



# **Human Rights and 'Fundamental Legislative Principles'**

**Submission to the Queensland Parliament Scrutiny of  
Legislation Committee:  
*Review of the meaning of 'fundamental legislative  
principles'***

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### **About the Human Rights Law Centre**

The Human Rights Law Centre protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the enhanced legal protection of human rights at the local, national, regional and international levels; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## 1. Executive summary

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1. This submission considers what meaning should be given to ‘fundamental legislative principles’ (**FLP**) for the purpose of the *Legislative Standards Act 1992* (Qld) and how FLP should be promoted by the Queensland Parliament and to the Queensland community.
2. The Human Rights Law Centre (**HRLC**) submits that Australia’s obligations under international human rights law are FLP to which the operation of Queensland legislation should have sufficient regard. Section 4(2) of the *Legislative Standards Act 1992* (Qld) requires that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament. We consider that section 4(2) should be amended to include a requirement that legislation has sufficient regard to **‘Australia’s international human rights obligations’**. We further consider that section 4(3) should be amended to provide that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, inter alia, it **‘is consistent with Australia’s international human rights obligations’**.
3. The Parliament’s explanation of the extent to which proposed Bills and subordinate legislation are compliant with FLP can be improved by specifying in greater detail the information to be provided in explanatory notes in respect of such compliance.
4. The Queensland Government should commit to improving the understanding of Queensland citizens of their rights and liberties by providing clear directives about the important of human rights education in the state curriculum, improving teacher training around human rights, and developing further human rights education material for the broader Queensland community.

## 2. ‘Fundamental legislative principles’ include human rights

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5. The principle that Queensland legislation has sufficient regard to and is consistent with Australia’s international human rights obligations’ (**Human Rights Principle**) should be included in sections 4(2) and (3) of the definition of FLP in the *Legislative Standards Act 1992* (Qld) because:
  - (a) the Queensland Parliament is subject to Australia’s international human rights obligations and these rights reflect minimum legislative standards expected by the community;
  - (b) such an amendment will assist to reflect the intention, and codify the current practice of, the Queensland Parliament that FLP do include Australia’s international human rights obligations; and
  - (c) scrutiny by reference to human rights principles and standards will enhance legislative and policy development.

## **2.1 The Queensland Parliament is subject to Australia's international human rights obligations and these rights reflect standards expected by the community**

### **(a) What are human rights?**

6. Human rights derive from the inherent dignity of people. According to the *Universal Declaration of Human Rights*, all people are free and equal and have fundamental human rights. These rights enshrine the civil, political, economic, social and cultural minimum standards that must be respected, protected and fulfilled to enable people to live with dignity. They apply irrespective of class, gender, race, age, religion, opinion or social status. Human rights are indivisible and interdependent, representing a comprehensive scheme of core minimum standards that conceptually should not – and practically cannot – exist in isolation. Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation. Effective protection of all rights is necessary to ensure the conditions necessary for all people to live with dignity and participate fully and equally in the community.

### **(b) What are the sources of Australia's human rights obligations?**

7. The primary source of Australia's international human rights obligations is the human rights treaties to which Australia is a party. A treaty is an instrument which imposes binding obligations on the states that become a party to it.<sup>1</sup> States may withdraw from a treaty if they no longer wish to be bound by the terms of the treaty.
8. Australia has ratified and accepted obligations under all of the primary international human rights treaties, including the two main human rights treaties, being the *International Covenant on Civil and Political Rights* ('**ICCPR**') and the *International Covenant on Economic, Social and Cultural Rights* ('**ICESCR**').<sup>2</sup>
9. In addition to these core covenants, Australia is party to five of the six the international treaties created to ensure the specific recognition and protection of particular groups and particular human rights, namely the:
- (a) *International Convention on the Elimination of all Forms of Racial Discrimination*;<sup>3</sup>
  - (b) *Convention on the Elimination of all Forms of Discrimination against Women*;<sup>4</sup>
  - (c) *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*;<sup>5</sup>

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<sup>1</sup> See art 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

<sup>3</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>4</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>5</sup> Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

- (d) *Convention on the Rights of the Child*;<sup>6</sup>
- (e) *Convention on the Rights of Persons with Disabilities*.<sup>7</sup>
10. Australia is not yet party to the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.<sup>8</sup>
11. As stated above, international human rights instruments are interdependent, inter-related and mutually re-enforcing. No rights can be fully enjoyed in isolation, but depend on the enjoyment of all other rights. It is the stated intention of the UN that they be considered together when determining a state's human rights responsibilities.<sup>9</sup>
12. As a signatory to the main international human rights treaties, Australia has an obligation to implement the full range of internationally recognised rights.
- (c) *Queensland's obligation to comply with Australia's international human rights obligations***
13. Article 50 of the ICCPR and Article 28 of the ICESCR state that human rights protections extend to all parts of federal States without limitation or exception. This requires Australia to guarantee that the states and territories of Australia comply with the covenants.
14. Accordingly, in Queensland all branches of government (legislative, executive and judicial) and other public or governmental authorities must respect, protect and fulfil the human rights afforded by the ICCPR and ICESCR.<sup>10</sup>
15. Human rights violations can still be established and recognised where the actions or laws in questions are those of a state or territory.<sup>11</sup>
- (d) *Human rights reflect contemporary standards***
16. At their essence, human rights promote values such as equality, dignity and justice; in short, the idea that people are entitled to 'a fair go'. As the 2009 National Human Rights Consultation revealed, human rights matter deeply to Australians and resonate with Australian values such as fairness, democracy and the rule of law.<sup>12</sup> The content of human rights reflects

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<sup>6</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>7</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>8</sup> Opened for signature 18 December 1990, 2220 U.N.T.S. 93 (entered into force 1 July 2003).

<sup>9</sup> OHCHR, Fact Sheet No 30: *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, 20–1.

<sup>10</sup> HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004). Article 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

<sup>11</sup> See, eg, the communication to the HRC in *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>12</sup> National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 96.

community views about the freedoms, protections and living standards to which Australians are entitled.

17. It is, therefore, appropriate for the Queensland Parliament to state in the definition of FLP that in the formulation and scrutiny of legislation sufficient regard is had to Australia's international human rights obligations and how such legislation might impact on the enjoyment of these rights by Queensland citizens.
18. Requiring legislation to have sufficient regard to Australia's international human rights obligations will clarify that FLP is not a static concept but rather one that should adapt over time in line with contemporary standards, including changes to Australia's international human rights commitments.

## **2.2 Incorporating the Human Rights Principle into the meaning of FLP is consistent with the current statutory framework and current practice**

19. FLP is defined in section 4(1) of the *Legislative Standards Act 1992 (Qld)* as 'the principles 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'. Section 4(3) provides a non-exhaustive list of criteria for determining whether legislation has sufficient regard to rights and liberties of individuals.
20. The HRLC submits that the Human Rights Principle should be included in sections 4(2) and (3) of the Act.
21. The requirement to consider FLP exists at a number of different stages of the lawmaking process in Queensland, including the development and consideration of proposed Bills and subordinate legislation by the Executive,<sup>13</sup> the advisory function of the Office of the Queensland Parliamentary Counsel,<sup>14</sup> and the scrutiny of Bills and subordinate legislation by the Scrutiny of Legislation Committee.<sup>15</sup>
22. The HRLC notes that the original intention of the *Legislative Standards Act 1992 (Qld)* was that FLP include Australia's obligations under international law. The explanatory note to the Act states in respect of the definition of FLP that '[b]asic democratic values, as well as common law presumptions and increasingly international law, contain a number of principles which underpin much legislation and against which legislation must constantly be assessed.'<sup>16</sup>
23. The HRLC further notes that the existing practice of the Queensland Parliament's Scrutiny of Legislation Committee is to consider the Human Rights Principle when determining whether

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<sup>13</sup> Queensland Government, *The Queensland Cabinet Handbook* (2010) 107.

<sup>14</sup> *Legislative Standards Act 1992 (Qld)* s 7.

<sup>15</sup> *Parliament of Queensland Act 2001 (Qld)* s 103.

<sup>16</sup> Office of the Queensland Parliamentary Counsel, *Queensland Acts 1992 Explanatory Notes* (1993) 260.

proposed law has sufficient regard to FLP.<sup>17</sup> As the Office of the Queensland Parliamentary Counsel has observed:

The Scrutiny Committee has consistently taken the approach that the matters specifically listed in [the definition of FLP in] the Legislative Standards Act are not exhaustive. The committee takes an expansive approach in identifying rights and liberties. These include traditional common law rights ... They can also encompass, for example, ... rights (especially human rights) that arise out of Australia's international treaty obligations.<sup>18</sup>

24. In any event, as set out in section 2.1(c) above, the Queensland Parliament is under an obligation to meet Australia's international human rights obligations. Including the Human Rights Principle in sections 4(2) and (3) will clarify that consideration of FLP includes giving sufficient regard to Australia's international human rights obligations in relevant circumstances.
25. Having regard to the Human Rights Principle will not alter the scope of the current requirements on lawmakers to evaluate whether proposed law meets FLP. Similar to current practice, evaluating whether proposed law is consistent with the Human Rights Principle will involve an assessment of how a proposed law balances international human rights standards and obligations against legislative goals. It will not compel the Queensland Parliament to prioritise human rights obligations over other legislative goals. The process of evaluating whether proposed law has regard to Australia's human rights obligations is unlikely to be onerous as in any given evaluation only a select number of human rights obligations are likely to be relevant.
26. Explicitly stating that proposed law must have regard to Australia's international human rights obligations will have the benefit of codifying codify current practice and providing lawmakers with clarity about the scope of the rights they need to consider when assessing the compliance of proposed law with FLP.

### **2.3 Developing and scrutinising legislation by reference to human rights will enhance processes and outcomes**

27. One of the key findings of the National Human Rights Consultation was that:

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.<sup>19</sup>

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17 See, for example, Scrutiny of Legislation Committee, *Alert Digest 2002/8 21*; Scrutiny of Legislation Committee, *Alert Digest 1999/3 12*.

<sup>18</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) 95, citing Scrutiny of Legislation Committee, *Annual Report 1998–1999* (1999) [2.13].

<sup>19</sup> National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 174. See also Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (March 2010) 46.

28. Amending the definition of FLP to incorporate the Human Rights Principle would encourage explicit identification and consideration of the human rights impacts and implications of legislation.
29. The entrenchment of the Human Rights Principle as a FLP is likely to improve the transparency and quality of legislation. As former High Court Chief Justice Sir Gerard Brennan has stated:
- The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.<sup>20</sup>
30. Countering this, a human rights-based approach can promote transparency, accountability, balances and safeguards in legislation. As the Victorian Equal Opportunity and Human Rights Commission observed in its 2009 Report:
- there is a growing body of international evidence demonstrating that policies and services which champion and reflect a commitment to human rights are not only indicative of a just, inclusive society; they are also more effective in attaining their objectives and producing beneficial outcomes.<sup>21</sup>
31. A further benefit of including the Human Rights Principle is that it may encourage policy makers and legislators to consider and draw on extensive and illuminating international and comparative human rights experience and jurisprudence.<sup>22</sup>

### 3. Improving explanatory notes

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32. An explanatory note must accompany the introduction of Bills and significant subordinate legislation in the Queensland Parliament. Under section 23(f) of the *Legislative Standards Act 1992* (Qld) the explanatory note for a Bill must include '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.'
33. The HRLC submits that the efficacy of explanatory notes can be improved by amending the *Legislative Standards Act 1992* (Qld) to require notes to provide greater about how proposed law complies with, or deviates from, FLP. The HRLC proposes amending section 23(f) of the Act to this effect as follows:
- (f) an assessment of:
- (i) whether the Bill is consistent with fundamental legislative principles, and, if so, how it is consistent; and

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<sup>20</sup> Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre seminar, Melbourne, 12 March 2008),

<sup>21</sup> Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 42.

<sup>22</sup> For a discussion of the benefits of drawing on such jurisprudence, see *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [201] (per Bell J).

- (b) if the Bill, or any part of the Bill, is not consistent with fundamental legislative principles—
  - (i) the nature and extent of the inconsistency; and
  - (ii) why the Bill should nevertheless be considered by the Legislative Assembly.

34. More expansive explanatory notes of the nature described above would have the benefits of:
- (a) ensuring human rights are properly considered when legislation is developed;
  - (b) enhancing transparency and accountability in the development and purposes of legislation;
  - (c) informing and thereby improving parliamentary dialogue, scrutiny and debate; and
  - (d) promoting evidence-based development of policy and legislation.

#### **4. Improving understanding of rights and liberties through education**

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35. The Call for Submissions Paper calls for responses on ‘what can be done to improve the understanding of the Queensland people of rights and liberties’?
36. Education is an integral component of building a culture that understands, respects, and is committed to upholding human rights for all members of society.<sup>23</sup> Consistent with this, the National Human Rights Consultation Committee recommended that “education be the highest priority for improving and promoting human rights in Australia”.
37. There is clear evidence that the legislative articulation and entrenchment of human rights standards and principles is a significant factor contributing to the extent and effectiveness of human rights education.<sup>24</sup> Entrenching human rights considerations in the FLP would underpin and reinforce human rights education.
38. Under international law, Australia has a duty to commit to providing human rights education. The specific content of the education to be provided to all persons is not prescribed by international law. However, international law does set down principles that must guide the content of such education.

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<sup>23</sup> National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 133-41. See also Office of the United Nations High Commissioner for Human Rights and United Nations Educational, Scientific and Cultural Organisation, ‘Plan of Action: World Programme for Human Rights Education First Phase’, 2006, available at: [http://www2.ohchr.org/english/issues/education/training/docs/PlanofActioninbrief\\_en.pdf](http://www2.ohchr.org/english/issues/education/training/docs/PlanofActioninbrief_en.pdf).

<sup>24</sup> Dr Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008) 270, 324.

39. The UN has emphasised that human rights education comprises of two necessary components.<sup>25</sup>
- (a) the teaching of human rights laws and norms through curriculum, and
  - (b) the imparting of human rights values through the experience of education.
40. The first component, human rights education as a curriculum subject, requires the teaching of key United Nations documents so that all people are aware of their rights (and responsibilities) as citizens of the world. The second component, human rights education as an experience, requires that teaching and learning 'are oriented towards human values allowing the realisation of peace, social cohesion and the respect for human dignity'.<sup>26</sup>
41. The HRLC submits that in order for the Queensland Government to comply with Australia's international obligations it must ensure that all primary and secondary school students receive education about human rights. The HRLC recommends that the following initiatives be implemented in order to ensure such compliance:
- (a) The Queensland Government must provide clear directives that human rights education is an essential component of the state curriculum, and also state where human rights education fits within the curriculum.
  - (b) All pre-service and in-service teachers should be provided with human rights education training.
  - (c) Building on the publication *Queenslanders' Basic Rights*, further human rights education materials should be developed by Queensland government departments or organisations and disseminated widely through the Queensland community.

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<sup>25</sup> See, for example, United Nations Educational, Scientific and Cultural Organisation, 'Peace and Human Rights Education', available at: [http://portal.unesco.org/education/en/ev.php-URL\\_ID=4731&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=4731&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>26</sup> Ibid.