



# Queensland's Approach to the Scrutiny of Legislation

## 1. Introduction

Queensland's approach to the scrutiny of legislation has evolved over time to reflect changes to the structure of the committee system. At the time of the 2011 conference, Queensland's former dedicated Scrutiny of Legislation Committee was being wound up and Parliament's committee system was embarking on a period of comprehensive reform.

This paper looks at the evolution of Queensland's approach to the scrutiny of legislation and examines how the 2011 reforms to the committee system have embraced an entirely novel approach to how committees scrutinise legislative proposals.

## 2. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (Qld) states that "*fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament*".

Regarding these fundamental legislative principles (commonly referred to as 'FLPs'), section 4(3) states:

*Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:*

*(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and*

*(b) is consistent with principles of natural justice; and*

*(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and*

*(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and*

*(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and*

*(f) provides appropriate protection against self-incrimination; and*

*(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and*

- (h) does not confer immunity from proceeding or prosecution without adequate justification; and*
- (i) provides for the compulsory acquisition of property only with fair compensation;*
- and*
- (j) has sufficient regard to Aboriginal tradition and Island custom; and*
- (k) is unambiguous and drafted in a sufficiently clear and precise way.*

Section 4(4) states:

*Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill:*

- (a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and*
- (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and*
- (c) authorises the amendment of an Act only by another Act.*

Section 4(5) covers subordinate legislation, noting:

*Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation:*

- (a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and*
- (b) is consistent with the policy objectives of the authorising law; and*
- (c) contains only matter appropriate to subordinate legislation; and*
- (d) amends statutory instruments only; and*
- (e) allows the sub delegation of a power delegated by an Act only-*
  - (i) in appropriate cases and to appropriate persons; and*
  - (ii) if authorised by an Act.*

### **3. The History of Legislative Scrutiny in Queensland**

In Queensland the former Committee of Subordinate Legislation began examining whether subordinate legislation ‘trespassed unduly on rights previously established by law’ in 1975.

The scrutiny of legislation in Queensland was reinforced in the aftermath of the 1989 “Fitzgerald Report” into corruption in Queensland. The *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (GE Fitzgerald QC, Chairman; “the Fitzgerald Report” 1989) expressed the view that:

*...the corruption and misconduct identified during the course of that Commission's investigations were partly due to the inability of the Queensland Parliament to effectively review the Government's legislative activity or public administration.<sup>1</sup>*

One of the many outcomes of the Fitzgerald Report recommendations was the establishment of the Queensland Electoral and Administrative Review Commission (the Commission). The Commission conducted two reviews in 1991 and 1992<sup>2</sup> and recommended that Queensland replace the Committee of Subordinate Legislation with a Scrutiny of Legislation Committee that would be given an expanded remit to allow it to review both primary legislation (Bills) and subordinate legislation (regulations and statutory instruments).

In its review of the Commission's Report, the Parliamentary Committee for Electoral and Administrative Review (PCEAR) commented on the proposal to combine the functions of scrutiny of legislation and subordinate legislation:

*The work of the new committee...will be extensive given the number of bills introduced to the Legislative Assembly each year together with the extensive volume of subordinate legislation which will, under EARC's recommendations, be required to be tabled in the Legislative Assembly. The Committee has given consideration to whether that workload should be split between two committees; that is the existing Subordinate Legislation Committee which would continue with responsibility for scrutinising subordinate legislation, and a new Scrutiny of Bills Committee which could be established with responsibility for scrutinising Bills. The Committee has given this matter serious consideration but on balance considers that EARC's recommendation for one committee is appropriate. (1991a, p.12-3)<sup>3</sup>*

At least one submission to the Commission noted the need for legislative provisions to be consistent with international instruments relating to human rights. The Commission therefore ensured the terms of reference of the proposed Committee would be broad enough in scope to consider these emerging fields.<sup>4</sup>

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<sup>1</sup> Electoral and Administrative Review Commission (1992) *'Report on Review of Parliamentary Committees'*, Government Printer, Brisbane, executive summary, xii.

<sup>2</sup> Electoral and Administrative Review Commission (1991) *'Report on Review of the Office of the Parliamentary Counsel'*, Government Printer, Brisbane; Electoral and Administrative Review Commission (1992) *'Report on Review of Parliamentary Committees'*, Government Printer, Brisbane.

<sup>3</sup> Electoral and Administrative Review Commission (1992) *'Report on Review of Parliamentary Committees'*, Government Printer, Brisbane, page 94.

<sup>4</sup> Electoral and Administrative Review Commission (1992) *'Report on Review of Parliamentary Committees'*, Government Printer, Brisbane, pages 95-6.

The *Legislative Standards Act 1992* saw FLPs enshrined into law, with the Committee of Subordinate Legislation continuing its scrutiny to see whether subordinate legislation gave sufficient regard to the newly enacted FLPs.

The Committee of Subordinate Legislation lasted until 1995 when a new *Parliamentary Committees Act* established the Scrutiny of Legislation Committee (SLC) to '*examine all Bills and subordinate legislation to consider the application of FLPs to particular Bills and subordinate legislation, and the lawfulness of particular subordinate legislation*'. The SLC was an all-party committee of seven.

In respect of the scrutiny of Bills, the Committee tabled a legislation 'alert' to Parliament at the beginning of every sitting week. These alerts canvassed any concerns the Committee had about the compliance of Bills and subordinate legislation with the FLPs. Those concerns were raised with the relevant Minister, with the SLC typically seeking a Ministerial response that could include the provision of additional information to address the SLC's concerns, or undertakings from Ministers to introduce amendments to the Committee's satisfaction. Once the Committee's inquiries were completed, the correspondence between the Committee and the Minister was published in the alert. If an issue remained unresolved, the Committee would then report to Parliament on the matter and, in the case of subordinate legislation, could move a motion to 'disallow' the instrument in question.

#### **4. Queensland's new committee system and FLPs**

That approach continued in Queensland for some 16 years, until a review of Queensland's parliamentary committee system in 2010 called for amendments to be made to the *Parliament of Queensland Act 2001* (POQA) to abolish the dedicated Scrutiny of Legislation Committee (among others) in favour of a completely new system of portfolio-based committees. That 'new' system has now been operative for five years (since mid-2011).

Section 93 of the POQA now requires each of the (currently 7) portfolio committees to *examine all Bills and subordinate legislation within its portfolio area*. Thus, the role of scrutinising legislation in Queensland shifted from being the responsibility of one dedicated Scrutiny Committee to being one aspect of the remit of each of seven portfolio committees.

The consideration of policy issues that is undertaken by the portfolio committees requires each committee examine the policy implications to be given affect by proposed legislation, a function that was not previously undertaken in any formal manner by Queensland committees. The former Scrutiny Committees were each restricted to examining the

application of FLPs to legislation and the lawfulness of subordinate legislation, with no remit to examine questions of policy.

The portfolio committees also monitor whether Explanatory Notes or Regulatory Impact Statements provided with legislation contain the information required by the *Legislative Standards Act 1992*, a role previously undertaken by predecessor Scrutiny Committees.

The seven portfolio committees in Queensland are:

- Finance and Administration
- Health, Communities, Disability Services and Domestic and Family Violence Prevention
- Legal Affairs and Community Safety
- Agriculture and Environment
- Education, Tourism, Innovation and Small Business
- Infrastructure, Planning and Natural Resources
- Transportation and Utilities

The above committees are assisted in their work by the Technical Scrutiny of Legislation Secretariat (TSS) which performs a very similar role to the former SLC by examining Bills and subordinate legislation for FLP compliance.

#### **4.1 Technical Scrutiny of Legislation Secretariat (TSS)**

The Technical Scrutiny Secretariat consists of one full time research director, 1.6 full time principal research officers and a shared executive assistant.

TSS provides written reports and subsequent oral briefings on FLP compliance to each portfolio committee on:

- all Bills (save for Appropriation Bills and those declared urgent and not referred to a committee); and
- all subordinate legislation – with an average 300+ pieces of sub-leg per annum.

The oral briefings provide portfolio committee members with an opportunity to seek further clarification on the issues raised in the written report or to ask other questions regarding a Bill's provisions. Each committee then reports back to the House on the technical scrutiny/FLP issues and policy issues considered in the course of their examination of a Bill or subordinate legislation. The TSS research staff (all legally qualified) are also on hand to answer questions from portfolio committee staff as to how certain provisions in a Bill will likely operate.

## **4.2 Compliance is determined by the Parliament**

As has always been the case, compliance with FLPs is not mandatory and it is within the Parliament's sovereignty to determine whether legislation has 'sufficient regard' to one or more of the FLPs and whether sufficient justification is given in the Bill's Explanatory Notes for any departure from them.

Departures in legislation from FLPs are not uncommon and there may be any number of legitimate reasons why basic rights and liberties need to be qualified or curtailed for a desired social objective (for example, during times of natural disaster). Legislative measures taken to protect society may often intrude on individual rights and freedoms and involve an acceptable departure from FLPs. For example, one FLP requires that any compulsory acquisition of property (by the State from an individual) can only occur if the individual is fairly compensated for their loss. A permissible exception to this FLP is legislation that allows the State to seize assets that were financed by the proceeds of crime. This is because the legitimate social expectation that criminals should not be allowed to profit from their crimes, and a wish to deter future criminal activity, both serve to justify a departure from the FLP requiring compensation for property seizures by the State.

## **5 Advantages and disadvantages with the Queensland approach**

There have been a number of advantages, disadvantages and trends emerging since the implementation of the 2011 reforms to the Queensland committee system in relation to the scrutiny of legislation.

### **5.1 Advantages & disadvantages**

#### *Removal of dedicated SLC*

Under the new system, with each committee considering FLP issues rather than having a dedicated scrutiny of legislation committee, more MPs are given direct exposure to, and experience contemplating, FLP issues. Most portfolio committees still however place a substantial focus on the policy issues raised by legislation, given these issues are typically the focus of community concern. As a consequence, the more technical questions of law, including many that will have a significant impact on rights and liberties, are often given comparatively less focus, typically only being addressed in submissions by legal professionals such as the Queensland Law Society, Queensland Bar Association and Queensland Council for Civil Liberties.

#### *Timeframes*

Timeframes for committees to consider legislation are variable, and have ranged from less than 36 hours (at one extreme) to six months at the other. A time period of four to six weeks is more common, with the default period for Private Members Bills being six months. The Constitution of Queensland and Other Legislation Amendment Bill 2016 currently before the House seeks to set a minimum referral time of six weeks, unless a Bill is declared “urgent”.

An example of a significantly compressed referral timeframe was the referral to the Legal Affairs Committee of the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, by the then Attorney-General. The Bill, part of a legislative package that became known as “the bikie laws” – was introduced by the Attorney on 19 November 2013 at 10.12pm, with a reporting date of 10am on 21 November 2013. This left the Committee just under 36 hours to examine the extensive amendments proposed by the Bill, undertake public consultation and table a report in the House. Given its introduction was well after close of business hours, the staff tasked to work on the Bill effectively had 24 hours to consider the Bill and submissions; and prepare a report for tabling.

Submissions were sought on that Bill, closing on the first business day after its introduction. This left organisations such as the Law Society, Bar Association, Council for Civil Liberties, Queensland Police Union and motorcycle clubs with very limited time to properly consider and communicate their concerns about arguably draconian measures proposed by the Bill.

#### *Method of reporting*

Compressed reporting timeframes for committees have a flow on effect to the TSS which must report back to the relevant portfolio committee in time for that committee to consider any FLP issues raised by the TSS, seek a response from the Department where appropriate, and decide whether and how to incorporate the material into their overall report to the House.

This method of reporting on FLPs, that is, TSS providing advice to portfolio committees, and committees then reporting to the House, also raises potential areas of concern for the continuing integrity of the advice presented. In this environment, TSS lacks control over where or how its reports are used, edited or reported. This may result in the proper meaning (especially on technical points of law) being lost or compromised during the editing phase of committee reports.

#### *Volume of legislation*

In 2015 (an election year) 68 Bills and 193 pieces of subordinate legislation were examined by portfolio committees. In 2014 there were 65 Bills and 345 pieces of subordinate legislation considered by committees. This may be seen as a positive in that a broader range

of staff and MPs receive increased exposure to a wide cross-section of FLP issues, however the sheer volume of legislation, requirements for public hearings and compressed reporting timeframes all compromise the level of detailed consideration that can be done in the available time.

### *Subject area diversity*

Legislation cuts across all portfolio areas, with many complex and diverse topics covered. A lack of familiarity with industry terms and jargon can considerably slow the process of considering a Bill and understanding the overarching policy framework in which it sits. The TSS researchers are trained as lawyers but are generally unfamiliar with the issues concerning some specialist subject areas (eg. environmental management) when compared with the departmental drafters and portfolio committee staff who routinely work in defined policy areas. To combat this issue, TSS staff also try, wherever time permits, to read submissions made by industry associations and others, to try to get across some of the likely problems that might accompany particular legislative reforms, but that are not discernible from the legislation itself, in the absence of subject area ‘insider’ knowledge. Whilst considering the submissions better informs the TSS advice that goes to the committee, it also slows the process down considerably as TSS staff deal with often huge numbers of submissions arriving very close to the TSS reporting deadline.

## **5.2 Trends in legislation**

Areas of concern identified in legislation by TSS include an increasing use of skeletal legislation and consequent over-reliance on regulations (in recent years likely attributable to two changes of Government, with the new Governments ‘finding their feet’ and drafting skeletal legislation to fulfil election commitments, with a view to ‘working out the details’ later). There has also been an increased use of Henry VIII clauses; clauses removing rights of review; adoption of third party material such as guidelines into legislation; a broadening of stop and search powers in counter-terrorism and public order legislation; reversals of the onus of proof; removal of particular defences from the Criminal Code; and an increasing use of retrospective provisions.

Previously the Scrutiny of Legislation Committee would publish reports on the aforementioned issues. With a strong focus on policy matters, reports of the portfolio committees on Bills and subordinate legislation do make reference to matters such as the adequacy of the Explanatory Notes provided, however there are no reports specifically dedicated to FLP issues such as existed under the previous committee system.



## **6. Conclusion**

Queensland's recent committee system reforms have brought significant change to the manner in which legislation is scrutinised. The most promising development is the exposure of a much greater number of MPs to rights and liberties issues and a recognition that, rather than just being boring technical points of law, any proposed violations of fundamental legislative principles can strike at the heart of what it means to live in a free and democratic society. Any attempt to curtail rights and freedoms must not go unexamined, but rather it is the duty of every Member of Parliament to act to ensure that the rights of the 'everyman' that they represent are protected from unnecessary incursion. Only then can Australia continue to hold its head high as the embodiment of a free and civilised nation.

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