LEGISLATION OF THE HIGHEST STANDARD?

FUNDAMENTAL LEGISLATIVE PRINCIPLES IN THE QUEENSLAND *LEGISLATIVE STANDARDS ACT* 1992.

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Introduction

For much of this century Queensland statutes have unduly emphasised executive power at the expense of the law-making power of the Parliament and easy solutions to problems at the expense of the rights and liberties of members of the community. This approach to legislating has not always been spectacular or obvious, but it has lead to a consistent erosion of the fundamental principles of Parliamentary democracy and the rule of law. The present Government is now ensuring that it is seen to be promulgating high quality legislation. One Minister has boasted that:

> The [Parliamentary Business and Legislation] Committee now rarely sees provisions that were once standard in Queensland: For example, unfettered search and seizure provisions (commonly known as the "first born provisions"), provisions exempting public officials from liability and general penalty provisions.[1]

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1 Mackenroth, T, 'Fundamental Legislative Principles: The Cabinet and Parliamentary Process', *Fundamental Legislative Principles: New Policy*

Premier Goss is especially proud that his government has introduced mechanisms by which it takes responsibility itself 'for ensuring that it does not, through legislation, unduly undermine basic rights.'[2] The *Legislative Standards Act* 1992 (Qld) establishes the Office of the Parliamentary Counsel as an independent statutory office with the responsibility for drafting Queensland legislation. It also introduces 'fundamental legislative principles' and states that the Office of the Parliamentary Counsel ("the Office") should have regard to them in drafting legislation.

Although the Act is primarily directed at the Office, the idea that legislation should conform to fundamental legislative principles has ramifications for the whole policy development process. It is also of considerable interest to those outside of Government who wish to understand or influence Queensland legislation. By incorporating such a concept in an Act of Parliament, the Queensland Government has acknowledged some of the guarantees that might be included in a Bill of Rights.

But people who expect the *Legislative Standards Act* to grant some of the protections of a Bill of Rights will be disappointed. While a Bill of Rights invalidates provisions which are repugnant to fundamental values, the *Legislative Standards Act* is aimed only at the pre-legislative process and is intended to stop provisions which override fundamental values being included in legislation in the first place. It is not directly legally enforceable and the Act also contemplates the overriding of fundamental legislative principles for a weightier policy purpose.[3]

This paper shall concentrate on 'fundamental legislative principles' in the *Legislative Standards Act*, their meaning, implementation and enforcement. The first part is an overview of the Act's provisions. The second part will deal with the possibilities for legal and political

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Processes, RIPAA Seminar, Brisbane, 2 April 1993, at 5.

2 Goss, W, 'Speech Notes', *Fundamental Legislative Principles: New Policy Processes*, RIPAA Seminar, Brisbane, 2 April 1993, at 2.

3 Only 'sufficient regard' need be had to the fundamental legislative principles: s 4. While this differentiates the *Act* from most Bills of Right, it should be noted that the Canadian *Charter of Rights and Freedoms* in the *Constitution Act 1982*, s 1 provides that it can be subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

enforcement of fundamental legislative principles.

The *Legislative Standards Act*

The need for Queensland legislation to become more consistent with Parliamentary democracy and the rights of individuals is not disputed. Pieces of Queensland legislation have granted wide and discretionary powers to administrators to make decisions which interfere with the ordinary rights and liberties of citizens. The legislation that sought to deprive Torres Strait Islanders of their land on racial grounds while they were seeking to establish their legal title to that land in the High Court was only one of the more spectacular examples.[4] Standard drafting devices have also deprived citizens of more mundane rights and liberties. For example, until recently, most Acts had a clause exempting the Crown and its servants from any liability,[5] legislation rarely provided for review of administrative decision-making and standard provisions granted administrative boards and tribunals all the powers that are given to commissions of inquiry under the *Commissions of Inquiry Act* 1950 (Qld). The Electoral and Administrative Review Commission ('EARC') also pointed out that many pieces of Queensland legislation contain very wide entry and search provisions which tend to override individual rights to privacy, property and due process.[6]

Queensland legislation has also subverted the institution of Parliamentary democracy by granting extraordinary and inappropriate powers to make delegated legislation to the executive arm of government. One common Queensland legislative device was the 'Henry the VIII clause', which authorised the amendment of an Act of Parliament by subordinate or delegated legislation.[7] Another was the 'ouster of

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4 This was the *Queensland Coast Islands Declaratory Act* 1985 (Qld) invalidated under the *Racial Discrimination Act* 1975 (Cth) in *Mabo* v *Queensland (No 1)* (1988) 166 CLR 186.

5 In their *Report on the Office of the Parliamentary Counsel*, (Electoral and Administrative Review Commission, Brisbane, 1991) the Electoral and Administrative Review Commission (EARC) pointed to such a provision as recently as 1989 in the *Banana Industry Protection Act* 1989 (Qld).

6 EARC, *Report on the Office of the Parliamentary Counsel*, *ibid* para 2.35 at 19.

7 This practice was only stopped in 1990 after the publication of the *Queensland*

jurisdiction' clause: at one time Justice Else-Mitchell was able to comment that clauses ousting the jurisdiction of the court to review the validity of delegated legislation were found 'notably in Queensland.'[8] Such clauses make the executive rather than the Parliament responsible for law-making.

The *Legislative Standards Act* is one of the many reforms deriving from the Fitzgerald Inquiry which recommended reviews and reforms of almost all aspects of Queensland administration. Since the Office has primary responsibility for preparing draft legislation and discussing the nature and wisdom of proposals with Departments, Fitzgerald suggested it should be reviewed in order to ensure its independence.[9] EARC performed that review in 1991.[10] The Act establishes the Office and gives it the functions of drafting primary and subordinate legislation[11] and ensuring that all legislation is easily available to the public. The more innovative reform is that the Office is also to advise Ministers, units of the public sector and Members on 'alternative ways of achieving policy objectives', the application of 'fundamental legislative principles' to legislation and the 'lawfulness of proposed subordinate legislation'.[12] The independence of the Office is necessary in order to ensure that this advice is not 'partisan or biased toward political expediency'.[13] A further feature of the Act as proposed by EARC was to have been the establishment of a Parliamentary Committee for the Scrutiny of Legislation which would

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Law Reform Commission Working Paper 33: Henry the VIII Clauses, Brisbane, 1990. However the Office has indicated that such clauses may still be used in compelling circumstances.

8 Else-Mitchell, J, quoted in *Queensland Law Reform Commission Working Paper 33, Henry VIII Clauses*, *ibid* at 2.

9 Fitzgerald, GE, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 'The Fitzgerald Report', Brisbane, Government Printer, 1989, at 140 and 371.

10 EARC, *Report on Review of the Office of the Parliamentary Counsel*, *supra n* 5.

11 Other than 'exempt instruments'. These are defined in s 2 of the *Legislative Standards Act* as by-laws and ordinances made by local authorities and statutory rules declared to be an exempt instrument, or declared not to be subordinate legislation. Under s 9 the Office still has a supervisory role over exempt instruments including with respect to fundamental legislative principles.

12 *Legislative Standards Act* s 7.

13 *Fitzgerald Report*, *supra n* 9 at 140.

make sure that legislation did not override the fundamental legislative principles without sufficient justification. The Queensland Government has not yet implemented this recommendation.[14]

What are fundamental legislative principles?

The meaning and extent of the 'fundamental legislative principles' will determine the obligations placed on the Office and the scope of the changes the Act can be expected to bring to Queensland legislation. They are defined as '*the principles relating to legislation that underlie a Parliamentary democracy based on the rule of law*'.[15] This definition does not indicate a radical departure from constitutional principles. Rather, it tends to confirm and strengthen them. This is borne out by subsection 4(2), which provides that legislation should have sufficient regard to:

(a) rights and liberties of individuals, and,

(b) the institution of Parliament.

The institution of Parliament as the supreme law-making authority over the Executive and any other body is part of the doctrine of responsible government. Well developed doctrines in administrative law are devoted to protecting Parliamentary sovereignty by ensuring that delegated and subordinate legislation do not go beyond the scope of what Parliament has authorised. Statutes that require the tabling of a wide range of delegated legislation in Parliament[16] and committees for the scrutiny of subordinate legislation[17] also reflect the basic idea that

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14 However it has indicated that the Committee will be introduced soon. But it is unclear whether it will be established by amendment to the *Legislative Standards Act* or purely by resolution of the Assembly.

15 *Legislative Standards Act* s 4(1), emphasis added.

16 For example, in Queensland the *Statutory Instruments Act* 1992.

17 These committees exist both at State and Commonwealth levels. The chair of the Queensland Subordinate Legislation Committee has indicated that his committee is keen to ensure the observance of fundamental legislative principles. See Sullivan, J, 'Whether a Bill has Sufficient Regard to the Institution of Parliament', *Fundamental Legislative Principles: New Policy Processes*, RIPAA Seminar, Brisbane, 2 April 1993.

Parliament is the supreme law-maker.

Rights and liberties of individuals are generally not as actively protected by constitutional and common law principles. Nevertheless the principle that legislation should have regard to individual rights and liberties is not new. The common law presumption that legislation does not take away existing rights and liberties unless it expressly says so is the most basic example of this concern. It has even been suggested that such 'presumptions of statutory intent may be thought of as a common law bill of rights'.[18] MacCormick and Bankowski argue that courts have formulated a set of 'fundamental legal principles' in statutory interpretation:

> [I]t is an important part of the legal and constitutional system to acknowledge as fundamental the values expressed by some such principles, for example those favouring freedom of the individual, or freedom of speech or of association, or favouring 'natural justice' and fairness in legal proceedings of all sorts, or favouring the right to compensation for harm carelessly inflicted, or favouring the upholding of bargains freely made, subject to protection of the weak from economic oppression, or requiring that guilty intent be proved against anyone charged with serious crime, or, compendiously the set of values earlier referred to as comprising the 'Rule of Law'.[19]

It is clear, then, that the Queensland Government has done little more than recognise principles which are already fundamental to our legal system and therefore should already be considered in the drafting of legislation. Unfortunately they have not always been adequately respected in Queensland legislation. To the extent that this Act formally reminds Queensland governments to actually have regard to them, it will be useful. But members of the community are likely to be more interested in using the Act to ask the Government to go beyond the limited considerations of

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18 Harris, JW, *Legal Philosophies*, London, Butterworths, 1980 at 146. See also Pearce, D, *Statutory Interpretation in Australia*, Third Edition, Sydney, Butterworths, 1988 at 97.

19 MacCormick, N, and Z Bankowski, 'Some Principles of Statutory Interpretation', in van Dunne, J, (ed) *Legal Reasoning and Statutory Interpretation*, Arnhem, Gouda Quint, 1989, 41 at 51.

common law. It is unclear how far the principles set out in the Act extend. They are not defined in the Act. But subsections 4(3), (4) and (5) provide examples of their operation. While these examples do not limit the operation of the principles, they may indicate how far they extend.[20]

Institution of Parliament

Subsections 4(4) and 4(5) give examples of what it means for legislation to have regard to 'the institution of Parliament':

> (4) Whether a **Bill** has sufficient regard to **the institution of Parliament** depends on whether, for example, the Bill -
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> (a) allows the delegation of a legislative power only in appropriate cases and to appropriate persons; and
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> (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
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> (c) authorises the amendment of an Act only by another Act.
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> (5) Whether **subordinate legislation** has sufficient regard to **the institution of Parliament** depends on whether, for example, the subordinate legislation -
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> (a) is within the power that, under an Act or subordinate legislation (the 'authorising law'), allows the subordinate legislation to be made; and
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> (b) is consistent with the purposes and intent of the authorising law; and
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> (c) contains only matter appropriate to subordinate legislation; and
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> (d) amends statutory instruments only; and
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> (e) allows the subdelegation of a power delegated by an Act only -

20 See *Acts Interpretation Act* 1954-1992 (Qld) s 14D.

(i) in appropriate cases and to appropriate persons; ... and

(ii) if authorised by an Act.

These examples restate the law of ultra vires relating to delegated legislation. The requirement that the exercise of the delegated legislative power be subject to the scrutiny of the Legislative Assembly bolsters the Parliamentary Committee system we already have. But they also state further principles which are within the 'spirit' of that law. For example the amendment of an Act other than by another Act is not prohibited at common law. But if Parliament is the supreme law-making body, its legislation should not be subject to changes by outsiders. Similarly while Parliament can authorise the delegation of legislative power to whoever it wishes, the appropriateness of the delegation should be considered if the integrity of Parliamentary law-making is to be preserved. Paragraph 4(5)(c) goes even further by putting an onus on the delegated legislators to consider whether or not particular pieces of proposed legislation are appropriate as subordinate legislation even where they are legally authorised.

These principles should remind Queensland Ministers and Departments that it is Parliament that has the responsibility for promulgating legislation, not the Executive. Breaches of these sorts of principles do not receive much public attention. But the inappropriate and unscrutinised use of delegated legislation erodes the institution of Parliamentary democracy by allowing the executive to exercise legislative power at the expense of the properly elected representatives of the people. The principles stated here do not significantly extend pre-existing principles, but they do focus attention on whether the executive is exercising power at the expense of Parliament by emphasising the need to consider the appropriateness of particular delegations of legislative power and the need for scrutiny of particular exercises of that delegated power.

Rights and Liberties of Individuals

It is the other principle that is more likely to capture the public interest and imagination. Subsection 4(3) gives examples of what it means for

legislation to have regard to 'rights and liberties of individuals'. This list of examples seems less cohesive than the 'institution of Parliament' considerations, and conforms less closely to the common law.

> (3) Whether **legislation** has sufficient regard to **the rights and liberties of individuals** depends on whether for example, the legislation -
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> (a) makes rights and liberties, or obligations dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
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> (b) is consistent with principles of natural justice; and
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> (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
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> (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
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> (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
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> (f) provides appropriate protection against self-incrimination; and
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> (g) does not adversely affect rights and liberties or impose obligations, retrospectively; and
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> (h) does not confer immunity from proceeding or prosecution without adequate justification; and
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> (i) provides for the compulsory acquisition of property only with fair compensation; and
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> (j) has sufficient regard to Aboriginal tradition and Island custom; and
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> (k) is unambiguous and drafted in a sufficiently clear and precise way.

This list of principles shows some potential to go beyond the rights and liberties granted or assumed at common law. This flexibility could mean that the Queensland Government will be asked to take a wide range of rights and liberties into account in developing legislation. Most of the

examples given in the Act fall broadly into categories of administrative and procedural rights and liberties which are already recognised at common law.

Both the Act itself and the EARC recommendations clearly contemplate that this principle should protect legal process rights.[21] Examples (a), (b), (d) and (f) provide that sufficient regard should be had to procedural type rights. The protection of individual liberty against the exercise of wide administrative powers and discretions is also a concern of the Act. Examples (a), (c) and (e) seem to fall into the category of 'administrative rights'. But (k) provides that legislation should be 'unambiguous and drafted in a sufficiently clear and precise way'. This is not obviously a principle relating to rights and liberties as such and illustrates the fact that the list seems to have been collated in a rather haphazard manner. The remaining two examples cover more substantive rights and liberties.

While the list of examples consists mainly of procedural and administrative rights, the term 'rights and liberties' is just as apt to cover substantive rights and liberties as administrative and procedural ones. Example (i) says that regard should be had to the protection of property rights and example (j) is an unusual command to have regard to Aboriginal tradition and Islander custom. Indeed it seems to recognise group rights rather than individual rights. These examples seem to have been added with little thought as to how they fit the rest of the examples, or what other things could be included if they are being included. They form a further basis for argument that the term 'rights and liberties' was intended to include substantive rights.

There could be little argument that, at the least, the term 'rights and liberties of individuals' includes substantive rights and liberties that are already established at law. Even the common law rules of statutory interpretation assume that the Parliament does not intend to take away existing legal rights, and example (i) is an example of having regard to a particular form of existing legal right (property rights). Much broader rights than many of the examples are already protected by Queensland

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21 *Report on Review of the Office of the Parliamentary Counsel, supra n 5*, para 2.5 at 9.

statutes and common law. Surely legislative drafters should have regard to these rights in drafting legislation under the *Legislative Standards Act* principle.

But even if it is clear that substantive rights should be considered, does this include only existing legal rights or a wider scope? The examples stated do not include the broader civil rights recognised by international treaties and declarations that are likely to be included in a Bill of Rights.[22] Nor do they include the economic, social, cultural and group rights that are developing in international law. There are good reasons to interpret 'rights and liberties' to include at least some of these international law rights. EARC specifically criticised the Queensland *Cabinet Handbook* which previously set out the Government's standards for legislation, for containing no policy on when legislation should seek to uphold international law obligations and norms.[23] The *Legislative Standards Act* has not expressly remedied this situation. Yet to ordinary members of the community the term 'rights and liberties of individuals' would include the rights and liberties recognised at international law. This is consistent with the rule of statutory interpretation which assumes that legislation is not to violate international law,[24] and the increasing willingness of the courts to take international law considerations into account in their decision making.[25]

The Act includes sufficient regard to 'Aboriginal tradition and Island custom'[26] as one of the examples. This approaches the recognition of a 'group right' that is not yet fully developed at international law. If the term 'rights and liberties' can include having regard to Aboriginal tradition and Island custom, surely it must also be wide enough to include having regard to rights and liberties that are well established at international law, and contained in treaties or conventions ratified by Australia. Therefore it

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22 See for example, EARC, *Issues Paper No 20: Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Brisbane, EARC, 1990.

23 See *Report on Review of the Office of the Parliamentary Counsel, supra n 5*, para 2.2 and 2.6 at 9, para 2.12 at 11 and para 2.15 at 13.

24 See for example, *Jumbunna Coal Mine NL* v *Victorian Coal Miners' Association* (1908) 6 CLR 309.

25 See for example the recent High Court of Australia decisions in *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1, and *R* v *Dietrich* (1992) 109 ALR 385.

26 These two terms are defined in s 36 *Acts Interpretation Act* 1954 (Qld).

seems that the Queensland Government could be asked to take a wider range of rights and liberties into account in making legislation than those explicitly mentioned in the *Legislative Standards Act.*

ENFORCEMENT OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

There are several possibilities for enforcing fundamental legislative principles or ensuring they are 'sufficiently regarded'. But the reforms recommended by EARC and set out in the *Legislative Standards Act* rely solely on the pre-legislative scrutiny process to ensure they are observed. The Goss Government has placed all its faith in internal government review and scrutiny processes, and not even given Parliament a formal role in reviewing draft legislation before passing it. But although the *Legislative Standards Act* is not a Bill of Rights, there may still be ways for members of the community to help enforce fundamental legislative principles. Courts may be willing to indirectly enforce fundamental legislative principles by interpreting legislation to comply with them where possible. The principles may also be enforced by political means by holding governmental processes for developing legislation accountable to the public.

A major difficulty with any of these methods, that will inevitably confound attempts to judge whether fundamental legislative principles have been complied with or not is the 'sufficient regard' formula.

Sufficient Regard

The Act only requires that 'sufficient regard' be had to the principles. This acknowledges that a policy objective or greater good may be important enough to justify overriding a fundamental legislative principle. The purpose is to put the onus on those who develop policy to aim for high quality legislation from the beginning.[27] For example, it is easier to

27 The Office realises that if departments develop high quality policy, the legislation they develop will respect fundamental legislative principles. To this end, they are aiming to educate all relevant public servants on fundamental legislative principles. To this end the Office conducted a seminar on legislative standards for

provide that a board shall have all the powers granted to a commission of inquiry by the *Commissions of Inquiry Act*, than to decide exactly what powers the board actually needs and set them out. But this sort of approach leads to legislation that ignores individual rights and liberties. The *Legislative Standards Act* encourages those who develop legislation to have sufficient regard to fundamental legislative principles from the beginning, by giving the Office the function of advising them. This should help ensure that the people who develop legislative proposals think through exactly what they want the legislation to do from the beginning, and how that can be achieved consistently with the fundamental principles. 'Sufficient regard' may also mean that the relevant Department or Minister should consult with the people who are likely to be affected by new legislation. In particular, having sufficient regard to Aboriginal tradition and Island custom would surely have to involve consultation with Aboriginal and Islander groups or spokespeople.[28]

But overall the 'sufficient regard' requirement significantly weakens the prospects for the enforcement of fundamental legislative principles. It is difficult for outsiders to judge whether sufficient regard was had to the principles. Ultimately this makes the observance of fundamental legislative principles dependent on executive discretion.[29]

Internal Government Enforcement

The main method of 'enforcement' of fundamental legislative principles is an internal government process of monitoring and checks, carried out by the Office, the Department of Justice and the Attorney-General and finally Cabinet. The decision to draft legislation is normally made within a Department.[30] But before any legislation is actually drafted by the

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public servants in April 1993, and a team from the Law Faculty at Griffith University has produced a public service manual on the *Legislative Standards Act*.

28 Casey, D, 'Having Sufficient Regard to Aboriginal and Islander Affairs', *Fundamental Legislative Principles: New Policy processes*, RIPAA Seminar, Brisbane, 2 April 1993, at 4.

29 Of course ultimately Parliament decides on all primary legislation, but until the Parliamentary Committee for the Scrutiny of Legislation is introduced, Parliament has no set process for turning its mind to such considerations.

30 Private members or the Opposition may also draft legislation or amendments and

Office, Cabinet has to approve the preparation of the bill and the drafting instructions. Once the bill is drafted, Cabinet must again approve the bill before it is introduced into Parliament. On both these occasions the impact of the bill on fundamental legislative principles is examined by the Parliamentary Business and Legislation Committee ('PBLC') of the Cabinet. The Parliamentary Counsel and the Attorney-General are members of this committee and have the particular responsibility of raising fundamental legislative principle issues. Both the Office and the Department of Justice and the Attorney-General will also discuss legislative proposals with officers of relevant Departments. Clearly the Government is relying heavily on the advice of the Office and Department of Justice and the Attorney-General officers to ensure that legislation is checked to ensure consistency with fundamental legislative principles. The newly acquired statutory independence of the Office is supposed to ensure the independence of their advice. But there is no assurance their advice will be followed or even brought to the attention of Parliament or the public.

Parliamentary Committee for the Scrutiny of Legislation

> 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.[31]

For this reason EARC extended the terms of its original review of the Office of the Parliamentary Counsel to

> examine the adequacy of present Parliamentary procedures for reviewing bills and subordinate legislation for impact on rights and liberties, and principles of Parliamentary

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the *Legislative Standards Act* specifically provides that the Office can draft such non-government legislation as long as it does not 'significantly and adversely' affect the Government's legislative program.

31 *Report on Review of the Office of Parliamentary Counsel, supra n* 5, at 7.

sovereignty.[32]

The Commission examined the present Parliamentary Committee for the Scrutiny of Subordinate Legislation[33] and recommended that this Committee be abolished, with an all party parliamentary committee for the scrutiny of all legislation established in its place. This Committee would provide independent scrutiny of government legislation to test compliance with fundamental legislative principles.[34] The Committee was to be established by legislation, so that it could not be removed or forgotten.[35] It would be able to make its own reports about the application of fundamental legislative principles to legislation, receive submissions from the public and explanations from the relevant Minister, and raise matters of concern in Parliament and force the relevant Minister to respond. There is some evidence that such committees do positively affect the content of legislation.[36]

The establishment of the committee was to have been the second major purpose of the *Legislative Standards Act*, and the ultimate means of ensuring that fundamental legislative principles were properly considered by the legislators. However the Government decided to omit it from the Act on the grounds that it would be unwise to set up any new Parliamentary committees until EARC's forthcoming review of the entire Parliamentary committee structure was completed. That review was completed in October 1992, and EARC again recommended that the new Committee be set up.[37] The recommendation has now been accepted by

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32 *Ibid* at 8.

33 The Committee was first set up in 1975 and has concerned itself with ensuring compliance with fundamental legislative principles, especially since the *Legislative Standards Act*. However it was not given any function under that Act.

34 *Report on Review of the Office of the Parliamentary Counsel*, *supra n* 5, at 83-102.

35 Such committees exist at Commonwealth level (the Senate Scrutiny of Bills Committee and the Senate Committee on Regulations and Ordinances) and in Victoria. However these Committees are only established by resolution of the Parliament at the beginning of each session.

36 See for example, Senate Standing Committee on Regulations and Ordinances, *Eighty-Sixth Report* (Parliamentary paper No 93 of 1990) at 1 where it is stated that the Senate had always followed the committee's advice to disallow a flawed instrument where the Minister was not willing to amend it.

37 EARC, *Report on Review of Parliamentary Committees*, EARC, Brisbane, 1992,

the Parliamentary Committee for Electoral and Administrative Review.[38] At the time of writing the Queensland Government has not yet implemented EARC;s recommendations, although it has indicated that it will do so.

Although Premier Goss promised in the Parliamentary debates on the *Legislative Standards Act* that the Parliamentary Committee would be included at a later date,[39] he also seemed to intentionally put the responsibility for observing fundamental legislative principles primarily on internal government processes. He did not see external review either by Parliament or by the courts as important priorities, having stated:

> We are establishing a mechanism by which the Government takes responsibility for ensuring that it does not, through legislation, unduly undermine basic rights ... Contrast our system with other democratic systems. In the United States, for example, the courts are heavily shackled with the responsibility for ensuring that legislation complies with a bill of rights. Relying so heavily on the courts to perform that role is time consuming, expensive and inefficient. The self monitoring, or self-assessing mechanism that this Government has established sets a unique trend. It is one in which Queensland leads the way.[40]

EARC commented on the Premier's attitude in its *Report on Parliamentary Committees*:

> Despite the reassurance of the Premier that legislation will be scrutinised by the Office of the Parliamentary Counsel and the Attorney-General, the Commission would wish to ensure that the Parliament, and not the Government, has the final responsibility for the scrutiny of legislation.[41]

It is ironic that one of the main principles of the Act is to support

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at 94-149, 406-413.

38 *Report No. 19: Report on Review of Parliamentary Committees*, Legislative Assembly of Queensland, October 1993, at 4, 11-14.

39 'Legislative Standards Bill: Second Reading Speech', *Hansard of the Legislative Assembly*, Queensland, 6 May 1992, at 166.

40 Goss, *supra n 2* at 2.

41 *Supra n 5*, para 4.12.

Parliamentary democracy against wide executive and administrative powers exercised without specific Parliamentary authorisation or scrutiny, but it relies solely on executive and administrative action for its execution.[42] If Parliamentary sovereignty and responsibility for legislation is supposed to be a fundamental legislative principle, surely it is important that there be a Parliamentary structure or process for making sure the *Legislative Standards Act* itself is well implemented. This is not to say that internal monitoring processes are not worthwhile. But Queenslanders know that governments cannot always be relied on for internal checks of their own actions, especially where those actions concern the balancing of the rights of citizens against the power of the state. When the Parliamentary Committee is introduced, it ought to be enshrined in the Act itself as was originally intended, so that it is obvious that the Parliament is taking responsibility for fundamental legislative principles and not just leaving it to the executive.

Direct enforcement of fundamental legislative principles in court

For those who wish to enforce the observance of fundamental legislative principles in court, the *Legislative Standards Act* will not provide much assistance. There is no provision for legislation to be made invalid or even interpreted differently if it does not comply with a fundamental legislative principle.[43] The Act is not an express limit on the legislative power of the State Parliament and such a limit cannot be necessarily implied into the Act which only addresses itself to the Parliamentary Counsel.

But this does not mean there is no way for some of the principles in the Act to be enforced. There are bases other than the *Legislative Standards Act* for the enforcement of some of the principles in it. The operation of

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42 With the exception of the Parliamentary Committee for the Scrutiny of Subordinate Legislation which has taken on a function with respect to fundamental legislative principles without the authority of the *Legislative Standards Act*.

43 Contrast the New Zealand *Bill of Rights Act* (1990) which provides that legislation should be interpreted in accordance with the values it expresses where possible, although it does not invalidate legislation. For a discussion of this, see Paciocco, DM, 'The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill', [1990] *New Zealand Recent Law Review* 353.

administrative law as set down by common law and reformed by statute would enforce some principles. There is considerable scope for the enforcement of fundamental legislative principles by reference to statutory human rights reforms. In particular the Queensland Parliament may be bound by Commonwealth human rights laws by virtue of section 109 of the *Commonwealth Constitution.*[44]

In the current context it is possible that fundamental legal principles will be further recognised and enforced by the courts. In *Union Steamship Co of Australia Pty Ltd* v *King*[45] an unanimous High Court suggested that, in the future they may be willing to make 'the exercise of ... legislative power ... subject to some restraints by reference to rights deeply rooted in our democratic system and the common law'. Such restraints have now been acknowledged at the Commonwealth level to some extent.[46] It is unclear how far the courts will take this reasoning and whether it can be applied to States. But the *Legislative Standards Act* is only a directory Act aimed at the Office and is unlikely to be the basis of such implications. At best it would only be one of many sources to which a court would have regard.

Interpreting an Act to Comply with Fundamental Legislative Principles

An indirect way of enforcing compliance with fundamental legislative principles would be to interpret legislation so as to comply with them where possible. Although the Act does not expressly mandate such a procedure, the *Legislative Standards Act* and the policy of fundamental legislative principles may still be useful in interpreting some legislation or provisions. This may occur by the use of material relating to the

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44 *Mabo* v *Queensland* (No 1) *supra n* 4.

45 (1988) 166 CLR 1, at 103

46 Fundamental common law values were used to limit legislative power in *Davis* v *The Commonwealth* (1988) 166 CLR 79 and *Nationwide News Pty Ltd* v *Wills* (1992) 66 ALJR 658. In *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 66 ALJR 695 legislative power was limited by a right to free speech in political discussions implied from the *Commonwealth Constitution.* For a comprehensive discussion of this topic see Toohey, J, 'A Government of Laws and Not Men?' (1993) 4 *Public Law Review* 158.

application of fundamental legislative principles to the particular Act, or by having regard to the general policy of the *Legislative Standards Act.* The guiding principle for interpreting legislation is that the interpretation that best gives effect to the purpose of the Legislature in passing the Act is to be chosen.[47] The best evidence of the Parliament's intention is generally the ordinary meaning of the Act itself. But the courts will now also look to extrinsic factors in determining the purpose of the Act.[48]

The most successful method would be to use material discussing the way the principles were intended to apply to particular legislation as evidence of the intention of the Parliament in enacting that legislation. Section 14B of the *Acts Interpretation Act* 1954 (Qld) allows a wide range of extrinsic material to be used if the ordinary meaning of a provision is either ambiguous or obscure, or if its ordinary meaning leads to a result that is manifestly absurd or unreasonable. In particular, Parliamentary debates and speeches referring to the application of fundamental legislative principles to the legislation would be useful.[49] When the Parliamentary Committee is set up, its reports will be especially relevant to show how Parliament intended fundamental legislative principles to apply to particular pieces of legislation.[50] Other internal government material discussing the relevance of fundamental legislative principles to particular pieces of legislation may also be available through the *Freedom of Information Act* 1992 (Qld).[51] Such material could be relevant 'extrinsic material' under section 14B, but as pre-Parliamentary material it would carry less weight than Parliamentary debates and reports.

This leaves the question of whether regard can be had to the general policy of observing fundamental legislative principles in interpreting legislation. If it could, the *Legislative Standards Act* could effectively strengthen and expand the common law presumptions and assumptions

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47 Section 14A *Acts Interpretation Act* 1954-1992 (Qld), *Bropho* v *State of Western Australia* (1989-90) 171 CLR 1.

48 *Ibid.*

49 Reference to these sources is expressly authorised by s 14B(3)(f) and (g) *Acts Interpretation Act* (Qld).

50 Section 14B(3)(c).

51 See below.

that normally apply to the interpretation of legislation. In order for a court to take into account the provisions of the *Legislative Standards Act*, it would have to be convinced that the Act evidenced Parliament's intention for subsequent pieces of legislation. The Act does suggest that the Parliament intends to ordinarily observe fundamental legislative principles. One of the main features of the Act is that Parliament is asking the Parliamentary drafter to have regard to fundamental legislative principles in drafting the bills Parliament will consider. This implies that in the future Parliament intends to enact legislation which has sufficient regard to those principles. This is not just a policy of the executive. Nor is it a mere drafting practice. Rather the policy has been set out in legislative form and adopted by Parliament itself. Therefore Parliament intends to observe fundamental legislative principles.

But this is a precarious argument. The legislative policy to have regard to fundamental legislative principles is necessarily weak evidence of Parliament's intention for particular statutes for two reasons. First, the *Legislative Standards Act* expresses only a general policy and more specific evidence about the particular provision in question would be capable of overriding it. Secondly, the *Legislative Standards Act* itself contemplates that fundamental legislative principles can be overridden; it would be difficult to say for sure how Parliament intended to have regard to fundamental legislative principles in any particular piece of legislation.

Public Accountability on Fundamental Legislative Principles

While breaches of fundamental legislative principles are not forbidden or sanctioned by invalidity of legislation, the *Legislative Standards Act* may provide a means for making the Government more accountable for its legislation. The Act sets out the legislative standards the Parliament wishes to follow in a permanent and public form which can be referred to in consultation, discussion and debate. While people will always lobby for their rights and liberties to be protected or other fundamental principles to be observed, having the principles set out in legislation makes it easier to hold governments accountable to them.

But what avenues are available for members of the public to become aware of the application of fundamental legislative principles to particular

pieces of legislation, and what opportunities are there to encourage public accountability for the implementation of those principles? The establishment of the Parliamentary committee is not likely to provide these opportunities. While there is some evidence that Parliamentary scrutiny committees are useful in making Parliament more aware of fundamental legislative principles,[52] there is little to suggest that they have been utilised by members of the public, or have made members of the public more aware of the issues. For meaningful public accountability to develop, members of the public will have to take an active interest in the application of fundamental legislative principles to legislation and find out for themselves what is happening. The media could also play a role here.

Freedom of Information

One way for members of the public and the media to become aware of potential problems with fundamental legislative principles and make the Government more accountable would be to use the *Freedom of Information Act* (the *FOI Act*). The Government's internal policy processes mean that documents discussing the applicability of fundamental legislative principles to Government legislation will be brought into existence. These could become susceptible to *FOI Act* claims. At a general level, documents that set out the Government's overarching policy on the application of fundamental legislative principles to legislation should be readily accessible under the Act.

There will be documents submitted to Cabinet which discuss the application of fundamental legislative principles to proposed legislation. But documents brought into existence for the purpose of Cabinet (or PBLC) examination and authority would be exempt from access under section 36 of the *FOI Act*. In a recent decision, the Queensland Information Commissioner has indicated that the class of documents to which this exemption applies will be construed narrowly.[53] Nevertheless

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52 See for example, Whalan, D, 'Forewarned is Forearmed - Suggested Legislative Benchmarks for Protecting Rights', *The Preparation of Acts and Regulations*, EARC Seminar, Brisbane, 5 February 1991, and EARC, *Report on the Office of the Parliamentary Counsel*, *supra n* 5 para, 8.16 to 8.19 at 86-7.

53 *Eccleston* v *Department of Family Services and Aboriginal and Islander Affairs*

section 36 will probably exempt the majority of the documents dealing with the internal Government monitoring of fundamental legislative principles from public access. Therefore, although the Goss Government is proud of the fact that Cabinet checks all proposed legislation twice over for interference with fundamental legislative principles,[54] there is no procedure by which Cabinet can be made publicly accountable for this process. By contrast, a functioning Parliamentary Committee for the Scrutiny of Legislation would put information about decisions made about the application of fundamental legislative principles to legislation on the public record without having to open up Cabinet discussions to the public.

Non-cabinet documents which record decisions made about the application of fundamental legislative principles to legislation and the reasons for those decisions may also exist. These should be accessible under the general provisions of the *FOI Act*.

Finally there may be documents that record advice, consultations and other work related to the development of legislation before a final decision on the application of fundamental legislative principles to the legislation was made. Material that records communications between the Office of the Parliamentary Counsel and relevant Departments on fundamental legislative principles is likely to be exempt by virtue of section 43 and the doctrine of legal professional privilege. The rest of this type of material is likely to fall under the category of 'deliberative process' documents. Under section 41 of the *FOI Act* such material is exempt if its disclosure 'would, on balance, be contrary to the public interest.' The onus is not on the person seeking disclosure to prove that disclosure is in the public interest, but on the Government to show it is not in the public interest.[55] There are good arguments for the proposition that the disclosure of material about the application of fundamental legislative principles to legislation is not contrary to the public interest since decisions about legislation which affect the rights and liberties of members of the community or the institution of Parliament are of great importance and

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(Unreported) 30 June 1993, at para. 158, at 53-4.

54 See Mackenroth, *supra n 1* at 3, and Wells, D, 'Press Release from A-G, 5.3.92', *The Proctor*, April 1992, at 12.

55 The Information Commissioner affirmed this in *Eccleston's Case*, *supra n 53* para 26 at 8.

concern to the public. On the other hand the process of considering and deciding on fundamental legislative principles is likely to be controversial and politically sensitive.

In the recent case of *Eccleston* v *Department of Family Services and Aboriginal and Islander Affairs*,[56] the Queensland Information Commissioner has taken a narrow view of what will be contrary to the public interest. The Information Commissioner emphasised that the rationale for the *FOI Act* as expressed in subsection 5(1) is that there is a public interest in disclosure that would facilitate the public accountability of government activity.[57] The whole policy of fundamental legislative principles is consistent with this type of approach to government, and public accountability on fundamental legislative principles would surely enhance their implementation in most cases. The Information Commissioner has also pointed out that a valid use of the *FOI Act* is to:

> assist interested persons or organisations who are not selected in a consultative process, first, to discover that an agency is developing a policy proposal, and second, to obtain the information which would permit meaningful participation; for instance by seeking to make their views known to the agency or the responsible minister.[58]

This sort of use of the *FOI Act* would be especially relevant in the context of fundamental legislative principles. However the Queensland courts have not yet considered the application of the *FOI Act*, so it is premature to offer a definite view on how that Act will be applied in Queensland.

Conclusion

The *Legislative Standards Act* is essentially an example of Government policy set down in legislative form. It has been criticised as a 'toothless tiger' and there is certainly no direct legal process by which

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56 *Ibid.*

57 *Ibid*, para. 58-75 at 20-26. See also *Re Rae and Department of Prime Minister and the Cabinet* (1985-6) 12 ALD 589.

58 *Ibid* para. 162, at 55.

observance of fundamental legislative principles can be enforced. It is a halfway house between having a mere executive policy and having a Bill of Rights. This is not to say that we need a Bill of Rights instead of the *Legislative Standards Act*. It is appropriate to maintain both pre-legislative and post-legislative guarantees of fundamental values.

The main advantage of the Act is that the Government has set down in statutory form a policy on 'high quality legislation'. The aim is to make all government officers involved in the development of policy and legislation aware of the impact of fundamental legislative principles from the beginning of the policy development process. This means that groups and individuals with an interest in proposed legislation should also be able to make use of the fundamental legislative principle policy to remind the Queensland Government of its responsibilities, and should be entitled to ask whether fundamental legislative principles have been sufficiently regarded. Ministers should be aware of the fundamental legislative principle implications of any legislation they are responsible for and ought to be able to demonstrate how fundamental legislative principles have been observed. But enforcement generally relies on internal Government processes, and on members of the public taking a sufficiently active interest in fundamental legislative principle issues to pursue them themselves. In that sense, the *Legislative Standards Act* fails to set an example for the implementation of the principles it contains.