**SUBMISSION**

**SCRUTINY OF LEGISLATION COMMITTEE**

**REVIEW OF THE MEANING OF 'FUNDAMENTAL LEGISLATIVE PRINCIPLES'**

**April 2011**

# Introduction

The Scrutiny of Legislation Committee of the Queensland Parliament is examining the meaning of 'fundamental legislative principles', and has invited submissions.

This submission focuses on human rights in the making of legislation.

* 1. **About the Anti-Discrimination Commission Queensland**

The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991* (the Queensland AD Act).

The scheme of the Queensland AD Act is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity, unless an exemption under the Act applies, and to provide a mechanism for resolving contraventions of the Act. Other objectionable conduct is also prohibited, including sexual harassment, victimisation, vilification and unlawful requests for information.

The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into, and where possible effecting conciliation of, complaints of contraventions of the Queensland AD Act. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.

# The Human Rights landscape in Queensland

Unlike Victoria and the ACT, Queensland does not have a Charter or Human Rights Act that ensures human rights are considered during governmental processes such as law-making, policy creation and decision-making.

Existing human rights protection in Queensland consists of:

* statutory interpretation;
* the examination of Bills and subordinate legislation by the Scrutiny of Legislation Committee;
* anti-discrimination laws.
	1. **Statutory interpretation**

In statutory interpretation there is a presumption that legislation is not intended to encroach upon fundamental rights and freedoms. However, this presumption can be displaced by the legislation itself. The rights and freedoms upheld by the courts include the freedom of speech, personal liberty, access to courts, legal professional privilege, self-incrimination, procedural fairness, no alienation of property without compensation, and equality of religion.

A contemporary example of such statutory interpretation concerns a regulation made under the *World Youth Day Act 2006* (NSW), which gave an authorised person the power to direct a person within a declared area to cease engaging in conduct that caused annoyance or inconvenience to participants in the World Youth Day event in 2008. The Full Court of the Federal Court interpreted that Act on the presumption that it was not the intention of parliament that regulations would be made under the Act preventing or interfering with the exercise of the fundamental right to freedom of speech.[[1]](#footnote-1) The relevant clause was declared invalid to the extent it sought to prevent merely annoying conduct.

In contrast, where a stateless person was detained with no real prospect of removal from Australia in the foreseeable future, the majority of the High Court failed to uphold the fundamental right to liberty against indefinite executive detention.[[2]](#footnote-2)

These two cases demonstrate the differences in the application of principles of statutory interpretation, and the limitations of statutory interpretation in protecting fundamental human rights.

* 1. **Examination of Bills and subordinate legislation**

Under the *Legislative Standards Act* *1992*, Queensland’s Parliamentary Counsel must provide advice to Ministers, government entities, and members of the Legislative Assembly on the application of fundamental legislative principles. The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals. The *Legislative Standards Act 1992* states[[3]](#footnote-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.

The Parliamentary Counsel is required to provide a brief assessment of the consistency of the Bill with fundamental legislative principles in the explanatory notes to a Bill before the Queensland Parliament. If the Bill is inconsistent with fundamental legislative principles, the reasons for the inconsistency must also be stated.

The *Parliament of Queensland Act 2001* requires the Parliamentary Scrutiny of Legislation Committee to examine all Bills and subordinate legislation for the application of fundamental legislative principles.[[4]](#footnote-4) The Committee may consider, report on, and make recommendations on the application of fundamental legislative principles contained in a Bill to the Legislative Assembly. The Committee can recommend a Bill be amended because, in the Committee’s opinion, it does not have sufficient regard to fundamental legislative principles. However, there is no mandatory requirement for the Member promoting the Bill to provide a response to the Committee’s recommendation.[[5]](#footnote-5)

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

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

* 1. **Anti-discrimination laws**

The current anti-discrimination legislation landscape involves a number of federal Acts, enacted under the external affairs power,[[6]](#footnote-6) with the State and Territories all having their own anti-discrimination and equal opportunity Acts.[[7]](#footnote-7) The Australian Human Rights Commission administers the federal laws and the Anti-Discrimination Commission Queensland administers the Queensland AD Act. Although there is some variance among the federal and State legislation, the dichotomy of legislation and bodies has worked effectively to date, with minimal difficulties or inconsistencies.

It is to be noted that Australia has committed to the implementation of the *International Convention on Civil and Political Rights* (ICCPR), with the federal, State and Territory authorities having regard to their respective constitutional powers and arrangements emanating from a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the states.[[8]](#footnote-8)

The grounds upon which discrimination is prohibited in the legislation reflect a number of human rights instruments that the Commonwealth has ratified, including:

* International *Covenant on Civil and Political Rights*
* International *Convention on the Elimination of All Forms of Racial Discrimination*
* Convention *on the Elimination of All Forms of Discrimination Against Women*
* International *Labour Organisation, Discrimination (Employment and Occupation) Convention* (‘ILO 111’)
* I*nternational Labour Organisation Workers with Family Responsibilities* *Convention* (‘ILO 156’)
* Convention *on the Rights of the Child*
* Declaration *on the Rights of Mentally Retarded Persons*
* Declaration *on the Rights of Disabled Persons*.

The Queensland AD Act does not purport to provide comprehensive protection for every human right articulated in the international human rights instruments. Rather, the legislation aims to promote equality of opportunity for everyone by providing protection from unfair discrimination in certain areas of public activity. The main process for remedying acts of unlawful discrimination is via the complaint process in the Queensland AD Act.

* + 1. **The Complaints Process**

The Queensland anti-discrimination scheme is for the Commission to endeavour to resolve a complaint through conciliation, and where that is not achieved there is a right of referral to the Queensland Civil and Administrative Tribunal. Approximately 60% of all accepted complaints are resolved through conciliation, with approximately 18-25% being referred to the tribunal.

This scheme is intended to be less formal, and more cost effective than a direct application to a court.

The complaint process allows for individuals who believe they have been discriminated against on the prohibited grounds to make a complaint to the Commission.

At the conciliation stage there are numerous ways in which complaints may be resolved, including negotiating changes in processes or procedures, changes in work conditions, and the giving of an apology. Negotiations, where successful, may lead to beneficial outcomes for the individuals involved in the complaint. However, the terms remain confidential and cannot serve as binding precedent, although de-identified information can be used for general educational purposes.

Not all complaints can be successfully conciliated and some may ultimately proceed to a public hearing before the tribunal. The decisions can indirectly affect more individuals and organisations than those involved in the specific complaint. The broader public benefit of tribunal or court decisions is that it builds a body of case law that can illustrate the circumstances and parameters of unlawful discriminatory conduct. Unfortunately, developing a body of case law can be slow and cannot efficiently assist the development of larger systemic changes that may be necessary to comprehensively protect an individual's human rights.

A complaints-based mechanism under the existing discrimination legislation has an important but limited effectiveness in comprehensively protecting human rights. The complaints mechanism, while valuable in dealing with instances of unlawful discrimination, cannot be relied upon as the primary means of ensuring an individual’s human rights are comprehensively protected.

# How could Queensland better protect and promote human rights in the law making process?

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

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

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

Queensland is in a position to benefit from the recent consultations, inquiries and reports in the federal sphere.

In response to the report of the National Human Rights Consultation Committee, the Australian Government issued its *Australia's Human Rights Framework* in April 2010. The framework included proposals to establish a statutory Parliamentary Joint Committee on Human Rights which would scrutinise compliance of legislation with human rights treaties, and a requirement that all new legislation introduced or tabled in Parliament be accompanied by statement of compatibility with human rights.

The Human Rights (Parliamentary Scrutiny) Bill 2010 was introduced in June 2010. The Bill establishes the proposed committee and provides for a requirement for statements of compatibility to be prepared for all Bills. The Bill lapsed in July 2010 with the general election after reaching the second reading stage and was referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Bill was reintroduced in September 2010 and the Senate Legal and Constitutional Affairs Committee published its report, with various recommendations, in January 2011.

The Senate Legal and Constitutional Affairs Legislation Committee advertised its inquiry and wrote to interested parties in October 2010, and conducted public hearings in Melbourne and Canberra in November 2010.

Key issues identified by the inquiry included the definition of human rights, and the content, form and scope of statements of compatibility.

* 1. **The proposed federal model for scrutiny of legislation**

The current Bill for the implementation of a federal mechanism for the scrutiny of legislation proposes the establishment of a committee to examine Bills and Acts for compatibility with human rights, together with a requirement for statements of compatibility. In the Bill, 'human rights' is defined as the rights and freedoms recognised or declared by the seven core United Nations human right treaties[[9]](#footnote-9), as those treaties apply to Australia.

The inquiry reported that although there was widespread support for the proposed new joint committee and its role, concerns were raised about the definition of 'human rights', including that it was too narrow, uncertain in coverage, and fails to include important international and domestic human rights standards[[10]](#footnote-10).

Submissions relating to the definition of 'human rights' suggested:

* expanding the definition to include:
	+ a wider range of international instruments;
	+ international instruments of 'lesser status' than the seven core treaties;
	+ the *Declaration on the Rights of Indigenous Peoples*;
	+ the International Labour Organisation (ILO) conventions and works;
	+ the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*;
	+ the *Universal Declaration of Human Rights*;
	+ recognition of customary international human rights law;
	+ international human rights jurisprudence;
	+ human rights protected under domestic law, such as express and implied constitutional rights or guarantees, judicial decisions and legislation;
* making the definition inclusive rather than exclusive, and replacing the word 'means' with 'includes';
* harmonising the definitions in the Bill and in the *Australian Human Rights Commission Act 1986,* and broadening both to include the ILO Convention 111 concerning *Discrimination in respect of Employment and Occupation*, the UN *Declaration on the Elimination on All Forms of Intolerance and of Discrimination Based on Religion and Belief* and the UN *Declaration on the Rights of Indigenous Peoples*;
	1. **Are human rights covered by the Queensland definition of 'fundamental legislative principles'?**

The definition of 'fundamental legislative principles' in section 4 of the *Legislative Standards Act 1992* is described as inclusive, however the expressions used and the examples contained in the legislation can make the definition appear, to a non-lawyer, as limited to the listed examples. The principles are described as including a requirement that legislation **has sufficient regardto** rights and liberties of individuals, and then examples are given of how legislation **has sufficient regard to rights and liberties of individuals**. Most of these examples are principles of various forms of human rights law. They are by no means exhaustive.

While the Commission generally supports the use of examples to promote awareness and understanding of human rights, this needs to be balanced so as to avoid the perception that these are the only considerations to be addressed.

The Commission suggests changing the reference to 'rights and liberties of individuals' to 'human rights', and adding to the objects provision in section 3, the objective that 'Queensland legislation is consistent with the promotion and protection of human rights'.

Much of the submissions to and report of the Senate Legal and Constitutional Affairs Legislation Committee concerned how human rights could be best defined for the purpose of scrutiny of legislation. Drawing on that work, in particular the definition suggested by Reverent Professor the Hon. Michael Tate AO[[11]](#footnote-11), the Commission suggests defining human rights inclusively and to accommodate changes over time, such as:

The personal rights and liberties recognised or expressed under the Constitutions of Queensland and Australia, in statutes of the parliaments of Queensland and Australia, or in treaties ratified by the government of Australia.

The Commission recommends the implementation of an instrument in the nature of a 'Guidance Note' to assist those involved in the preparation and scrutiny of legislation, as well as Members and the public, to identify human rights issues. Such Guidance Note could be updated from time to time to keep abreast with changes to human rights law, without the necessity of amendment of the legislation.

* 1. **Other possible measures to increase protection and promotion of human rights in law the law making process**

An explanatory note for a Bill is required to include, amongst other things, a brief assessment of the consistency of the Bill with fundamental legislative principles, and if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.[[12]](#footnote-12) This provision was inserted in 1994, well before a Charter and Human Rights Act were introduced in Victoria and the ACT, and the recent Human Rights Consultation. The contemporary approach is to require that explanatory notes (or explanatory memorandum) include statements of compatibility.

The issue of the content, form and scope of statements of compatibility was discussed in the report of the Senate Legal and Constitutional Affairs Legislation Committee. There was concern that statements of compatibility not be 'one-liners' or too brief or cursory, and that they not be too long, legalistic or technical. Developments in Victoria were reported as increasing use of public consultations when developing legislation, and the statements focusing on the rights that may be limited rather than every right that is potentially engaged by a Bill. This seems to be a good approach.

The Commission suggests that it is more appropriate for the provision (of the *Legislative Standards Act 1992*) to require a 'statement of compatibility' rather than a 'brief assessment of consistency', as the latter (and current) terminology suggests a more cursory consideration than might be appropriate in the circumstances.

As noted previously, there is currently no requirement for a Minister promoting a Bill to respond to any recommendations of, or issues of inconsistency raised by, the Scrutiny of Legislation Committee. This means that although the Committee may have examined a Bill and reported inconsistencies with fundamental legislative principles, these are not necessarily addressed by the Member promoting the Bill or debated in Parliament.

The Commission recommends amendment of the *Parliament of Queensland Act 2001* to provide a requirement for the Member presenting a Bill to address any recommendations or issues of incompatibility raised by the Scrutiny of Legislation Committee.

# Conclusion

The Commission acknowledges that Queensland has been at the forefront in Australia in taking measures ensure its legislation is of a high standard. It is time however to strengthen the protection and promotion of human rights in the law making process. The recommendations of the Commission are aimed at promoting an awareness of human rights across the whole of the Queensland community.

In summary, the Commission recommends amendments to the relevant legislation to:

1. Include as one of the express objectives of the *Legislative Standards Act 1992* that Queensland legislation is consistent with the promotion and protection of human rights;

2. Incorporate 'human rights' into the meaning of 'fundamental legislative principles';

3. Develop and implement a 'Guidance Note' to assist in identifying human rights issues.

4. Require explanatory notes to Bills and amendments to incorporate a statement of compatibility with fundamental legislative principles, with an explanation of the reasons for any departure; and

5. Require the Member promoting a Bill to respond to any recommendations or concerns raised by the Scrutiny of Legislation Committee.

The Commission strongly supports the adoption of a Charter of Rights or a Human Rights Act for Queensland, and refers the Committee to the Commission's submission to the Human Rights Consultation. The submission is available on the Commission's website at:

<http://www.adcq.qld.gov.au/main/mediarel.html#submissions>

The Commission thanks the Scrutiny of Legislation Committee for the opportunity to make this submission.

**KEVIN COCKS AM**

**Anti-Discrimination Commissioner**

**Queensland**

1. *Evans v State of New South Wales* (2008) 250 ALR 33 at para 7. [↑](#footnote-ref-1)
2. *Al-Kateb v Godwin* (2004) 219 CLR 562. [↑](#footnote-ref-2)
3. *Legislative Standards Act 1992* (Qld) , section 4(3) [↑](#footnote-ref-3)
4. *Parliament of Queensland Act 2001*, s103. [↑](#footnote-ref-4)
5. *Parliament of Queensland Act 2001,* s*107.* [↑](#footnote-ref-5)
6. *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), and *Age Discrimination Act 2004* (Cth). [↑](#footnote-ref-6)
7. *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1995* (Vic), *Racial and Religious Tolerance Act 2001* (Vic), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1996* (NT), *Discrimination Act 1991* (ACT), *Human Rights Act 2004* (ACT). [↑](#footnote-ref-7)
8. See  Australia's 1984 declaration to the ICCPR , <http://www2.ohchr.org/english/law/ccpr.htm>,  [↑](#footnote-ref-8)
9. *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD); *International Covenant on Civil and Political Rights* (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); *Convention on the Rights of the Child* (CROC); and *Convention on the Rights of Person with Disabilities*. [↑](#footnote-ref-9)
10. See 3.11, page 18 of the inquiry report [↑](#footnote-ref-10)
11. See 3.43, page 26 of the inquiry report [↑](#footnote-ref-11)
12. *Legislative Standards Act 1992*, section 23(f) [↑](#footnote-ref-12)