

**Lynda Pretty**

**Acting Committee Secretary, Committee Office**

**Queensland Parliamentary Service**

**Does legislative scrutiny by parliamentary committees improve human rights compatibility of legislation?**

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## Abstract

Rights scrutiny is not a new concept for Queensland: from the 1990s parliamentary committees of the Queensland Parliament have scrutinised proposed legislation for the application of fundamental legislative principles, as established by the *Legislative Standards Act 1992* (Qld) and the *Parliament of Queensland Act 2001* (Qld), and reported on their findings to the parliament. Committees can recommend changes to a bill prior to the bill being passed as law. The government may respond to recommended changes by moving amendments during consideration in detail of the bill during debate on the bill in parliament. The process is designed to require that all proposed legislation has *sufficient regard* to the common law rights and liberties of individuals, thereby holding governments accountable to produce better law.

This research paper assesses the effectiveness of Queensland's current scrutiny system for rights compatibility and reports on the analysis of government acceptance of committee legislative recommendations in relation to rights compatibility, by looking at committee activity in two previous parliaments of very different political composition.

This paper will confirm that other influences, in particular the political agenda of the government, strongly affect committees' capacity to enable further legislative amendment.

Drawing on the experiences of other Australian jurisdictions with similar human rights legislation to Queensland's new *Human Rights Act 2018* (Qld), this research paper will determine whether a new layer of human rights scrutiny will make for better, more considered, rights-compatible law in this state.

# 1 Introduction

This research paper assesses the effectiveness of Queensland's current scrutiny system for rights compatibility as established by the *Legislative Standards Act 1992* (Qld) (LSA) and the *Parliament of Queensland Act 2001* (Qld) (PoQA).

The paper will report on the analysis of government acceptance of committee legislative recommendations in relation to rights compatibility by looking at committee activity in two previous parliaments of very different political composition.

This paper will confirm that other influences, in particular the political agenda of the government, strongly affect support committees' capacity to enable further legislative amendment.

Drawing on the experiences of other Australian jurisdictions with similar human rights legislation to Queensland's new *Human Rights Act 2018* (Qld) (HRA), this research paper will determine whether a new layer of human rights scrutiny will make for better, more considered, rights-compatible law in this state.

## 1.1 Human rights and parliamentary scrutiny in Australia

In Australia, individual rights and freedoms are protected by the *Australian Constitution*, the common law and federal and state laws.<sup>1</sup>

Australia has international obligations to human rights treaties, including the United Nations' International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In addition, Australia's common law provides a range of rights protections, including protection against trespass to the person and property, injury to reputation, breaches of confidence, and protection of rights through the principles of natural justice.<sup>2</sup>

There are federal laws that protect people from breaches of human rights.<sup>3</sup> Additionally, the *Australian Human Rights Commission Act 1986* (Cth) established the Australian Human Rights Commission to oversee and report on the protection of human rights in Australia. The Act restates the obligations Commonwealth authorities have under key international human rights treaties.<sup>4</sup> In Queensland there are also a range of state laws that provide specific rights protection.<sup>5</sup>

All Australian jurisdictions have committees within their parliaments that scrutinise proposed legislation. Some committees apply scrutiny principles to assist committees

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<sup>1</sup> Australian Government, Australian Law Reform Commission, *Traditional rights and freedoms – encroachments by Commonwealth laws: issues paper* (2014) 10.

<sup>2</sup> Australian Government, Attorney-General's Department, *Human rights protections* (2019) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Human-Rights-Protections.aspx>>.

<sup>3</sup> For example, the *Privacy Act 1988* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

<sup>4</sup> Australian Human Rights Commission, *Human rights in Australia* (1 April 2016) <<https://www.humanrights.gov.au/education/students/get-informed/human-rights-australia>>.

<sup>5</sup> For example, the *Anti-Discrimination Act 1991* (Qld), *Right to Information Act 2009* (Qld), *Information Privacy Act 2009* (Qld) and *Fair Trading Act 1989* (Qld).

to consider the impact of the proposed legislation on personal rights and liberties.<sup>6</sup> However there is much diversity across the nine Australian parliaments,<sup>7</sup> in terms of approach to legislative scrutiny and focus.

Three Australian jurisdictions, Victoria, the Australian Capital Territory and most recently Queensland, have enacted human rights legislation that implement the rights recognised in the ICCPR, and ICESCR to a limited degree. The human rights legislation in all these jurisdictions prescribe a process of parliamentary scrutiny for compatibility with rights prescribed in international treaties.

Parliamentary scrutiny for rights compatibility in proposed legislation is not limited to those jurisdictions with specific human rights legislation.<sup>8</sup> The Australian Parliament, New South Wales Parliament and the Queensland Parliament employ a 'parliamentary model' of rights protection.<sup>9</sup> In the Australian Parliament, the Parliamentary Joint Committee on Human Rights considers whether proposed federal laws comply with the ICCPR and the ICESCR. The New South Wales' Legislation Review Committee reviews all bills introduced to parliament and reports on the impact of proposed legislation on personal rights and liberties.<sup>10</sup> A brief evolution of the Queensland system is provided below.

## 1.2 An evolution of legislative scrutiny in Queensland

In Queensland, prior to 1989, legislation was 'almost exclusively the preserve of the cabinet',<sup>11</sup> and the passage of legislation through the parliament was merely a formality.<sup>12</sup> But the publication of the *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Report) in 1989 revealed widespread corruption in the public sector, and identified the need to enhance the parliament with all-party policy and investigatory committees, so that 'scrutiny of government legislative activity and of public administration is more effective as a consequence'.<sup>13</sup>

In 1991 the Queensland Electoral and Administrative Review Commission (EARC) recommended the existing Committee of Subordinate Legislation, operating within the Queensland Parliament since 1975, be replaced with a new Scrutiny of Legislation

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<sup>6</sup> Parliament of New South Wales, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987* (November 2018) 1.

<sup>7</sup> Laura Grenfell, 'An Australian spectrum of political rights scrutiny: "Continuing to lead by example?"' (2015) 26 *Parliamentary Law Review* 19, 19-20.

<sup>8</sup> In 2017 the Northern Territory Legislative Assembly introduced a scrutiny process whereby a Bill must be accompanied by a statement of compatibility and be reviewed by a scrutiny committee for human rights as defined in the federal *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). South Australia, Western Australia and Tasmania parliaments have no enhanced human rights scrutiny processes; Parliament of New South Wales, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987* (November 2018) Appendix 3.

<sup>9</sup> Sarah Moulds, 'Committees of influence: parliamentary committees with the capacity to change Australia's counter-terrorism laws' (2016) 31 *Australasian Parliamentary Review* 46, 47.

<sup>10</sup> Parliament of New South Wales, *Legislation Review Committee* (2019) <<https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=245>>.

<sup>11</sup> David Solomon, 'A comparison of the Queensland and the Commonwealth approaches to the legislative process' (1994) 3 *AIAL Forum* 35, 35.

<sup>12</sup> *Ibid.*

<sup>13</sup> GE Fitzgerald (Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 124.

Committee.<sup>14</sup> Shortly after, the LSA introduced scrutiny of legislation for fundamental legislative principles to ‘facilitate the achievement of a high standard of legislation in Queensland’.<sup>15</sup> Additionally, the Act established the Office of the Queensland Parliamentary Counsel to ‘provide advice on the nature and appropriateness of legislative proposals’.<sup>16</sup>

The application of FLPs to drafting legislation was extended to the scrutiny of proposed legislation by a parliamentary committee, with the passing of the *Parliamentary Committees Act 1995* (Qld). This Act established a new Scrutiny of Legislation Committee, empowered to review ‘all bills and all items of subordinate legislation in accordance with fundamental legislative principles’<sup>17</sup> as defined in the LSA.<sup>18</sup>

Queensland’s rights scrutiny system was reviewed in 1998 when the Legal, Constitutional and Administrative Review Committee conducted an inquiry on whether to adopt a bill of rights in Queensland.<sup>19</sup> In relation to legislative scrutiny the committee found that ‘the FLP process has been successful’ as another layer of protection of people’s fundamental rights.<sup>20</sup> The committee stated:

*... new pre-legislative process which ensures, among other matters, that Queensland legislation has sufficient regard to individuals’ rights and liberties is now an integral part of Queensland’s legislative process.*<sup>21</sup>

Reforms occurred again in 2011 following a review of the Queensland parliamentary committee system by the select Committee System Review Committee. Consequently the *Parliament of Queensland Act (Reform and Modernisation) Amendment Act 2011* (Qld) established seven portfolio committees with each committee assigned specific subject areas of responsibility, including the consideration of FLPs of any bill referred to a portfolio committee, and any subordinate legislation within a committee’s portfolio subject areas.<sup>22</sup>

Section 93 of the PoQA currently requires committees to examine each bill and item of subordinate legislation in its portfolio area for the application of FLPs to legislation.<sup>23</sup>

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<sup>14</sup> Electoral and Administrative Review Commission, Queensland, *Report on the Review of the Office of the Parliamentary Counsel* (1992) 88-89.

<sup>15</sup> Legislative Standards Bill 1992 (Qld), *Explanatory notes*, 2.

<sup>16</sup> Ibid.

<sup>17</sup> *Parliamentary Committees Act 1995* (Qld), s 22.

<sup>18</sup> *Legislative Standards Act 1992* (Qld), s 4.

<sup>19</sup> Queensland Parliament, Legal, Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals’ rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* (November 1998)

<sup>20</sup> Ibid 27.

<sup>21</sup> Ibid 79.

<sup>22</sup> Portfolio committees do not include statutory committees: the Committee of the Legislative Assembly, the Parliamentary Crime and Corruption Committee and the Ethics Committee. In this research paper all references to committees are to portfolio committees.

<sup>23</sup> *Parliament of Queensland Act 2001* (Qld) s 93.

## 1.3 Introducing human rights legislation to Queensland

### 1.3.1 Inquiry into human rights legislation for Queensland, 2016

In December 2015 the Parliament directed the Legal Affairs and Community Safety Committee to consider whether to introduce human rights legislation to Queensland.<sup>24</sup>

During the inquiry the committee received several submissions about the value of Queensland's current system of legislative scrutiny. These submissions argued that, with the LSA and its framework for legislative scrutiny in place, and with common law protections, Queensland did not need human rights legislation.<sup>25</sup>

The committee was unable to form a majority conclusion in its deliberations.<sup>26</sup> Government members however, including the Chair of the committee, supported the introduction of human rights legislation in the future.<sup>27</sup>

### 1.3.2 The *Human Rights Act 2019* (Qld)

On 31 October 2018 the Attorney-General and Minister for Justice Hon Yvette D'Ath MP introduced the Human Rights Bill 2018 (Qld). The bill was referred to the Legal Affairs and Community Safety Committee for consideration. The Parliament passed the bill on 27 February 2019.<sup>28</sup> The HRA will commence on a day to be fixed by proclamation.<sup>29</sup>

The 23 rights set out in the HRA are primarily civil and political rights from the ICCPR, including recognition and equality before the law, the right to life, freedom of movement and freedom of expression.<sup>30</sup> The Act also protects two rights from the ICESCR – right to education and right to health services - as well as property rights, drawn from the Universal Declaration of Human Rights.<sup>31</sup>

Other rights not prescribed in the Act are not limited by their absence in the Act, including rights prescribed in other laws.<sup>32</sup>

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<sup>24</sup> Queensland Parliament, Legal Affairs and Community Safety Committee, *Human Rights Inquiry* (2016) <<http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/14-HumanRights>>.

<sup>25</sup> See for example, Office of the Information Commissioner (Queensland), Submission No 417 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland*, April 2016, 1, 5; Bar Association of Queensland, Submission No 477 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland*, April 2016, 1, 10; Queensland Council for Civil Liberties, Submission No 405 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland*, April 2016, 1, 9; Anti-Discrimination Commission Queensland, Submission No 421 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland*, April 2016, 1, 10.

<sup>26</sup> Queensland Parliament, Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* (June 2016) ix.

<sup>27</sup> Ibid.

<sup>28</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 478 (Yvette D'Ath, Attorney-General and Minister for Justice).

<sup>29</sup> *Human Rights Act 2019* (Qld), s 2.

<sup>30</sup> Ibid ss 15 – 23, 25 – 35.

<sup>31</sup> Ibid ss 24, 36 – 37. Refer to *Human Rights Act 2019* (Qld) Part 2, Division 2 for a full list of civil and political rights articulated in the Act.

<sup>32</sup> *Human Rights Act 2019* (Qld) s 12.



## 2 Scrutiny of legislation in Queensland

### 2.1 Fundamental legislative principles

Fundamental legislative principles intend to be observed ‘when drafting legislation’;<sup>33</sup> that ‘underlie a parliamentary democracy based on the rule of law’.<sup>34</sup> The principles include requiring that legislation has ‘sufficient regard to the rights and liberties of individuals and the institution of Parliament’.<sup>35</sup>

Fundamental legislative principles are neither exhaustive nor absolute, rather the principles reflect society’s ‘basic democratic values’.<sup>36</sup> The scrutiny established by the PoQA is designed to ensure the FLPs underpin legislation and that any departure from the principles is explained and justified.<sup>37</sup> The intent is that, in having regard to FLPs, the highest standard of Queensland legislation may be ensured.

### 2.2 The current scrutiny process by committees

After a bill is introduced to the Legislative Assembly it is usually referred to a committee for examination. Committees examine proposed legislation within a determined timeframe and report their findings to the Legislative Assembly. The committee will recommend whether the bill be passed or not passed. The committee may make additional recommendations, for legislative amendment or on other policy matters. For all bill inquiries, the committee will comment in its report as to whether the bill could potentially breach fundamental legislative principles.

A committee may identify provisions that breach a matter of FLP, assess whether the legislation has ‘sufficient regard’ to FLPs,<sup>38</sup> and consider whether sufficient justification has been provided in the bill’s supporting documentation to support the breach.<sup>39</sup> If the committee regards a potential breach of FLP to be sufficiently significant, the committee will make recommendations to amend the bill in respect to those potential breaches.<sup>40</sup>

If the committee makes a legislative recommendation the responsible minister is required to provide the Legislative Assembly with a response to the committee report within three months.<sup>41</sup> The government may note the committee’s recommendations, and either support or not support the amendments suggested by the committee.<sup>42</sup>

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<sup>33</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1992, 5003 (Wayne Goss, Premier).

<sup>34</sup> *Legislative Standards Act 1992* (Qld) s 4(1).

<sup>35</sup> *Ibid* s 4(2), (3).

<sup>36</sup> Queensland Government, Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) 2.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Parliament of Queensland Act 2001* (Qld) s 93 (1).

<sup>39</sup> Queensland Parliament, *Factsheet 3.23 Fundamental Legislative Principles* (2018) <[https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet\\_3.23\\_FundamentalLegislativePrinciples.pdf](https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePrinciples.pdf)>.

<sup>40</sup> Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly* (2004) Standing Orders 131-136. See for example Education (Accreditation of Non-State Schools) Bill 2017.

<sup>41</sup> *Parliament of Queensland Act 2001* (Qld) s 107.

<sup>42</sup> See for example Local Government Legislation Amendment Bill 2014.

Amendments to the bill occur during the ‘consideration in detail’ stage of the passage of the bill in the Assembly.<sup>43</sup> Amendments during consideration in detail are usually, except for urgent bills or private members’ bills, prepared for the parliament by the Office of the Queensland Parliamentary Counsel. Government departments are required to prepare supplementary explanatory notes for amendments to a bill intended to be moved.<sup>44</sup>

Some bills bypass fulsome examination.

Under Standing Order 137 and in accordance with the *Constitution of Queensland Act 2001* (Qld),<sup>45</sup> a government may introduce a bill to the House and declare the bill to be urgent. If a bill is declared urgent, it may be referred to a committee for a period of less than six weeks, or the House may direct that the urgent bill not stand referred to a committee, and move straight to the second reading stage.<sup>46</sup> The Legislative Assembly can declare a bill urgent by an ordinary majority, whereby the government requires no more than its current majority in the House.<sup>47</sup>

### 2.3 Scrutiny processes introduced by the Human Rights Act

The HRA requires that a Member of Parliament introducing a bill must prepare a statement of compatibility for the bill.<sup>48</sup> Committees, when examining a bill, must consider and report to the Parliament about whether the bill is not compatible with human rights and consider, and report on, the statement of compatibility.<sup>49</sup>

The HRA allows for human rights to be limited. Section 13(1) sets out how legislation may limit human rights, allowing for circumstances where a right may be reasonably limited under law and it can be demonstrated that the limit is justified in a ‘free and democratic society based on human dignity, equality and freedom’.<sup>50</sup>

An ‘override declaration’ may be made by the parliament to expressly declare an Act has effect despite being incompatible with one or more human rights. The HRA requires a member to make a statement to the parliament explaining the circumstances that justify an override declaration.<sup>51</sup> The Act states that it is the intention of Parliament that an override declaration is only to be made in exceptional circumstances.<sup>52</sup>

Nothing in the HRA prevents a government from declaring a bill urgent, such that the bill is referred to a committee for consideration for a limited time, or not at all.<sup>53</sup>

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<sup>43</sup> Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly* (2004) Standing Order 142.

<sup>44</sup> Queensland Government, *The Queensland Legislation Handbook: Governing Queensland* (5th ed, 2014) 4.7.

<sup>45</sup> Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly* (2004) Standing Order 137; *Constitution of Queensland Act 2001* (Qld) s 26B(3).

<sup>46</sup> *Constitution of Queensland 2001* s 26B(3); Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly* (2004) Standing Order 137.

<sup>47</sup> Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly* (2004) Standing Order 137.

<sup>48</sup> *Human Rights Act 2019* (Qld) s 38.

<sup>49</sup> *Ibid* s 39.

<sup>50</sup> *Human Rights Act 2019* (Qld) s 13(1); Explanatory notes 16.

<sup>51</sup> *Ibid* s 44.

<sup>52</sup> *Ibid* ss 43(4), 44.

<sup>53</sup> Queensland Parliament, Legal Affairs and Community Safety Committee, *Report on Human Rights Bill 2018* (2019) 62.

However, as all bills must be accompanied by a statement of compatibility, an urgent bill will require this statement, regardless of whether or not a committee will eventually examine the bill.

The HRA amends s 93 of the PoQA to reflect the committees' new responsibilities to include considering bills, subordinate legislation and other laws and matters as required.<sup>54</sup> The provisions do not affect the established scrutiny of rights system prescribed by the LSA and the PoQA.

### 3 Scope of analysis and resources

There is agreement among scholars that human rights scrutiny by parliamentary committees is an effective way of protecting human rights.<sup>55</sup> For example, Laura Grenfell and Sarah Moulds observed that, beyond protections provided by the *Australian Constitution* and the common law, parliamentary committees have an 'almost exclusive responsibility for directly protecting the rights of all members of the community'.<sup>56</sup>

However, Laura Grenfell and Sarah Moulds also acknowledge the reality that parliamentary committees, dominated by government and the government's political agenda, are 'seriously compromised' as forms of rights protection.<sup>57</sup> In searching for a positive impact of parliamentary rights scrutiny, they identified five factors relevant to assessing overall capacity to deliver rights protection: adequacy of time to conduct formal scrutiny; the attributes of committees to facilitate legislative influence, such as committee membership; the power and willingness of committees to facilitate public engagement; a culture of respect for the value of formal parliamentary scrutiny; and the generation of rights discourse in parliamentary debates.<sup>58</sup>

#### 3.1 Scope

This research paper compares committee scrutiny of bills from the 54<sup>th</sup> Parliament, 15 May 2012 to 6 January 2015, to the 55<sup>th</sup> Parliament, from 24 March 2015 to 29 October 2017.

At the commencement of the 54<sup>th</sup> Parliament in 2012 the Liberal National Party (LNP) formed government with Campbell Newman as Premier. The LNP held a majority of 78 seats to the Australian Labor Party (ALP)'s seven seats, with two Katter Party seats and two independents.

The ALP formed government under the Premiership of Anastacia Palaszczuk after the state general election in March 2015. The 55<sup>th</sup> Parliament consisted of a slim majority to the ALP of 44 seats, with the LNP holding 42 seats, with two Katter Party seats and one independent.<sup>59</sup>

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<sup>54</sup> *Human Rights Act 2019* (Qld) s 160.

<sup>55</sup> Jeremy Gans, 'Scrutiny of bills under bills of rights: is Victoria's model the way forward?' 502 (2010) *University of Melbourne Legal Studies Research Paper* 1, 1.

<sup>56</sup> Laura Grenfell and Sarah Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia' (2018) 41 *UNSW Law Journal* 40, 40.

<sup>57</sup> Laura Grenfell and Sarah Moulds, above n 57, 40.

<sup>58</sup> *Ibid* 44.

<sup>59</sup> Queensland Parliament, *Parliamentary Record 2015-2017: The 55<sup>th</sup> Parliament* (Queensland Parliament, 15<sup>th</sup> revised ed, 2018) 414.

In accordance with the PoQA, the size and political make-up of a committee reflects the number of non-government members in the parliament.<sup>60</sup> Committee activity, such as committee findings and recommendations, is very much shaped by the committee's political composition.

During the 54<sup>th</sup> Parliament committees consisted of seven members, of which at least one member was a non-government Member of Parliament.<sup>61</sup> Reaching agreement with respect to the examination of bills, and any consequential recommendations from that examination, was not a difficult outcome for committees during this Parliament.

With the 55<sup>th</sup> Parliament consisting of more than 50 per cent non-government membership, committees consisted of six members, with three government members and three non-government members.<sup>62</sup> Pursuant to the PoQA, a question put to the committee would be decided by a majority of the votes of members present and if the votes on a question were equal, the question would be decided in the negative.<sup>63</sup> Therefore, during the 54<sup>th</sup> Parliament, government members of committees did not, by default, have the majority of the committee to move recommendations.

### 3.2 Resources

This research paper draws on statistics produced by the Queensland Parliamentary Service:

- statistics on bills introduced during a parliamentary term and referred to committees to examine, including number of legislative amendments recommended, and average duration of inquiries, published in the Queensland Parliamentary Service *Annual Reports*,<sup>64</sup> and available internally by parliamentary session (for example, the 54<sup>th</sup> Parliament, the 55<sup>th</sup> Parliament)
- the *Bills Register* for each parliament,<sup>65</sup> providing the date bills are introduced by parliamentary session, the stage reached for each bill, and any government agreed amendments to the bill during consideration in detail in the House, and
- the biannual *Matters of Procedural Interest* bulletin which includes the number of bills introduced to the House, referred to committees and declared urgent by the Legislative Assembly.<sup>66</sup>

The above resources do not provide insight into the number of times a bill is passed by amendment as a result of committee legislative recommendations in relation to matters of FLP. To discern this, it is necessary to:

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<sup>60</sup> *Parliament of Queensland Act 2001* (Qld) ss 91-91C.

<sup>61</sup> *Ibid* s 91A.

<sup>62</sup> *Ibid* s 91C(5).

<sup>63</sup> *Ibid* s 91C(7).

<sup>64</sup> Queensland Parliament, *Annual Reports* (2018) <<http://www.parliament.qld.gov.au/explore/publications-and-reports/annual-reports>>.

<sup>65</sup> Queensland Parliament, *Bills previous Parliament* (2018) <<http://www.parliament.qld.gov.au/work-of-assembly/bills-and-legislation/previous-bills-register>>.

<sup>66</sup> Queensland Parliament, *Matters of Procedural Interest* <<http://www.parliament.qld.gov.au/explore/publications-and-reports/chamber-and-procedural-publications/procedural-bulletin>> and Queensland Parliament, *Statistics of the Assembly*, <<https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/work-of-the-house/work-of-house-current>>.

- examine the *Bills Register*<sup>67</sup> for each parliament
- for each bill passed with government agreed amendment, refer to the report of the committee for the nature of the recommended legislative amendment
- refer to the government response to the committee's report to confirm the proposed amendments on matters of FLP were supported or not supported, and
- refer to the *Matters of Procedural Interest* bulletins during the period under examination for the number of bills declared urgent.

### 3.3 Analytical framework

This research paper measures effectiveness by undertaking a qualitative survey of legislative amendments on matters of FLP by committees during the 54<sup>th</sup> and 55<sup>th</sup> Parliaments to gauge, as suggested by George Williams and Daniel Reynolds,<sup>68</sup> a measure of legislative impact of rights scrutiny. This is achieved by looking for the number of times committee recommendations for legislative amendment on matters of FLP are supported by the government. The qualitative survey identifies considerable political influences on and within committees, by methods employed by governments to avoid committee scrutiny, including urgent bills.

## 4 Legislative impact of committee activity, 2012-2017

An analysis of the above-described sources for the period under examination are presented in the table below.

Parliament	54 <sup>th</sup> Parliament	55 <sup>th</sup> Parliament
Bills introduced	203	192
Bills referred to committees	185	183
Bills examined by committees	161	143
Legislative amendments recommended	308	139
Legislative amendments accepted	162	118
Percentage accepted	52%	85%
Bills with recommendations or comments on matters of FLP supported/partially supported by government	27	22
Proportion of recommendations or comments on matters of FLP supported/partially supported by government of total legislative amendments accepted	16%	18%

<sup>67</sup> Queensland Parliament, *Bills this Parliament* (2018) <<http://www.parliament.qld.gov.au/work-of-assembly/bills-and-legislation/current-bills-register>>.

<sup>68</sup> George Williams and Daniel Reynolds, 'The operation and impact of Australia's parliamentary scrutiny regime for human rights' (2015) *Monash University Law Review* 469, 472.

Legislative outcomes over the two parliaments under analysis indicate that, since the reforms of 2011, the Legislative Assembly regularly responds to scrutiny undertaken by committees.<sup>69</sup>

The data across both parliaments for all committee legislative recommendations is encouraging in terms of positive impact. In the 54<sup>th</sup> Parliament where the LNP held a large majority, and committees featured a majority of government members, 52 per cent of all committee legislative recommendations were accepted by the government.

The percentage of accepted recommendations was significantly higher in the 55<sup>th</sup> Parliament, at 85 per cent. The difference may be an indication that committee practice in this Parliament was more than a 'rubber stamp'.<sup>70</sup> The analysis shows the minority government and consequential balance of government to non-government members in committees, indicates a practice whereby committees actively scrutinised and refined government bills.<sup>71</sup>

The difference in the number of bills that attracted a committee recommendation in respect to matters of FLP, and were supported by the government, was negligible between the two parliaments under consideration (16 per cent in 54<sup>th</sup> Parliament compared to 18 per cent in 55<sup>th</sup> Parliament). This may be an indication that the political composition of the committee is inconsequential. However, taking a wider perspective, the most significant difference between committee activity during the two parliaments were the limitations imposed on committees to properly examine legislation, as discussed below.

## 5 Restraints affecting committee effectiveness

### 5.1 Short time frames for committee scrutiny

The reforms to Queensland's committee system in 2011 created a vital and active component of the parliament. But it has been noted that the Parliament's committees are restrained from full and detailed legislative scrutiny by short reporting timeframes and heavy workloads.<sup>72</sup>

The Clerk of the Queensland Parliament recently stated that the ideal referral period for bills would be 12 weeks, giving enough time for stakeholders to 'prepare properly formulated submissions' and for the committee to undertake briefings, hearings and report.<sup>73</sup> However, reporting time is set down in the Queensland Constitution as a minimum of six weeks unless the bill is declared urgent.<sup>74</sup>

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<sup>69</sup> Neil Laurie, 'Moving towards the entrenchment of parliamentary committees' (Paper presented at 49<sup>th</sup> Presiding Officers and Clerks Conference, Wellington, 7-14 July 2018) 1, 9.

<sup>70</sup> Ruth Barney, 'The impact of minority government on executive dominance and legislative scrutiny in the 43<sup>rd</sup> Parliament' (Australian and New Zealand Association of Clerks-at-the-Table Conference, Melbourne, 23-25 January 2012) 1, 7.

<sup>71</sup> Ibid.

<sup>72</sup> Renee Easten, 'Queensland's approach to the scrutiny of legislation' (Paper presented at Australia-New Zealand Scrutiny of Legislation Conference, Perth, 11-14 July 2016) 7.

<sup>73</sup> Neil Laurie, above n 78, 11.

<sup>74</sup> *Constitution of Queensland Act 2001* (Qld) s 26B.

During the 54<sup>th</sup> Parliament the average duration of committee inquiries into government bills was 8.5 weeks, and 9.2 weeks during the 55<sup>th</sup> Parliament.<sup>75</sup>

The amount of time given to inquire into a bill is beyond the control of the committee, and when legislation is passed quickly there is insufficient time to properly consider the implications of proposed legislation.<sup>76</sup>

**5.1.1 Time constraints experienced in other Australian jurisdictions**

The 2015 Victorian Review identified a chronic lack of time available to SARC to adequately investigate, engage with the public and report on all bills. George Williams and Janina Boughey have since affirmed the lack of time SARC is given to adequately carry out its functions to be a ‘key concern’.

In 2018 the Australian Human Rights Commission identified ‘challenges’ for the PJCHR, including that, due to time limitations, bills often pass through parliament before the PJCHR has released its view on a bill’s human rights compatibility, thus denying members of parliament access to the committee’s findings, which are often on complex human rights matters, during debate on the bill.

**5.2 Bills declared urgent with limited or no consideration period**

The government of the 54<sup>th</sup> Parliament declared a significantly larger number of bills to be urgent than during the 55<sup>th</sup> Parliament.<sup>77</sup> A comparison of bills declared urgent across the two parliaments is presented below.

Parliament	54 <sup>th</sup> Parliament	55 <sup>th</sup> Parliament
Bills introduced	203	192
Bills declared urgent under SO 137 and passed by the House in the same week introduced <sup>78</sup>	15	2

During 2013 alone, ten bills were declared urgent upon introduction and not referred to a committee.<sup>79</sup> Among the bills declared urgent were three ‘anti-bikie’ laws. The Vicious Lawless Association Disestablishment Bill 2013, the Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 and the Tattoo Parlours Bill 2013 were passed the same day they were introduced, on 15 October 2013. The then Opposition Leader Anastacia Palaszczuk lamented the lack of time to examine the bills during debate in the Legislative Assembly:

*... today this Queensland parliament has been presented with no fewer than three bills amounting to over 160 pages of laws that this government expects to ram through tonight—not tomorrow, not on Thursday, but tonight. How can any*

<sup>75</sup> Neil Laurie, above n 78, 11.  
<sup>76</sup> Zoe Hutchinson, above 58, 93.  
<sup>77</sup> Queensland Parliament, *Matters of Procedural Interest* <<http://www.parliament.qld.gov.au/explore/publications-and-reports/chamber-and-procedural-publications/procedural-bulletin>>  
<sup>78</sup> In the 55<sup>th</sup> Parliament, one additional bill was declared urgent with 22 days to report.  
<sup>79</sup> Queensland Parliament, *Matters of Procedural Interest No.4 – January to June 2013* (2013) <<https://www.parliament.qld.gov.au/documents/TableOffice/bulletins/4-JantoJun13.pdf>> and *Matters of Procedural Interest No. 5 – July to December 2013* (2014) <<https://www.parliament.qld.gov.au/documents/TableOffice/bulletins/5-JultoDec13.pdf>>.

*reasonable person be expected to get across the details of this legislation in two or three hours?*<sup>80</sup>

Urgent bills often concern legislation that impinge on personal rights and liberties, such as bills concerning community safety.<sup>81</sup> Governments need to urgently pass legislation on occasion.<sup>82</sup> The doctrine of parliamentary sovereignty allows the parliament to respond to emerging issues of public health or safety in a timely manner by passing legislation incompatible with certain rights.<sup>83</sup> However, as noted by the Law Society of New South Wales, it is undesirable for bills to be identified as urgent simply for political purposes.<sup>84</sup>

An additional three bills were introduced in 2013 and passed within a two-week period. One of them, the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, was introduced and referred to the Legal Affairs and Community Safety Committee on 19 November 2013 at 10.12pm, with a reporting date of 10.00am on 21 November 2013.<sup>85</sup> The committee was given less than 36 hours to inquire into the bill, call for submissions, hold a public briefing and report back to the Legislative Assembly. Upon the bill's introduction, the then Attorney-General Jarrod Bleijie MP stated:

*I am hoping as a sign of good faith the government is showing that we will send the bill off for at least a day so that committee members can get their teeth into it.*<sup>86</sup>

Of course, a shortened reporting time, or no time to examine legislation at all, prevents committees from identifying matters of concern and recommending legislative amendment. Tom Campbell and Stephen Morris' observation is pertinent:

*Committees do not have the power to control the will of democratic governments, which themselves are formed by a majority of the parliament and dependent on continued successful electoral outcomes.*<sup>87</sup>

Laura Grenfell and Sarah Moulds considered the approach of governments to parliamentary scrutiny in regards the introduction of 'anti-bikie' legislation between 2009 and 2014, and concluded:

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<sup>80</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3158 (Annastacia Palaszczuk, Opposition Leader).

<sup>81</sup> Parliament of New South Wales, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987* (November 2018) 23.

<sup>82</sup> Ibid 26.

<sup>83</sup> Michael Brett Young, *From commitment to culture: The 2015 review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 174.

<sup>84</sup> Law Society of NSW, submission 4 to Parliament of New South Wales, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987* (November 2018) 4.

<sup>85</sup> Renee Easten, above n 82, 7.

<sup>86</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 2013, 3993 (Jarrod Bleijie, Attorney-General and Minister for Justice).

<sup>87</sup> Tom Campbell and Stephen Morris, 'Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) *University of Queensland Law Journal* 7, 25.



*Governments repeatedly devise strategies to circumvent such parliamentary mechanisms, as is shown by the fast-tracking of bills and the shortening of timeframes.*<sup>88</sup>

Governments can, and will, introduce legislation and declare it urgent, justifying the declaration as being a necessary measure to protect the safety of the community. For example, upon the introduction of the Vicious Lawless Association Disestablishment Bill 2013 the then Attorney-General Hon Jarrod Bleijie stated that the bill would 'increase public safety and security by the disestablishment of the [motorcycle] associations'. He also stated:

*It is imperative that this bill be passed as a matter of urgency to ensure the public is protected from the serious criminal activities of criminal associations.*<sup>89</sup>

In considering the scrutiny role prescribed by LSA and PoQA and performed by committees, the analysis shows effectiveness is limited by external forces such as time and political influence.

### 5.3 Non-compulsory compatibility in the current system of scrutiny

The introduction of FLPs with the commencement of the LSA in 1992 was hailed as 'a significant step in the preservation and enhancement of individual rights and liberties'.<sup>90</sup> The Act was designed to ensure that better legislation was created. But it was observed just after its commencement and since<sup>91</sup> that the LSA was not, nor ever intended to be, 'a mini Bill of Rights'<sup>92</sup> because the application of FLPs in the Act is neither enforceable nor absolute.

The principles set out in the LSA require that Queensland Parliament determines whether legislation has *sufficient regard* to the rights and liberties of individuals. The Act allows governments to pass legislation that may breach FLP where required.<sup>93</sup> A non-compulsory framework allows for occasions where people's common rights and liberties are limited or curtailed by legislative measures to protect society when necessary. The LSA merely requires that any departure from the principles are explained or 'justified' by the government that introduced them.<sup>94</sup>

With the doctrine of parliamentary sovereignty in place, the examination of proposed legislation by committees, and the government's response to committee recommendations, has never been contested in court. Legislation that may be considered a breach of human rights is more likely to be challenged in court for its constitutional validity, as was the case in *Kuczborski v Queensland* [2014] HCA 46, in relation to the *Vicious Lawless Association Disestablishment Act 2013* (Qld).<sup>95</sup>

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<sup>88</sup> Laura Grenfell and Sarah Moulds, above n 57, 65.

<sup>89</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3155 (Jarrod Bleijie).

<sup>90</sup> Legislative Standards Bill 1992 (Qld), *Explanatory notes* 2.

<sup>91</sup> George Williams, 'The role of parliament under an Australian charter of human rights' (Paper presented at Australia-New Zealand Scrutiny of Legislation Conference, 8 July 2009) 1, 5.

<sup>92</sup> David Solomon, above n 11, 37.

<sup>93</sup> *Legislative Standards Act 1992* (Qld), ss 4(2), 23(f).

<sup>94</sup> David Solomon, above n 11, 37.

<sup>95</sup> The High Court dismissed a constitutional challenge to the *Vicious Lawless Disestablishment Act 2013* (Qld) and other Queensland legislation introduced in 2013 in regards to motorcycle gangs;

Committees may identify matters of FLP but not recommend a legislative amendment, and governments can choose not to respond to recommended legislative amendments by committees, as was observed in the analysis of the 54<sup>th</sup> and 55<sup>th</sup> parliaments.

#### 5.4 Political influences that undermine scrutiny processes

The Victorian Parliament is unrestrained by the Victorian Charter from introducing emergency legislation. Proposed legislation would require a statement of compatibility to justify the limits imposed on people's rights by the emergency legislation.<sup>96</sup> The parliament may pass the law, and by noting its incompatibility, would avoid the need to invoke an override declaration.<sup>97</sup>

A 2015 review of the Victorian Charter considered the effectiveness of SARC's human rights scrutiny. The review found that SARC was 'cautious' about commenting on the incompatibility of bills with human rights and whether limitations of rights are justified,<sup>98</sup> due largely to SARC's practice of paraphrasing statements from the government without committee comment.<sup>99</sup>

The review also noted that SARC's constitution as a bipartisan committee, with a government majority and Chair, may sometimes result in partisan or perceived partisan commentary, a noted limitation of the Victorian model.<sup>100</sup>

George Williams and Janina Boughey affirmed these findings in 2018, stating the impact of the Victorian Charter on parliamentary debate about human rights had been 'disappointing', in part due to SARC's political composition.<sup>101</sup>

In the Australian Parliament, there has been an increasing trend from 2014 for the PJCHR to report, with fewer consensus reports in favour of reports containing dissenting opinion from committee members. According to George Williams and Daniel Reynolds, presenting divided conclusions to the parliament risks rendering the PJCHR 'ineffectual'.<sup>102</sup>

## 6 Will the new Human Rights Act make for better law?

To some observers, the new legislation is an improvement. According to the Anti-Discrimination Commission of Queensland, the HRA offers an additional layer of protection of human rights. Unlike the LSA, it will 'properly articulate' human rights so that at the earliest stage in the drafting of legislation, there is an opportunity to 'meaningfully identify human rights that are going to be impacted by legislation', take

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Queensland Government, Crown Law, *High Court dismisses VLAD challenge* (18 December 2014) <<https://www.crownlaw.qld.gov.au/resources/publications/high-court-dismisses-vlad-challenge>>.

<sup>96</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>97</sup> Michael Brett Young, above n 92, 200.

<sup>98</sup> *Ibid* 176.

<sup>99</sup> *Ibid* 177.

<sup>100</sup> *Ibid*.

<sup>101</sup> George Williams and Janina Boughey, Submission No 8 to Legal Affairs and Community Safety Committee, *Human Rights Bill 2018*, 2018 1, 2.

<sup>102</sup> George Williams and Daniel Reynolds, above n 60, 481.

them into account and consider alternative ways to achieve the same purpose without impinging on human rights.<sup>103</sup>

An emerging culture of rights was observed after the introduction of human rights legislation in the ACT and Victoria.<sup>104</sup> Therefore the compulsory aspect brought by the Act will be beneficial in bringing human rights considerations to the attention of committees and the parliament, and more broadly, to foster a human rights culture in Queensland.

Once the HRA has commenced, the Queensland Parliament could enhance its reputation for rights protection via a number of strategies, including increased public engagement and education.<sup>105</sup>

A potential duplication of the scrutiny process arises with the introduction of the Human Rights Act.<sup>106</sup> According to one observer, there is nothing in the HRA that 'does anything different to what is in the requirements under the LSA to ensure that regard is had to human rights at an earlier stage'.<sup>107</sup> But in terms of articulated rights, there are differences between the two. The rights in the HRA are more specific than the FLPs, but both sets of rights are not limited by their legislation and may encompass other unarticulated rights.

What is certain is that scrutinising legislation against both sets of rights will require committees to have sufficient resources to undertake the scrutiny and consider and report on both the bill's statement of compatibility, and whether the bill has regard for FLPs, in a timely manner.

This research paper has noted that time constraints are problematic for parliamentary committees in other jurisdictions with human rights legislation. The HRA does not allow more time to examine a bill, nor does it ensure that the committee has completed its examination and reported on the bill, prior to consideration in the Legislative Assembly. During the inquiry into the Human Rights Bill 2018 the Department of Justice and Attorney-General (DJAG) stated that the current timeframe provided to committees was 'adequate opportunity to consider the compatibility of a bill with human rights before the bill is debated'.<sup>108</sup> The Legal Affairs and Community Safety Committee did not recommend legislative amendment to the Bill.<sup>109</sup>

The HRA does not restrain governments from employing tactics to curtail or avoid committee scrutiny to achieve their policy agendas. The provisions of the HRA does

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<sup>103</sup> Evidence to Queensland Parliament, Legal Affairs and Community Safety Committee, Brisbane, 4 December 2018, 2 (Scott McDougall).

<sup>104</sup> Michael Brett Young, above n 92, 22; ACT Human Rights Commission, Submission No 434 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland*, April 2016, 1, 13.

<sup>105</sup> Laura Grenfell, 'Parliaments' reputation as the 'pre-eminent' institution for defending rights: do parliamentary committees always enhance this reputation?' (2016) 31 *Australasian Parliamentary Review* 34, 34.

<sup>106</sup> Evidence to Legal Affairs and Community Safety Committee, Queensland Parliament, Brisbane, 4 December 2018, 67 (Luke Geurtsen).

<sup>107</sup> *Ibid*, 68.

<sup>108</sup> Letter from Queensland Government, Department of Justice and Attorney-General to Legal Affairs and Community Safety Committee, 3 December 2018, 45.

<sup>109</sup> Queensland Parliament, Legal Affairs and Community Safety Committee, *Report on Human Rights Bill 2018* (2019)

not prevent the Legislative Assembly from declaring a bill an urgent bill under the current Standing Order 137.

The general limitations provision purports to set out a framework for deciding when and how a human right may be limited and demonstrably justified.<sup>110</sup> DJAG provided two implied legislative reasons for limiting rights:

- *public interest considerations (including national security and community safety), and*
- *protection of the rights of others (for example, children and domestic violence victims).*<sup>111</sup>

Allowing rights to be limited for the purposes of community safety is strongly reminiscent of the reasons recent majority governments have introduced urgent legislation in Queensland, on the grounds that it is in the public interest to protect community safety.

The HRA restricts the use of the override provision to exceptional circumstances, such as war, a state of emergency or immediate threats to public safety, health or order. However, with the general limitations provision available, and the ability for governments to declare a bill urgent by ordinary majority in the House, governments will have little need to make an override declaration.<sup>112</sup>

## 7 Conclusion

The qualitative study of Queensland's committee recommendations for legislative reform during the 54<sup>th</sup> and 55<sup>th</sup> parliaments reveals modest responsiveness to committee recommendations, and little difference between the two parliaments on matters of FLP, despite differing political composition in both the Legislative Assembly and the committees themselves.

This paper has observed occasions in the Queensland Parliament under the current scrutiny system when a strident government has either declared a bill urgent in order to bypass scrutiny of controversial legislation, or given a committee a very short timeframe to examine a bill, on the pretext of addressing immediate matters of community safety. Taking into account the experiences of other jurisdictions through the prism of Laura Grenfell and Sarah Moulds' assessment factors, the adequacy of time to properly examine and report on human rights compatibility of proposed legislation prior to debate in parliament has been a major obstacle in scrutiny committees in other Australian jurisdictions, and in Queensland under the established system.<sup>113</sup>

The Act expressly allows for rights to be limited or for an override declaration to be made in respect to legislation incompatible with human rights. The government need only justify the offending provisions. With the political composition of committees reflecting the composition of the parliament, a committee is unlikely to contradict major reform policy by finding a bill to be incompatible with human rights.

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<sup>110</sup> Ibid 41.

<sup>111</sup> Ibid.

<sup>112</sup> A situation recognised in the Victorian model; Michael Brett Young, above n 92, 198.

<sup>113</sup> Neil Laurie, above n 78, 9.

Under the new HRA, sufficient time to consider proposed legislation is not expected to improve in Queensland without further amendment to the HRA or the Queensland Constitution. There is nothing in the HRA to prevent a government from limiting or bypassing committee scrutiny of proposed legislation, and employing such tactics in the future.

However, the future is not entirely bleak. With sufficient time provided to committees to adequately examine rights compatibility of proposed legislation and supporting public engagement, committees can contribute to the emergence of a human rights culture in Queensland. Building on the foundations created by the LSA and the examination of fundamental legislative principles, a rights culture can flourish where human rights are considered, articulated and promoted by the parliament and government actions are properly explained, justified and endorsed.

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