A COMPARISON OF THE QUEENSLAND AND COMMONWEALTH APPROACHES TO THE LEGISLATIVE PROCESS

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It is necessary to begin by making an obvious point: the fundamental difference between the Queensland and Commonwealth parliaments is that the former is unicameral, the latter bicameral. This means, among other things, that the opportunity for Parliament to review and revise legislation as it processes it, is substantially less in Queensland. It also means that the ability of the Queensland Parliament to establish committees which might have an input into the legislative process is considerably less than that of the Commonwealth Parliament. And of course it means that the government in Queensland is always in control of the legislative process in Parliament: the government is the government because it has majority support in the one and only House of the Parliament.

Until 1989 this meant that legislation was almost exclusively the preserve of the cabinet. Passage by Parliament was essentially a formality. There were no parliamentary committees to which a Bill might be referred, nor to comment on its content, and little time was made available for debate.

But 1989 was an important year. There were three not unconnected events. The Fitzgerald Commission reported: the National Party government established a series of parliamentary committees and independent commissions; and the Labor Party won the State election.

One of the independent Commissions was the Electoral and Administrative Review Commission (EARC). Its Act gave it a broad agenda to review the public administration of the State, including the operation of the Parliament.[1] One of its early reviews was focused on a "review of the role and functions of the Parliamentary Counsel", one of the problem areas which Mr Tony Fitzgerald QC had highlighted.[2] He had noted that the Parliamentary Counsel was attached to the Premier's Department and was not independent. The Report also said, "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."[3]

EARC produced its report on its Review of the Office of the Parliamentary Counsel[4] in May 1991. Its recommendations were largely supported by the Parliamentary Committee on Electoral and Administrative Review which reported

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two months later and were implemented for the most part in the *Legislative Standards Act 1992*.

That Act was concerned primarily with the creation of the Office of Parliamentary Counsel (OPC) but the first operative part of the Act deals with Legislative Standards, and in particular with what are described as "fundamental legislative principles".

PART 2 - LEGISLATIVE STANDARDS

Purpose of Act

3.(1) The purposes of this Act include ensuring that -

(a) Queensland legislation is of the highest standard; and

(2) The purposes are primarily to be achieved by establishing the Office of the Queensland Parliamentary Counsel with the functions set out in section 7.

Meaning of "fundamental legislative principles"

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

(2) The principles include requiring that legislation has sufficient regard to -

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -

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

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

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

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

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

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

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

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill -

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation -

(a) is within the power that, under an Act or subordinate legislation (the **"authorising law"**), allows the subordinate legislation to be made; and

(b) is consistent with the purposes and intent of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only -

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

(ii) if authorised by an Act.

This is obviously a very important piece of legislation but it would be counter-productive to overstate that importance. It is not a mini Bill of Rights. Nor was it intended to be. EARC noted in its report that it would be dealing with the question of a Bill of Rights for Queensland at a later time.[5] That it did last year.[6] The Fundamental Legislative Principles (FLPs) in the *Legislative Standards Act* were not intended to be enforceable. They were not absolute, as EARC noted and "there may be circumstances where the public interest justifies or even requires that a principle be modified or displaced ... The principles are, however, of sufficient importance that there should exist mechanisms to ensure that departures from the principles are explained or justified."[7]

The FLPs are an important checklist, more extensive than those which are monitored by the Senate Standing Committee for the Scrutiny of Bills. And more importantly, they are applied at the drafting end of the legislative process and in the processing of Bills by cabinet and its committees, rather than after Bills have been introduced into the Parliament.

As they presently stand, the FLPs fall within the responsibilities of the Parliamentary Counsel. The Office of the Queensland Parliamentary Counsel is required, by s.7 of the *Legislative Standards Act*, to provide advice to ministers and units of the public sector on the application of fundamental legislative principles in relation to the drafting of government Bills, amendments and subordinate legislation (s.7(g)(ii)). It similarly advises members of the Legislative Assembly of those principles in

relation to private members' Bills and amendments (s.7(h)(ii)).

The government has set in place procedures which are designed to ensure that the cabinet is aware of whether proposed legislation infringes any of the FLPs. The principal features of the system adopted by the government are set out below.[8]

Cabinet first approves the preparation of a Bill on an "authority to prepare" submission. The cabinet handbook requires drafting instructions to be attached to the submission. The drafting instructions enable the details of the legislative proposal to be examined for its impact on fundamental legislative principles before cabinet gives approval to prepare the Bill.

When the drafting of the Bill has been completed, cabinet approves the introduction of the Bill on an "authority to introduce" submission. The Bill must be attached to the submission.

All proposed subordinate legislation (other than exempt instruments) is drafted by the OPC. The cabinet handbook requires subordinate legislation with a "significant" regulatory impact to be submitted to cabinet on an "authority to forward significant subordinate legislation" submission. The draft subordinate legislation must be attached to the submission.

As a safeguard, the Office of the Parliamentary Counsel has been instructed to certify subordinate legislation only if it is satisfied that the subordinate legislation does not infringe fundamental legislative principles.

A crucial aspect of the process is that the Parliamentary Business and Legislation Committee of the Cabinet (PBLC) considers each "authority to prepare" submission, each "authority to introduce" submission and each "authority to forward significant subordinate legislation" submission immediately before it is considered by cabinet. Although the PBLC has a broad range of functions, in practice it devotes most of its attention to the consideration of the impact of legislative proposals on FLPs.

Insiders say the system works. Mr Mackenroth, who chairs the PBLC, says the Committee now rarely sees provisions that were once standard in Queensland: for example, unfettered search and seizure provisions, exempting public officials from liability and general penalty provisions.

The PBLC has a small membership and meets immediately before cabinet does. It is chaired by the Leader of the House, and includes the Attorney-General and one other minister, plus the Parliamentary Counsel, a nominee of the Premier and a senior officer of the Premier's Department. The Attorney-General and the Parliamentary Counsel attend all meetings. Any issues concerning FLPs which are raised in the Committee by the Attorney-General or the Parliamentary Counsel are taken to cabinet by the Leader of the House.

There are two other bodies which may examine legislation after it has been through cabinet but before its introduction to the House. The Labor Government has established a series of ministerial committees shadowing each minister, and virtually all legislation goes to the relevant ministerial committee. Additionally, any legislation affecting the courts or the legal system must be considered by the Litigation Reform Commission a body consisting mainly of judges of the Court of Appeal.

Once a Bill is introduced in Parliament, the opposition normally

has the opportunity to use the OPC to draft amendments. But of course those amendments will be adopted only if the government decides to accept them.

There can be no doubt that the government has taken the concept of FLPs very seriously and is concerned to ensure that public servants also take them seriously. The material on the processes developed by government which I have been quoting is taken from a speech given by Mr Mackenroth to a seminar and workshop conducted in April last year by the Office of Parliamentary Counsel and RIPAA, primarily for public servants. It is probably worth directly quoting the Minister's concluding remarks:

> The processes are designed, among other things, to identify potential breaches of fundamental legislative principles, and ensure that departures from fundamental legislative principles are properly justified and are approved by cabinet. It is the role of those assisting the government in developing policy to ensure that the processes are complied with, to assist in the identification of issues involving FLPs, and to provide the government with high quality advice on all aspects of policy, including the application of FLPs to proposed legislation. The proper carrying out of the role will ensure efficient, fair and democratic government. It will also, of course, assist in avoiding embarrassment to the government, and yourselves, by unintended and unjustified breaches of fundamental legislative principle.[9]

On a personal note, I should add that in my own contact with the OPC I found that the FLPs had become an essential part of the culture. In one of the Bills we wanted prepared there was a reference to the possibility of obtaining documents compulsorily. We were quickly put right about the proper processes which were required in order to conform with the FLPs, though we did negotiate a procedure slightly amending what had become a standard format in the OPC in relation to such matters.

Now, while it is true that the new system is working well, I must say that in my view it is not yet adequate. EARC, in its report on the OPC and in a subsequent report on parliamentary committees[10] thought it essential that there should also be a Scrutiny of Legislation Committee which would examine all legislation, including subordinate legislation, to ensure that it did conform with the FLPs, or if not, why not. The creation of this Committee has not been rejected by government. There is a possibility that the Committee will come into being later this year.

That Committee, however, would not have the capacity or sufficient resources to be able to subject all legislation to detailed scrutiny. What is necessary is that the Parliamentary Counsel should have to report to the Committee about breaches or compromises of the FLPs. Departures from the principles should be explained or justified in public and not merely in secret to cabinet and its committees.

In the absence of these two developments (ie the creation of a Scrutiny of Legislation Committee and the publication by the OPC of its assessment that a Bill contains provisions contrary to an FLP) it remains the case that the crucial beneficial aspects of the Queensland legislative process occur before legislation is presented to the Parliament.

That applies, too, in relation to a matter which featured significantly in the report of the Sackville Committee on Access to Justice.[11] I have included the recommendations the Committee made in relation to the drafting and availability of legislation as an appendix. What I want to comment upon here is its proposal that the Commonwealth should undertake more consultation before it introduces legislation.

This is an area where there has been considerable movement in Queensland already. More often than not, explanatory memorandums now include an account of what consultation has taken place. Let me quote from just two recommendations which accompanied Bills introduced into Parliament in the last sittings:

JUSTICE AND ATTORNEY-GENERAL (MISCELLANEOUS PROVISIONS) BILL 1994

EXPLANATORY NOTES

Consultation

Consultation was conducted with relevant government agencies, the Courts, the Litigation Reform Commission, the Queensland Law Society and the Bar Association of Queensland in relation to particular amendments in which they had an interest.

RACING AND BETTING AMENDMENT ACT 1994

EXPLANATORY NOTES

Consultation

The Review of the *Racing and Betting Act 1980* Discussion Paper was released to Government Departments, racing industry organisations and community and business groups in September 1993. A range of policy issues arising from the review of the Racing and Betting Act was further discussed with a committee of racing industry administrators. The changes to the structure of the Queensland Principal Club and the reform of the Racing Industry Advisory Committee reflect the responses and consultation with the racing industry bodies.

I must add, that although all Bills are supposed to be accompanied by explanatory memorandums which include such details, not all departments or agencies yet comply. This is not because there is no consultation (though it may not be fully adequate). It is just, I believe, that this particular change does not seem as urgent or important as many others. And it must be recalled that before 1989 Parliament (not to mention cabinet) was not given the benefit of any explanatory memorandums at all.

One of the benefits of Parliament being given information about the consultation process is that it should be in a better position to explore the adequacy of that consultation, noting which interested groups were not consulted and using the evidence of those affected to measure the benefits or deficiencies of the proposed legislation. That kind of function could only be carried out by legislation committees. Their creation was also recommended by EARC[12] but unfortunately there is no immediate prospect of that recommendation being implemented.

The consultation issue highlights what I sought to emphasise in relation to the fundamental legislative principles. What has happened in Queensland is that the focus of the legislative process has moved away from Parliament to the executive. Sound legislation is dependent in part on adequate consultation and the

application of proper principles. The application of this discipline has undoubtedly been beneficial. But it ought not to be regarded as sufficient. Parliament also must have a role, other than as a rubber stamp. This is not easy in a unicameral Parliament. But it is not impossible if an adequate parliamentary committee system is created to ensure that government performs its legislative task properly.

Footnotes

1 *Electoral and Administrative Review Act 1989*, s2.10(1)(A).

2 Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the "Fitzgerald Report") p.371, rec. 11f.

3 ibid. p.140.

4 91/R2.

5 ibid.pp.25-26.

6 Report on the Preservation and Enhancement of Individuals' Rights and Freedoms. 93/R5.

7 91/R2, p.26.

8 This is an edited extract from part of a speech given by the Hon Terry Mackenroth, Leader of the House, to a seminar and workshop on "Fundamental Legislative Principles: new policy processes", 2 April 1993.

9 ibid. p.8.

10 Report on Parliamentary Committees, 92/R4.

11 Access to Justice.

12 92/R4, Chapters 4-5.

Appendix

Access to Justice

Extracts from the Action Plan concerning legislation

Action 21.1

The Commonwealth should implement the reforms proposed by the Administrative Review Council, the Senate Standing Committee on Legal and Constitutional Affairs and the House of Representatives Standing Committee on Legal and Constitutional Affairs designed to improve consultation in the making of legislation. In particular, the Commonwealth should introduce by legislation, or other appropriate means, a general requirement for the Government to consult in the process of making legislation, subject to appropriate specified exceptions.

Action 21.2

The Commonwealth should adopt a policy for the updating of its primary legislation to ensure that all Acts that are widely used are put into the new and better drafting style currently being developed by the Office of Parliamentary Counsel in light of the recent reports by the Senate Standing Committee on Legal and Constitutional Affairs and the House of Representatives Standing Committee on Legal and Constitutional Affairs.

Action 21.3

The Commonwealth should, in accordance with the recommendations made by the Administrative Review Council, introduce a scheme for the sunsetting of all delegated legislation on a ten-year rotating basis to ensure that delegated legislation is a high quality, and up to date if it is required at all. If the cost of this proposal is too high, at the very least, the Commonwealth should adopt a similar policy for the updating of delegated legislation as proposed earlier for primary legislation.

Action 21.4

The Commonwealth should provide additional resources to parliamentary scrutiny committees to ensure that they are capable of fulfilling their functions as the volume of legislation, both primary and delegated, increases.

Action 21.5

The Commonwealth should ensure that its computerised database for legislation is as comprehensive as possible and, in particular, it should contain relevant explanatory and other information to assist in the interpretation of legislation.

The Commonwealth should negotiate with the States to obtain permission for its computerised database to include or have access to State information.

Access to the database and to printed versions of legislation should be as inexpensive as possible.