Queensland
THE NEW EXEMPLAR OF Democracy

Spencer Zifcak

A mini bill of rights? Queensland's Legislative Standards Act.

In May 1992, the Queensland Government enacted its path-breaking *Legislative Standards Act*. The Act establishes an array of standards against which the appropriateness of State legislation must now be judged. In doing so, the Government ushered in a system of legislative review that provides a model that other States and the Commonwealth would do well to follow. Although not without its flaws, the new legislative scheme will ensure that, in future, the merits of legislation which trespasses on the rights and liberties of Queenslanders will be actively and critically considered. Democracy in Queensland will be the principal beneficiary.

In this article, I describe the principal features of the new legislation, comment on some of the innovations it introduces and conclude with suggestions for its further reform.

Background

The *Legislative Standards Act* was introduced in response to the recommendations of the Electoral and Administrative Review Commission (EARC).[1] EARC had inquired into the role of the Office of Parliamentary Counsel following from the Fitzgerald Commission's concern that Queensland's Parliamentary Counsel had not been given sufficient independence during the Bjelke-Petersen years.[2] It recommended not only that the Office of Parliamentary Counsel should be established independently but also that the Office play a pivotal role in ascertaining whether legislation conformed with fundamental legislative principles defined by law.

Introducing the legislation, the Premier, Mr Goss, set it in its political context:

> For too many years, the system of law making in Queensland operated without sufficient regard for the rights and liberties of our citizens. What we now call fundamental legislative principles were not previously well known among public servants and even Ministers.
>
> Of greater concern was the absence of proper checks and balances to ensure that both Cabinet and Parliament were adequately informed when proposed legislation was designed (intentionally or otherwise) to depart from fundamental principles upholding rights and liberties . . .
>
> Fundamental legislative principles are guiding principles that help us ensure that legislation does not unduly interfere with the rights and freedoms of Queenslanders . . .
>
> They are principles on which a parliamentary democracy based on the rule of law is founded.[3]

The objects of the Act are to ensure that Queensland legislation is of the highest standard, that it is drafted efficiently and effectively and that it is readily available in both printed and electronic form (s.3).

In order to achieve these objects, the Act establishes the Office of Queensland Parliamentary Counsel (s.5(1)). Subject to the Minister, the Office is placed under the control of the Parliamentary Counsel (s.6(1)). The Office is not, therefore, part of a department. It performs its functions independently. Parliamentary Counsel's principal function is to draft legislation and regulations for submission to the Parliament (s.7(a)-(f)). In doing so, it provides Ministers and public servants with advice on the application of the fundamental legislative principles set down in the Act (s.7(g)).

The Act defines fundamental legislative principles as principles that

Spencer Zifcak teaches law at La Trobe University.

underlie a parliamentary democracy based on the rule of law (s.4(1)). The principles require that legislation must have sufficient regard to the rights and liberties of individuals and to the institution of Parliament (s.4(2)).

More specifically, s.4 of the Act sets down the principles in these two categories as follows:

> 4(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 the 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 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;
> (k) is unambiguous and drafted in a sufficiently clear and precise way.
> 4(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 delegated legislative power to the scrutiny of the Legislative Assembly; and
> (c) authorises the amendment of an Act only by another Act.

The requirement that legislation should have 'sufficient' regard to the principles set down is a clear indication that the principles themselves are not to be taken as absolute standards. Rather, they act as presumptions about the desirable form of legislation, presumptions which may be displaced where either individual circumstance or the broader public interest so dictates. As the Premier put it, these are 'fundamental but not fundamentalist' principles. They should be read and applied in a common sense way with due regard to the operation of competing interests and standards.[4]

Consequently, Parliamentary Counsel and legislation officers in departments will be required to address a number of questions in determining whether or not a breach of the principles has occurred. These may, for example, include the following:

1. What is the object of the legislation?
2. What are the principal means by which the legislation seeks to achieve the object?
3. Are the means set down proportional to the object to be achieved? That is:
   Are they appropriately designed to achieve the object?
   Are they consistent with the fundamental legislative principles?
   Is their effect proportional to the importance of the object?
4. If the means are not proportional to the object, does the importance of the object outweigh the lack of proportionality that has been disclosed?

The fundamental legislative principles are broadly cast and, as a result, the power conferred on Parliamentary Counsel to advise on the appropriateness of legislation is wide. This advice can be pitched at any one of the three levels. First, Parliamentary Counsel's officers will alert departments to possible breaches of the principles when drafting legislation pursuant to Cabinet instructions. Second, if no agreement about the form of legislation can be reached between the Office and the department concerned, Parliamentary Counsel may pursue the matter with the Chief Executive or Minister concerned. If these discussions prove unfruitful, Parliamentary Counsel may draw the issue in question to the attention of Cabinet's Parliamentary Business and Legislation Committee of which he/she is a member.

The Public Business and Legislation Committee monitors, reviews and ranks legislative proposals for Cabinet and is responsible to Cabinet for the efficiency and effectiveness of the Government's legislative systems and programs. One of its terms of reference is to advise the Cabinet of any dissenting views expressed either by the Attorney-General or Parliamentary Counsel concerning the operation of the fundamental legislative principles or any other matters in proposed legislative initiatives. The Office is, therefore, authorised and entitled to express its views regarding the form and content of legislation at the highest levels of Queensland government.[5]

Innovations

The *Legislative Standards Act* commands attention for a number of different and important reasons. It codifies principles of best legislative practice in detailed terms, terms designed not only to better protect the rights and privileges of individuals and the Parliament, respectively, but also to improve the quality of legislation more generally. It amounts, in effect, to a mini bill of rights, although its methods of enforcement are quite different from those usually associated with such bills.

It establishes the Office of Parliamentary Counsel to act as the guardian of these new principles. The Office will not, of course, have effectively performed its role in this regard until it has instilled an awareness of, and adherence to, the principles within each department with which it deals. In the interim, however, the authority with which it has been conferred will ensure that, within government, considerable pressure can and will be brought to bear to ensure that reasoned legislation is produced.

The Act provides Parliamentary Counsel with a wide-ranging and independently exercised mandate. The role of Parliamentary Counsel is not limited to drafting legislation on government instruction. It may also draft private members bills and any other bills for Members if requested to do so. The Office not only provides advice to Ministers with regard to the application of the fundamental legislative principles but may also advise individual Members in relation to them. Perhaps, more interstingly, the Office is required to provide advice to Ministers and Members on alternative ways of achieving the policy objectives embodied in legislation (s.7(g) and (h)). This policy role is expressed in broad terms and marks a significant departure from the more technical functions which similar offices have traditionally pursued.

In short, Parliamentary Counsel is no longer the creature of government but like the Auditor-General and the Ombudsman, stands alone and forms part of a new, post-Fitzgerald system of checks and balances on which good government in Queensland will now be founded.

Comment

There are two features of the legislation which, I believe, deserve more detailed consideration. The first is the enmeshment of Parliamentary Counsel in policy issues. The second concerns the role which the Parliament should play in scrutinising new bills and subordinate legislation. I will deal with each in turn.

It has never been the case, however popularly the view may be held, that Parliamentary Counsel's staff are mere technicians. In order properly to perform their functions, these staff must immerse themselves in the policy domain inhabited by the legislation with which they are concerned. No Cabinet instruction ever provides comprehensive guidance on how relevant policy objectives should be effected in legislation. A host of second order policy issues must, therefore, be resolved during drafting.

Consequently, to construct an effective legislative scheme there must be continuous dialogue between a sponsoring department and those drafting its legislation. As they arise, policy problems will then be resolved by the two in tandem and each will bring to the problems a knowledge of, and attitude towards, the policy concerned.[6] So much can be taken as read. However, the *Legislative Standards Act* adds two further dimensions to Parliamentary Counsel's role which are novel and potentially controversial.

Following the Act's introduction, Parliamentary Counsel in Queensland enters policy negotiations as the representative of a clearly defined set of legislative values – the values embodied in the fundamental legislative principles. These principles and values, in turn, have a clear policy content. As the guardian of the principles, therefore, Parliamentary Counsel's influence in policy discussion is likely to be enhanced considerably.

The influence of the Office need not stop there. Parliamentary Counsel is given a clear mandate by the Act not only to advise on the application of the fundamental legislative principles but also to advise Ministers, parliamentarians and departmental officers on any 'alternative ways of achieving policy objectives (s.7(g) and (h)). While this may mean no more than that Parliamentary Counsel staff carry out their traditional functions as previously described, the very general way in which the mandate is couched appears to give Parliamentary Counsel an authority to contribute to policy development, which is not only uncharted but unprecedented.

In coming years, one of the more fascinating exercises in Australian administrative law will be to observe how exactly Queensland's Parliamentary Counsel balances the Office's traditional requirement for professional detachment with its newly conferred mandate to intervene in and suggest alternative means of achieving the government's policy objectives. The present Parliamentary Counsel, John Leahy, formulated the dilemma in these terms:

> One the one hand, the drafter must remain professionally detached and objective. The drafter must not allow personal views to affect professional judgement nor become a partisan in areas of political or policy controversy . . .
>
> On the other hand . . . the drafter must adopt a pro-active role . . . the drafter must frequently play devil's advocate and forcefully point out the implications and consequences of policy proposals and alternative approaches to implement them. If the drafter fails to do so, the drafter does not carry out the drafter's professional role to serve the interests of his or her client.[7]

Paradoxically, and in conclusion, the very strength of Parliamentary Counsel's new role may turn out to constitute one of the legislation's principal weaknesses. This is because the task of commenting on the appropriate form of legislation and on its compliance with the fundamental legislative principles falls primarily on Parliamentary Counsel's shoulders and, therefore, remains 'in house'.

Unlike the systems established in Canberra and Victoria, no parliamentary scrutiny of acts and regulations committee has yet been established. The existence of such a committee is of great importance, since it is only through such a multi-party committee that the scrutiny process can become more open and accessible.

At present, it is only the government which has the benefit of professional advice regarding the form and quality of legislation. It would be preferable if, in addition, a parliamentary committee (and, through it, the Parliament as a whole) could also receive similar advice, whether provided by Parliamentary Counsel or independently by the Parliament's own staff.

The Goss Government is currently considering whether to establish such a committee. Were it to do so, the Queensland Parliament's capacity to hold government to account would be significantly advanced and Queensland's model of legislative review could unequivocally be held out as the exemplar for the development of similar systems elsewhere in Australia and other Westminster countries.

References

1. Electoral and Administrative Review Commission, *Report on the Review of the Office of Parliamentary Counsel*, 1991.
2. *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (The Fitzgerald Commission), Queensland Government Printer, 1989, p.140.
3. Wayne Goss, speech delivered to Fundamental Legislative Principles Seminar, 2 April 1993, Brisbane, Queensland (unpublished).
4. Wayne Goss, speech, above, p.4.
5. For a more detailed examination of the relevant Cabinet processes and the role of Parliamentary Counsel in assisting them see the Hon. Terry Mackenroth, 'Fundamental Legislative Principles: the Cabinet and Parliamentary Processes', speech delivered to Fundamental Legislative Principles Seminar, 2 April 1993 (unpublished).
6. For an excellent and stimulating discussion of the role of Parliamentary Counsel in policy development see Leahy J., 'Fundamental Legislative Principles: New Policy Processes', speech delivered to Fundamental Principles Seminar, 2 April 1993, Brisbane, Queensland (unpublished).
7. Leahy J., above p.9.