



Scrutiny of Legislation Committee

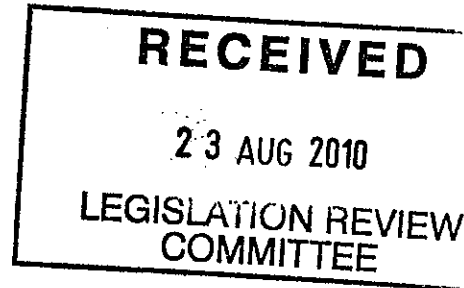
SCRUTINY OF LEGISLATION COMMITTEE

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18 August 2010

Mr Allan Shearan MP
Chair
Legislation Review Committee
New South Wales Parliament
Macquarie Street
SYDNEY NSW 2000



Dear Mr Shearan

Discussion Paper on *Public Interest and the Rule of Law*

I refer to your letter dated 11 May 2010 seeking comment on your committee's discussion paper and thank you for the opportunity to provide comment well after the date of 4 June 2010.

Enclosed are copies of:

- a submission the Scrutiny of Legislation Committee of the Queensland Parliament made to a select committee of the Queensland Parliament which is reviewing the committee system in Queensland;
- *Queenslanders' Basic Rights*, a publication of the former Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly; and
- *Bell & Anor v Beattie & Ors* [2003] QSC 333.

The submission was tabled last week, with its anticipated tabling providing the reason for the committee's delay in providing comment. We hope that you will consider it as a submission relevant to your committee's review. We refer, for example, to the discussion on pages 12-13 under the heading 'Consistency with fundamental legislative principles'.

I note that the key differences in the responsibilities of our Queensland committee and your committee arise from the contrast between our responsibility to consider the application of 'the principles relating to legislation which underlie a parliamentary democracy based on the rule of law' and your committee's responsibility to report on whether legislation 'trespasses unduly on personal rights and liberties'.

The committee's consideration of the application of fundamental legislative principles is assisted often by the *Queenslanders' Basic Rights* publication and by a publication of the Inter-Parliamentary Union and the Office of the United Nations High Commissioner for Human Rights, *Human Rights Handbook for Parliamentarians* (2005).

However, as stated in the submission, the committee has always adopted the approach that it is for parliament to determine whether legislation has 'sufficient regard' to fundamental legislative principles and, where it does not, whether sufficient justification exists for the enactment of the legislation.

This approach is consistent with statements regarding the role of fundamental legislative principles in the parliamentary process in *Bell & Anor v Beattie & Ors* at [23] – [28]. In that decision, Mackenzie J stated (at [23]-[24]):

Section 4(1) of the Legislative Standards Act states that for the purposes of the Act fundamental legislative principles are those relating to legislation that underlie a parliamentary democracy based on the rule of law. Section 4(2) states that the principles include requiring that legislation has sufficient regard to:

- (a) rights and liberties of individuals; and
- (b) the institution of Parliament.

Section 4(3) sets out a number of examples of criteria for determining whether legislation has sufficient regard to rights and liberties of individuals. While the various criteria are said only to be examples, none relates directly to the principles expressed by the first applicant. However, since they are only examples, the categories are not closed.

Two things may be said about the Act. One is that it is not an entrenched piece of legislation. Legislation inconsistent with it may therefore, as a matter of ordinary principle, be passed by Parliament. The second is that s 23(1)(f) of the Act clearly implies that Parliament is not prohibited from considering a Bill inconsistent with fundamental legislative principles. All that is required is a statement in an Explanatory Note for the Bill explaining the reason for the inconsistency with fundamental legislative principles. In other words, if there is a departure from fundamental legislative principles, the Minister who presents the Bill to the Legislative Assembly must bring that fact to the notice of the House. The way prescribed for doing that is in the Explanatory Note.

Thank you for the opportunity to participate in the challenging discussion regarding human rights and public interests. We look forward to reading your committee's report with interest.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jo-Ann Miller'.

Mrs Jo-Ann Miller MP
Chair

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