through the Cabinet unless the Government otherwise directs. This function requires a measure of professional independence and mechanisms to protect and enhance the sensitive nature of the drafter's role. It is submitted that the mechanisms should be statute based.*
>
> *Secondly, if the Office is to have the function of drafting Bills and amendments for private members, it needs to perform the function independently of the Government with the members concerned as its clients. In this regard, the Office needs not only to act independently but be seen to be acting independently. Confidentiality is the corner-stone of the professional relationship between private Members and the Office.*

Thirdly, if the Office is to have a legislative scrutiny function in relation to primary or subordinate legislation, it will require the standing, authority and appropriate measure of independence to perform the function. It may also be desirable for the Parliament to debate and enact the rules that are established in relation to the scrutiny of legislation."

6.11 The OPC further suggested that rather than have an Act dealing only with the functions of the Parliamentary Counsel.

"An alternative, and, it is suggested, preferable, approach would be to have a single Act dealing comprehensively with all matters relating to the drafting and Parliamentary scrutiny of primary and subordinate legislation".

6.12 The Departmental submission (S8) suggested:

"Most Queensland Government Departments are of the view that the OPC does not need a statutory base.

As set out in the Issues Paper (p. 40, item 6.6) and as argued elsewhere, the introduction of a statutory base was used by the Commonwealth as a device for securing better pay and conditions with the intention of attracting and retaining a higher standard of personnel, rather than because of the need to assure the independence of the OPC.

There are other ways to achieve these ends, including flexibility of appointments and conditions for staff and administrative arrangements which ensure the status and independence of the Parliamentary Counsel. Such arrangements include the appointment of the Parliamentary Counsel at the level of a Department Head (Band 1) and clear instructions as to his or her reporting responsibilities including a particular responsibility to the Government as a whole.

If, however, EARC recommends that there should be a statutory base, it has been suggested that it should be a comprehensive statute which should:

- *Establish the Office of the Parliamentary Counsel;*
- *Detail that staff are governed by the Public Service Management and Employment Act;*
- *Detail their role of ensuring that the quality standards of legislation before Parliament are met;*
- *Detail OPC's responsibility to highlight breaches of fundamental legislation principles in draft legislation and have these principles defined;*
- *State the role of OPC in relation to Private Members' Bills and amendments and discretionary powers to allocate resources to that function;*
- *State OPC's role [in relation] to Committees of Parliament;*
- *State Reporting and Audit requirements;*
- *Possibly include provisions dealing with subordinate legislation."*

6.13 Finally, Ms Theresa Johnson (S10) contended:

"A statutory basis for the OPC is desirable, primarily because it increases the status and independence of the Office. The analogy drawn by the Liberal Party between the OPC and the Auditor-General, whose office is already statute based, is valid.

Other matters, such as the confidentiality of information obtained during the rendering of drafting services to private members must be enshrined in a statute.

Both the Queensland Government Departments and the OPC submitted that, if the OPC was to be statute based, the statute should be comprehensive and address the role of the OPC in relation to primary, subordinate and private members' legislation, together with the other matters previously discussed. These submissions are commended to the EARC for consideration."

Statutory Term Appointments for Senior Counsel

6.14 In relation to whether statutory term appointments should be provided for senior Parliamentary Counsel, the OPC (S9) submitted that:

> *"... statutory term appointments are desirable for the senior positions in the Office ... to achieve, among other things an appropriate balance between the Office's independence and the need for performance accountability to its principal client - the Government. If such statutory term appointments were of an appropriate length (say 5-7 years), the appointments would strengthen, and not diminish, the independence of the Office, particularly in relation to the responsible Minister's department. This is borne out by the experience of the Commonwealth Office of Parliamentary Counsel."*

6.15 Ms Theresa Johnson (S10) also considered that term appointments for a minimum of five years would be appropriate for the Parliamentary Counsel:

> *"Security of tenure is normally synonymous with independence. The Fitzgerald Report, however, makes the point that a person seeking promotion and a person seeking renewal of appointment can both be equally open to the sort of pressure which is inconsistent with independence. While this would not apply to a person, such as the Parliamentary Counsel, who has already been promoted to the highest level in the OPC, admittedly it is consistent with current practice in Queensland for senior positions to be by way of term appointments. The submissions of the Queensland Government Departments and of the OPC support the adoption of this practice in the OPC.*
>
> *The OPC submission goes further in suggesting that the term appointments to senior positions be statutory term appointments. Provided the terms were for a minimum of 5 years (or so much of that period as would occur before the appointee reached 65), the OPC contention that statutory term appointments would strengthen the independence of the Office is correct. What might be questioned is whether the position of senior Assistant Parliamentary Counsel should be the subject of a statutory term appointment."*

6.16 Mr Leo Murray QC (S1) disagreed that statutory term appointments should be provided for the Parliamentary Counsel and senior staff:

> *"I can think of no surer way of weakening the independence of a Parliamentary Counsel (if Ministers were minded to do so and counsel were susceptible to pressure) than that of making appointments for a renewable term of years. If a term may be renewed, it may also not be renewed. In common with other contract employment, there is no criteria by which to adjudge whether the term would or would not be renewed. If independence is a significant feature of Parliamentary Counsel's role then counsel's tenure of office should be secure from vagaries that might govern the question of renewal."*

Appointment of OPC Staff

6.17 In relation to staff appointed to the OPC, other than senior Counsel, the OPC (S9) submitted that:

> *"normal Public Service selection, appointment, termination and other Public Service standards should apply to the staff of the Parliamentary Counsel's Office."*

6.18 The Departmental submission (S8) commented:

> *"The common view among Government Departments is that the staff of the OPC should be public servants (as is the case now) with the possible exception of those in more senior positions. Selection, appointment and the terms and conditions of service should be no different to those of the Public Service."*

6.19 The submission from the Public Sector Management Commission (S2) considered that staff of the OPC should not be removed from public sector wide personnel standards including those covering selection:

> *"These procedures do not prevent independent action by such officers but ensure consistency in their treatment as individuals. The only exceptions are those organisations generally understood to be Government owned enterprises, in effect private businesses in which the Government is the only share holder."*

6.20 The Aboriginal and Torres Strait Islander Commission (S3) also observed:

> *"It would seem appropriate that O.P.C. selection, appointments etc should be in line with proposals of the Public Sector Management Commission and included as S.E.S. positions."*

Control by the Parliamentary Counsel over OPC Staff

6.21 In relation to whether the Parliamentary Counsel should have Chief Executive powers over the staff and resources of the OPC, the OPC (S9) contended:

> *"... in order to ensure the appropriate degree of independence for Counsel and ensure the Office serves the Government as a whole, it is important the Parliamentary Counsel has adequate independent administrative powers in relation to the staff and budget of the Office. This is the position that applies in relation to the Commonwealth Office of Parliamentary Counsel... and has been the linchpin in ensuring the independence of that Office."*

6.22 However, Mr Leo Murray QC (S1) cast doubt on whether the Parliamentary Counsel should have statutory control over the staff of the OPC:

> *"I do not see legislative recognition adding one iota to the independence of members of the Office of Parliamentary Counsel or to securing that independence against some conjectured threat that has not yet materialised. I do see legislative recognition adding to the administrative burdens of the Parliamentary Counsel. The work performed in the office is of a specialised nature and consists in preparation and publication of legislation and associated material. In my view, the members of the office should be able to devote the whole of their time to those tasks, and should be required to be concerned in administrative processes as little as possible. These processes should be the concern of the Ministerial department to which the office is attached."*

ANALYSIS OF EVIDENCE AND ARGUMENTS

6.23 The Commission considers that the OPC should be given a statutory basis in a proposed new Act of Parliament. The Commission proposes that this Act be entitled the "Legislative Standards Act" (the proposed Bill is contained in Appendix H). The Commission suggests this title to emphasize the primary purpose of the legislation, namely, to achieve and maintain high standards of Queensland legislation.

6.24 The Commission considers that the proposed Legislative Standards Act should clearly establish the OPC's key legislative drafting and advisory functions and provide for independent control by the Parliamentary Counsel over the resources of the Office. These measures would substantively and symbolically reinforce the independence of the OPC consistent with the role of Parliamentary Counsel in providing independent advice to Government and ensuring high standards in legislation. Defining the functions of the OPC by statute, including the right of the OPC to provide advice in the area of fundamental legislative principle, would place the process of legislative scrutiny within Government on a more secure footing and provide for a measure of continuity.

6.25 The Commission agrees with submissions that there is no compelling reason for removing staff of the OPC from the Public Service. Staff should continue to be appointed under the *Public Service Management and Employment Act 1988* (or future equivalent), although the process of appointment should be controlled by the Parliamentary Counsel as Chief Executive of the Office.

6.26 In respect of the appointment of the Parliamentary Counsel, the Commission notes that in recent years appointments to senior Public Service positions, including Chief Executive, have been by way of contract employment. It is understood that the Government intends to abolish contract employment for senior positions below Chief Executive and to restore tenure to these positions subject to performance. However, contract employment will continue for Chief Executive positions.

6.27 The Commission further notes that selection procedures for Chief Executive positions involve the constitution of a selection panel which is chaired by the responsible Minister and includes a representative of the Public Sector Management Commission.

6.28 The Commission makes no observation on these selection and appointment procedures for departmental Chief Executives except to observe that in relation to the position of Parliamentary Counsel it would seem inappropriate for a Minister to be involved in the selection process. The independence required of the position would suggest that selection be undertaken by an independent advisory panel. It is considered that this panel should include a representative of the Public Sector Management Commission and a serving Parliamentary Counsel from a jurisdiction outside Queensland.

6.29 The Commission proposes, therefore, that separate statutory provisions be made for appointment of the Parliamentary Counsel under the proposed Legislative Standards Act. The proposed Act should provide that the Parliamentary Counsel be appointed on a term basis of up to 7 years (in practice it is recommended that appointment be for a minimum of 5 years). The terms and conditions of service should be determined by the Governor in Council.

6.30 It is not considered necessary for the particular selection procedure outlined in paragraph 6.28 to be prescribed by the proposed Act.

6.31 The Commission considers that the Parliamentary Counsel should be appointed for a fixed term. The Commission does not agree, with respect, with the observations of Mr Leo Murray QC, in paragraph 6.16 above. There is no necessary correlation between short terms and independence, particularly with persons of the calibre one would expect to occupy the position of Parliamentary Counsel. No holder of a statutory office for a fixed term should have any expectation as to reappointment and should proceed to carry out his or her duties on that basis. There has never been any suggestion, for example, that the Commissioners of the Criminal Justice Commission or of this Commission are less independent because they hold office on fixed terms.

RECOMMENDATIONS

6.32 **The Commission recommends that:**

(a) a new statute be enacted entitled "The Legislative Standards Act";

(b) the proposed Act should:

(i) establish a position entitled "The Queensland Parliamentary Counsel" and an "Office of the Queensland Parliamentary Counsel";

(ii) exclude the position of the Parliamentary Counsel from the *Public Service Management and Employment Act 1988*;

(iii) declare that to be eligible for appointment as the Parliamentary Counsel, a person must be a barrister or solicitor or legal practitioner of the High Court or of the Supreme Court of a State or Territory of not less than 7 years standing;

(iv) provide for the Parliamentary Counsel to be appointed by the Governor in Council on a renewable term basis. A term may be up to 7 years, however, the Commission recommends that, in practice, appointments be for a minimum of 5 years;

(v) provide that remuneration and conditions of service for the Parliamentary Counsel should be determined by the Governor in Council;

(vi) provide that staff of the OPC are to be appointed under the *Public Service Management and Employment Act*; and

(vii) state that the functions and resources of the OPC are under the control of the Parliamentary Counsel and establish that in relation to the OPC the Parliamentary Counsel:

(A) has powers of a Chief Executive under the *Public Service Management and Employment Act*;

(B) is an accountable officer under the *Financial Administration and Audit Act 1977*.

(c) in respect of selection for the position of the Parliamentary Counsel, the following procedures should be instituted:

(i) selection should be undertaken by an independent advisory panel which should include a representative of the Public Sector Management Commission and a serving Parliamentary Counsel from interstate. The panel should not include a Minister of the Crown;

(ii) the selection panel should forward the nomination to the Attorney-General who should submit the nomination to the Governor in Council; and

(iii) where the Governor in Council appoints a person not recommended by the selection panel, the Attorney-General should inform Parliament of the fact.

6.33 The Commission notes that the terms "Office of the Parliamentary Counsel" or "Parliamentary Counsel's Office" are used in several jurisdictions. To clarify that the Queensland OPC is responsible for drafting Queensland laws, the Commission considers that the position of Parliamentary Counsel should be entitled "The Queensland Parliamentary Counsel" and the OPC should be renamed accordingly as reflected in paragraph 6.32(b)(i). However, to avoid confusion, the Commission uses the terms "Parliamentary Counsel" and "OPC" in the text of this Report when referring to both existing arrangements and arrangements proposed by the Commission.

Comparisons Between the Parliamentary Counsel and the Auditor-General

6.34 The Commission notes the suggestion in two submissions (S5 and S10) that the independence required for the Parliamentary Counsel is analogous to that of the Auditor-General. However, the Commission observes that the independence required of Auditor-General is qualitatively different to that expected of Parliamentary Counsel and this difference is reflected in the respective relationships of the two positions to Parliament.

6.35 Auditors-General exercise an independent review function on behalf of the Parliament and are required to be totally independent of the Executive in auditing and reporting on the Government's financial stewardship. The Auditor-General's relationship with the Parliament is reinforced by statutory provisions which require the Auditor-General to report to Parliament on audits and which enable the Auditor-General to be removed from office only on address from Parliament. Some overseas jurisdictions go further and give Parliament, as opposed to the Executive, the right to undertake the selection of Auditors-General and determine the annual budget for the Auditor-General's office (see EARC Issues Paper No. 9).

6.36 By contrast, Parliamentary Counsel in virtually all jurisdictions have been officers of Government. Their primary function is to provide a drafting and legislative advisory service to the Government of the day. They have not been officers of Parliament or primarily responsible to Parliament.

6.37 This Report does not propose to recommend any alteration of these arrangements. The Parliamentary Counsel and his or her staff will continue to be responsible to the Government. Statutory recognition for the Office will ensure that the Parliamentary Counsel has sufficient authority within Government to provide independent advice on legislative principle and other matters relating to the drafter's professional responsibilities. However, at the end of the day, the Parliamentary Counsel and his or her staff are officers of government and must act in accordance with lawful directions given by Ministers.

6.38 The Commission notes that a recent strategic management review of the Victorian Parliament conducted for the Presiding Officers has recommended that the Victorian OPC should be responsible to Parliament and not to the Executive. The review contends:

> *"Parliamentary Counsel ... exist primarily to facilitate the working of Parliament, and in our view this office should also form part of the parliamentary organisation. We also consider it inappropriate that the Parliamentary Counsel's office should be within the Attorney-General's department, part of the executive arm of government...The fact that there are strong links between the cabinet office and government departments and the Parliamentary Counsel's office does not detract from this.*
>
> *The transfer of these resources to the parliamentary organisation would furnish Parliament with a strong group of staff skilled in matters related to Parliament's primary function of making and renovating legislation.*
>
> *We consider that the Chief Parliamentary Counsel ought to report directly to the Presiding Officers.*
>
> *As with the Auditor-General's staff, staff appointed in future to the Parliamentary Counsel's office should be appointed under the Parliamentary Officers' Act, with appropriate provisions to preserve entitlements and allow cross-movement between the Public Service and the Parliamentary Service"* (Victoria, Parliament 1991, p.31).

6.39 The Commission reiterates that since their creation in the nineteenth century, Parliamentary Counsel have been responsible to the Executive. Were the OPC to be made responsible to the Queensland Parliament this could have the effect of:

(a) blurring lines of accountability - Parliamentary Counsel would be generally responsible to Parliament yet undertake most of their drafting and advisory functions for the Government;

(b) creating difficulties for the OPC in observing legislative principles as many of these relate to legal policies established by the Government;

(c) weakening important links between the OPC and the Attorney-General - the Commission considers that the OPC must have ready access to the First Law Officer and his or her Department in the important area of legislative principle (para. 6.55 refers); and

(d) blurring distinctions between the role of Counsel responsible for drafting of legislation (the OPC) and the role of Counsel engaged by Parliamentary Committees to independently review legislation sponsored by the Executive (see para. 8.47).

Ministerial Responsibility

INTRODUCTION

6.40 The Fitzgerald Report raised the appropriateness of the OPC being under the control of the Premier from the standpoint of independence.

6.41 Since 1933, the OPC in Queensland has been responsible to the Premier. Prior to 1933, the Parliamentary Counsel was responsible to the Attorney-General and Minister for Justice.

6.42 EARC Issues Paper No. 7 observed that in other States, Parliamentary Counsel have generally come under the Attorney-General, although at times responsibility has been exercised by the Premier.

6.43 The Issues Paper suggested that reasons for giving the Attorney-General responsibility have included:

(a) the Attorney-General's traditional responsibilities for legislation, including advice on legislative issues;

(b) a perceived need for Parliamentary Counsel to have access to the First Law Officer in representing legislative issues to Cabinet;

(c) provision within the Department of the Attorney-General of common legal services for Government;

(d) the early history of drafting where legal officers within the Department sometimes doubled as Parliamentary drafters; and

(e) the tradition of independence and impartiality required of Attorneys-General in the provision of legal advice to the Government.

6.44 In respect of the Premier having responsiblity, the Issues Paper observed:

> *"An argument in favour of making the Parliamentary Counsel responsible to the Premier or Prime Minister is the involvement of the Premier/Prime Minister in determining the work priorities of Parliamentary Counsel in respect of Government bills.*
>
> *Premiers and Prime Ministers as chairpersons of Cabinet are responsible for assisting Cabinet to co-ordinate the Government's legislative program. In Queensland this is done through the Parliamentary Business and Legislation Committee of Cabinet of which the Premier is Executive Chairman (the Chairman is the Leader of the House, presently the Minister for Police and Emergency Services). Secretarial services to this Committee are provided by the Cabinet Office which is located within the Department of the Premier, Economic and Trade Development.*
>
> *The Committee works closely with the OPC in determining the drafting timetable and Counsel is required to report regularly to the Committee on progress in drafting bills. This necessitates close liaison between the OPC and Cabinet Office staff.*
>
> *A modifying perspective is that close liaison between Counsel and Cabinet offices also occurs in jurisdictions where Parliamentary Counsel are responsible to the Attorney-General, for example in Victoria. An issue is whether effective liaison depends on Counsel being attached to the Premier's Department."* (pp. 45-46)

EVIDENCE AND ARGUMENTS

6.45 The Aboriginal and Torres Strait Islander Commission (S3) considered that the Attorney-General should have responsibility:

> *"The Attorney General should have Ministerial responsibility.*
>
> *The O.P.C. should answer directly to the Attorney General. The Attorney General's Department would provide administrative support to a separate OPC office."*

6.46 The PSMC (S2) considered that, on balance, the OPC should be attached to the Department of the Attorney-General:

> *"On the one hand attachment to a Premier's Department may be important in ensuring some independence from the competing demands of departments and their Ministers. On the other, the location within the Department of the Premier, Economic and Trade Development isolates professionals from the more well developed career path which lawyers might appreciate if attached to a legal department such as Attorney-General or Justice.*
>
> *With an eye to career paths, therefore, we would suggest including the Office of Parliamentary Counsel within one of the legal agencies, presumably the Department of the Attorney-General. However, we acknowledge that a number of locations are possible and this is a matter for judgement rather than principle."*

6.47 The Departmental submission (S8) suggested that:

> *"... Departments which did comment tended to favour location with the Attorney-General, both by virtue of the legal character of the work performed and because this is the more usual location in other jurisdictions."*

6.48 The Departmental submission noted the views of the Department of Justice that:

> *"'The Department of the Attorney-General was established primarily to ensure that matters of legal principle would be given greater effect to. One of those matters was the traditional independence and impartiality of the Office of the Attorney-General.*
>
> *It is considered that the independence and impartiality of the OPC would be bolstered if it was placed under the control of the Attorney-General rather than any other Minister.*
>
> *As the Department of the Attorney-General is the primary provider of legal services to the Government, and as the OPC essentially falls within this category, it is considered that it would be sensible for the Attorney-General to have responsibility for it.'"*

6.49 The Departmental submission further noted that:

> *"'... if the OPC was brought within the Department of the Attorney-General there would be greater intradepartmental mobility for officers. This would encourage people to both move into and out of the OPC as and when circumstances were appropriate. This would not weaken the independence of the OPC but would instead strengthen it by ensuring that officers who were appointed to it would not have limited alternative career prospects after that time.'"*

6.50 However, the Departmental submission also presented arguments in favour of location within the Premier's Department as expressed by Treasury:

"'The arrangement whereby OPC is attached to Premier's seems to work well, especially given the links to the Cabinet Office. It also provides a useful counterpoint to the Attorney-General's Office in the provision of legal advice. If the Attorney-General and the OPC are in conflict about a key point of law, surely the Cabinet - not just the chief law officer - should have a say in how the matter should be resolved.'"

6.51 The OPC (S9) considered:

"From the Government's point of view, it is essential that the Government retain direct control over the preparation of the Bills in its legislative program. Because the Government's legislative program is of such paramount importance, the practice in Queensland, the Commonwealth, the United Kingdom and other jurisdictions is for the control of the legislative program not to be conferred on a single Minister, but rather to be retained by the Cabinet itself. The Cabinet's control is usually exercised through Cabinet Committees: in the Commonwealth, the Parliamentary Business and Legislation Committees and, in Queensland, the Parliamentary Business and Legislation Committee. Because of their particular ministerial responsibilities, the Leader of the House of Assembly and the Attorney-General would usually be members of the relevant Cabinet Committee.

Whether or not the Attorney-General has ministerial responsibility for the Office, appropriate regard would need to be had to the Attorney-General's ministerial responsibility as the First Law Officer of the Crown."

6.52 Mr Leo Murray QC (S1) considered that the OPC should remain under the Premier:

"In the end, it is a matter for the Premier for the time being to elect how closely the Premier wishes to be associated with the management of the government legislative programme. That programme provides the legal framework by which the government's policy programme is made effective. It is of significance to the government's welfare.

Whatever may be the popular perception, or that of political parties, the government for the time being is that of the Premier in accord with Westminster principles. The Premier is its leader, its leading spirit, and the person who is responsible for its fate. It is in a Premier's interests to have ready access to information and advice on the progress of the legislative programme and on matters relevant thereto that may be brought to the attention of the Premier.

During my term as Parliamentary Counsel I have been questioned by a Premier on matters concerning proposed legislation under the aegis of other Ministers. It seems to me that a Premier who wished to keep a finger on the pulse would prefer to deal with a counsel directly responsible to him or her rather than with counsel responsible to the Attorney-General or some other Minister ...

One objective merit in leaving the office of Parliamentary Counsel in the Premier's Department is that the department has little (if any) legislation of its own. This allows the Parliamentary Counsel, being free of other Ministerial influence, to apportion the available time of the office appropriately to the whole of the legislative programme. I do not know what legislation the Attorney-General, as a distinct entity, might be concerned with but previously, when that portfolio was combined with that of Minister for Justice there would have been a distinct possibility of counsel being pressured to give priority to that department's legislation."

6.53 Ms Theresa Johnson (S10) commented:

"For practical purposes, there are 3 possible repositories of responsibility for the OPC. One is the current repository, namely, the Premier. Another is the Attorney-General and another is some other Minister or Parliamentary Committee who is given responsibility for the OPC and the Law Reform Commission.

While each possibility has its advantages and disadvantages, the general consensus seems to be that the Attorney-General should have Ministerial responsibility. The perceived problem of the Attorney-General preferring and achieving higher priority for his or her own bills would not arise, if the Parliamentary Business and Legislation Committee continues to determine drafting priorities.

There is also much force in the argument that assigning ministerial responsibility to the Attorney-General, allows greater career and collegiate opportunities for the lawyers in the OPC and the Attorney-General's Department."

ANALYSIS OF EVIDENCE AND ARGUMENTS

6.54 The Commission considers that in essence the OPC has four lines of accountability:

(a) to the Attorney-General in ensuring that legislation is legally effective and that the process of drafting takes into account legislative principle;

(b) to the Premier, as Chairperson of Cabinet, in ensuring that legislation is drafted in accordance with the Cabinet's agreed drafting program and Cabinet decisions;

(c) to individual Ministers in ensuring that an efficient drafting service is provided to their departments; and

(d) to the Parliament in providing a confidential drafting service to Members and in ensuring that any statutory obligations imposed on the Parliamentary Counsel are discharged.

6.55 It is suggested that the deciding factor in determining Ministerial responsibility is the need for the Parliamentary Counsel to have access to the Attorney-General who carries primary responsibility for advising Cabinet on matters of law and legal policy. It is especially important that the Parliamentary Counsel should feel able to count on the support of the First Law Officer in carrying out Counsel's advisory role proposed in the Report. For these reasons in particular, the Attorney-General would appear to be the most appropriate Minister to have Ministerial responsibility for the OPC.

6.56 The responsibilities of the OPC will, of course, require the OPC to continue to have close relationships with the Cabinet Office. As well, in respect of certain matters identified in the Report, the Parliamentary Counsel will be required to report directly to the Premier as Chair of Cabinet (para. 3.35(b) refers).

6.57 It is noted that Ministerial responsibility for a unit of public administration is not normally assigned by legislation but by administrative arrangements. However, in view of the importance of Ministerial responsibility to the appropriate functioning of the OPC it is appropriate that the Attorney-General's responsibility should be established by statute.

6.58 In the Commonwealth and New Zealand, the respective legislation setting up the Parliamentary Counsel function prescribes that the Attorney-General has responsibility for this function.

RECOMMENDATION

6.59 **The Commission recommends that the proposed Legislative Standards Act should provide that the Minister responsible for the OPC is the Attorney-General.**

Relationship with the Department of the Attorney-General

6.60 While the Parliamentary Counsel should have autonomy over the functions and resources of the OPC, the Commission considers that there would be advantages in attaching the OPC, for administrative support purposes, to the Department of the Attorney-General. This would enable the Chief Executive of the Department of the Attorney-General and the Parliamentary Counsel, where appropriate, to negotiate the provision of common services for both agencies.

6.61 Ideally, the OPC should be located in the same building as the Department of the Attorney-General to facilitate communication between the two. This might present some difficulties as the OPC is presently located in The David Longland Building close to the Cabinet Office and Parliament House, while the Department of the Attorney-General is located in the State Law Building near the Law Courts Complex. It is suggested that this matter be investigated further with a view to achieving a mutually convenient location.

RECOMMENDATIONS

6.62 **The Commission recommends that:**

(a) the OPC should be attached, for administrative support purposes, to the Department of the Attorney-General; and

(b) consideration be given to locating the OPC in the same building as the Department of the Attorney-General.

CHAPTER SEVEN

DRAFTING STYLES, LEGISLATIVE INFORMATION AND TRAINING

Plain English Drafting

EVIDENCE AND ARGUMENTS

> *"I'm the Parliamentary Draftsman*
> *I compose the country's laws,*
> *And of half the litigation*
> *I'm undoubtedly the cause.*
> *I employ a kind of English*
> *Which is hard to understand;*
> *Though the purists do not like it,*
> *All the lawyers think it's grand...*
>
> *I'm the Parliamentary Draftsman*
> *And my meanings are not clear,*
> *And though my words are merely language*
> *I have made them my career.*
> *I admit my kind of English*
> *Is inclined to be involved -*
> *But I think it's even more so*
> *When judicially solved.*
>
> *I'm the Parliamentary Draftsman,*
> *And they tell me it's a fact*
> *That I often make a muddle*
> *Of a simple little Act.*
> *I'm a target for the critics,*
> *And they take me in their stride -*
> *Oh, how nice to be a critic*
> *Of a job you've never tried!"* (Lack 1960, p.779)

7.1 These humorous lines were penned several decades ago, possibly by a former Queensland Parliamentary Counsel, John Laskey Woolcock (Lack 1960, p.779). It illustrates that the language employed by legislative drafters has been a lively issue for many years, with laypersons and increasingly lawyers reflecting adversely on its tendency to obscurity and complexity.

7.2 The debate over drafting styles has become more pronounced in the past ten years in association with a world-wide movement to introduce "plain English " drafting for Acts and subordinate legislation. Making statutes and subordinate legislation more intelligible to the layperson and the professional lawyer is seen as having numerous advantages including:

(a) reducing legal costs associated with statutory interpretation; and

(b) improving the quality of administration by making statutes more comprehensible to Government officers required to administer statutory based programs.

7.3 At the Commission's Public Seminar, several speakers addressed the need for Queensland legislation to be drafted in plain English. The issue was also a major focus of the Bond University Legislative Drafting Conference.

7.4 It appears that significant progress is being made by the OPC in introducing more modern drafting styles. A reading of recent statutes produced by the OPC suggests that major improvements have already been made. The Parliamentary Counsel has also initiated projects to further review drafting styles within the Office.

7.5 The Commission is confident that the move towards a clearer legislative style will become established among Parliamentary Counsel. As an additional incentive, however, the Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should have authority to draw the attention of Parliament to any bill or subordinate legislation that appears to be ambiguous or drafted in an insufficiently clear or precise style. The proposed terms of reference for the Committee outlined in paragraph 8.23(b)(F) make mention of this role.

7.6 The Commission also considers that the Parliamentary Counsel should have authority to issue standards relating to drafting style and format for observance by agencies (including local authorities) responsible for drafting their own subordinate legislation. This recommendation is made in Chapter Three (para. 3.28(c)).

Gender Neutral Drafting

EVIDENCE AND ARGUMENTS

7.7 It would seem to be generally accepted that Government publications and legislation should no longer use language that unnecessarily discriminates against any one sex.

7.8 In Queensland the OPC is alert to this principle. The Premier has directed that gender-neutral language be employed in the drafting of legislation and the Parliamentary Counsel has recently issued a Drafting Instruction which provides guidance in achieving this objective (Queensland OPC 1991a) .

7.9 As part of its review into legislative drafting styles, the OPC has issued a discussion paper which highlights the need for amendments to the *Acts Interpretation Act 1954* to make the rules in that Act relating to gender, gender-neutral (Queensland OPC 1991c).

7.10 The Commission agrees with these initiatives. The Commission considers further that guidance on non-sexist drafting should be included in the proposed guidelines to be issued by the Parliamentary Counsel to local authorities and other agencies responsible for drafting subordinate legislation.

Dissemination of Legislation

EVIDENCE AND ARGUMENTS

7.11 In Queensland, statutes and statutory reprints have been made available to the public in printed form through the Government Printer and commercial law publishers.

7.12 In some other jurisdictions, Acts and, in some cases, subordinate legislation, are now available for on-line searching through computerised databases.

7.13 Until recently, Queensland appears to have made little progress in establishing on-line facilities for statute retrieval. As well, significant backlogs appear to have arisen in the consolidation and reprinting of legislation, particularly subordinate legislation. Moreover, the Commission notes that many amended Acts are consolidated only when a significant number of amendments occur or when a department requests that a consolidation is made.

7.14 In June 1990 responsibility for administrative and funding arrangements for legislative publications including statutory reprints was transferred from the Department of Justice to the OPC. As well, administration of relevant Acts (the *Acts Citation Act 1903*, the *Statute Law Revision Acts, 1908 to 1959*, the *Statutes Reprint Act 1936*, the *Statutory Instruments Reprint Act 1952* and the *Queensland Statutes (1962 Reprint) Act 1962)* was transferred to the Department of the Premier, Economic and Trade Development. The publishing program was given an initial budget of $300,000 for the 1990/91 financial year. A copy of a paper from the Parliamentary Counsel outlining the OPC's publication and information role is reproduced in Appendix G.

7.15 The OPC has commenced moves to establish a computerised drafting and publishing system in association with the Department of the Attorney-General. The declared aim of the system is to provide accurate, up-to-date texts and information relating to Queensland legislation in printed and database format (see Appendix G).

7.16 Additionally, the Attorney-General has reconstituted a consultative committee chaired by the Hon. Mr Justice de Jersey to advise on matters related to the marketing and integration of database facilities.

ANALYSIS OF EVIDENCE AND ARGUMENTS

7.17 The Commission has not undertaken an investigation of the OPC database project. However, the Commission strongly supports the principle of having a readily accessible database for retrieval of both Acts and subordinate legislation. As well, the Commission considers that:

(a) particular attention should be given to improving the process for issuing consolidated editions of Acts and subordinate legislation;

(b) any database developed should have the facility to allow consolidations to occur almost immediately after amendments are made to the legislation. These consolidations should be available in database form and also in printed form taking into account cost effectiveness considerations;

(c) the Government should seek to ensure that sufficient resources are provided to the OPC, and any associated agencies involved in the project, for development and maintenance of the project;

(d) the proposed Legislative Standards Act should state as one of its objectives, the need to ensure the satisfactory state of the statute book and the availability of legislative texts and information; and

(e) the Act should give authority to the proposed Parliamentary Scrutiny of Legislation Committee to monitor progress toward achieving this objective and to report to Parliament on any reviews conducted into this area.

7.18 The Commission also notes the difficulty for people outside Brisbane in obtaining ready access to Queensland statutes supplied by the Government Printer. The Commission considers that the Government Printer should examine options to improve this availability, perhaps through the use of local retail outlets as sub-agents.

7.19 The Commission endorses the suggestion in the submission from Ms Theresa Johnson (S10) that subordinate legislation should be issued in an annual volume as occurs in Victoria. In Queensland, only statutes are made available in annual volumes.

RECOMMENDATIONS

7.20 **The Commission** agrees with the Government's proposal to establish a computerised database for retrieval of both Acts and subordinate legislation and **recommends that:**

(a) **particular attention should be given to improving the process for issuing consolidated editions of Acts and subordinate legislation with the aim of ensuring that consolidations occur almost immediately after amendments are made to the legislation. These consolidations should be available in database form and also in printed form taking into account cost effectiveness considerations;**

(b) **the Government should seek to ensure that sufficient resources are provided to the OPC and any associated agencies for development and maintenance of the project;**

(c) **the proposed Legislative Standards Act should state as one of its objectives, the need to ensure the satisfactory state of the statute book and the availability of legislative texts and information;**

(d) **the Act should give authority to the proposed Parliamentary Scrutiny of Legislation Committee to monitor progress toward achieving this objective and to report to the Legislative Assembly on any reviews conducted by the Committee into this area;**

(e) **the Government Printer should examine options to improve the availability of legislative texts and information to persons outside the Brisbane metropolitan area; and**

(f) **subordinate legislation should be issued in an annual volume in the same manner as for statutes.**

Staff Training

7.21 EARC Issues Paper No. 7 observed:

> *"It is generally held that legislative drafting is a highly specialised and exacting skill, requiring years of experience to perfect. In the past, lawyers have generally been recruited to Parliamentary Counsel offices at a relatively young age - often straight from law school. Training is traditionally provided on the job (VLRC 1987, p. 64).*
>
> *In the past two decades, attempts have been made in various countries to provide formal training courses for drafters ...*

Arguments in favour of formal training courses for drafters include:

(a) on-the-job instruction is not always effective given time constraints;

(b) formal courses can aid in establishing uniform standards and up to date drafting techniques (eg. plain English and non-sexist approaches); and

(c) formal courses provide opportunity for Counsel to obtain ideas and experiences outside the confines of their office and their particular jurisdiction.

However, it is also acknowledged that formal training has limitations, and that it does not replace the need for on-the-job instruction and experience gained through actual drafting.

An issue raised in this Paper is the extent to which training courses or seminars could be used to provide Parliamentary Counsel with opportunities to address ethical issues associated with their role" (pp.49-50).

7.22 The Issues Paper also asked whether greater use should be made of secondments in broadening the experience of Queensland Parliamentary Counsel:

"Secondments and interchanges are potentially effective means of broadening the experience of Government officers by exposing them to techniques, practices and principles applied in other jurisdictions.

The Commonwealth Office of Parliamentary Counsel regularly uses secondments and interchanges for this purpose. For example, staff have been exchanged with the Canadian Legislative Counsel and with the drafting section of the United Kingdom Law Reform Commission.

Although an interchange scheme has been developed for the Queensland Public Service, it appears that this scheme has not been substantially utilised in relation to the Queensland OPC.

Secondments and interchanges can be expensive and difficult to organise, particularly on an international basis. Nevertheless, there could be benefits for Queensland Parliamentary Counsel to be seconded to the Commonwealth and selected State Parliamentary Counsel offices for certain periods" (pp.50-51).

EVIDENCE AND ARGUMENTS

7.23 Several submissions, including the OPC submission (S9), supported the concept of off-the-job training for drafters in the OPC. The OPC submission commented on the potential for secondments to other jurisdictions which, it suggested, would:

"... provide an invaluable means of exposing Parliamentary Counsel to different approaches and ideas, particularly in cases where Counsel have been drafting for some time. The experience of the Commonwealth Office of the Parliamentary Counsel has been that exchange schemes are a very valuable means of staff development both for the Counsel concerned and for the Offices involved."

7.24 Since EARC Issues Paper No. 7 was released, the OPC has conducted a three day conference for its drafters in association with the Law Reform Commission of Victoria and Bond University. This conference addressed issues concerned with the policy role of Counsel, judicial interpretation of statutes, plain English techniques and computerised drafting aids.

ANALYSIS OF EVIDENCE AND ARGUMENTS

7.25 The Commission observes that legislative drafters tend to be somewhat insulated from the mainstream of Public Service activity and career development, and that seminars like the one recently conducted at Bond University are very important in exchanging ideas between drafting offices.

7.26 The Commission observes that future training for the OPC should give priority to matters addressed in this report, in particular issues associated with the area of legislative principle. With the greater emphasis on legislative principles proposed for the Queensland *Cabinet Handbook*, and with the operation of the proposed Parliamentary Scrutiny of Legislation Committee, greater responsibility will be placed on individual Counsel to understand the application of these principles. In the Commonwealth, Parliamentary Counsel have had the benefit of ten years experience of the Senate Scrutiny of Bills Committee and its reports. Through this process they have become aware, as suggested by Ms Penfold, of the kind of provisions that may be questioned by such scrutiny committees (Penfold 1991, pp.11-12).

7.27 The Commission suggests that there could be merit in having persons expert in the field of legislative scrutiny conduct a series of seminars for Counsel which would allow legislative principles and their practical application to be addressed in depth, in a professional environment. These seminars could be run jointly with the Department of the Attorney-General.

7.28 The Commission also considers that secondments to other drafting offices in Australia should be organised for Queensland Parliamentary Counsel for the reasons suggested in EARC Issues Paper No. 7 and the OPC submission. It could be particularly beneficial for secondments to be arranged with jurisdictions having a strong tradition of legislative scrutiny.

7.29 Finally, opportunity should be explored with the Department of the Attorney-General to second individual Parliamentary Counsel to legal policy and advisory sections within the Department of the Attorney-General. This would assist in keeping Parliamentary Counsel abreast of trends in legal policy and in understanding the relationships between legal policy and drafting. It would also help broaden the career development and opportunities of those drafters concerned. Secondments to the OPC from the Department, law firms and universities could also be encouraged.

RECOMMENDATIONS

7.30 **The Commission recommends that:**

(a) **the OPC and the Department of the Attorney-General conduct a series of seminars for Parliamentary Counsel and public servants generally which would allow legislative principles and their practical application to be addressed in depth;**

(b) **the Parliamentary Counsel should seek to arrange periodic secondments of Counsel to drafting offices in other jurisdictions, particularly those with a strong tradition of legislative scrutiny; and**

(c) the Parliamentary Counsel should explore opportunities with the Department of the Attorney-General to second individual Parliamentary Counsel to legal policy and advisory sections within the Department of the Attorney-General and to encourage the secondment of lawyers from the Department, law firms and universities to the OPC.

CHAPTER EIGHT

PARLIAMENTARY SCRUTINY OF LEGISLATION

Introduction

8.1 The proposed recommendations in this Report relating to clarification of key legislative principles, the role of the Parliamentary Counsel in advising on these principles, and the provision of statutory independence for the OPC are designed to strengthen the system of legislative scrutiny within Government.

8.2 To the extent that the system operates effectively, Parliament will have substantial assurance that legislation has been subjected to detailed scrutiny by the Government before its introduction into the Legislative Assembly, or its tabling in the case of subordinate legislation.

8.3 An important question, however, remains: how far should the Parliament be expected to rely on scrutiny procedures within Government when seeking to test legislation against fundamental principles?

Scrutiny of Bills

8.4 EARC Issues Paper No. 7 observed that:

> *"Much of the modern debate about the adequacy of contemporary checks and balances in the scrutiny of draft legislation has centred not so much on the role of Government officers but on the role of Parliament.*
>
> *For some decades, concern has been expressed about the limitations on effective Parliamentary scrutiny of proposed legislation caused by the growing volume of bills, the location of expertise in the bureaucracy and the partisan nature of party politics.*
>
> *One solution adopted in many Westminster legislatures has been to establish a system of all-party committees to scrutinise legislation and government administration and to report significant issues to the Parliament. Most of these committees are concerned with the policy aspects of draft legislation which may be referred to them. However, in 1981 the Australian Senate established a Standing Committee for the Scrutiny of Bills with terms of reference to examine all bills introduced into Parliament and to report to the Senate on bills introduced into that House which:*
>
> *'(i) trespass unduly on personal rights and liberties;*
>
> *(ii) make such rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;*
>
> *(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;*
>
> *(iv) inappropriately delegate legislative power; or*
>
> *(v) insufficiently subject the exercise of legislative power to Parliamentary scrutiny"* (pp.25-26).

8.5 The Issues Paper further observed:

> *"The work of the Scrutiny of Bills Committee is based on a number of propositions. These include the following:*

(a) while Government guidelines usually require departments, legal officers and Parliamentary Counsel to identify proposals that might reduce legal rights, the Government may still choose as a matter of policy to adopt a deliberate course in this direction. There may be sound policy reasons for this choice of action but it is incumbent upon the Parliament to ensure that such proposals are identified and adequately debated;

(b) the nature of bureaucracy and chain of command may sometimes weaken the professional independence of Government legal officers (including those in Attorney-General's Departments) and their capacity to provide independent advice on sensitive issues; and

(c) the pace of legislative drafting may lead to some issues being overlooked or insufficiently considered by departments and Ministers" (p.26).

8.6 Since 1975, the Queensland Parliament has had a Committee responsible for scrutinising subordinate legislation tabled in the Legislative Assembly. This Committee is the Committee of Subordinate Legislation and is modelled on similar committees operating in the Australian Senate and State legislatures.

8.7 The Committee of Subordinate Legislation is established by resolution of the Legislative Assembly at the commencement of each Parliament. The duty of the Committee is to consider all regulations, rules, by-laws, ordinances, orders in council and proclamations (collectively described in the Committee's terms of reference as "regulations") which are required to be tabled in the Assembly and which are subject to disallowance by resolution, and to examine in each case:

"a) whether the Regulations are in accord with the general objects of the Act pursuant to which they are made;

b) whether the Regulations trespass unduly upon rights previously established by law;

c) whether the regulations contain matters which in the opinion of the Committee should properly be dealt with in an Act of Parliament;

d) whether for any special reason the form or purport of the Regulations calls for elucidation;

e) whether the regulations unduly make rights dependent upon administrative and not judicial decisions" (Hansard 6 March 1990).

8.8 Where the Committee forms the opinion that the instrument should be disallowed, it is required to report that opinion to the Legislative Assembly before the end of the period during which a motion for disallowance of the instrument may be moved.

8.9 The Committee of Subordinate Legislation has no authority to examine bills introduced into the House. Although bills are subject to parliamentary debate, during which opportunity is provided for amendments to be moved by the Opposition or Government, there is no equivalent to the Senate Standing Committee for the Scrutiny of Bills through which bills are subject to detailed scrutiny in terms of legislative principle.

8.10 No other State legislature has introduced a bills scrutiny process equivalent to that of the Senate, although in 1987 the Legal and Constitutional Committee of the Victorian Parliament recommended that it be given authority to examine bills as well as subordinate legislation in terms of the matters considered by the Senate Scrutiny of Bills Committee (Legal and Constitutional Committee 1987, p.125). However, the ACT Legislative Assembly upon its establishment, set up a "Standing Committee for the Scrutiny of Bills and Subordinate Legislation" which combines scrutiny of bills and subordinate instruments in terms of principles examined by the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances (the equivalent to the Queensland Committee of Subordinate Legislation).

8.11 When the Commission released Issues Paper No. 7 in September 1990 it noted that it would not, in the course of the OPC review, be examining the operation of the Queensland parliamentary committee system to determine the adequacy of legislative scrutiny procedures. A key factor in this decision was an informal agreement between the Chairman of the Commission and the Speaker of the Legislative Assembly that the Commission would refrain from examination of the operations of the Parliament during 1990 and early 1991 to enable Parliament to consider its own practices.

8.12 Nevertheless, in the course of the review into the OPC, it became apparent that any system of checks and balances in the making of legislation within Government could not be satisfactorily considered unless they were also related to the system of checks and balances operating in the parliamentary arena.

8.13 Accordingly, while the Commission plans to commence a general review into the parliamentary committee system later this year, the Commission did widen its enquiries in the course of the OPC review to examine aspects of parliamentary committee procedures in relation to legislative scrutiny.

8.14 A factor which prompted the Commission to do this was a suggestion in two submissions that the Commission should examine whether a Scrutiny of Bills Committee should be established by the Legislative Assembly. One of the submissions was from the OPC (S9) which commented:

> *"The Commission may wish to consider whether or not the effectiveness of the role of the Office [OPC] would be enhanced if the Queensland Legislative Assembly were to have a committee, like the Senate Standing Committee for the Scrutiny of Bills, charged with the task of examining Bills in a non-partisan manner for impact on "fundamental legislative principles".*

8.15 The other submission was from Ms Theresa Johnson (S10) which observed:

> *"As Sir William Dale in his book Legislation Drafting: A New Approach observed:*
>
> > *'A legislative body is wise to arm itself with the means of criticising and revising the draft Bills laid before it'.*
>
> *Although Sir William favoured the European approach of interposing a stage in the legislative process between drafting a Bill and its enactment, the introduction of regulatory impact statements and/or the establishment of a Scrutiny of Bills Committee would serve a similar purpose."*

EVIDENCE AND ARGUMENTS

8.16 In light of the suggestion made in the two submissions, the Commission invited Emeritus Professor Douglas Whalan, the independent Legal Advisor to the two Senate scrutiny committees and the ACT Scrutiny of Bills and Subordinate Legislation Committee, to address the Public Seminar about the operation and effectiveness of these Committees.

8.17 Professor Whalan indicated that both the Senate Scrutiny of Bills Committee and the Senate Committee on Regulations and Ordinances have played an important role in drawing the attention of Parliament to legislative clauses which appear to vary fundamental principle. Further, Professor Whalan and the Commonwealth Second Parliamentary Counsel, Ms Hilary Penfold, indicated that the operation of the Senate Scrutiny of Bills Committee has had a direct impact on drafting procedures employed by the Commonwealth OPC. Ms Penfold commented:

> *"I mentioned in my introduction the Senate's Scrutiny of Bills Committee which Prof. Whalan has already talked about. He suggested that eventually people drafting legislation learn how to avoid the sorts of provisions that Scrutiny of Bills Committees don't like. Now, we in the Commonwealth at least, have no formal relationship with the Senate Scrutiny of Bills Committee but we have indeed learnt the sorts of provisions that this Committee doesn't like ....The terms of reference of those sorts of Committees have been mentioned on a number of occasions already, so I won't read them out. On a more practical level, the sorts of provisions that we look for, and that we warn instructors of, are such things as provisions reversing the onus of proof, and provisions that retrospectively disadvantage members of the public - you can usually get away with a provision retrospectively disadvantaging the Government - and provisions giving Ministers unlimited power to delegate their statutory powers. The Committee tends to take a fairly strict view that this sort of delegation ought to be restricted to, for instance, officers of a Minister's department ..."* (Penfold 1991, pp.11-12).

8.18 In subsequent correspondence with the Commission, the Secretary of the ACT Scrutiny of Bills and Subordinate Legislation Committee commented favourably on the impact of that Committee on legislative scrutiny. In terms of its work on bills, he observed:

> *"Generally speaking, the impact of the Committee's work has been very favourable. Where a concern is raised, the government responds to the Committee through the Attorney-General. To date, the Committee has had most of its major concerns addressed in the proposed legislation. The Committee has noted that points raised earlier in the life of the Committee are now being implemented in the proposed legislation as a matter of course"* (Duncan 1991, EARC File 022/Folio 109).

8.19 The Commission notes that favourable comment on the operation of scrutiny of bills committees has also been made by bodies outside the Commonwealth and ACT legislatures. The *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* made by the Legal and Constitutional Committee of the Victorian Parliament observed that the Senate Scrutiny of Bills Committee:

> *"performs a valuable, if often unrecognized role in furthering the protection of human rights at Commonwealth level in Australia ... It works within the time-frame of normal parliamentary procedures, and does not delay the passage of legislation;*

> *it operates upon broadly apolitical grounds; and it has managed to exert a healthy influence over the content of legislation put forward by government departments. It has been vigilant in scrutinizing and drawing to the attention of Parliament legislation which contains clauses dealing with such matters as the reversal of the onus of proof in criminal cases, the granting of powers of entry, search and seizure, the imposition of retrospective penalties, self-incrimination, and a range of other issues relevant to the protection of human rights"* (Victoria Parliamentary Legal and Constitutional Committee 1987, pp.77-79).

The *Report of the Advisory Committee to the Constitutional Commission* observed:

> *"It is sometimes said that Parliament is the great bastion of our liberties. However, a government wishing to be seen to be doing something decisive when confronted with a problem that is inconveniencing many people or causing public pressure for a response can and will infringe fundamental rights and freedoms of all. For example, the 1985 Queensland legislation relating to supply of electricity places restrictions on freedom of speech and assembly. Of course many agree with the aim of such legislation, without realizing that an underlying erosion of the basic freedoms of all citizens is occurring even if all are not immediately affected by the provision ...*
>
> *Legislation is supposed to be scrutinised by Parliament, but strong party discipline and the entrenched power of the executive have diminished that safeguard significantly. In most of our legislatures there is little evidence of safeguards in respect of delegated legislation. There is, in the Senate, a standing committee on rules and regulations which checks them for infringements of human rights. There is also a Scrutiny of Bills Committee. Both of these are committees whose work has gone largely unrecognised, but these recommendations about delegated legislation are always listened to and generally given effect to."* (Australia, Parliament 1987, p.17).

ANALYSIS OF EVIDENCE AND ARGUMENTS

8.20 The Commission considers that the above submissions and reports contain strong arguments to improve parliamentary review of legislation in Queensland for impact on fundamental legislative principles, by establishing a scrutiny of bills process similar to that operating in the Senate and the ACT Legislative Assembly.

8.21 Such a process could be established in two ways:

(a) a new committee separate to the existing Committee on Subordinate Legislation could be established with responsibility for scrutiny of bills; or

(b) the existing Committee of Subordinate Legislation could be replaced by a new scrutiny of legislation committee responsible for both scrutiny of bills and scrutiny of subordinate legislation as in the ACT Legislative Assembly.

8.22 The Commission favours the second option for the following reasons. Firstly, there is a natural affinity between the kinds of issues that a scrutiny of bills committee should look for and issues which should concern subordinate legislation committees. For example, a committee concerned to ensure that a regulation did not contain matters that should be contained in an Act could seek to ensure that this principle was followed in statutory provisions setting forth regulation making powers. Secondly, the type of legal expertise and research support required to assist scrutiny of bills and subordinate legislation committees is similar. Thirdly, appointment of a combined committee could be more cost effective in terms of MLAs' time, and of research and administrative support.

RECOMMENDATIONS

8.23 **The Commission recommends that:**

(a) **The Committee of Subordinate Legislation of the Legislative Assembly be discontinued and replaced by a new Standing Committee entitled the "Parliamentary Scrutiny of Legislation Committee";**

(b) **the principal functions of the Committee should be to:**

(i) **review each bill introduced into the Legislative Assembly and report to the Assembly where, in the Committee's opinion, the bill, or a particular clause in the bill, appears:**

(A) **to trespass unduly upon rights and liberties including, for example, by:**

(I) **making rights, liberties and/or obligations dependent upon insufficiently defined administrative powers;**

(II) **making rights, liberties or obligations dependent upon non-reviewable administrative decisions or decisions that are not subject to appropriate review;**

(III) **being inconsistent with principles of natural justice;**

(IV) **inappropriately delegating administrative powers;**

(V) **reversing the onus of proof in criminal proceedings;**

(VI) **conferring power to enter premises and search or seize documents or other property without a warrant issued by a judge or other judicial officer;**

(VII) **failing to provide appropriate protection against self-incrimination;**

(VIII) **adversely affecting rights retrospectively;**

(IX) **conferring immunity from action, proceeding or prosecution;**

(X) **providing for the compulsory acquisition of property without fair compensation;**

(B) **to delegate legislative power inappropriately;**

(C) **to permit an Act to be amended by subordinate legislation;**

(D) **not to subject, or to insufficiently subject, the exercise of legislative power to the scrutiny of the Legislative Assembly;**

(E) to fail to have sufficient regard to Aboriginal tradition and Torres Strait Islander tradition; and

(F) to be drafted in an insufficiently clear and precise style.

(ii) review any subordinate legislation laid before the Legislative Assembly and report to the Assembly where, in the Committee's opinion, the subordinate legislation appears:

(A) to exceed the powers conferred by the Act under which the subordinate legislation was made;

(B) to be inconsistent with the principles, objects or intent of that Act;

(C) to trespass unduly upon rights and liberties, including for example, by doing any one or more of the things mentioned in para. 8.23(b)(i)(A);

(D) to contain any matter which should properly be dealt with by an Act and not by subordinate legislation;

(E) to amend a provision of an Act;

(F) to provide for sub-delegation of powers delegated by the Act;

(G) to fail to have sufficient regard to Aboriginal tradition and Torres Strait Islander tradition; and

(H) to be ambiguous or drafted in an insufficiently clear and precise style.

8.24 The proposed criteria for review by the Committee outlined in the above recommendation are broadly based on those of the Senate Scrutiny of Bills Committee, the Senate Committee on Regulations and Ordinances and the existing Queensland Committee of Subordinate Legislation - although some criteria have been elaborated or added to. The relevant principles have been discussed in Chapter Two.

8.25 In respect of subordinate legislation, the proposed criteria are broader than those of the existing Committee of Subordinate Legislation. In reviewing whether subordinate instruments (and bills) trespass unduly upon rights and liberties, the Commission proposes that the Parliamentary Scrutiny of Legislation Committee should not be confined to instances where trespass occurs on rights *previously established by law* - the criteria of the Committee of Subordinate Legislation. The proposed Parliamentary Scrutiny of Legislation Committee should have freedom to comment on rights that have not been fully or clearly established in the common law or statute law but are sufficiently important to warrant mention.

8.26 The Commission also considers that the present Committee's terms of reference in relation to administrative review are too restrictive in light of possible changes to administrative law mechanisms in Queensland. Whereas the Committee of Subordinate Legislation focusses on *judicial review*, the Commission's proposed criterion for the Parliamentary

Scrutiny of Legislation Committee centres upon the broader concept of *non-reviewability*. This broader mandate will permit the Committee to address the full spectrum of administrative review options applied to, or excluded from, new legislation including ministerial review, review by tribunal, judicial review and review by any future administrative appeals body.

8.27 As well, the Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should have specific authority to report on provisions which appear, without sufficient reason, to vary certain other fundamental legislative principles discussed in Chapter Two of this Report - that is provisions which appear to:

(a) override common law principles of natural justice;

(b) inappropriately confer immunity from actions, proceedings or prosecution;

(c) provide for the compulsory acquisition of property without fair compensation;

(d) provide insufficient protection against self-incrimination;

(e) reverse onus of proof; and

(f) pay insufficient regard to Aboriginal and Torres Strait Islander tradition.

8.28 The Commission notes that the introduction to recommendation 8.23(b)(i)(A) would, if enacted in legislation, enable the Committee to report on concerns in the area of rights and liberties which are not specified in paragraphs (I) - (X) . This would give the Committee scope to develop fundamental legal principles in the area of rights and liberties not specified in the Committee's proposed terms of reference. It will also give the Committee scope to examine issues in the developing area of international human rights law (see para. 2.62 above).

Method of Operation for the Proposed Parliamentary Scrutiny of Legislation Committee

8.29 The Commission considers that the detailed operation of the proposed Parliamentary Scrutiny of Legislation Committee should be left to the Parliament to determine, having regard to broad principles outlined in this Report and the proposed Legislative Standards Act.

Review of Bills

8.30 The Commission considers that all bills introduced into the Legislative Assembly should be reviewed by the Committee. Where the Committee considers that it should report on any matter it should table a written report in the Legislative Assembly.

8.31 Presently, Standing Orders provide for a minimum of six calendar days between the introduction of a bill and the commencement of debate on the bill - technically the resumption of the second reading debate (Standing Order 241(d)). The Commission believes that the Committee should be able to review and report on a bill within this period to enable Parliamentary debate on the bill to be informed by the Committee's findings. This would, of course, require the Committee to work very

quickly, although it is observed that many bills are afforded a longer period than six days between introduction and resumption of the second reading debate. The Legislative Assembly, however, may wish to consider extending the six day rule to allow the Committee greater time in which to report on matters arising from its examination of bills.

8.32 Where a bill is taken as a matter of urgency, the Committee should be required to report only to the extent which it considers practicable. It may be that no report is possible in the circumstances. However, the Committee should have authority to report on urgent bills after they have been passed by the Legislative Assembly.

8.33 The Commission further considers that where the Committee reports on a bill, the responsible Minister or Member (in the case of a private Member's bill) should table a response to the Committee's report. The Commission considers that this response should be tabled before the close of the second reading debate and before the House moves into committee to consider the bill in detail. This might require some change to Parliamentary timetables.

RECOMMENDATIONS

8.34 **The Commission recommends that:**

(a) all bills introduced into the Legislative Assembly should be reviewed by the proposed Parliamentary Scrutiny of Legislation Committee. Where the Committee considers that it should report on any matter it should table a written report in the Legislative Assembly before or at the resumption of the second reading debate;

(b) the Committee should have discretion to report on urgent bills to the extent which it considers practicable. The Committee should also have authority to review and report on urgent bills after they have been passed by the Legislative Assembly; and

(c) where the Committee reports on a bill, the responsible Minister or Member (in the case of a private Member's bill) should table a response to the Committee's report before the close of the second reading debate on the bill.

Review of Subordinate Legislation

8.35 The *modus operandi* for review of subordinate legislation established by the present Committee of Subordinate Legislation appears satisfactory and should be adopted by the proposed Parliamentary Scrutiny of Legislation Committee.

8.36 It is understood that the essential features of the system are as follows:

(a) where the Committee of Subordinate Legislation identifies a problem with a statutory instrument, it usually refers the matter in writing to the responsible Minister;

(b) where the response from the Minister is satisfactory - for example, where the Minister undertakes to seek an appropriate amendment to the instrument - the matter usually rests there, although the Committee generally reports the outcome in its regular reports to Parliament; and

(c) where the Committee considers the response unsatisfactory, the Committee may recommend that a subordinate instrument be disallowed. This option has been called on only rarely.

RECOMMENDATION

8.37 **The Commission recommends that where the proposed Parliamentary Scrutiny of Legislation Committee considers that a subordinate legislative instrument may be of a nature that requires the instrument to be reported to the Legislative Assembly, the Committee must, before tabling its report, provide opportunity for the relevant Minister to respond to the report. However, the process of seeking the Minister's comments should not prevent the Chair of the Committee from giving notice of a resolution disallowing the instrument at any time within the prescribed period.**

Other Functions of the Proposed Parliamentary Scrutiny of Legislation Committee

8.38 The Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should have two other significant functions in addition to reviewing individual bills and subordinate legislation.

8.39 One is that the Committee should, on behalf of the Parliament, monitor overall progress in meeting the objectives of the proposed Legislative Standards Act and report to Parliament on any reviews conducted into these matters. Among the matters which the Committee should seek to monitor are:

(a) progress in achieving effective legislative scrutiny within Government and Parliament, including the overall extent to which Queensland legislation has regard to fundamental legislative principles;

(b) the operation of the OPC in accordance with the purpose and provisions of the proposed Legislative Standards Act;

(c) progress in achieving professional drafting styles in legislation (see Chapter Seven);

(d) observance of the proposed guidelines on subordinate legislation to be issued by the Parliamentary Counsel for drafting authorities outside the OPC (see para. 3.26);

(e) progress in ensuring efficient and effective consolidation of statutes, reprinting of statutes, the availability of computerised legislative information, and accessibility of legislative texts in regional centres of Queensland (see Chapter Seven); and

(f) the standard of explanatory memoranda provided to Parliament (see para. 9.16).

8.40 The Commission also proposes that the Committee undertake a comprehensive review into notification, publication, tabling and disallowance requirements for all Queensland statutory instruments. The need for this review is discussed in paragraph 8.91.

RECOMMENDATIONS

8.41 **The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee monitor:**

(a) progress in achieving effective legislative scrutiny within Government and Parliament, including the overall extent to which Queensland legislation has regard to fundamental legislative principles;

(b) the operation of the OPC in accordance with the purpose and provisions of the proposed Legislative Standards Act;

(c) progress in achieving professional drafting styles in legislation;

(d) observance of the proposed guidelines on subordinate legislation to be issued by the Parliamentary Counsel for drafting authorities outside the OPC (para. 3.28(c) refers);

(e) progress in ensuring efficient and effective consolidation of statutes, reprinting of statutes, the availability of computerised legislative information, and accessibility of legislative texts in regional centres of Queensland (para. 7.20 refers); and

(f) the standard of explanatory memoranda provided to Parliament (para. 9.27 refers).

Membership of Proposed Parliamentary Scrutiny of Legislation Committee

8.42 The success of the Committee will depend, among other things, on the degree of bi-partisanship brought to bear by the membership.

8.43 At the Commission's Public Seminar, Professor Whalan observed:

> *"The most fundamental point in a Scrutiny Committee getting the confidence of its Chamber is that it must be non-partisan ... That tradition is unwavering in the Senate. You hear people talking, and you couldn't tell what their political affiliations were. Already, I'm delighted to say, the same approach is occurring in the A.C.T. Committee. I illustrate from that Committee. On the A.C.T. Committee there are two Government Members and an Opposition Member. Whether it's Government legislation or an Opposition private Member's Bill - including one that might come from the Opposition Member sitting in the Committee - the Committee makes its criticisms and, indeed, both Government and Opposition have responded very generously indeed to the Committee. It is doing a House of Review function, in fact ... Members of both the Senate Committee and the A.C.T. Committee have said to me: 'I take off my party political hat at the door, and I can thoroughly enjoy this Committee.' I have actually seen one vote on the Senate Committee - some people will tell you there's never been a vote, but I have seen one - and it most certainly was not on party political lines. Most decisions are made by consensus ..."* (Whalan 1991b, p.7).

8.44 The Commission notes that the present Committee of Subordinate Legislation has seven members, the Government members by tradition holding the majority. The composition of the present Committee reflects the current state of the parties and comprises four ALP Members (one of whom is Chairman), two National Party Members and one Liberal Party Member.

8.45 The Commission considers that the composition of the proposed Parliamentary Scrutiny of Legislation Committee should reflect the practice established for the Committee of Subordinate Legislation. That is, the Committee should consist of seven Members, not more than four of whom should be nominated by the Leader of the House, and not less than two of whom should be nominated by the Leader of the Opposition.

RECOMMENDATION

8.46 **The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee should consist of seven Members, not more than four of whom should be nominated by the Leader of the House, and not less than two of whom should be nominated by the Leader of the Opposition.**

Legal Advisor

8.47 If the proposed Parliamentary Scrutiny of Legislation Committee is to function effectively, the Committee will need access to quality legal advice. Preferably this advice should be sought from an experienced lawyer familiar with the general principles of administrative law and common law rights, fundamental human rights and civil liberties.

8.48 An issue is whether the legal advisor should be independent of the Executive. By tradition, the Committee of Subordinate Legislation has been advised by a relatively junior legal officer attached originally to the OPC and subsequently to the Department of the Attorney-General. EARC Issues Paper No. 7 noted that the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for Scrutiny of Bills have traditionally engaged senior private legal counsel outside Government as advisors. This tradition has been continued by the ACT Legislative Assembly Scrutiny of Bills and Subordinate Legislation.

8.49 EARC Issues Paper No. 7 asked whether the present Committee of Subordinate Legislation should also be advised by an independent lawyer. While this question was posed in relation to that Committee it is also pertinent to the proposed Parliamentary Scrutiny of Legislation Committee.

8.50 In relation to the existing Committee, public submissions generally supported the principle of having an independent lawyer provide advice.

8.51 The Departmental submission (S8) presented alternative views: on the one hand it acknowledged the arguments for the engagement of private lawyer; on the other it suggested that a Government legal officer could provide sufficient independence through his or her professional ethics.

8.52 The submission from Ms Theresa Johnson (S10) considered that:

> *"If the Committee of Subordinate Legislation of the Queensland Parliament is to effectively discharge its functions, it is critical that the Committee be fully and correctly advised of possible contentious legal matters appearing in subordinate legislation. While some prescribe to the view that, by virtue of a lawyer's professional ethics, the source of this advice could be a public servant, others rightly adopt a more cautious approach. The Committee is an all party committee and appearances, if little else, dictate that it should be advised by a lawyer who is independent of the Executive. The same argument would apply to the type of legal advisor who should assist a Scrutiny of Bills Committee if such a committee were to be established."*

8.53 The OPC (S9) suggested that the question of legal advice to the Committee of Subordinate Legislation could be addressed in a statute dealing with the drafting and scrutiny of legislation.

8.54 At the Commission's Public Seminar, Professor Whalan emphasised the worth of having an independent lawyer available to scrutiny committees:

> *"A [scrutiny] Committee has to earn its reputation. One aspect of... that is the fact that a Committee should have independent help separate from the Executive - not necessarily separate from the Parliament - but separate from the Executive. Until I was appointed as the first academic to do the task...the [Senate Committee on Regulations and Ordinances] Legal Adviser had usually been a Sydney, Melbourne or Adelaide Queen's Counsel. The two just before me were Sir Maurice Byers, and the now just recently retired Mr Justice Howard Zelling, before he went to the bench in South Australia.*
>
> *Since 1945 when the first Adviser, Sir John Spicer, was appointed, the Committee has had independent Legal Advice. I quote the Committee's 1942 Report:*
>
> > *'The Government offered to make available the services of a legal officer of the Attorney-General's Department. The Committee decided that this was not a satisfactory solution of the problem, as it was of the opinion that legal assistance from outside the Commonwealth Public Service was preferable.'*
>
> *That is, the independence of Parliament from the Executive was of paramount importance, and one manifestation of that was the Committee's insistence that it be independently advised"* (Whalan 1991b, pp.6-7).

8.55 Taking into account the views contained in submissions and the experience in the Commonwealth, the Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should, as a matter of principle, be advised by an experienced lawyer independent of the Executive. That is, the committee's legal advisor should be engaged either as a private consultant, in the manner of Professor Whalan, or engaged on the staff of the Parliamentary Service Commission.

8.56 While it would be ideal for the Committee to have the services of an experienced lawyer of the calibre of those appointed to the Senate Committees this may not be feasible because of cost or availability factors - although it should be noted that the present advisor to the Senate Committees is remunerated by honorarium rather than on a commercial basis. Nevertheless, the Parliamentary Service Commission should endeavour to ensure that the persons who are engaged to the position are appropriately qualified for the task.

RECOMMENDATION

8.57 **The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee be advised by an experienced lawyer engaged either on a private consultancy basis or on the staff of the Parliamentary Service Commission.**

Secretariat

8.58 The proposed Committee will have a significant workload, much of which will fall on the secretariat and the legal advisor. The workload will arise from the need to review bills as quickly as possible during the Parliamentary session; from the demands arising from review of subordinate instruments; from the special review of subordinate legislation proposed in paragraph 8.93(d); and from the Committee's other functions proposed in paragraphs 8.41 and 8.96 of this Report.

8.59 The Commission notes that the present Committee of Subordinate Legislation has limited resources: the Committee is supported by a clerk and a legal advisor. This level of staffing would be inadequate to support the work of the proposed Parliamentary Scrutiny of Legislation Committee. The Commission notes that scrutiny committees in the Commonwealth and New South Wales have more substantial staff resources than available to the existing Committee of Subordinate Legislation. The Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances have, in addition to legal counsel, the following staff:

Senate Standing Committee for the Scrutiny of Bills:

1 Committee Secretary (remuneration $45,000 - 52,000);

1 Parliamentary Officer (remuneration $26,000 - 28,000);

1 Casual Typist (remuneration $19,000 - 22,000) (Argument, correspondence 29 January 1991)

Senate Standing Committee on Regulations and Ordinances:

1 Committee Secretary (remuneration approximately $50,000)

1 Research Officer (remuneration approximately $40,000)

1 Clerk (remuneration approximately $30,000)

1 Typist (remuneration approximately $25,000) (Oral advice from the Committee Secretary).

8.60 The Secretariat of the New South Wales Regulation Review Committee has three legally qualified officers plus administrative support staff (Oral advice from Committee Secretary).

8.61 The Commission considers that, as a minimum, the proposed Parliamentary Scrutiny of Legislation Committee should have available to it (in addition to a legal advisor) a research director, two research officers,

a clerk and an administrative assistant all of whom should be appointed by the Parliamentary Service Commission. At least one and preferably two of the staff should have legal qualifications. The Commission notes that the proposed level of staffing for the Committee would still be very modest compared to that available to the Government in the area of legislative preparation and review.

8.62 Provision could be made for secondments to the Committee Secretariat from the Public Service on the recommendation of the Committee.

8.63 The Commission considers that the proposed Legislative Standards Act should state the general principle that the Committee should be provided with the necessary staff to undertake its functions.

RECOMMENDATIONS

8.64 **The Commission recommends that:**

(a) as a minimum, the proposed Committee should have available to it a research director, two research officers, a clerk and an administrative assistant who should be appointed under the *Parliamentary Service Act 1988*; and

(b) the proposed Legislative Standards Act should state the general principle that the Committee should be provided with the necessary staff required to undertake its functions.

Powers of the Committee

8.65 The Commission considered whether the proposed Parliamentary Scrutiny of Legislation Committee should have available to it the full range of statutory powers relating to the obtaining of information, the holding of hearings and compellability of witnesses as provided to the Public Accounts Committee and the Public Works Committee under their respective legislation.

8.66 The Commission considers that in reviewing bills and subordinate legislation, the proposed Committee is unlikely to require extensive investigatory powers of the kind required by the Public Accounts and Public Works Committees, although it should have general power to require information, conduct hearings and summon witnesses. The Commission proposes that such powers be regulated by Standing Orders. However, the Parliament may consider that these powers, together with appropriate safeguards, should be specified in the Act itself.

Statutory Basis for the Committee

8.67 In Australia, legislative scrutiny committees have mostly been established by Parliamentary resolution or by standing orders.

8.68 In New South Wales, the Regulation Review Committee (equivalent to the Queensland Committee of Subordinate legislation) is established by the *Regulation Review Act 1987*. In Victoria, the Sub Committee of Subordinate Legislation is established under both the *Subordinate Legislation Act 1962* and the *Parliamentary Committees Act 1968*.

8.69 The Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee and its basic operating principles should be established under the proposed Legislative Standards Act. An advantage of this option is that it would encapsulate within a single legislative framework the respective responsibilities of the Parliamentary Counsel and the proposed Committee.

Arguments Against Establishing a Parliamentary Scrutiny of Legislation Committee

8.70 The Commission has identified two possible arguments against its proposal to establish a Parliamentary Scrutiny of Legislation Committee.

8.71 Firstly, the operation of the Senate Scrutiny of Bills Committee is partly associated with the status of the Senate as a House of Review and the development, over time in that House, of a sophisticated system of non partisan committees. It could be suggested that to translate a scrutiny of bills process into a unicameral system such as Queensland might not be practicable.

8.72 However, the fact that Queensland has only one House of Parliament effectively controlled by the Government of the day seems to the Commission to reinforce rather than detract from the need for a Committee such as the one proposed in this Report. This point was also suggested at the Commission's Public Seminar by Professor Whalan who compared his experience of the ACT Legislative Assembly with that of the Senate:

> *"As is the case in Queensland, the A.C.T. has only one House. My observation so far, of the operation of the Territory Committee, which has only been going for a little over a year, is that, paradoxically, such technical scrutiny may be even more important where there is only one House. Where there is no House of Review, there is no methodical oversight of the kinds of issues that are considered by Scrutiny Committees away from the heat of policy debate"* (Whalan 1991b, p.3).

8.73 Secondly, it could be argued that rather than establish a Scrutiny of Legislation Committee, the Parliament should consider the establishment of a system of select committees to review bills as operated in the Senate and the New Zealand Parliament. The Speaker of the Legislative Assembly, the Hon. Jim Fouras MLA, has himself publicly raised the possibility of establishing a select committee system based on the New Zealand model (Fouras 1990, pp.4-5).

8.74 At the Commission's Public Seminar, the New Zealand Chief Parliamentary Counsel, Mr Walter Iles QC, described the operation of the New Zealand model by which bills are automatically referred to a particular select committee for examination in terms of their policy and administrative implications (Iles 1991b).

8.75 However, the experience of the Senate suggests that select committees do not replace the need for legislative scrutiny committees. Both types of committees are complementary but each looks at different aspects. Indeed, there could be a danger in assuming that select committees would be adept at identifying matters that involve legislative principle, as the primary focus of such committees tends to be on the overall objectives and administrative aspects of the legislation.

8.76 The New Zealand system of select committees undoubtedly marks a revolutionary change in the way legislation is considered by Parliament and deserves further examination. The Commission intends to address the pros and cons of introducing a select committee system to Queensland in the course of its forthcoming review of Parliamentary Committees. However, the Commission considers that such committees, if recommended by the Commission and introduced by the Legislative Assembly, would not replace the need for a committee of the kind proposed in this Report.

Committee of Subordinate Legislation

8.77 In recommending the replacement of the Committee of Subordinate legislation by a new committee with a broader mandate, the Commission does not in any way wish to reflect unfavourably on the work of the Committee of Subordinate Legislation and its advisors. On the contrary, a reading of the Committee's reports suggests that the Committee has, since 1975, performed valuable work in drawing attention to subordinate instruments which offend legislative principles and, in the process, has helped to define what these principles mean. It has undertaken this work with limited staff and has had to operate in the context of a Parliamentary and Executive system of government that for many years did not place a high priority on legislative review. The Commission hopes that the experience gained by the Legislative Assembly in operating the Committee of Subordinate Legislation will be of assistance in setting up and maintaining the proposed Parliamentary Scrutiny of Legislation Committee.

Publication, Tabling and Disallowance Provisions for Subordinate Legislation

EVIDENCE AND ARGUMENTS

8.78 In the course of research for this review it became apparent that Queensland lacks a satisfactory framework for defining and dealing with subordinate instruments of a legislative character.

8.79 Of particular concern to the Commission is that not all subordinate legislation is subject to Parliamentary scrutiny and disallowance.

8.80 Section 28A of the *Acts Interpretation Act 1954* prescribes standard requirements for publication in the Gazette and tabling of regulations, and provides authority to the Legislative Assembly to disallow a regulation where notice of a motion to do so has been given within 14 sitting days after the regulation has been laid before the House.

8.81 However, by virtue of section 28A (1) of the Act, this provision does not apply to regulations whose enabling legislation contains provisions contrary to section 28A. Nor do the requirements of section 28A apply to the range of other subordinate legislative instruments made under Queensland legislation other than regulations. Such instruments include proclamations, orders in council of a legislative character, statutory authority by-laws and local authority by-laws. While some of these instruments are required by their enabling legislation to be tabled in the Legislative Assembly it would appear that many are not.

8.82 An example of a subordinate legislative instrument which escapes Parliamentary scrutiny occurs under the *Public Service Management and Employment Act 1988*. That Act provides that promotion appeals may lie in respect of Public Service positions. However, it also delegates power to the Governor in Council to determine by order in council particular positions to which appeals will not apply.

8.83 It is questionable whether a policy matter of this kind should be dealt with in subordinate legislation rather than in the Act itself. However, of greater concern is that an order in council made under this provision is not required to be tabled in the Legislative Assembly and is not subject to scrutiny and disallowance by the House - although it is required to be published in the Gazette.

8.84 The Reports of the Committee of Subordinate Legislation contain further examples of enabling provisions for subordinate legislation which do not provide for adequate Parliamentary scrutiny.

8.85 If the Parliament, through the proposed Parliamentary Scrutiny of Legislation Committee is to undertake effective scrutiny of delegated legislation it must be assured that all statutory instruments of significant legislative character are open to Parliamentary review.

8.86 The Commission proposes that the *Acts Interpretation Act* be redrafted to require all subordinate legislation defined in paragraph 3.28(a)(i) of this Report to be published in the Gazette, to be tabled in the Legislative Assembly and to be open to disallowance by resolution of the House.

8.87 The Commission notes that requiring all subordinate legislation to be tabled as defined in paragraph 3.28(a)(i) could have resource implications for departments and statutory authorities. However, the Commission also notes that departments are now in a much better position to co-ordinate publication and tabling arrangements for subordinate legislation through the institution of the system of "Cabinet Legislation and Liaison Officers" in all departments. These officers are responsible, among other things, for co-ordinating the preparation of subordinate legislation and ensuring that departments meet Cabinet and statutory procedures.

8.88 To provide some flexibility for the Government, the Commission proposes that the Governor in Council, by regulation, should be able to exempt a statutory rule made under *existing* legislation (other than a regulation) from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. The proposed safeguard in this procedure is that the regulation would be subject to tabling in the Legislative Assembly and hence would be open to disallowance on recommendation of the proposed Parliamentary Scrutiny of Legislation Committee. In respect of a statutory rule made after commencement of the proposed amendments to the *Acts Interpretation Act*, the Commission considers that exemption from Gazettal and tabling requirements should be made only by express provision in the enabling legislation.

Local Authority By-Laws and Ordinances

8.89 Under the *Local Government Act 1936*, by-laws made by local authorities are not tabled in the Legislative Assembly, although ordinances made by the Brisbane City Council are tabled under separate requirements of the *City of Brisbane Act 1924*.

8.90 However, as indicated in Chapter Three, the Commission has major concern about the relative lack of legislative scrutiny applied to local authority instruments generally. The proposed guidelines on drafting subordinate legislation to be issued to local authorities by the Parliamentary Counsel (para. 3.26) should provide additional safeguards in respect of fundamental legislative principles. However, in the long term, there could still be some merit in amending the *Acts Interpretation Act* to either require all local authority by-laws and ordinances to be tabled in the Legislative Assembly - without making a distinction between Brisbane City Council by-laws and other local authority by-laws - or, requiring those by-laws and ordinances to be tabled which are made under particular enabling provisions affecting rights and liberties.

8.91 The Commission considers that this matter should be examined by the proposed Parliamentary Scrutiny of Legislation Committee. The Committee should also examine whether any other subordinate instruments not covered by the amendments to the *Acts Interpretation Act* recommended in this Report, should be brought within standard notification, publication, tabling and disallowance requirements.

8.92 The Commission itself does not propose to recommend that local authority by-laws be should be tabled as this would be mark a substantial change from traditional practice and could have significant resource implications which have not been analysed by the Commission. Indeed, the Commission considers that the present anomaly of requiring Brisbane City Council ordinances to be tabled and not those of other local authorities should be addressed by amending the *City of Brisbane Act* to discontinue tabling requirements for Brisbane City Council ordinances.

RECOMMENDATIONS

8.93 **The Commission recommends that:**

(a) the *Acts Interpretation Act 1954* be amended to require all subordinate legislation defined in paragraph 3.28(a) of this Report to be published in the Gazette, to be tabled in the Legislative Assembly and to be open to disallowance by the Legislative Assembly;

(b) the Governor in Council should have authority to exempt, by regulation, a statutory rule made under *existing* legislation (other than a regulation) from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. However, in respect of a statutory rule made after the commencement of the proposed amendments to the *Acts Interpretation Act*, exemption from Gazettal and tabling arrangements in that Act should be made only by express provision in the enabling legislation;

(c) the *City of Brisbane Act 1924* should be amended to discontinue the requirement to table Brisbane City Council ordinances in the Legislative Assembly; and

(d) the proposed Parliamentary Scrutiny of Legislation Committee should, as one of its first tasks, review the notification, publication, tabling and disallowance provisions of all statutory instruments not covered by the Commission's proposed amendments to the *Acts Interpretation Act*, including local authority by-laws and ordinances, to determine whether any of them should be brought into conformity with the proposed new arrangements.

QUASI-LEGISLATIVE INSTRUMENTS

8.94 Another matter to which the Commission draws attention is the increasing provision in Queensland legislation for quasi-legislative instruments such as "standards" and "guidelines" to be issued by various authorities including Ministers and officials. Their use reflects a reasonable objective to free up regulatory controls and allow for greater administrative flexibility. However, one effect of some of these instruments is to remove the subject matter prescribed from parliamentary scrutiny as these instruments are not presently regarded as subordinate legislation and are not subject to tabling requirements.

8.95 The Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should investigate the use of quasi-legislative instruments under Queensland laws and examine whether any guidelines should be developed to ensure that statutory provisions providing for such instruments contain appropriate safeguards in terms of legislative principle and Parliamentary scrutiny.

RECOMMENDATION

8.96 **The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee investigate the use of quasi-legislative instruments under Queensland laws, such as "guidelines" and "standards", and examine whether any guidelines should be developed to ensure that statutory provisions providing for such instruments contain appropriate safeguards in terms of legislative principle and parliamentary scrutiny.**

CHAPTER NINE

REGULATORY IMPACT STATEMENTS AND EXPLANATORY MEMORANDA

Regulatory Impact Statements

9.1 EARC Issues Paper No. 7 observed:

> *"The Fitzgerald Report (p. 141) suggested that bills introduced into Parliament could be accompanied by impact statements which would outline the assessed impacts of the legislation.*
>
> *In Victoria and New South Wales, there is a statutory obligation on Ministers to issue regulatory impact statements prior to the making of subordinate legislation, although this obligation does not extend to bills. Each statement must outline the instrument's objectives, identify alternative options, and provide an assessment of the costs and benefits of the proposed instrument and of the alternative options identified. The statement must be made available for public comment prior to the instrument being made, and must be tabled in Parliament together with the instrument.*
>
> *In Queensland, some departments have issued Green Papers in respect of new legislative proposals but the extent to which this procedure is used appears to depend on the discretion of the Minister and the department concerned ....*
>
> *Submissions are invited on whether all bills introduced into the Queensland Parliament, and all significant statutory instruments tabled in the Parliament, should be accompanied by regulatory impact statements. If so, what should these statements contain; what community consultation should occur; and who should be responsible for monitoring compliance with the required procedures?"* (p.27).

EVIDENCE AND ARGUMENTS

9.2 A number of public submissions advocated increased consultation in respect of new legislation.

9.3 The Aboriginal and Torres Strait Islander Commission (S3) commented:

> *Historically, Aboriginal and Torres Strait Islander people in Queensland have been subjected to numerous legislative decisions which have rushed through Parliament with minimal consultation. Sections of these Acts were poorly drafted and infringed basic human rights as well as serving a politically motivated agenda... legislation specifically affecting Aboriginal and Torres Strait Islanders should be subject to wide community consultation prior to enactment."*

9.4 Similar views were expressed by the Tharpuntoo Legal Service Aboriginal Corporation (S7).

9.5 The Dirranbandi District Irrigator's Association (S6) commented:

> *"The system of Green Papers certainly allows for comment but the full ramifications of legislation are not known until the actual wording of the legislation is available. There must be a process by which there is an opportunity to actually comment on the legislation itself."*

9.6 In relation to the question of regulatory impact statements, the Aboriginal and Torres Strait Islander Commission (S3) recommended that all legislation affecting Aboriginal and Torres Strait Islander issues be accompanied by a regulatory, impact statement:

> *"prepared in consultation with appropriate organisations and communities."*

9.7 The Tharpuntoo Legal Service Aboriginal Corporation (S7) agreed with the proposal for regulatory impact statements and observed:

> *"The wider costs and benefits of proposed legislation should be assessed and this assessment should include an Aboriginal and Islander component, should be open for public comment, and should be submitted with bills (and statutory instruments) to be part of parliamentary debate."*

9.8 The Departmental submission (S8) commented that:

> *"... Departments have expressed some interest but sound a note of caution on the basis that not enough is known about the resource implications of such an initiative and that the extent to which its introduction would simply 'slow the process' has yet to be sufficiently considered .*
>
> *The Attorney-General's Department has pointed out that:*
>
> > *'... If Queensland were to adopt such a proposal, it would be a substantially delaying feature in the preparation of legislation. Furthermore, the issues paper makes no reference to the costs involved in having the statements prepared. In this context, this Department would be reluctant to wholeheartedly endorse such a proposal without further studies being undertaken'.*
>
> *Furthermore, the Department of Employment, Vocational Education, Training and Industrial Relations, states that:*
>
> > *'Whilst the concept of regulatory impact statements may be desirable, it is considered that there are sufficient checks and balances in place under the revised Cabinet system concerning the introduction of Bills into the Queensland Parliament. The "Authority to Prepare" and "Authority to Introduce" Submissions detail criteria which must be satisfied prior to Cabinet approval being given for the preparation and introduction of Bills. It is suggested that regulatory impact statements have proved administratively onerous in those jurisdictions where such statements are required ...'*
>
> *However, if Regulatory Impact Statements were to be introduced, the Department of Transport suggests they should contain:*
>
> - *the objective of the Bill*
> - *an assessment of the costs and benefits of the proposed instrument*
>   *-this should include financial and socio-economic costs where practical*
> - *identification of alternative options*
> - *assessments of the costs and benefits of alternative options*
>   *-this must be limited to practical options and should only be undertaken to the extent that it demonstrates the appropriateness of the chosen alternative.*
>
> *A public consultation period should not be opposed but the following points should be considered:*
>
> - *in addition to consulting with identified affected parties, provisions will have to be made for public advertising of Statements - this would limit scope for complaints of inadequate consultation*
> - *the consultation process should provide for proper management of the time available for consultation so that consultation does not lead to policy paralysis.*
>
> *Finally, it should be stressed that sufficient flexibility must be provided so that the process can be adjusted to match the particular circumstances of each case.'"*

9.9 At the Commission's Public Seminar, the Chairman of the New South Wales Regulation Review Committee, Mr Adrian Cruickshank MP, spoke of his Committee's experience with monitoring impact statements and commended the initiative.

9.10 The recently formed Business Regulation Review Unit of the Queensland Department of Business, Industry and Regional Development put in a late submission (S11) which gave support to the concept of regulatory impact statements and favoured the concept of such a scheme having a statutory base. However, the submission observed:

> *".. before this proposal could be introduced it would be necessary for full consultation to be held with all interested parties (departments, the business sector, the community). This will ensure all the issues pertinent to Queensland are addressed and that the benefits outweigh the costs."*

ANALYSIS OF EVIDENCE AND ARGUMENTS

9.11 From comments in submissions, the Commission's Public Seminar, and from its own research, the Commission observes that there could be merit in introducing some form of consultation and impact statement procedure in Queensland along the lines of the arrangements introduced in New South Wales and Victoria, and applicable to both bills and subordinate legislation. However, the Commission does not in this Report propose to recommend the introduction of such a scheme for the following reasons.

9.12 The impact statement procedures established in New South Wales and Victoria are elaborate, involve significant administrative commitment and are backed up by a detailed legislative framework. Despite the support for such a concept in submissions, it may be desirable for more feedback to occur on the desirability of introducing such a scheme for Queensland than has been obtainable through this OPC review process.

9.13 Further, in New South Wales and Victoria, responsibility for monitoring the impact statement procedures on behalf of Parliament is exercised by the respective committees of subordinate legislation. This responsibility has increased the workload of these committees, which undertake the responsibility together with their traditional role of legislative scrutiny.

9.14 Were impact statements to be introduced in Queensland, an option might be to give a monitoring role to the proposed Parliamentary Scrutiny of Legislation Committee. However, as this Committee will have a significant workload in the area of legislative scrutiny it would not be wise to burden it, at this stage, with the responsibilities attached to regulatory impact review. Furthermore, because impact statements involve examination of legislation in terms of its economic and social effects, it might be more appropriate to give any monitoring role in this area to a parliamentary committee or committees concerned with the policy and administrative aspects of legislation.

9.15 The Commission proposes to re-examine the issue of impact statements in the context of the Commission's forthcoming Parliamentary Committee review.

Explanatory Memoranda

9.16 While the Commission has refrained from recommending the introduction of regulatory impact statements at this stage, an immediate reform that could be readily implemented would be to improve the scope and content of explanatory memoranda.

9.17 It is customary practice for bills to be tabled in the Legislative Assembly with an explanatory memorandum. The purpose of the memorandum is to provide a clause by clause description of the nature and intention of the bill as an aid to Members in understanding the proposed legislation.

9.18 However, memoranda presently produced contain little in the way of background information to the proposal, such as the extent of consultation undertaken with affected parties, and the estimated costs to Government of introducing the legislation. These matters are sometimes addressed in the second reading speech but there is no necessary consistency in this regard.

9.19 Also, explanatory memoranda are not provided with subordinate legislation tabled in the House.

9.20 The Commission considers that for every bill introduced into the Legislative Assembly, and for all subordinate legislation that is required to be tabled, an explanatory memorandum should also be tabled for the information of Members. The explanatory memorandum should indicate:

(a) the objectives of the legislation;

(b) the reasons why legislation is considered necessary for achieving these objectives;

(c) the estimated cost to the Government of implementing the legislation; and

(d) the extent of consultation undertaken with parties likely to be affected by the legislation;

as well as describing in plain terms the intent and nature of each clause.

9.21 Additionally, in respect of subordinate legislation, the explanatory memorandum should indicate the relevant sections of the Act under which the legislation was made.

9.22 The Commission considers that responsibility for preparing the explanatory memoranda for bills and subordinate legislation should be that of the responsible department in consultation, where appropriate, with the OPC.

9.23 It is noted that the information proposed to be included in the memorandum is already provided by departments to the Cabinet Office in respect of bills and that its inclusion in the memorandum to Parliament should not impose a substantially extra burden on departments.

9.24 It should also be noted that the Commission is not proposing that explanatory memoranda identify the costs of the legislation for the community - the Commission's proposal is that memoranda identify the administrative costs for Government. In other words, explanatory memoranda should not be seen as a substitute for regulatory impact statements should these be introduced at a later stage.

9.25 Finally, the Commission does not propose to make any recommendations on the use of explanatory memoranda as extrinsic aids to the interpretation of legislation. Under the *Acts Interpretation Act 1901* (Cwlth) explanatory memoranda can be used as extrinsic aids in the interpretation of Commonwealth legislation - see section 15AB(2)(e) of that Act. On 22 April 1991 the Queensland Cabinet authorised the preparation of legislation relating to extrinsic aids (see press release of the Attorney-General, The Hon. D Wells, dated 22 April 1991). The Commission understands that this legislation will address the use of explanatory memoranda as extrinsic aids.

9.26 The Commission considers that the proposed requirements for explanatory memoranda should be established in the proposed Legislative Standards Act.

RECOMMENDATIONS

9.27 **The Commission recommends that:**

(a) the proposed Legislative Standards Act require that for every bill introduced into the Legislative Assembly, and for all subordinate legislation required to be tabled in the Legislative Assembly an explanatory memorandum should be tabled for the information of Members;

(b) the explanatory memorandum should:

(i) outline:

(A) the purpose or objectives of the legislation;

(B) the reasons why legislation is considered necessary for achieving these objectives;

(C) the estimated cost for the Government of implementing the legislation;

(D) the extent of consultation undertaken with parties likely to be affected by the legislation; and

(ii) describe in plain terms the intent and nature of each clause; and

(c) additionally, in respect of subordinate legislation, the explanatory memorandum should indicate the relevant sections of the Act under which the legislation was made.

CHAPTER TEN

SUMMARY AND RECOMMENDATIONS

10.1 In this Chapter, the Commission summarises its conclusions; describes the major features of the proposed Legislative Standards Bill and consolidates its recommendations.

Scope of Review

10.2 The present Office of the Parliamentary Counsel ("OPC") drafts bills for introduction into the Legislative Assembly and subordinate legislation (regulations, orders in council, and certain other statutory instruments) for making by the Governor in Council and other approved authorities.

10.3 The Fitzgerald Report noted that, in the course of drafting legislation giving effect to departmental proposals, the nature and wisdom of those proposals are often discussed and advice provided to the department in question by Counsel. The Report suggested that Parliamentary Counsel should not tailor advice to political expediency or fail to point out fundamental errors in principle or obligation in any proposed course, and recommended that this Commission undertake a review of the role and functions of the OPC to ensure its independence.

10.4 The Commission has reviewed the role and functions of the OPC in accordance with the recommendation of the Fitzgerald Report. The review focussed in particular upon the role and authority of the OPC in providing independent advice to the Government on matters involving fundamental legislative principles - that is principles relating to the sovereignty of Parliament (for example, ensuring that the Legislative Assembly has appropriate scrutiny over delegated legislation and that the Executive is not inappropriately delegated power to amend an Act of Parliament); principles concerned with ensuring that personal rights and liberties (including those established in common law) are not unnecessarily overriden by new legislation; and principles concerned with provision of appropriate forms of administrative review in statutes.

10.5 In relation to the role of the OPC, the review also addressed other matters including the OPC's drafting responsibilities, its responsibility for drafting private Members' legislation and issues concerning legislative style and statutory reprinting.

10.6 In the course of the review, the Commission also extended its enquiries to examine the adequacy of parliamentary scrutiny of bills and subordinate legislation in terms of their impact on fundamental legislative principles, including impact on rights and liberties.

Conclusions

10.7 The Commission believes that it is essential for legislative drafters and departmental instructing officers to be aware of and to understand basic principles relating to the protection of rights, the rule of law and parliamentary government. In Chapter Two of the Report, the Commission

examined the sufficiency of Government guidance on legislative principles provided to departments through the Queensland *Cabinet Handbook*. The Commission considers that there is scope to expand this guidance, particularly in relation to the following:

(a) ensuring that legislation which confers discretions on officials sets out the principles and criteria to govern the exercise of the discretion;

(b) ensuring that statutory schemes provide for appropriate forms of judicial and merits review;

(c) ensuring that legislation is consistent with principles of natural justice;

(d) providing appropriate controls where Parliament delegates administrative powers;

(e) ensuring that immunity from actions, proceedings or prosecution is not inappropriately conferred on the Crown and government agencies;

(f) ensuring that provision is made for fair compensation in cases where property is compulsorily acquired;

(g) ensuring that subordinate legislation does not regulate matters which should more appropriately be dealt with by an Act, including for example, subordinate legislation which amends Acts of Parliament or which creates penalties of imprisonment;

(h) ensuring that statutory provisions enabling the making of subordinate legislation provide for appropriate parliamentary scrutiny of such instruments; and

(i) ensuring that legislation pays due regard to Aboriginal and Torres Strait Islander tradition.

10.8 The Commission observes that many of the fundamental legislative principles identified in Chapter Two are not absolute. There may be circumstances where the public interest justifies or even requires that a principle be modified or displaced. For example, the principle relating to the acquisition of property on just terms should not apply to proceeds of crime legislation where the very purpose of such legislation is to strip criminals of their ill-gotten gains. The principles are, however, of sufficient importance that there should exist mechanisms to ensure that departures from the principles are explained and justified.

10.9 In Chapter Three, the Commission examined the drafting responsibilities of the OPC. The Commission considers that the OPC should have responsibility for drafting all Government bills under the proposed Legislative Standards Act (para. 10.19 refers). As well it should have statutory responsibility for drafting subordinate legislation. However, there should be flexibility for the Government to exempt particular subordinate legislation (other than regulations) from drafting by the OPC. The Commission proposes that this should be done by regulation under the proposed Legislative Standards Act. This would require the regulation to be tabled in the Legislative Assembly and to be open to review by the proposed Parliamentary Scrutiny of Legislation Committee.

10.10 The Commission does not recommend that local authority by-laws and ordinances should be drafted by the OPC. However, the Commission is concerned about the relative lack of scrutiny applied to these instruments in the area of legislative principle. For this reason, the Commission recommends that the Government examine whether by-laws and ordinances made by local authorities should be referred to the OPC, in addition to the Department of Housing and Local Government, for review prior to their approval by the Governor in Council.

10.11 The Commission also considers that where the OPC does not have responsibility for drafting particular subordinate legislation under the proposed Legislative Standards Act, the Parliamentary Counsel should have authority under that Act to issue guidelines to be observed in the drafting process. The guidelines should address drafting style and provide a check-list of fundamental legislative principles to be taken into account in the drafting process.

10.12 Chapter Four examined the OPC's legislative advisory role. The Commission agrees with the Government's decision to formalise a role for the Parliamentary Counsel in drawing the attention of Cabinet to draft legislation which goes beyond Cabinet approvals or raises difficulty in terms of legislative principle. This role is established under arrangements which require the Parliamentary Counsel to brief the Parliamentary Business and Legislation Committee of Cabinet which monitors the development of bills.

10.13 The Commission recommends that in addition to reviewing bills, the Parliamentary Business and Legislation Committee of Cabinet should also examine subordinate legislation that is made by the Governor in Council and which has significant policy implications, potential impact on business or legal rights or significant expenditure or resource implications. As well, the right of the Parliamentary Counsel to advise the Committee of any concerns involving proposed subordinate legislation should be clarified in the *Cabinet Handbook*.

10.14 In Chapter Four, the Commission further recommends that the function of the OPC to advise Ministers and Members of the Legislative Assembly on fundamental legislative principles should be given statutory protection under the proposed Legislative Standards Act.

10.15 In Chapter Five the Commission recommends that Members of the Legislative Assembly should have access to the OPC for drafting private Member's bills and amendments to Government legislation.

10.16 The Commission considers that Members should be able to request the Parliamentary Counsel directly for drafting assistance. The Parliamentary Counsel should endeavour to meet the request as fully and expeditiously as possible but should have authority to decline assistance where he or she considers that the request would significantly disrupt the OPC's drafting program.

10.17 The Commission considers that where the OPC provides drafting assistance to a Member, relations between the drafter and the Member should be on the basis of legal professional privilege - that is the drafter should be obliged to protect the confidentiality of the proposed legislation and any communications that transpire between the drafter and the client.

10.18 The Commission recommends that the proposed arrangements for drafting private Member's legislation, and for protection of confidentiality, be addressed in the proposed Legislative Standards Act.

10.19 Chapter Six considered the arguments for and against establishing the OPC as an independent statutory office. The Commission concludes that the OPC should be made a statutory office under a new Act proposed to be entitled the "Legislative Standards Act". The Commission considers that this would substantively and symbolically reinforce the independence of the Parliamentary Counsel and his or her staff, consistent with their role in providing independent advice and ensuring quality control standards in legislation. The Commission recommends that the proposed Act should:

(a) create a new position of "Queensland Parliamentary Counsel";

(b) create an "Office of the Queensland Parliamentary Counsel";

(c) provide for renewable term appointment for the Parliamentary Counsel; and

(d) assign control over the resources of the Office to the Parliamentary Counsel.

10.20 In Chapter Six, the Commission also recommends that Ministerial responsibility for the OPC should be transferred from the Premier - where it has resided since 1933 - to the Attorney-General. The deciding factor in this recommendation is the need for Parliamentary Counsel to have access to the First Law Officer in advising Cabinet on matters of legislative principle.

10.21 In Chapter Seven, the Commission agrees with moves by the Government and the OPC to introduce plain English and non sexist drafting styles in legislation. To reinforce this initiative, the Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee should have authority to draw the attention of Parliament to any bill or subordinate legislation that is drafted in an insufficiently clear or precise style.

10.22 The Commission also supports initiatives by the Government to establish a computerised database for Acts and subordinate legislation. The Commission recommends that adequate resources be provided for this project and that priority be given to systems and procedures which would allow consolidations of Acts and subordinate legislation to be issued within a much shorter time frame than at present.

10.23 The Commission further recommends that the proposed Parliamentary Scrutiny of Legislation Committee should have authority to review progress made in achieving a satisfactory standard of legislative reprinting and associated information.

10.24 In Chapter Eight, the Commission observed that its recommendations relating to the *Cabinet Handbook* and the OPC are designed to strengthen the system of legislative scrutiny in Queensland. However, a question remains as to how far the Parliament should be expected to rely on scrutiny procedures within Government when seeking to test proposed legislation against fundamental principles.

10.25 The Commission notes that, since 1975, the Legislative Assembly has had a Committee (the Committee of Subordinate Legislation) charged with scrutinising subordinate instruments for impact on fundamental principles including personal rights and liberties. However, unlike the Australian Senate and the ACT Legislative Assembly, the Queensland Parliament has not established any process for subjecting bills to specific scrutiny in terms of such principles.

10.26 The Commission considers that there are strong arguments for instituting a bills scrutiny process in the Legislative Assembly. Firstly, while Government legislation is subjected to scrutiny by Parliamentary Counsel and the Attorney-General, Governments may, at the end of the day, choose to override or modify rights or liberties, or principles of parliamentary government, as a matter of policy. While there may be good reasons for doing so, it is incumbent upon the Parliament to ensure that such proposals are adequately identified and debated. Secondly, the substantial volume of bills, the relatively limited time available for parliamentary debate, and the nature of party politics may lead to matters of legislative principle being overlooked in the parliamentary process. Thirdly, statutory provisions which may offend fundamental principles tend to be of a technical, legal character that require effective analysis by trained legal officers. Such skills may not always be available to Members.

10.27 Accordingly, the Commission recommends that the present Committee of Subordinate Legislation be discontinued and replaced by a new standing Committee to be called the "Parliamentary Scrutiny of Legislation Committee". The Commission considers that this Committee should be a bi-partisan, all party committee with responsibility for examining all bills introduced into the Parliament and all subordinate legislation tabled in the House.

10.28 Paragraph 8.23(b) outlines the proposed criteria for review by the Committee. The Commission considers that where the proposed Committee forms the opinion that a bill or subordinate legislation falls within the specified criteria, it should report its findings to the Legislative Assembly. In the case of bills, the Committee should be able to recommend appropriate amendments. In the case of subordinate legislation, the Committee should have the power to recommend amendments and the additional power to recommend that the instrument be disallowed by the Parliament.

10.29 The Commission also recommends that the proposed Parliamentary Scrutiny of Legislation Committee should, as a matter of principle, be advised by an experienced lawyer engaged by the Parliamentary Service Commission. As well, in order for the Committee to function effectively, the Commission recommends that adequate research and administrative staff should be provided to the Committee.

10.30 Finally in Chapter Eight, the Commission recommends that the *Acts Interpretation Act 1954* should be amended to require all subordinate legislation - with the exception of local authority by-laws and ordinances and certain other instruments - to be subject to standard requirements regarding Gazettal, tabling and disallowance. Currently, only regulations are subject to the standard requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance.

10.31 To provide some flexibility for the Government, the Commission proposes that the Governor in Council, by regulation, should be able to exempt a statutory rule (other than a regulation) made under *existing* legislation from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. The proposed safeguard in this procedure is that the regulation would be subject to tabling in the Legislative Assembly and hence would be open to disallowance on recommendation of the proposed Parliamentary Scrutiny of Legislation Committee. In respect of a statutory rule made after commencement of the proposed amendments to the *Acts Interpretation Act*, the Commission considers that exemption from Gazettal and tabling requirements should be made only by express provision in the enabling legislation.

10.32 Chapter Nine of the Report examined whether regulatory impact statements should be introduced for bills and subordinate legislation. The Commission concludes that there appears to be merit in the concept of having impact statements produced for bills introduced into Parliament and also for subordinate legislation tabled in the House. However, since such a procedure could have significant resource implications which have not been fully explored, the Commission does not propose at this stage to recommend their introduction.

10.33 However, as an immediate reform, the Commission recommends that for every bill introduced into the Legislative Assembly, and for all subordinate legislation that is required to be tabled, an explanatory memorandum should also be tabled for the information of Members. The explanatory memorandum should indicate:

(a) the objectives of the legislation;

(b) the reasons why legislation is considered necessary for achieving these objectives;

(c) the estimated cost to the Government of implementing the legislation; and

(d) the extent of consultation undertaken with parties likely to be affected by the legislation

as well as describing in plain terms the intent and nature of each clause.

Legislative Standards Bill

10.34 Appendix H contains the draft Bill for a Legislative Standards Act recommended by the Commission. The major provisions of the proposed Bill are outlined below:

Clause 3 sets out the purposes of the Act which include ensuring that Queensland legislation is of the highest standard and that there is adequate Parliamentary scrutiny of legislation;

Clause 5 establishes a position of "Queensland Parliamentary Counsel" and an "Office of the Queensland Parliamentary Counsel";

Clause 6 provides for Ministerial responsibility for the Office to be exercised by the Attorney-General and allows the Office to be attached, for administrative support purposes, to the Department of the Attorney-General;

Clause 7 outlines the functions of the Office including its responsibility for drafting bills and subordinate legislation. Clause 7(e) in conjunction with Clause 4 allows statutory rules (other than regulations) to be exempted from drafting by the Office by a regulation made under the Act. Clause 7 also establishes a statutory right for the OPC to advise Ministers and Members on fundamental legislative principles;

Clause 8 allows the Parliamentary Counsel to approve the drafting of a particular government bill or subordinate legislation by a person outside the Office;

Clause 9 authorises the Parliamentary Counsel to issue guidelines to be observed by persons in the drafting of local authority by-laws and ordinances, Aboriginal and Islander Council by-laws and other subordinate instruments exempted under the *Acts Interpretation Act 1954* or the Legislative Standards Act from drafting by the Office;

Clause 10 establishes a statutory right for Members of the Legislative Assembly to request drafting assistance from the Parliamentary Counsel and establishes that confidential communications between the Member and the drafter are subject to legal professional privilege;

Clause 11 establishes that the staff of the Office of Parliamentary Counsel will be appointed as public servants and that the Parliamentary Counsel will, in relation to the Office's staff, exercise the powers of a chief executive;

Clause 12 imposes a duty on the Parliamentary Counsel to arrange for adequate training of Office staff;

Clause 13 establishes that the Parliamentary Counsel is an accountable officer in terms of the *Financial Administration and Audit Act* 1977;

Clause 14 establishes annual reporting requirements for the Office;

Clause 15 stipulates eligibility criteria for appointment as Parliamentary Counsel; provides that the Parliamentary Counsel is to be appointed for a renewable term of up to 7 years, and excludes the position of Parliamentary Counsel from the Public Service;

Clause 16 provides for the Governor in Council to establish remuneration and other conditions of employment for the Parliamentary Counsel;

Clause 17 allows for preservation of rights where an officer of the Public Service is appointed as Parliamentary Counsel;

Clause 18 authorises the Attorney-General to grant leave of absence for the Parliamentary Counsel;

Clause 19 prescribes the mode of resignation for the Parliamentary Counsel;

Clause 20 specifies conditions for termination of appointment of the Parliamentary Counsel;

Clause 21 authorises the Parliamentary Counsel to delegate his or her powers;

Clause 22 establishes arrangements for acting appointments as Parliamentary Counsel;

Clause 23 requires explanatory memoranda to be tabled in the Legislative Assembly for all bills;

Clause 24 requires explanatory memoranda to accompany all subordinate legislation tabled in the Legislative Assembly;

Clause 25 constitutes an all-party Parliamentary Scrutiny of Legislation Committee;

Clause 26 applies the Rules and Standing Orders of the Legislative Assembly relating to Select Committees to the Parliamentary Scrutiny of Legislation Committee;

Clause 27 prescribes the term of appointment of Committee members;

Clause 28 deals with casual vacancies on the Committee;

Clause 29 prescribes the appointment of the Committee Chairperson and deputy Chairperson and arrangements for presiding over Committee meetings in the absence of the Chairperson or deputy Chairperson;

Clause 30 regulates quorum and voting procedures of the Committee;

Clause 31 establishes that the Committee may sit while the Legislative Assembly is not sitting;

Clause 32 establishes that the Committee is not bound by rules of evidence;

Clause 33 outlines the functions of the Committee in reviewing and reporting on bills and subordinate legislation and on other matters related to the purpose of the Act. The proposed criteria for review of bills and subordinate legislation are also outlined in this clause. This is an important clause in that it sets out, non-exhaustively, the fundamental legislative principles to be considered by the Committee;

Clause 34 regulates the timing of the Committee's reports on bills and provides that, where the Committee reports on a bill, a response must be tabled by the Member sponsoring the bill;

Clause 35 provides that the Committee may report on urgent bills to the extent considered practicable;

Clause 36 regulates the timing of the Committee's reports on subordinate legislation and requires the Committee to allow the relevant Minister reasonable opportunity to respond to a proposed report of the Committee; however, the Clause establishes that the procedure for consulting with the relevant Minister will not interfere with the Committee's right to move a motion of disallowance within the prescribed period;

Clause 37 requires the Committee to produce an Annual Report;

Clause 38 provides that the Committee has power to do all necessary things connected with the performance of its duties;

Clause 39 establishes that the Committee's powers to conduct hearings and summon witnesses will be regulated by Standing Orders;

Clause 40 provides for the appointment and conduct of subcommittees;

Clause 41 allows a subsequently constituted Committee to consider evidence provided to a previously constituted Committee;

Clause 42 establishes a position of Legal Advisor to the Committee;

Clause 43 provides that the Legal Advisor is to be appointed by the Parliamentary Service Commission; stipulates eligibility criteria for appointment and prevents the Legal Advisor from being an officer of the Public Service;

Clause 44 provides for the appointment of Committee staff by the Parliamentary Service Commission;

Clause 45 provides for travelling expenses and allowances for Committee Members to be determined by the Governor in Council;

Clause 46 clarifies that the position of Chairperson or Committee Member is not an office or place of profit under the Crown;

Clause 47 provides that funding of the Committee will be provided out of the estimates of the Parliamentary Service Commission;

Clause 48 provides for a regulation-making power under the Act;

Clauses 49 to 54 amend the *Acts Interpretation Act* to provide uniform publication, commencement, tabling and disallowance requirements for all subordinate legislation other than local authority by-laws and ordinances; subordinate legislation made by Aboriginal and Island Councils and such statutory instruments as are specifically exempted.

Clauses 50 and 51 repeal section 28A of the *Acts Interpretation Act* and insert new sections 29B to 29G:

New Section 29B(1) assures public access to subordinate legislation by requiring its publication in the Gazette;

New Section 29B(2) provides that unless a later commencement day or time is fixed in the legislation, subordinate legislation commences on the day it is Gazetted;

New Section 29B(3) provides that different provisions of the legislation may be commenced on different days or at different times;

New Section 29B(4) covers the situation where the commencement day or time purportedly fixed in the legislation occurs before the legislation is Gazetted; the section provides that in such cases, the legislation commences on the day of Gazettal;

New Section 29B(5) provides that where subordinate legislation is required to be approved by the Governor in Council, publication and commencement will not occur until approval has been given;

New Section 29C requires subordinate legislation to be tabled in the Legislative Assembly within 14 sitting days of Gazettal; failure to do so will cause the legislation to cease having effect;

New Sections 29D(1) and 29D(2) provide that the Legislative Assembly is able to disallow the legislation if notice of disallowance is given within 14 sitting days of tabling; and that the consequence of disallowance is that the legislation ceases to have effect;

New Section 29D(3) provides that Parliament's prorogation or dissolution does not affect the Legislative Assembly's power to pass a disallowance resolution;

New Section 29D(4) provides incentive for Parliament to deal with a notice of disallowance as the subordinate legislation in question will automatically cease to have effect if the notice is not debated;

New Section 29D(5) gives the Legislative Assembly opportunity to disallow part only of any subordinate legislation;

New Section 29(E) saves anything done before any subordinate legislation ceases to have effect because of new section 29C or 29D;

New Section 29F revives any legislation amended or repealed by subordinate legislation which ceases to have effect because of new section 29C or 29D;

New Section 29G takes away the effect of any Gazettal, tabling or disallowance provisions for subordinate legislation in other Acts;

Clause 52 inserts in section 36 of the *Acts Interpretation Act* a new definition of subordinate legislation which defines those subordinate instruments recommended by the Commission for tabling in the Legislative Assembly. The definition allows statutory rules (other than regulations) made under existing legislation to be excluded from the definition by regulation under the *Acts Interpretation Act*. Statutory rules made after the amendment comes into effect can only be excluded from the definition by an Act;

Clause 53 inserts new section 38AA in the *Acts Interpretation Act* which makes it clear that calculation of the number of sitting days is not affected if the days occur in different sessions of Parliament;

Clause 54 provides for a regulation making power under the *Acts Interpretation Act* so that it can be declared whether or not certain statutory rules are subordinate legislation as defined in the Act.

Clauses 55 to 56 repeal section 38(13) of the *City of Brisbane Act 1924* which requires Brisbane City Council ordinances to be tabled in the Legislative Assembly. This reflects the recommendation in paragraph 8.93(c) of this Report to remove the current anomaly whereby Brisbane City Council ordinances are required to be tabled but not local authority by-laws.

(Appendix I contains an index of paragraphs in this Report which refer to the subject matter of particular clauses of the proposed Legislative Standards Bill.)

Consolidation of Recommendations

10.35 In the course of the Report, the Commission has made a number of recommendations relating to the OPC, Parliamentary scrutiny of legislation and legislative review generally. These recommendations have been drawn together below to provide a summary list.

CHAPTER 2 DEFINING LEGISLATIVE PRINCIPLES

The Commission recommends that the Queensland *Cabinet Handbook* should be revised to take into account the additional fundamental legislative principles identified in Chapter Two of this Report (para. 2.70).

CHAPTER 3 DRAFTING FUNCTIONS OF THE OPC

Drafting of Government Bills

The Commission recommends that the proposed Legislative Standards Act (para 6.32(a) refers) provide that one of the functions of the OPC be to draft Government bills (para. 3.5).

Drafting of Subordinate Legislation

The Commission recommends that:

(a) the proposed Legislative Standards Act should:

(i) amend the *Acts Interpretation Act 1954* to define subordinate legislation as:

(A) statutory rules comprising regulations, rules, statutes, by-laws and ordinances (except for by-laws or ordinances made by a local authority, the Brisbane City Council or Aboriginal and Island Councils), and orders in council and proclamations of a legislative character;

(B) any other statutory instrument declared to be subordinate legislation by an Act or by a regulation of the Governor in Council made under the *Acts Interpretation Act*;

(ii) and establish that such subordinate legislation will be drafted by the OPC;

(b) the proposed Legislative Standards Act should allow the Governor in Council to exempt a statutory rule (other than a regulation) from drafting by the OPC;

(c) where the OPC does not have statutory responsibility for drafting particular subordinate legislation, the proposed Legislative Standards Act should give authority to the Parliamentary Counsel to issue guidelines to the drafting authority which would lay down standards to be observed in the drafting process. The guidelines should provide guidance on modern drafting style and also provide a list of fundamental legislative principles to be considered in the drafting of subordinate legislation; and

(d) the Government should examine whether by-laws made under the *Local Government Act 1936* and ordinances made under the *City of Brisbane Act 1924* should be referred to the OPC for examination prior to their approval by the Governor in Council (para. 3.28).

Use of External Consultants

The Commission recommends that:

(a) departments should be permitted to approach the Parliamentary Counsel to use a specialist consultant to draft a particular bill, or subordinate legislative instrument for which the OPC is responsible for drafting. The Parliamentary Counsel should have authority to approve or reject the request depending on the availability of appropriate drafting expertise within the OPC;

(b) **before a consultant-drafted bill or subordinate legislative instrument is introduced into Parliament or made by the prescribed authority, it should be submitted to the Parliamentary Counsel for examination. Where the Parliamentary Counsel considers that the bill or subordinate legislative instrument does not meet acceptable standards, he or she must advise the Premier as Chair of Cabinet; and**

(c) **these arrangements should be established in the proposed Legislative Standards Act** (para. 3.35).

Drafting Instructions for Subordinate Legislation

The Commission recommends that written drafting instructions should be prepared for all subordinate legislation required to be drafted by the OPC (para. 3.46).

CHAPTER 4 LEGISLATIVE ADVISORY FUNCTIONS OF THE OPC

Advice on Alternative Legislative Means of Achieving Policy Objectives

The Commission recommends that:

(a) **the proposed Legislative Standards Act provide that one of the functions of the OPC is to provide advice on alternative legislative means of achieving policy objectives; and**

(b) **departments continue to be encouraged to seek the advice of the OPC before seeking Cabinet approval for legislation to be drafted where it is considered that the OPC could usefully advise on alternate legislative means of achieving the intended policy** (para. 4.14).

The OPC as Cabinet Watchdog

The Commission recommends that:

(a) **subordinate legislation made by the Governor in Council which significantly affects:**

(i) **a politically sensitive policy area;**

(ii) **other departments, statutory bodies, or inter-governmental relations;**

(iii) **business operations or the rights of the general public; and**

(iv) **government expenditure or increases in revenue in excess of the CPI rate;**

should be subject to examination by the Parliamentary Business and Legislation Committee of Cabinet before its making by the Governor in Council;

(b) consideration be given to submitting particularly sensitive or substantial proposals for subordinate legislation to full Cabinet for approval prior to drafting;

(c) the requirement for the Parliamentary Counsel to advise the Parliamentary Business and Legislation Committee of Cabinet where Counsel considers that a bill departs from Cabinet approvals or raises difficulties, should be stated in the *Cabinet Handbook*. The *Handbook* should further clarify that:

  (i) any advice provided by Counsel should be by written memorandum; and

  (ii) such advice should be provided in relation to any proposed subordinate legislation considered by the Committee as well as bills;

(d) where Parliamentary Counsel consider that a drafting instruction exceeds Cabinet authority or raises difficulties, Counsel's position should be referred to the department or Cabinet as appropriate. The OPC should not seek to resolve the issue itself;

(e) where the Parliamentary Counsel advises Cabinet of any concerns arising from legislative proposals, including concerns in the area of legislative principle, he or she must in the end defer to the Cabinet decision;

(f) in advising Cabinet (through the Parliamentary Business and Legislation Committee) of any perceived difficulties associated with proposed legislation, the Parliamentary Counsel should not be expected to comment on matters that fall outside the drafter's professional responsibilities;

(g) the legislative advisory role of the Parliamentary Counsel should not extend to ensuring that legislation complies with party political platforms but only with Cabinet approved positions;

(h) the Parliamentary Counsel should not be called upon to give general legal advice to the Government about proposed courses of action other than in relation to legislative proposals; and

(i) consideration be given by the Government to:

  (i) splitting the Cabinet Handbook into two volumes: one dealing with Cabinet processes generally, the other with all matters to do with the preparation of legislation; and

  (ii) publishing both volumes and making them available for public sale (para. 4.51).

<u>The OPC's Advisory Role in Relation to Legislative Principles</u>

The Commission recommends that:

(a) the Parliamentary Counsel be given explicit authority in the Queensland *Cabinet Handbook* to advise the Parliamentary Business and Legislation Committee of Cabinet of any concerns involving points of law and legislative principle arising from bills and any subordinate legislation considered by the Committee. This advice should be conveyed by memorandum;

(b) where the Chair of the Parliamentary Business and Legislation Committee conveys to full Cabinet any views of the Parliamentary Counsel in connection with points of law or legislative principle that are contrary to those of the Committee, the Attorney-General should also be given opportunity to advise Cabinet as the Attorney considers appropriate; and

(c) the function of the OPC to advise Ministers and Members of the Legislative Assembly on fundamental legislative principles should be stated in the proposed Legislative Standards Act (para. 4.82).

CHAPTER 5 PRIVATE MEMBERS' LEGISLATION

The Commission recommends that:

(a) the proposed Legislative Standards Act provide that:

(i) a Member of the Legislative Assembly may request the Parliamentary Counsel to provide assistance from the OPC for the purpose of drafting a private Member's bill or an amendment to a bill before the Legislative Assembly; and

(ii) the Parliamentary Counsel must provide the assistance requested except where he or she considers that the level of assistance required would significantly disrupt the planned drafting program of the Office;

(b) the proposed Parliamentary Scrutiny of Legislation Committee should monitor access by Members to OPC drafting resources and report to the Parliament if arrangements recommended by the Commission prove to be unsatisfactory (para. 5.15).

The Commission recommends that the proposed Legislative Standards Act provide that where the OPC provides drafting assistance to a Member of the Legislative Assembly for the purpose of a private Member's bill or amendment before the House, relations between the drafter and the client should be governed by legal professional privilege. That is, the drafter must ensure that any instructions received from the client, and any advice provided in the form of a draft bill or amendment or other form, are kept confidential in accordance with the wishes of the client. This requirement would continue beyond the legislation's introduction into the Legislative Assembly (para. 5.23).

CHAPTER 6 ORGANISATION AND CONTROL OF THE OPC

The Commission recommends that:

(a) a new statute be enacted entitled "The Legislative Standards Act";

(b) the proposed Act should:

(i) establish a position entitled "The Queensland Parliamentary Counsel" and an "Office of the Queensland Parliamentary Counsel";

(ii) **exclude the position of the Parliamentary Counsel from the *Public Service Management and Employment Act 1988*;**

(iii) **declare that to be eligible for appointment as the Parliamentary Counsel, a person must be a barrister or solicitor or legal practitioner of the High Court or of the Supreme Court of a State or Territory of not less than 7 years standing;**

(iv) **provide for the Parliamentary Counsel to be appointed by the Governor in Council on a renewable term basis. A term may be up to 7 years, however, the Commission recommends that, in practice, appointments be for a minimum of 5 years;**

(v) **provide that remuneration and conditions of service for the Parliamentary Counsel should be determined by the Governor in Council;**

(vi) **provide that staff of the OPC are to be appointed under the *Public Service Management and Employment Act*; and**

(vii) **state that the functions and resources of the OPC are under the control of the Parliamentary Counsel and establish that in relation to the OPC the Parliamentary Counsel:**

(A) **has powers of a Chief Executive under the *Public Service Management and Employment Act*;**

(B) **is an accountable officer under the *Financial Administration and Audit Act 1977*.**

(c) **in respect of selection for the position of the Parliamentary Counsel, the following procedures should be instituted:**

(i) **selection should be undertaken by an independent advisory panel which should include a representative of the Public Sector Management Commission and a serving Parliamentary Counsel from interstate. The panel should not include a Minister of the Crown;**

(ii) **the selection panel should forward the nomination to the Attorney-General who should submit the nomination to the Governor in Council; and**

(iii) **where the Governor in Council appoints a person not recommended by the selection panel, the Attorney-General should inform Parliament of the fact** (para. 6.32).

Ministerial Responsibility

The Commission recommends that the proposed Legislative Standards Act should provide that the Minister responsible for the OPC is the Attorney-General (para. 6.59).

The Commission recommends that:

(a) **the OPC should be attached, for administrative support purposes, to the Department of the Attorney-General; and**

(b) **consideration be given to locating the OPC in the same building as the Department of the Attorney-General** (para. 6.62).

CHAPTER 7 DRAFTING STYLES, LEGISLATIVE INFORMATION AND TRAINING

The Commission agrees with the Government's proposal to establish a computerised database for retrieval of both Acts and subordinate legislation and **recommends that:**

(a) **particular attention should be given to improving the process for issuing consolidated editions of Acts and subordinate legislation with the aim of ensuring that consolidations occur almost immediately after amendments are made to the legislation. These consolidations should be available in database form and also in printed form taking into account cost effectiveness considerations;**

(b) **the Government should seek to ensure that sufficient resources are provided to the OPC and any associated agencies for development and maintenance of the project;**

(c) **the proposed Legislative Standards Act should state as one of its objectives, the need to ensure the satisfactory state of the statute book and the availability of legislative texts and information;**

(d) **the Act should give authority to the proposed Parliamentary Scrutiny of Legislation Committee to monitor progress toward achieving this objective and to report to the Legislative Assembly on any reviews conducted by the Committee into this area;**

(e) **the Government Printer should examine options to improve the availability of legislative texts and information to persons outside the Brisbane metropolitan area; and**

(f) **subordinate legislation should be issued in an annual volume in the same manner as for statutes** (para. 7.20).

The Commission recommends that:

(a) **the OPC and the Department of the Attorney-General conduct a series of seminars for Parliamentary Counsel and public servants generally which would allow legislative principles and their practical application to be addressed in depth;**

(b) **the Parliamentary Counsel should seek to arrange periodic secondments of Counsel to drafting offices in other jurisdictions, particularly those with a strong tradition of legislative scrutiny; and**

(c) **the Parliamentary Counsel should explore opportunities with the Department of the Attorney-General to second individual Parliamentary Counsel to legal policy and advisory sections within the Department of the Attorney-General and to encourage the secondment of lawyers from the Department, law firms and universities to the OPC** (para. 7.30).

CHAPTER 8 PARLIAMENTARY SCRUTINY OF LEGISLATION

Proposed Parliamentary Scrutiny of Legislation Committee

The Commission recommends that:

(a) The Committee of Subordinate Legislation of the Legislative Assembly be discontinued and replaced by a new Standing Committee entitled the "Parliamentary Scrutiny of Legislation Committee";

(b) the principal functions of the Committee should be to:

(i) review each bill introduced into the Legislative Assembly and report to the Assembly where, in the Committee's opinion, the bill, or a particular clause in the bill, appears:

(A) to trespass unduly upon rights and liberties including, for example, by:

(I) making rights, liberties and/or obligations dependent upon insufficiently defined administrative powers;

(II) making rights, liberties or obligations dependent upon non-reviewable administrative decisions or decisions that are not subject to appropriate review;

(III) being inconsistent with principles of natural justice;

(IV) inappropriately delegating administrative powers;

(V) reversing the onus of proof in criminal proceedings;

(VI) conferring power to enter premises and search or seize documents or other property without a warrant issued by a judge or other judicial officer;

(VII) failing to provide appropriate protection against self-incrimination;

(VIII) adversely affecting rights retrospectively;

(IX) conferring immunity from action, proceeding or prosecution;

(X) providing for the compulsory acquisition of property without fair compensation;

(B) to delegate legislative power inappropriately;

(C) to permit an Act to be amended by subordinate legislation;

(D) not to subject, or to insufficiently subject, the exercise of legislative power to the scrutiny of the Legislative Assembly;

(E) to fail to have sufficient regard to Aboriginal tradition and Torres Strait Islander tradition; and

(F) to be drafted in an insufficiently clear and precise style.

(ii) review any subordinate legislation laid before the Legislative Assembly and report to the Assembly where, in the Committee's opinion, the subordinate legislation appears:

(A) to exceed the powers conferred by the Act under which the subordinate legislation was made;

(B) to be inconsistent with the principles, objects or intent of that Act;

(C) to trespass unduly upon rights and liberties, including for example, by doing any one or more of the things mentioned in (b)(i)(A);

(D) to contain any matter which should properly be dealt with by an Act and not by subordinate legislation;

(E) to amend a provision of an Act;

(F) to provide for sub-delegation of powers delegated by the Act;

(G) to fail to have sufficient regard to Aboriginal tradition and Torres Strait Islander tradition; and

(H) to be ambiguous or drafted in an insufficiently clear and precise style (para. 8.23).

Review of Bills by Proposed Committee

The Commission recommends that:

(a) all bills introduced into the Legislative Assembly should be reviewed by the proposed Parliamentary Scrutiny of Legislation Committee. Where the Committee considers that it should report on any matter it should table a written report in the Legislative Assembly before or at the resumption of the second reading debate;

(b) the Committee should have discretion to report on urgent bills to the extent which it considers practicable. The Committee should also have authority to review and report on urgent bills after they have been passed by the Legislative Assembly; and

(c) where the Committee reports on a bill, the responsible Minister or Member (in the case of a private Member's bill) should table a response to the Committee's report before the close of the second reading debate on the bill (para. 8.34).

Review of Subordinate Legislation

The Commission recommends that where the proposed Parliamentary Scrutiny of Legislation Committee considers that a subordinate legislative instrument may be of a nature that requires the instrument to be reported to the Legislative Assembly, the Committee must, before tabling its report, provide opportunity for the relevant Minister to respond to the report. However, the process of seeking the Minister's comments should not prevent the Chair of the Committee from giving notice of a resolution disallowing the instrument at any time within the prescribed period (para. 8.37).

Other Functions of Proposed Committee

The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee monitor:

(a) progress in achieving effective legislative scrutiny within Government and Parliament, including the overall extent to which Queensland legislation has regard to fundamental legislative principles;

(b) the operation of the OPC in accordance with the purpose and provisions of the proposed Legislative Standards Act;

(c) progress in achieving professional drafting styles in legislation;

(d) observance of the proposed guidelines on subordinate legislation to be issued by the Parliamentary Counsel for drafting authorities outside the OPC (para 3.28(c) refers);

(e) progress in ensuring efficient and effective consolidation of statutes, reprinting of statutes, the availability of computerised legislative information, and accessibility of legislative texts in regional centres of Queensland (para 7.20 refers); and

(f) the standard of explanatory memoranda provided to Parliament (para 9.27 refers) (para. 8.41).

Membership of the Committee

The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee should consist of seven Members, not more than four of whom should be nominated by the Leader of the House, and not less than two of whom should be nominated by the Leader of the Opposition (para. 8.46).

Legal Advisor

The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee be advised by an experienced lawyer engaged either on a private consultancy basis or on the staff of the Parliamentary Service Commission (para. 8.57).

Secretariat

The Commission recommends that:

(a) as a minimum, the proposed Committee should have available to it a research director, two research officers, a clerk and an administrative assistant who should be appointed under the *Parliamentary Service Act 1988*; and

(b) the proposed Legislative Standards Act should state the general principle that the Committee should be provided with the necessary staff required to undertake its functions (para. 8.64).

Publication, Tabling and Disallowance Provisions for Subordinate Legislation

The Commission recommends that:

(a) the *Acts Interpretation Act 1954* be amended to require all subordinate legislation defined in paragraph 3.28(a) of this Report to be published in the Gazette, to be tabled in the Legislative Assembly and to be open to disallowance by the Legislative Assembly;

(b) the Governor in Council should have authority to exempt, by regulation, a statutory rule made under *existing* legislation (other than a regulation) from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. However, in respect of a statutory rule made after the commencement of the proposed amendments to the *Acts Interpretation Act*, exemption from Gazettal and tabling arrangements in that Act should be made only by express provision in the enabling legislation;

(c) the *City of Brisbane Act 1924* should be amended to discontinue the requirement to table Brisbane City Council ordinances in the Legislative Assembly; and

(d) the proposed Parliamentary Scrutiny of Legislation Committee should, as one of its first tasks, review the notification, publication, tabling and disallowance provisions of all statutory instruments not covered by the Commission's proposed amendments to the *Acts Interpretation Act*, including local authority by-laws and ordinances, to determine whether any of them should be brought into conformity with the proposed new arrangements (para. 8.93).

Quasi-Legislative Instruments

The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee investigate the use of quasi-legislative instruments under Queensland laws, such as "guidelines" and "standards", and examine whether any guidelines should be developed to ensure that statutory provisions providing for such instruments contain appropriate safeguards in terms of legislative principle and parliamentary scrutiny (para. 8.96).

CHAPTER 9 REGULATORY IMPACT STATEMENTS AND EXPLANATORY MEMORANDA

The Commission recommends that:

(a) the proposed Legislative Standards Act require that for every bill introduced into the Legislative Assembly, and for all subordinate legislation required to be tabled in the Legislative Assembly an explanatory memorandum should be tabled for the information of Members;

(b) the explanatory memorandum should:

(i) outline:

(A) the purpose or objectives of the legislation;

(B) the reasons why legislation is considered necessary for achieving these objectives;

(C) the estimated cost for the Government of implementing the legislation;

(D) the extent of consultation undertaken with parties likely to be affected by the legislation; and

(ii) describe in plain terms the intent and nature of each clause; and

(c) additionally, in respect of subordinate legislation, the explanatory memorandum should indicate the relevant sections of the Act under which the legislation was made (para. 9.27).

CHAPTER ELEVEN

ACKNOWLEDGEMENTS AND CONCLUDING REMARKS

11.1 The Commission wishes to express its appreciation to all persons and organisations who made submissions to the Commission, or otherwise provided views, on the Review of the Office of the Parliamentary Counsel. All submissions and all opinions expressed at the Public Seminar or via consultations with Commission staff were taken into account. Public input is essential to the Commission's review process and the Commission benefited greatly from the submissions and comments received from the public and from government agencies.

11.2 The Commission also wishes to express its appreciation to the following members of staff who assisted the Commission in the conduct of the Review; namely Mr Denzil Scrivens (Project Officer), Ms Nicola Burrows, Ms Jane Chester and Miss Sharon Byrne. The Commission would also like to thank the consultant for the review, Mr Harry Rossiter AO QC, formerly the Parliamentary Counsel for New South Wales, and also Emeritus Professor Douglas Whalan, who commented on certain draft Chapters of the Report.

11.3 The Commission also acknowledges the assistance of Mr John Leahy, the Queensland Parliamentary Counsel, and Ms Theresa Johnson of the Queensland University of Technology, in drafting the proposed Bill.

11.4 The Commission also wishes to place on record the assistance provided by the Office of the Parliamentary Counsel in providing the Commission with information relevant to the Review.

11.5 This Report was adopted unanimously at a meeting of the Commission held on 10 May 1991. Four Commissioners - the Chairman, Commissioner Hall, Commissioner Hughes and Commissioner Watson Blake - were present at the meeting. Commissioner Hunter, who was unable to attend this meeting, considered this Report and had agreed with its contents.

TOM SHERMAN
Chairman

15 May 1991

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APPENDIX A

QUEENSLAND

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

NOTICE OF REVIEW OF THE OFFICE OF THE PARLIAMENTARY COUNSEL

The Commission seeks written public submissions on its review of the Office of the Queensland Parliamentary Counsel (OPC). This review will culminate in a report to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier.

Issues Paper No 7 on the OPC is now available. Copies can be inspected at Public Libraries throughout the State (or, where there is no library within reasonable distance, the local Magistrate's Court House). Persons wanting a copy of the Issues Paper should contact the Commission on Ph 237 9696 (Brisbane callers) or 008 177 172 (Non-metropolitan callers).

The OPC drafts legislation for introduction into the Queensland Parliament and regulations for making by Executive Council. Issues to be considered in the review include:

a) to what extent should the OPC be able to provide independent advice to Government on the appropriateness of legislative proposals?

b) should the OPC have a role in scrutinising legislative proposals for impact on established legal principles, particularly those relating to legal rights?

c) what organisational and statutory options might best protect the independence of the OPC?

d) what assistance should the OPC provide to non-Government Members of Parliament?

e) should legislation introduced into Parliament and regulations tabled in Parliament be accompanied by regulatory impact statements?

Initial written submissions should be sent to the Commission by 19 October 1990. The address for written submissions is:

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION
P.O. BOX 349
NORTH QUAY QLD 4002 (REFERENCE 22)

All submissions received will be available for public inspection at Public Libraries and Magistrates Courts and in the Commission's Public Reading Room from 5 November 1990.

Commission location: Level 9, Capital Hill, 55 George Street, Brisbane. Telephone (07) 237 1185; Facsimile (07) 237 9778.

TOM SHERMAN
Chairman, 1 September 1990

A8800C

APPENDIX B

LIST OF SUBMISSIONS RECEIVED

Submission No.	Name/Organisation	Address
1	L Murray, CB QC	49 Red Hill Road NUDGEE Q 4014
2	Dr Peter Coaldrake Chairman of the Commission Public Sector Management Commission	PO Box 190 NORTH QUAY Q 4002
3	N A Johnson A/Regional Manager Aboriginal and Torres Strait Islander Commission	1st Floor Aplin House 19 Aplin Street CAIRNS Q 4870
4	Rodney Van Wegen Australian Community Action Network	PO Box 1693 ASHFIELD NSW 2131
5	Denver Beanland, MLA Parliamentary Liberal Leader Member for Toowong	Parliament House George Street BRISBANE Q 4000
6	John Grabbe Secretary/Executive Officer Dirranbandi District Irrigators' Association Inc.	PO Box 7 DIRRANBANDI Q 4486
7	Bruce White Research Officer Tharpuntoo Legal Service Aboriginal Corporation	PO Box 6175 CAIRNS Q 4870
8	E.F.F. Finger* Director-General Dept. of the Premier, Economic and Trade Development * Letter enclosing submission from Queensland Government Departments	Executive Building 100 George Street BRISBANE Q 4000
9	Office of the Parliamentary Counsel	David Longland Bldg George Street BRISBANE Q 4000
10	T Johnson Lecturer Faculty of Law Qld University of Technology	GPO Box 2434 BRISBANE Q 4001
11	R K Boyle Director-General Dept. of Business, Industry & Regional Development (Prepared by Business Regulation Review Unit)	GPO Box 1141 BRISBANE Q 4001

APPENDIX C

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

PUBLIC SEMINAR

"THE PREPARATION OF ACTS AND REGULATIONS"

What Checks and Balances are Needed to Ensure that Legislative Drafting Pays Due Regard to Personal Rights and Liberties?

Are the Public and Parliament Adequately Informed of the Impact of Proposed Legislation?

How Might Acts and Regulations be Made more Accessible?

TUESDAY 5 FEBRUARY 1991 STATE WORKS CENTRE, 80 GEORGE ST BRISBANE

Chairpersons:	Morning: Denzil Scrivens EARC Afternoon: Greg Sorensen EARC
8.15-8.45 REGISTRATION	
8.45-9.05 OVERVIEW OF SEMINAR	Mr Tom Sherman, Chairman EARC
9.05-10.10 SESSION 1. WHAT FUNDAMENTAL PRINCIPLES SHOULD BE OBSERVED IN DRAFTING?	
"'Forewarned is Forearmed' - Suggested Legislative Benchmarks for Protecting Rights"	Emeritus Professor Douglas Whalan, Advisor to Senate Scrutiny of Bills Committee and Senate Committee on Regulations and Ordinances
"Protecting Rights and Freedoms: A Judicial Perspective on the Drafter"	Hon Justice Elizabeth Evatt AO, President, Australian Law Reform Commission
"The Resurgence of Fundamental Legislative Principles in Queensland"	Hon Dean Wells MLA, Attorney-General, Queensland
10.10-10.30 MORNING TEA	

10.30-11.35
SESSION 2. GOVERNMENT RESPONSIBILITY FOR LEGISLATIVE SCRUTINY

"The Role of Parliamentary Counsel"	Ms Hilary Penfold, Second Parliamentary Counsel, Commonwealth of Australia
"The Role of the Cabinet Office Central Agency"	Mr Michael Consolo, Director, Cabinet Office Victoria
"Responsibilities of New Zealand Legislation Advisory Committee"	Mr Walter Iles CMG QC, Chief Parliamentary Counsel, New Zealand

11.35-12.15
PANEL QUESTIONS - FOR SESSIONS 1 AND 2

Prof Whalan

Justice Evatt

Ms Penfold

Mr Consolo

Mr Iles

12.15-1.45 LUNCH

1.45-2.45
SESSION 3. PARLIAMENTARY SCRUTINY OF LEGISLATION

"Scrutiny of Legislation by Parliamentary Committees: A Possible Menu"	Emeritus Professor Douglas Whalan, Advisor to Senate Scrutiny of Bills Committee and Senate Committee on Regulations and Ordinances
"New Zealand Experience in Relation to Parliamentary Scrutiny of Legislation"	Mr Walter Iles CMG QC, Chief Parliamentary Counsel, New Zealand
"Regulation Review - NSW Experience: Costs, Benefits and Implications"	Mr Adrian Cruickshank MP, Chairman, Regulation Review Committee, New South Wales Parliament

2.45-3.10
PANEL QUESTIONS FOR SESSION 3

Mr Cruickshank

Prof Whalan

Mr Iles

3.10-3.30 AFTERNOON TEA

3.30-4.05
SESSION 4. LEGISLATION - USER PERSPECTIVES

"Legislation is for the People"	Mr Bill Kidston, Director of Legislation, Queensland Department of Primary Industries
"Goodbye to Gobbledegook"	Ms Theresa Johnson, Lecturer in Law, Queensland University of Technology

4.05-4.20 PANEL QUESTIONS FOR SESSION 4

Mr Kidston

Ms Johnson

Mr John Leahy
Parliamentary Counsel
Queensland

4.20-4.30
SUMMING UP AND CONCLUSION — Mr Matt Foley MLA, Chairman, Parliamentary Committee for Electoral and Administrative Review, Queensland

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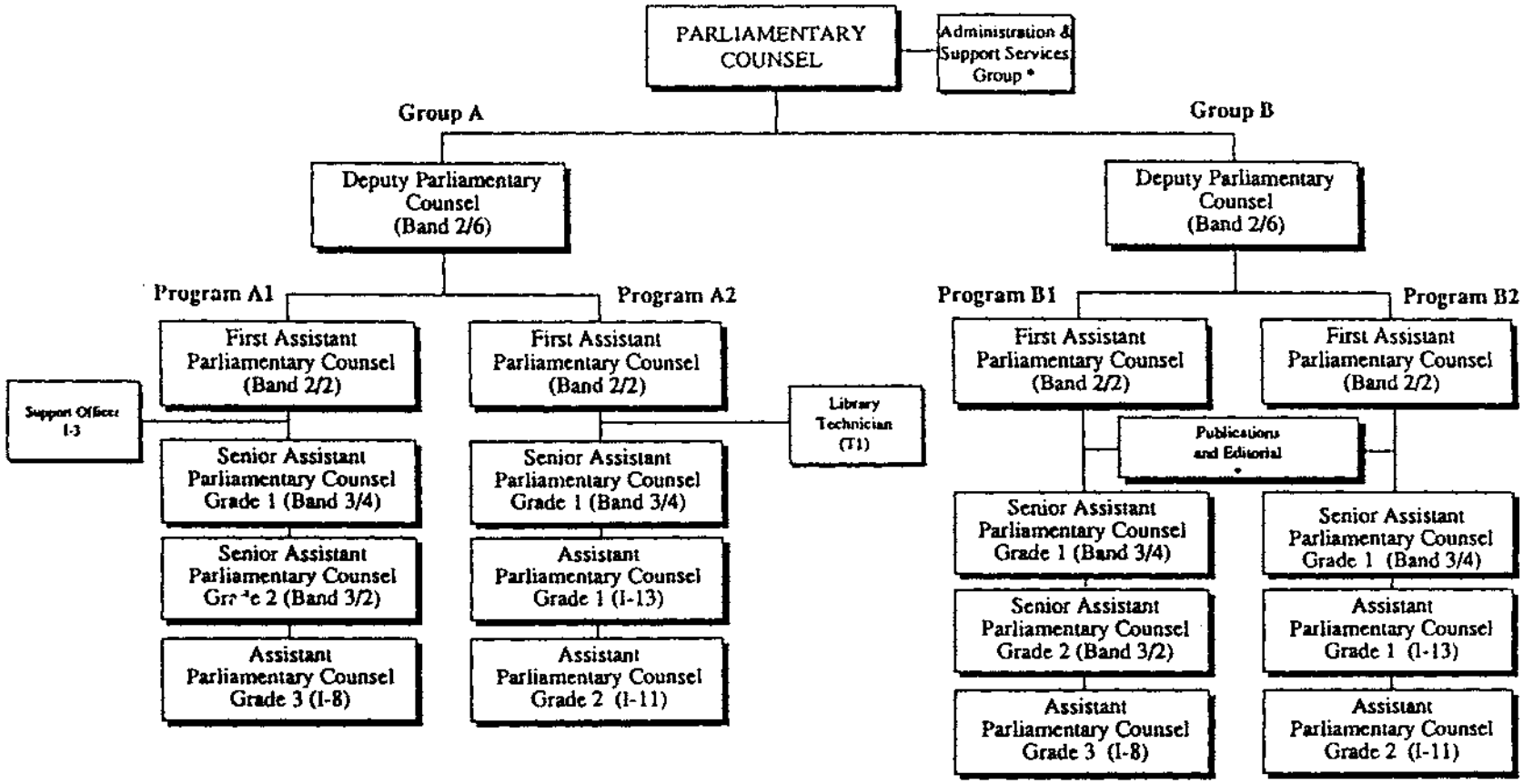
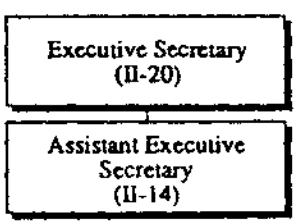
APPENDIX D: ORGANISATIONAL STRUCTURE FOR THE OFFICE OF THE PARLIAMENTARY COUNSEL

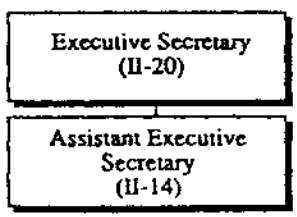


Group A: Secretarial Support Services



* Refer detail attached

Group B: Secretarial Support Services



APPENDIX E

HISTORY OF LEGISLATIVE DRAFTING

(REVISED VERSION OF EARC ISSUES PAPER NO. 7, CHAPTER TWO)

In Westminster systems, the major function of Parliament is to enact laws.

An Act is introduced into Parliament in the form of a bill. Until the end of the nineteenth century many bills were introduced on the initiative of individual Members. However, with the growth of party government, parliamentary business came to be dominated by Government matters. Nowadays, virtually all legislation considered by Westminster legislatures originates with the Government of the day.

Government bills are drafted at the direction of Cabinet and are introduced into Parliament by the Minister responsible for the legislation. During passage of the legislation, amendments to the bill may be moved at the instigation of the Government or on the initiative of Opposition or individual Members. But no amendment is likely to be adopted unless it receives the support of the Government which usually commands the majority in Parliament.

For several hundred years bills and amendments to bills have been mostly drafted by lawyers, or those having some form of legal training. This practice has been designed to ensure that the policy intent of a bill is drafted so as to have proper legal effect, ie. that:

(a) the legislation conforms with the statutory forms of the time and accepted legal terminology;

(b) its meaning is understood by the courts; and

(c) appropriate legal principles are taken into account in drafting.

In medieval England, legislative drafting was undertaken by judges who framed the statutes in terms of general principles. By the nineteenth century, growth in the amount and exactitude of legislation led to Government departments in England engaging legal advisors to draft bills. Private Members also engaged their own lawyers to draft legislation. However, by the middle of the century serious concern had developed over the unco-ordinated nature of legislative drafting. A major complaint related to inconsistencies in style, structure and provision among statutes. Another was the absence of a co-ordinated program to consolidate statutory amendments, the lack of which made English statutory law unnecessarily difficult to use.

For the Government, a further issue was the need to provide greater control over the drafting timetable in order to ensure that priority was given to bills to which the Government attached most importance. Without a centralised drafting service it became difficult to co-ordinate competing priorities among departments (Holdsworth 1938, pp. 371-84).

Establishment of U.K. Parliamentary Counsel

The perceived solution to these problems was to establish a new Office styled "Parliamentary Counsel to the Treasury". The Office was set up in 1869 and made responsible for:

(a) drafting all Government bills;

(b) advising on private Members' bills; and

(c) consolidating Acts and amendments to Acts.

Over time, the Office also came to play a role in training colonial drafters, particularly through the practice of sending out "model" Acts and Regulations to the colonies.

The Office of Parliamentary Counsel was made responsible to the Treasury in view of that Department's traditional co-ordination of many aspects of Government administration in England. It was styled "Counsel" because of the intention to engage a barrister in the position. The work of the Office was seen to require more than expertise in drafting, especially the kind exhibited in conveyancing:

> *"(the Parliamentary Counsel) 'is not merely a draftsman but is expected to give advice, when requested, on any matter involving, or likely to, involve, legislation' ... He is dealing not with a limited number of contingencies which may happen under an existing set of legal rules, but with the unknown effects which may result from a new and untried set of legal rules. He needs more vision, more 'constructive imagination', than a draftsman of conveyances. In addition he must, in the matter both of style and substance, 'study the idiosyncrasies of Parliament much, as a nisi prius barrister has to study the idiosyncrasies of a common jury'"* (Holdsworth 1938, p.383).

Since 1869, the Parliamentary Counsel for England and Wales has exercised continuous responsibility for drafting of Government bills and related parliamentary resolutions.

Colonial New South Wales

Between 1788 and 1823 the colony of New South Wales was governed without a local Parliament. The laws that applied were the laws of England. Nevertheless, the Governor was given power to make regulations and ordinances, provided that they were consistent, as far as practical, with English law. Drafting of the regulations was undertaken by the Governor, legal officers and judicial officers of the young colony.

In 1823 a Legislative Council was established which, in conjunction with the Governor, was given authority to make "laws and ordinances for the welfare and good government" of the colony (Melbourne 1963, p. 98). In 1842 a new Council was established with two-thirds of the Members elected by franchise and in 1855 a Legislative Assembly was created. These two Houses, together with the Governor, constituted the Parliament of New South Wales.

During the early years of the Legislative Council, the local judiciary assisted in drafting bills as well as regulations. Indeed in the 1820's and 1830's judicial officers played an active role in constitutional politics, at times initiating, drafting and advancing their own legislative schemes to achieve constitutional change. However, with the continued development of Parliament, the increasing amount of legislation, and further separation of executive and judicial functions, drafting work was taken over by lawyers other than judges. Most appear to have been private practitioners, although some drafting was undertaken within Government circles (Melbourne 1963, parts I-IV).

Eventually, in 1878, New South Wales followed the English model and adopted a central drafting service responsible for preparation of all Government legislation. Victoria followed suit in 1879.

Queensland

Following separation from New South Wales in 1859, the Queensland Partiament was established. Together with the Governor as representative of the Crown the Parliament was empowered to make laws for the "peace, welfare and good government" of the new colony (s.2 Queensland *Constitution Act 1867).*

INVOLVEMENT OF MINISTERS IN DRAFTING LAWS

In the early days of the new Queensland Parliament, legislation was occasionally drafted by Ministers. This practice was facilitated by the relatively small amount of legislation and the fact that several early Premiers and Ministers in Queensland were lawyers. The 1884 *Public Health Act* for example was drafted by Sir Samuel Griffith as Premier, Chief Secretary and Attorney-General. Later in 1901, Griffith drafted the Queensland *Criminal Code* while serving as Chief Justice of the Supreme Court of Queensland (Joyce 1990a and 1990b; VLRC 1987, p. 80).

Certainly, Ministers often played a close role in scrutinising legislative drafts, effectively undertaking the role normally performed today by departmental instructing officers. This was by no means unusual. In England, Prime Minister Gladstone used to go through bills line by line with the first Parliamentary Counsel Lord Thring (Duckworth 1990, correspondence).

MOVES TO ESTABLISH A CENTRAL DRAFTING SERVICE IN QUEENSLAND

Tentative moves had been made in Queensland as early as 1860 to establish a Parliamentary Draftsman. In 1860 John Bramston, Barrister, was appointed first Clerk of the Executive Council and temporary Parliamentary Draftsman (Bramston resigned in 1874 to become Attorney-General of Hong Kong and subsequently Assistant Under Secretary of State for the Colonies in Whitehall).

In the 1880's and 1890's it appears that the position of Parliamentary Draftsman was discontinued. Much of the drafting work seems to have been contracted out to private practitioners.

In 1899 the position was reconstituted, again as a part-time office. The incumbent, J L Woolcock, was allowed to engage in private practice. In 1927 Woolcock resigned from the position having been appointed a Judge of the Supreme Court of Queensland.

In 1927 the position became full time and in 1937 was redesignated "Parliamentary Counsel and Draftsman".

Since the 1930's, the OPC has expanded in size to meet the growing demands of legislative drafting. By 1957 the Office was employing three staff. By 1970 numbers had grown to six and, by 1981, to 13.

Since coming to office, the Goss Government has re-organised the OPC to take account of changing responsibilities, particularly in relation to subordinate legislation. The Premier has approved a new structure for the Office (reproduced in Appendix D). This structure provides for a total staff complement of 34 comprising 19 drafters and 15 clerical/secretarial staff.

Commonwealth

When the Commonwealth Government was established in 1901, responsibility for all legislative drafting was given to the Attorney-General's Department. The head of the Department, Sir Robert Garran, combined the roles of Permanent Head, Parliamentary Draftsman and (from 1916) Solicitor-General. In 1947 a separate office of Parliamentary Draftsman was created within the Department. In 1970 a statutory Office of Parliamentary Counsel was established responsible to the Attorney-General.

QUEENSLAND PARLIAMENTARY COUNSEL

DRAFTING INSTRUCTION NO. 1 OF 1990

PARLIAMENTARY COUNSEL'S ADVICE TO PARLIAMENTARY BUSINESS AND LEGISLATION COMMITTEE

The Chairman of the Committee has asked for briefing notes to be provided to the Committee in relation to certain Bills.

A. Cases where briefing notes must be provided

2. The cases in which briefing notes must be provided are as follows:

(a) Departure from Cabinet authority

Cases where there has been a significant departure from the relevant Cabinet Decision. These cases could arise because provisions have been included that were not authorised by the Cabinet or are inconsistent with what the Cabinet authorised. Cases in which there have been insignificant departures from the detailed wording of the relevant Cabinet Decision, or provisions have been included that are entirely consistent with the policy approved by the Cabinet, need not necessarily be drawn to the Committee's attention.

(b) Potential embarrassment to Government

Cases where provisions have been included that are consistent with what the Cabinet authorised, but could be potentially embarrassing to the Government and have not been specifically considered by the Cabinet.

(c) Infringement of fundamental legislative principles

Cases where provisions have been included that infringe fundamental legislative principles (see Cabinet Handbook). The Chairman of the Committee has mentioned to me that these are cases in which the Committee looks particularly to this Office for advice and expects this Office to play an active role.

(d) Unresolved disagreements between Departments

Cases where there are significant unresolved disagreements between Departments or agencies.

(e) Failure to consult with interested Departments

Cases where there has been a refusal or failure to consult with a Department or agency with an interest in aspects of the Bill.

(f) Subordinate legislation not subject to tabling and disallowance

Cases where provisions have been included that authorise the making of subordinate legislation of a legislative nature that is not subject to tabling and disallowance or is subject to tabling and disallowance requirements that do not conform to the Acts Interpretation Act.

B. Other cases in which briefing notes are to be provided

3. Briefing notes should also be provided in cases where there are other issues of which the Cabinet should be aware.

C. Procedure where cases arise during drafting

4. Where Counsel becomes aware of an issue that may need to be drawn to the Cabinet's attention, Counsel should immediately draw the matter to the attention of the instructing officers and may ask them to reconsider the matter and, in appropriate cases, ask them to draw the matter to the attention of senior officers of the instructing Department and the relevant Minister (see Cabinet Handbook regarding instructions beyond or contrary to Cabinet authority).

5. If the issue is relevant to the Attorney-General's role as First Law Officer of the Crown (eg. involves infringement of fundamental legislative principles), the instructing officers should also be informed that the issue will need to be drawn to the Attorney-General's attention.

6. If the instructing officers insist that the Bill be drafted as instructed, Counsel should immediately inform Parliamentary Counsel of the matter and, in appropriate cases, also inform the Attorney-General's liaison officer (Ms Karen Walters - 93467).

D. Cases of doubt

7. If cases arise where Counsel is uncertain whether a matter should be drawn to the Cabinet's attention or as to the procedure to be followed in handling a matter, please draw the matter to my attention as soon as possible and, in any event, before the Bill is put in the Cabinet bag.

E. Clearance of briefing notes

8. Briefing notes should be cleared by Parliamentary Counsel or, in his absence, Deputy Parliamentary Counsel or Senior Assistant Parliamentary Counsel.

F. Time for preparation of briefing notes

9. Briefing notes need to be prepared in time to be submitted to the Secretary of the Committee early in the afternoon of the Friday before the relevant Committee meeting.

(John Leahy)
Parliamentary Counsel
3 December 1990

APPENDIX G

PARLIAMENTARY COUNSEL'S OFFICE: PUBLICATION AND INFORMATION SERVICES (18 FEBRUARY 1991)

(supplied by Parliamentary Counsel of Queensland)

INTRODUCTION

1. The Parliamentary Counsel's Office has traditionally performed a range of tasks associated with the publication of Queensland legislation and information relating to Queensland legislation.

2. The Office's role was complicated, until recently, by the fact that another department, the Department of Justice (formerly the Department of Justice and Attorney-General), had overall responsibility for the administrative and funding arrangements for legislative publications.

3. The Department of Justice and Attorney-General, at various times in the past, arranged for agreements to be entered into between the State and legal publishers (with one exception, the publisher concerned was Butterworths Pty. Ltd.). For example, the 1962 Reprint of Queensland Statutes was prepared and published under contract with Butterworths. Other agreements were made with Butterworths for the preparation and marketing, or the marketing, of the Queensland Statute and Case Annotations, the Continuing Reprint of Queensland Legislation and the Annual Volumes of Queensland Statutes. The last of these agreements expired several weeks ago. However, the legislative publications continue to be prepared and marketed on the basis of the expired agreements.

4. In June 1990 responsibility for administrative and funding arrangements for legislative publications was transferred to the Parliamentary Counsel's Office. At about the same time, the administration of relevant Acts (The Acts Citation Act of 1903, The Statute Law Revision Acts, 1908 to 1959, The Statutes Reprint Act of 1936, The

Statutory Instruments Reprint Act of 1952 and The Queensland Statutes (1962 Reprint) Act of 1962 were vested in the Department of the Premier, Economic and Trade Development. The publishing program was initially given a budget of $300,000 for the 1990/1991 financial year.

5. The Parliamentary Counsel's Office is moving towards a complete computerisation of its drafting and publishing functions. Computerisation will revolutionise the procedures and processes involved in publishing information and information relating to legislation.

6. This new development, together with the administrative and funding control now held by this Office and the expiry of the previous agreements for the preparation and marketing of legislation, will provide a unique opportunity to review systems and procedures governing the publication of Queensland legislation and information relating to Queensland legislation. This review is now in progress, but its finalisation is dependent, amongst other things, on the progress of the Office's computerisation program.

7. From the Office's perspective, the aim of the review is to ensure that the Office provides the Government, the Parliament and the people of Queensland with legislative publications and information services of the highest quality. From a broader perspective, the aim of the review is to ensure the availability of accurate, up-to-date texts of, and information relating to, Queensland legislation (in both printed and data base format). In a parliamentary democracy based on the rule of law, it is essential that legislation be readily available in a form that can be relied on with confidence. It is the Office's intention to ensure that these aims are achieved in the most effective and efficient way.

DESCRIPTION OF MAJOR FUNCTIONS

(a) General

8. The general publishing functions of the Parliamentary Counsel's Office involve 7 separate publication series:-

(1) the publication of reprints of all Acts of the Queensland Parliament on a continuing basis, "**the Continuing Statutes Reprint**";

(2) the publication of reprints of subordinate legislation made under Acts of the Queensland Parliament on a continuing basis, "**the Continuing Subordinate Legislation Reprint**";

(3) the publication of **departmental reprints**;

(4) the publication of the Queensland Statutes and Case Annotations (a loose leaf volume providing a comprehensive list of Queensland Acts together with all amending Acts and subordinate legislation, case notes and other notes containing relevant information) "**the Statutory Annotations**";

(5) the publication of the Acts of the Queensland Parliament for each year in bound volumes, "**the Annual Volume**";

(6) the publication of Queensland subordinate legislation for each year in bound volumes (selected material is taken from the Gazette and reprinted in the volumes), "**the Queensland Statutory Instruments Reprint**";

(7) the publication of bound volumes for each session of Parliament containing a precis of each Bill passed during the Session, "**the Record of Legislative Acts**".

9. Staff of the Parliamentary Counsel's Office also perform duties associated with the publication of the **Queensland Statutes (1962 Reprint)**, which was carried out between 1962 and 1974.

10. The publications work of the Office is carried out in 2 sections. The Publications Section is concerned with the publication of the Annual Volume, the Queensland Statutory Instruments Reprint and the Record of Legislative Acts. The Section also provides administrative support services for the Office. The Editorial Section is concerned with the publication of the Continuing Statutes Reprint, the Continuing Subordinate Legislation Reprint and departmental reprints.

11. The Publications Section is headed by the Publications Officer and the Editorial Section by the Editorial Officer. Each Section is oversighted by a Senior Counsel on a rotational basis. As a result of recent restructuring of the Office, the other staff of the Sections will occupy "pool" positions and will be available to work in either Section as the work-load requires. However, it is envisaged that the Publications Officer will usually be assisted by a Senior Legislation Officer and the Editorial Officer will usually be assisted by 2 Senior Legislation Officers and 3 Legislation Officers. It is intended that the staff of the Sections will, through a series of rotations and on-the-job training, be fully trained in the work of both Sections.

(b) Continuing Statutes Reprint

12. The Continuing Statutes Reprint involves the following procedures:

(1) Allocation of priorities for reprinting

13. The Editorial Section draws up a priority list of Acts for reprinting after -

- considering the budget available for reprinting;

- considering the degree to which each Act has been amended since its last reprinting;

- considering the Acts that are not yet in the Continuing Statutes Reprint series;

- consulting as necessary with the relevant administering agency in order to assess the extent to which an Act is used and its importance; and

- consulting as necessary with the Government Printing Office in order to assess the demand for an Act.

(The Office has only recently assumed this responsibility. Previously Acts were reprinted only on the instructions of the Department of Justice.)

(2) Preparation of manuscript for printing

13. The Editorial Section prepares a manuscript for each Act that is to be reprinted. The manuscript:

(a) uses the last reprint and incorporates all subsequent amendments in cut and paste form;

(b) includes an analysis of contents and a cover page; and

(c) also includes notes showing the amending Acts, annotations (down to subsection) of amended provisions, transitional and savings provisions and any amending or other provisions that are not yet in force.

(When the Office's Publication functions have been computerised, the manuscript will be prepared electronically and not by the physical cutting and pasting of material. The Office is presently reviewing the format of reprints and will be consulting with interested parties through its legislative Drafting Issues Discussion paper series.)

(3) Printing and proofreading of manuscript

14. The manuscript is sent to the Government Printing Office ("Goprint") for printing. The Editorial Section proofreads the proof of the printed manuscript on its return.

(The present procedures involve inefficiencies both for Goprint and this Office. Goprint has to do a substantial amount of rekeying in preparing the reprint, although data is "captured" from the existing Goprint database wherever possible. The proofreading burden for the Office is considerable, because there is substantial room for error under the present procedures and printed manuscripts have to be fully proofread. When the Office's publication functions have been computerised, the manuscript will be prepared entirely in the Office, eliminating rekeying by Goprint and reducing the need for proofreading in the Office.)

(4) Procedures accompanying proofreading of printed manuscript

15. During the proofreading process, particular attention is paid to the detection of errors in the reprinted Act. Apart from printing errors, there could be errors that arose during the drafting of the original Act or any of the subsequent amending Acts (e.g. mis-spellings, grammatical errors, inconsistencies of style, incorrect citations or cross-references or mistakes in amending formulae). There may also be printing errors carried forward from an earlier reprint. Errors that require legislative correction are noted in the reprint and arrangements made for their correction in a subsequent Statute Law Revision Bill. It should be mentioned that a high premium is placed on the accuracy of the reprints and considerable care is taken to ensure a very high degree of accuracy.

16. At this stage, matters requiring updating (e.g. matters of setting out, format and style) are noted on the printed manuscript if they do not need further legislative authority for their implementation.

17. A check is made of the notes to the reprint and the notes are expanded as necessary. This may involve research over decades of legislative activity to ensure that the legislative history of a provision is correctly noted.

18. In appropriate cases, an index to the reprint is prepared or, if an index has previously been prepared for the Act, the index is updated. Until recently, the practice followed was to prepared an index for each Act that was reprinted. This practice was very time consuming and was delaying the finalisation of many reprints. Accordingly, it has been tentatively decided that, as a general rule, indexes should only be prepared (or updated) for Acts that are of particular importance or utility and Acts that are over 30 pages in length. (This Office proposes consulting with interested parties on this matter through its Legislative Drafting Issues Discussion Paper series. The need for indexes will, in any event, need to be examined once there is a database of Queensland legislation and the capacity exists to do computer searches of that database.)

(5) Revision of printed manuscript

19. The revised manuscript is sent to Goprint for a revised proof. The revised proof is proofread on its return. This process is repeated until the Editorial Section is satisfied with the proof.

(6) Printing and distribution of reprint

20. When the Editorial Section is satisfied with the proof, Goprint is instructed to print the reprint.

21. After the printing of a reprint has been completed, the Office pays Goprint for the printing from its budget allocation for printing.

22. Butterworths have a standing order for copies of every reprint and are invoiced by the Office in accordance with the agreement rate. Goprint keep copies for direct sale by Goprint and distribute other copies as directed by the Office, including those sent to Butterworths and those that are distributed, free of charge in accordance with the "free list". A stock of the reprints is maintained at Goprint. Stock control is left primarily to Goprint staff and the Office is advised when stocks are depleted and need renewing. If the relevant Act is not to be reprinted, this is done by a "fastprint" of the existing reprint.

23. (These printing and distribution procedures are presently under review. As part of the computerisation of the Office publication functions, consideration will need to be given to whether a loose-leaf system should be adopted for the Continuing Statutes Reprint. If some kind of loose-leaf system is not adopted, the cost of printing reprints in whole after minor amendment may prevent the attainment of the goal of a completely up-to-date set of reprints. It may, however, be preferable to set a lower goal for the reprints and to deal with minor amendments through the Annotations.)

(c) Continuing Subordinate Legislation

24. The Editorial Section carries out the same process with respect to subordinate legislation as it carries out with respect to the reprint of Acts. There are, however, some special problems with subordinate legislation reprints and the Continuing Subordinate Legislation series is by no means as advanced as the Continuing Statutes reprint. Many of these special problems are attributable to the fact that until recently drafting of subordinate legislation was a matter for the administering department itself. The Crown Solicitor's role was limited to settling drafts prepared by the Department. It is likely to take a number of years for these problems to be overcome unless there is a comprehensive review of Queensland subordinate legislation.

(d) Departmental Reprints

25. Departmental reprints are completed in the same manner as a reprint that is to be included in the Continuing Reprint. The only difference is that the reprint is requested by the administering department. If the reprint is also to be included in the Continuing Reprint, the department usually shares the printing costs.

(e) Statutory Annotations

26. The Statutory Annotations is the basic research tool for all persons, lawyers and others, seeking to discover the current state and history of Queensland laws. It is a loose-leaf volume with replacement pages published twice a year. The Publications Officer supplies an updated manuscript of the legislation information content in the format in which it is to be published. Butterworths supply the case annotations of particular cases on particular provisions of legislation.

(f) The Annual Volume

27. This is a relatively straightforward task for the Office. The Publications Officer receives from the Government Printer over a period of time pages of the Acts to be included in an Annual Volume and checks them for accuracy and completeness.

(g) Queensland Statutory Instruments Reprint

28. The Publications Officer examines each week's Gazette and selects material to be printed in quarterly volumes for each year. The selection involves choosing the regulations and other instruments traditionally regarded as worthy of reprinting in the series. The series has a very low number of subscribers and its continued viability seems questionable even if it were to be marked appropriately. It would seem preferable for the Reprint to be replaced by a number of pamphlet series and annual volumes.

APPENDIX H

LEGISLATIVE STANDARDS BILL 1991

TABLE OF PROVISIONS

PART 6 - AMENDMENTS OF ACTS INTERPRETATION ACT 1954

PART 7 - AMENDMENT OF CITY OF BRISBANE ACT 1924

A BILL

FOR

An Act relating to the standards of legislation, the drafting and Parliamentary scrutiny of legislation, and for other purposes related to legislation

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows -

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Legislative Standards Act 1991.

Commencement

2. This Act commences on a day to be fixed by proclamation.

Purposes of Act

3. The purposes of this Act include ensuring that -

(a) Queensland legislation is of the highest standard; and

(b) an effective and efficient legislative drafting service is provided for Queensland legislation; and

(c) there is adequate Parliamentary scrutiny of Queensland legislation; and

(d) Queensland legislation, and information relating to Queensland legislation, is readily available in both text and database form.

Interpretation

4. In this Act -

"**Aboriginal tradition**" means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships;

"**Bill**" means a Bill for an Act proposed for enactment by the Parliament;

"**Committee**" means the Parliamentary Scrutiny of Legislation Committee;

"**committee member**" means a member of the Committee;

"**exempt instrument**" means -

(a) a by-law or ordinance made by a local authority; or

(b) a statutory rule (other than a regulation) that is declared not to be subordinate legislation by an Act or by regulations made under the Acts Interpretation Act 1954;

(c) a statutory rule (other than a regulation) that is declared to be an exempt instrument by an Act or the regulations;

"**Government Bill**" means a Bill presented, or proposed to be presented, to the Legislative Assembly by a Minister acting in that capacity;

"**Legal Advisor**" means the Legal Advisor to the Committee;

"**Member**" means a member of the Legislative Assembly;

"**Office**" means the Office of the Queensland Parliamentary Counsel;

"**Private Member's Bill**" means a Bill that is not a government Bill;

"**review**" includes examine and inquire;

"**Torres Strait Islander tradition**" means the body of traditions, observances, customs and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships;

"**urgent Bill**" means a Bill that, by leave of the Legislative Assembly, is or is to be passed with unusual expedition through all its stages.

PART 2 - OFFICE OF THE QUEENSLAND PARLIAMENTARY COUNSEL

Division 1 - General

The Parliamentary Counsel and Office

5. (1) There is to be a Queensland Parliamentary Counsel.

(2) An office to be called the Office of the Queensland Parliamentary Counsel is established.

(3) The Office consists of the Parliamentary Counsel and the staff of the Office.

Control of Office

6. (1) Subject to the Attorney-General, the Parliamentary Counsel is to control the Office.

(2) Subsection (1) does not prevent the attachment of the Office to the department for the purpose of ensuring that the Office is supplied with the administrative support services that it requires to carry out its functions effectively and efficiently.

Functions of Office

7. The functions of the Office are -

(a) to draft all Government Bills; and

(b) to draft, on request, Private Member's Bills; and

(c) to draft all amendments of Bills for Ministers; and

(d) to draft, on request, amendments of Bills for other Members; and

(e) to draft all proposed subordinate legislation (other than exempt instruments); and

(f) to draft, on request, instruments for use in the Legislative Assembly (whether or not in relation to a Bill or amendment); and

(g) in performing its functions under paragraphs (a), (c), (e) and (f), to provide advice to Ministers and departments on -

(i) alternative legislative means of achieving policy objectives; and

(ii) the application to proposed legislation of fundamental legislative principles of Queensland's system of government and law; and

(h) in performing its functions under paragraphs (b), (d) and (f), to provide advice to Members on -

(i) alternative legislative means of achieving proposed policy objectives; and

(ii) the application to proposed legislation of fundamental legislative principles of Queensland's system of government and law; and

(i) to provide advice to the Governor in Council, Ministers and departments on the lawfulness of proposed subordinate legislation; and

(j) the making of arrangements for -

(i) the printing and publication of Queensland legislation, including reprints of Queensland legislation; and

(ii) access to Queensland legislation in database form; and

(k) any other function conferred on the Office by or under this or any other Act; and

(l) functions incidental to a function under another paragraph of this section.

Drafting of government legislation otherwise than by Office

8. (1) The Parliamentary Counsel may, in writing, approve the drafting of a particular government Bill or particular proposed subordinate legislation by a person who is not a member of the Office.

(2) When drafting of the Bill or proposed subordinate legislation is finished, it must be submitted to the Parliamentary Counsel for examination to determine whether it achieves an acceptable standard of legislative drafting.

(3) If the Parliamentary Counsel is not satisfied that the Bill or proposed subordinate legislation achieves that standard, the Parliamentary Counsel must advise the Premier in writing.

Drafting of exempt instruments

9. (1) The Parliamentary Counsel may issue guidelines with respect to the drafting practices that are to be observed by persons in the drafting of exempt instruments.

(2) Without limiting subsection (1), guidelines under that subsection may make provision for or with respect to -

(a) the citation and numbering of exempt instruments; and

(b) the use of gender-neutral language in exempt instruments; and

(c) the application to exempt instruments of fundamental legislative principles of Queensland's system of government and law; and

(d) the printing and drafting style used in exempt instruments.

Private Member's Bills and amendments

10. (1) A Member may request the Parliamentary Counsel to draft a Bill, an amendment of a Bill or an instrument to be used in the Legislative Assembly (whether or not in relation to a Bill or amendment).

(2) The Parliamentary Counsel must comply with the request unless he or she considers that it would not be possible to comply with the request without significantly and adversely affecting the government's legislative program.

(3) Confidential communications passing between a Member or a member of the staff of a Member's office, and the Parliamentary Counsel or a member of the staff of the Office, are subject to legal professional privilege.

(4) Without limiting subsection (3), such communications may not be disclosed by the Parliamentary Counsel or the member of the staff of the Office without the consent of the Member.

(5) Subsections (3) and (4) have effect despite any other law to the contrary.

Division 2 - Staff of the Office

Staff of Office

11. (1) The staff of the Office are to be appointed under the Public Service Management and Employment Act 1988.

(2) The Parliamentary Counsel has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit comprising the staff of the Office, as if -

(a) that unit were a department within the meaning of the Public Service Management and Employment Act 1988; and

(b) the Parliamentary Counsel were the chief executive of that department.

Duty of Parliamentary Counsel in relation to training

12. It is the duty of the Parliamentary Counsel to ensure that the staff of the Office are adequately and appropriately trained to enable the Office to carry out its functions effectively and efficiently.

Division 3 - Accountability requirements

Parliamentary Counsel accountable officer

13. (1) Subject to the Attorney-General, the Parliamentary Counsel is the accountable officer of the Office within the meaning of the Financial Administration and Audit Act 1977.

(2) The Financial Administration and Audit Act 1977 applies to the Parliamentary Counsel and the Office as if -

(a) the Office were a department within the meaning of the Public Service Management and Employment Act 1988; and

(b) the Parliamentary Counsel were the chief executive of that department.

Annual report

14. (1) The Parliamentary Counsel must, not later than 4 months after the end of each financial year, prepare and give to the Attorney-General a report on the operations of the Office during the year.

(2) Without limiting subsection (1), the Parliamentary Counsel must include in the report -

(a) an outline of the goals and objectives of the Office; and

(b) particulars of the principal activities of the Office for the year; and

(c) an outline of the organisational structure and resources of the Office; and

(d) an assessment of the progress made towards achieving the purposes of this Act.

(3) The Attorney-General must cause a copy of the report to be laid before the Legislative Assembly, and given to the Committee, within 14 days after its receipt by the Attorney-General.

(4) If, at the time the Attorney-General would otherwise be required to lay a copy of the report before the Legislative Assembly, the Legislative Assembly is not in session or not actually sitting, the Attorney- General must give a copy of the report to the Clerk of the Parliament.

(5) The Clerk must cause a copy of the report to be laid before the Legislative Assembly on its next sitting day.

(6) For the purposes of its printing and publication, the report is taken to have been laid before the Legislative Assembly, and to have been ordered to be printed by the Legislative Assembly, when it is given to the Clerk.

(7) The duty of the Parliamentary Counsel under this section is in addition to any duty of the Parliamentary Counsel under the Financial Administration and Audit Act 1977 or any other Act.

Division 4 - Provisions relating to the Parliamentary Counsel

Appointment of Parliamentary Counsel

15. (1) The Parliamentary Counsel is to be appointed by the Governor in Council.

(2) A person is not eligible for appointment as Parliamentary Counsel unless the person is a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of the State, another State or a Territory of not less than 7 years standing.

(3) Subject to sections 19 and 20, the Parliamentary Counsel holds office for such term (not exceeding 7 years) as is specified in the instrument of appointment, but is eligible for re-appointment.

(4) The Public Service Management and Employment Act 1988 does not apply to the appointment of the Parliamentary Counsel.

Terms and conditions of appointment

16. (1) The Parliamentary Counsel is to be paid such remuneration and allowances as are determined by the Governor in Council.

(2) The Parliamentary Counsel holds office on such terms and conditions not provided for by this Act as are determined by the Governor in Council.

Preservation of rights

17. (1) This section applies if an officer of the public service is appointed as the Parliamentary Counsel.

(2) The person retains and is entitled to all rights that have accrued to the person because of employment as such an officer, or that would accrue in the future to the person because of that employment, as if service as Parliamentary Counsel were a continuation of service as an officer of the public service.

(3) If the person has not attained 65 years of age on the expiry of the person's term of office or resignation -

(a) the person is entitled to be appointed to an office in the public service at a salary level not less than the present salary level of an office equivalent to the one the person held before being appointed as Parliamentary Counsel; and

(b) the person's service as Parliamentary Counsel is to be regarded as service of a like nature in the public service for the purpose of determining the person's rights as an officer of the public service.

Leave of absence

18. The Attorney-General may grant leave of absence to the Parliamentary Counsel on such terms and conditions as the Attorney-General considers appropriate.

Resignation

19. The Parliamentary Counsel may resign by writing signed and delivered to the Governor.

Termination of appointment

20. The Governor in Council may terminate the appointment of the Parliamentary Counsel if the Parliamentary Counsel -

(a) becomes a patient within the meaning of the Mental Health Services Act 1974; or

(b) is convicted of an indictable offence (whether in Queensland or elsewhere); or

(c) is guilty of misconduct of a kind that could warrant dismissal from the public service if the Parliamentary Counsel were an officer of the public service; or

(d) is absent, without the Attorney-General's leave and without reasonable excuse, for 14 consecutive days or 28 days in any 12 months.

Delegation of powers

21. The Parliamentary Counsel may delegate his or her powers under this or any other Act to a member of the staff of the Office.

Acting Parliamentary Counsel

22. The Governor in Council may appoint a person to act as Parliamentary Counsel -

(a) during a vacancy in the office; or

(b) during any period, or during all periods, when the Parliamentary Counsel is absent from duty or from the State or is, for any other reason, unable to perform the duties of the office.

PART 3 - EXPLANATORY MEMORANDA

Explanatory memoranda required for Bills

23. (1) The Minister who presents a government Bill to the Legislative Assembly must, during or at the end of the Minister's second reading speech, lay before the Legislative Assembly an explanatory memorandum relating to the Bill.

(2) The explanatory memorandum must -

(a) be in clear and precise language; and

(b) outline -

(i) the purposes or objects of the Bill; and

(ii) the reasons why legislation is necessary or desirable for achieving the purposes or objects; and

(iii) the estimated cost for the Government of implementing the Bill; and

(iv) the consultation undertaken with persons likely to be affected by the Bill; and

(c) describe the purpose or object, and intended operation, of each clause.

(3) To allay any doubt, it is declared that failure to comply with this section does not affect the validity of any legislation.

Explanatory memoranda required for subordinate legislation

24. (1) When any subordinate legislation is laid before the Legislative Assembly, it is to be accompanied by an explanatory memorandum prepared under the authority of the Minister administering the provisions of the Act under which the subordinate legislation was made.

(2) The explanatory memorandum must -

(a) be in clear and precise language; and

(b) outline -

(i) the purposes or objects of the subordinate legislation; and

(ii) the reasons why legislation is necessary or desirable for achieving the purposes or objects; and

(iii) the estimated cost to the Government of implementing the subordinate legislation; and

(iv) the consultation undertaken with persons likely to be affected by the subordinate legislation; and

(b) describe the purpose or object, and the intended operation, of each clause or similar provision of the subordinate legislation; and

(c) indicate the provisions of the Act under which the subordinate legislation was made.

(3) Failure to comply with this section does not affect the validity of the subordinate legislation.

PART 4 - THE PARLIAMENTARY SCRUTINY OF LEGISLATION COMMITTEE

Division 1 - Constitution and meetings of the Committee

Constitution and appointment of Committee

25. (1) A committee to be called the Parliamentary Scrutiny of Legislation Committee is established.

(2) The Committee is to be appointed -

(a) immediately after the commencement of this Act; and

(b) immediately after the first session of each later Parliament.

(3) The Committee is to consist of 7 members.

(4) The committee members are to be appointed by the Legislative Assembly.

(5) Not more than 4 of the committee members are to be nominated for appointment by the Minister who is recognised in the Legislative Assembly as the Leader of the House.

(6) Not less than 2 of the committee members are to be nominated for appointment by the Member who is recognised in the Legislative Assembly as the Leader of the Opposition.

(7) A Minister is not to be a committee member.

(8) The practice of the Legislative Assembly in relation to the appointment of members of Select Committees applies to the appointment of committee members so far as it is consistent with this Act.

Committee taken to be Select Committee

26. The Standing Rules and Orders of the Legislative Assembly relating to Select Committees apply to the Committee and the conduct of its business as if it were a Select Committee of the Assembly.

Term of committee members

27. (1) The committee members go out of office on the dissolution or expiry of the term of the Legislative Assembly.

(2) The membership of the Committee is not affected by the prorogation of the Parliament.

Casual vacancies

28. (1) The seat of a committee member becomes vacant if the person -

(a) dies;

(b) resigns by writing signed and delivered to the Speaker or, if the office of Speaker is vacant, the Clerk of the Parliament; or

8.82 An example of a subordinate legislative instrument which escapes Parliamentary scrutiny occurs under the *Public Service Management and Employment Act 1988*. That Act provides that promotion appeals may lie in respect of Public Service positions. However, it also delegates power to the Governor in Council to determine by order in council particular positions to which appeals will not apply.

8.83 It is questionable whether a policy matter of this kind should be dealt with in subordinate legislation rather than in the Act itself. However, of greater concern is that an order in council made under this provision is not required to be tabled in the Legislative Assembly and is not subject to scrutiny and disallowance by the House - although it is required to be published in the Gazette.

8.84 The Reports of the Committee of Subordinate Legislation contain further examples of enabling provisions for subordinate legislation which do not provide for adequate Parliamentary scrutiny.

8.85 If the Parliament, through the proposed Parliamentary Scrutiny of Legislation Committee is to undertake effective scrutiny of delegated legislation it must be assured that all statutory instruments of significant legislative character are open to Parliamentary review.

8.86 The Commission proposes that the *Acts Interpretation Act* be redrafted to require all subordinate legislation defined in paragraph 3.28(a)(i) of this Report to be published in the Gazette, to be tabled in the Legislative Assembly and to be open to disallowance by resolution of the House.

8.87 The Commission notes that requiring all subordinate legislation to be tabled as defined in paragraph 3.28(a)(i) could have resource implications for departments and statutory authorities. However, the Commission also notes that departments are now in a much better position to co-ordinate publication and tabling arrangements for subordinate legislation through the institution of the system of "Cabinet Legislation and Liaison Officers" in all departments. These officers are responsible, among other things, for co-ordinating the preparation of subordinate legislation and ensuring that departments meet Cabinet and statutory procedures.

8.88 To provide some flexibility for the Government, the Commission proposes that the Governor in Council, by regulation, should be able to exempt a statutory rule made under *existing* legislation (other than a regulation) from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. The proposed safeguard in this procedure is that the regulation would be subject to tabling in the Legislative Assembly and hence would be open to disallowance on recommendation of the proposed Parliamentary Scrutiny of Legislation Committee. In respect of a statutory rule made after commencement of the proposed amendments to the *Acts Interpretation Act*, the Commission considers that exemption from Gazettal and tabling requirements should be made only by express provision in the enabling legislation.

Local Authority By-Laws and Ordinances

8.89 Under the *Local Government Act 1936*, by-laws made by local authorities are not tabled in the Legislative Assembly, although ordinances made by the Brisbane City Council are tabled under separate requirements of the *City of Brisbane Act 1924*.

8.90 However, as indicated in Chapter Three, the Commission has major concern about the relative lack of legislative scrutiny applied to local authority instruments generally. The proposed guidelines on drafting subordinate legislation to be issued to local authorities by the Parliamentary Counsel (para. 3.26) should provide additional safeguards in respect of fundamental legislative principles. However, in the long term, there could still be some merit in amending the *Acts Interpretation Act* to either require all local authority by-laws and ordinances to be tabled in the Legislative Assembly - without making a distinction between Brisbane City Council by-laws and other local authority by-laws - or, requiring those by-laws and ordinances to be tabled which are made under particular enabling provisions affecting rights and liberties.

8.91 The Commission considers that this matter should be examined by the proposed Parliamentary Scrutiny of Legislation Committee. The Committee should also examine whether any other subordinate instruments not covered by the amendments to the *Acts Interpretation Act* recommended in this Report, should be brought within standard notification, publication, tabling and disallowance requirements.

8.92 The Commission itself does not propose to recommend that local authority by-laws be should be tabled as this would be mark a substantial change from traditional practice and could have significant resource implications which have not been analysed by the Commission. Indeed, the Commission considers that the present anomaly of requiring Brisbane City Council ordinances to be tabled and not those of other local authorities should be addressed by amending the *City of Brisbane Act* to discontinue tabling requirements for Brisbane City Council ordinances.

RECOMMENDATIONS

8.93 **The Commission recommends that:**

(a) the *Acts Interpretation Act 1954* be amended to require all subordinate legislation defined in paragraph 3.28(a) of this Report to be published in the Gazette, to be tabled in the Legislative Assembly and to be open to disallowance by the Legislative Assembly;

(b) the Governor in Council should have authority to exempt, by regulation, a statutory rule made under *existing* legislation (other than a regulation) from conforming to the requirements of the *Acts Interpretation Act* in respect of Gazettal, tabling and disallowance. However, in respect of a statutory rule made after the commencement of the proposed amendments to the *Acts Interpretation Act*, exemption from Gazettal and tabling arrangements in that Act should be made only by express provision in the enabling legislation;

(c) the *City of Brisbane Act 1924* should be amended to discontinue the requirement to table Brisbane City Council ordinances in the Legislative Assembly; and

(d) the proposed Parliamentary Scrutiny of Legislation Committee should, as one of its first tasks, review the notification, publication, tabling and disallowance provisions of all statutory instruments not covered by the Commission's proposed amendments to the *Acts Interpretation Act*, including local authority by-laws and ordinances, to determine whether any of them should be brought into conformity with the proposed new arrangements.

QUASI-LEGISLATIVE INSTRUMENTS

8.94 Another matter to which the Commission draws attention is the increasing provision in Queensland legislation for quasi-legislative instruments such as "standards" and "guidelines" to be issued by various authorities including Ministers and officials. Their use reflects a reasonable objective to free up regulatory controls and allow for greater administrative flexibility. However, one effect of some of these instruments is to remove the subject matter prescribed from parliamentary scrutiny as these instruments are not presently regarded as subordinate legislation and are not subject to tabling requirements.

8.95 The Commission considers that the proposed Parliamentary Scrutiny of Legislation Committee should investigate the use of quasi-legislative instruments under Queensland laws and examine whether any guidelines should be developed to ensure that statutory provisions providing for such instruments contain appropriate safeguards in terms of legislative principle and Parliamentary scrutiny.

RECOMMENDATION

8.96 **The Commission recommends that the proposed Parliamentary Scrutiny of Legislation Committee investigate the use of quasi-legislative instruments under Queensland laws, such as "guidelines" and "standards", and examine whether any guidelines should be developed to ensure that statutory provisions providing for such instruments contain appropriate safeguards in terms of legislative principle and parliamentary scrutiny.**

CHAPTER NINE

REGULATORY IMPACT STATEMENTS AND EXPLANATORY MEMORANDA

Regulatory Impact Statements

9.1 EARC Issues Paper No. 7 observed:

> *"The Fitzgerald Report (p. 141) suggested that bills introduced into Parliament could be accompanied by impact statements which would outline the assessed impacts of the legislation.*
>
> *In Victoria and New South Wales, there is a statutory obligation on Ministers to issue regulatory impact statements prior to the making of subordinate legislation, although this obligation does not extend to bills. Each statement must outline the instrument's objectives, identify alternative options, and provide an assessment of the costs and benefits of the proposed instrument and of the alternative options identified. The statement must be made available for public comment prior to the instrument being made, and must be tabled in Parliament together with the instrument.*
>
> *In Queensland, some departments have issued Green Papers in respect of new legislative proposals but the extent to which this procedure is used appears to depend on the discretion of the Minister and the department concerned ....*
>
> *Submissions are invited on whether all bills introduced into the Queensland Parliament, and all significant statutory instruments tabled in the Parliament, should be accompanied by regulatory impact statements. If so, what should these statements contain; what community consultation should occur; and who should be responsible for monitoring compliance with the required procedures?"* (p.27).

EVIDENCE AND ARGUMENTS

9.2 A number of public submissions advocated increased consultation in respect of new legislation.

9.3 The Aboriginal and Torres Strait Islander Commission (S3) commented:

> *Historically, Aboriginal and Torres Strait Islander people in Queensland have been subjected to numerous legislative decisions which have rushed through Parliament with minimal consultation. Sections of these Acts were poorly drafted and infringed basic human rights as well as serving a politically motivated agenda... legislation specifically affecting Aboriginal and Torres Strait Islanders should be subject to wide community consultation prior to enactment."*

9.4 Similar views were expressed by the Tharpuntoo Legal Service Aboriginal Corporation (S7).

9.5 The Dirranbandi District Irrigator's Association (S6) commented:

> *"The system of Green Papers certainly allows for comment but the full ramifications of legislation are not known until the actual wording of the legislation is available. There must be a process by which there is an opportunity to actually comment on the legislation itself."*

9.6 In relation to the question of regulatory impact statements, the Aboriginal and Torres Strait Islander Commission (S3) recommended that all legislation affecting Aboriginal and Torres Strait Islander issues be accompanied by a regulatory, impact statement:

> *"prepared in consultation with appropriate organisations and communities."*

9.7 The Tharpuntoo Legal Service Aboriginal Corporation (S7) agreed with the proposal for regulatory impact statements and observed:

> *"The wider costs and benefits of proposed legislation should be assessed and this assessment should include an Aboriginal and Islander component, should be open for public comment, and should be submitted with bills (and statutory instruments) to be part of parliamentary debate."*

9.8 The Departmental submission (S8) commented that:

> *"... Departments have expressed some interest but sound a note of caution on the basis that not enough is known about the resource implications of such an initiative and that the extent to which its introduction would simply 'slow the process' has yet to be sufficiently considered .*
>
> *The Attorney-General's Department has pointed out that:*
>
> > *'... If Queensland were to adopt such a proposal, it would be a substantially delaying feature in the preparation of legislation. Furthermore, the issues paper makes no reference to the costs involved in having the statements prepared. In this context, this Department would be reluctant to wholeheartedly endorse such a proposal without further studies being undertaken'.*
>
> *Furthermore, the Department of Employment, Vocational Education, Training and Industrial Relations, states that:*
>
> > *'Whilst the concept of regulatory impact statements may be desirable, it is considered that there are sufficient checks and balances in place under the revised Cabinet system concerning the introduction of Bills into the Queensland Parliament. The "Authority to Prepare" and "Authority to Introduce" Submissions detail criteria which must be satisfied prior to Cabinet approval being given for the preparation and introduction of Bills. It is suggested that regulatory impact statements have proved administratively onerous in those jurisdictions where such statements are required ...'*
>
> *However, if Regulatory Impact Statements were to be introduced, the Department of Transport suggests they should contain:*
>
> - *the objective of the Bill*
> - *an assessment of the costs and benefits of the proposed instrument -this should include financial and socio-economic costs where practical*
> - *identification of alternative options*
> - *assessments of the costs and benefits of alternative options -this must be limited to practical options and should only be undertaken to the extent that it demonstrates the appropriateness of the chosen alternative.*
>
> *A public consultation period should not be opposed but the following points should be considered:*
>
> - *in addition to consulting with identified affected parties, provisions will have to be made for public advertising of Statements - this would limit scope for complaints of inadequate consultation*
> - *the consultation process should provide for proper management of the time available for consultation so that consultation does not lead to policy paralysis.*
>
> *Finally, it should be stressed that sufficient flexibility must be provided so that the process can be adjusted to match the particular circumstances of each case.'"*

9.9 At the Commission's Public Seminar, the Chairman of the New South Wales Regulation Review Committee, Mr Adrian Cruickshank MP, spoke of his Committee's experience with monitoring impact statements and commended the initiative.

9.10 The recently formed Business Regulation Review Unit of the Queensland Department of Business, Industry and Regional Development put in a late submission (S11) which gave support to the concept of regulatory impact statements and favoured the concept of such a scheme having a statutory base. However, the submission observed:

> *".. before this proposal could be introduced it would be necessary for full consultation to be held with all interested parties (departments, the business sector, the community). This will ensure all the issues pertinent to Queensland are addressed and that the benefits outweigh the costs."*

ANALYSIS OF EVIDENCE AND ARGUMENTS

9.11 From comments in submissions, the Commission's Public Seminar, and from its own research, the Commission observes that there could be merit in introducing some form of consultation and impact statement procedure in Queensland along the lines of the arrangements introduced in New South Wales and Victoria, and applicable to both bills and subordinate legislation. However, the Commission does not in this Report propose to recommend the introduction of such a scheme for the following reasons.

9.12 The impact statement procedures established in New South Wales and Victoria are elaborate, involve significant administrative commitment and are backed up by a detailed legislative framework. Despite the support for such a concept in submissions, it may be desirable for more feedback to occur on the desirability of introducing such a scheme for Queensland than has been obtainable through this OPC review process.

9.13 Further, in New South Wales and Victoria, responsibility for monitoring the impact statement procedures on behalf of Parliament is exercised by the respective committees of subordinate legislation. This responsibility has increased the workload of these committees, which undertake the responsibility together with their traditional role of legislative scrutiny.

9.14 Were impact statements to be introduced in Queensland, an option might be to give a monitoring role to the proposed Parliamentary Scrutiny of Legislation Committee. However, as this Committee will have a significant workload in the area of legislative scrutiny it would not be wise to burden it, at this stage, with the responsibilities attached to regulatory impact review. Furthermore, because impact statements involve examination of legislation in terms of its economic and social effects, it might be more appropriate to give any monitoring role in this area to a parliamentary committee or committees concerned with the policy and administrative aspects of legislation.

9.15 The Commission proposes to re-examine the issue of impact statements in the context of the Commission's forthcoming Parliamentary Committee review.

Explanatory Memoranda

9.16 While the Commission has refrained from recommending the introduction of regulatory impact statements at this stage, an immediate reform that could be readily implemented would be to improve the scope and content of explanatory memoranda.

9.17 It is customary practice for bills to be tabled in the Legislative Assembly with an explanatory memorandum. The purpose of the memorandum is to provide a clause by clause description of the nature and intention of the bill as an aid to Members in understanding the proposed legislation.

9.18 However, memoranda presently produced contain little in the way of background information to the proposal, such as the extent of consultation undertaken with affected parties, and the estimated costs to Government of introducing the legislation. These matters are sometimes addressed in the second reading speech but there is no necessary consistency in this regard.

9.19 Also, explanatory memoranda are not provided with subordinate legislation tabled in the House.

9.20 The Commission considers that for every bill introduced into the Legislative Assembly, and for all subordinate legislation that is required to be tabled, an explanatory memorandum should also be tabled for the information of Members. The explanatory memorandum should indicate:

(a) the objectives of the legislation;

(b) the reasons why legislation is considered necessary for achieving these objectives;

(c) the estimated cost to the Government of implementing the legislation; and

(d) the extent of consultation undertaken with parties likely to be affected by the legislation;

as well as describing in plain terms the intent and nature of each clause.

9.21 Additionally, in respect of subordinate legislation, the explanatory memorandum should indicate the relevant sections of the Act under which the legislation was made.

9.22 The Commission considers that responsibility for preparing the explanatory memoranda for bills and subordinate legislation should be that of the responsible department in consultation, where appropriate, with the OPC.

9.23 It is noted that the information proposed to be included in the memorandum is already provided by departments to the Cabinet Office in respect of bills and that its inclusion in the memorandum to Parliament should not impose a substantially extra burden on departments.

9.24 It should also be noted that the Commission is not proposing that explanatory memoranda identify the costs of the legislation for the community - the Commission's proposal is that memoranda identify the administrative costs for Government. In other words, explanatory memoranda should not be seen as a substitute for regulatory impact statements should these be introduced at a later stage.

9.25 Finally, the Commission does not propose to make any recommendations on the use of explanatory memoranda as extrinsic aids to the interpretation of legislation. Under the *Acts Interpretation Act 1901* (Cwlth) explanatory memoranda can be used as extrinsic aids in the interpretation of Commonwealth legislation - see section 15AB(2)(e) of that Act. On 22 April 1991 the Queensland Cabinet authorised the preparation of legislation relating to extrinsic aids (see press release of the Attorney-General, The Hon. D Wells, dated 22 April 1991). The Commission understands that this legislation will address the use of explanatory memoranda as extrinsic aids.

9.26 The Commission considers that the proposed requirements for explanatory memoranda should be established in the proposed Legislative Standards Act.

RECOMMENDATIONS

9.27 **The Commission recommends that:**

(a) the proposed Legislative Standards Act require that for every bill introduced into the Legislative Assembly, and for all subordinate legislation required to be tabled in the Legislative Assembly an explanatory memorandum should be tabled for the information of Members;

(b) the explanatory memorandum should:

(i) outline:

(A) the purpose or objectives of the legislation;

(B) the reasons why legislation is considered necessary for achieving these objectives;

(C) the estimated cost for the Government of implementing the legislation;

(D) the extent of consultation undertaken with parties likely to be affected by the legislation; and

(ii) describe in plain terms the intent and nature of each clause; and

(c) additionally, in respect of subordinate legislation, the explanatory memorandum should indicate the relevant sections of the Act under which the legislation was made.