

# Public deliberation on legislation: from Fitzgerald to Facebook and beyond

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## Introduction

Across the range of subjects on which parliaments legislate, members of parliamentary scrutiny committees have responsibility to give rational, measured and full consideration to large volumes of new law, primary and subordinate. In Queensland, the Scrutiny of Legislation committee has statutory responsibility to examine the application to legislation of 'the principles underlying a parliamentary democracy based on the rule of law'.<sup>2</sup> That responsibility was conferred within the framework of extensive public sector reform which followed the 1989 report of the Fitzgerald commission of inquiry.<sup>3</sup>

The Fitzgerald report sought to promote public accountability in Queensland by altering the balance of power between the Government, the Parliament and the people. The twenty-year anniversary of its tabling provides an opportunity to examine its impact upon the parliamentary scrutiny of legislation to date. It provides also an opportunity to consider the way forward.

On the question of scrutiny and accountability in the 21st century, this paper suggests that, although in practical terms, all major Fitzgerald reforms regarding parliamentary scrutiny of legislation have been implemented, the Fitzgerald road map for accountability continues to provide direction. Accordingly, we might continue to use the Fitzgerald commitment to democratic government by consent, adopting and adapting to Queensland circumstances scrutiny and accountability practices demonstrated to have worked elsewhere.

## Fitzgerald – a road map for accountability

### Fitzgerald commission of inquiry

From a Queensland perspective, any discussion of the scrutiny of legislation and accountability in the 21st century must commence with a consideration of 'the most remarkable Commission of Inquiry in Australia's history' and the resulting reforms put in place in the final decade of the 20th century.<sup>4</sup> Twenty years ago in Queensland, Commissioner Fitzgerald gave us 'a road map for a new era of accountability'.<sup>5</sup>

On 3 July 1989, the *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* was tabled in the Queensland Parliament.<sup>6</sup> In the 620 pages of his report, Commissioner Fitzgerald identified perceived deficiencies in Queensland's institutional framework, ethics and performance – the Parliament, Cabinet, public sector departments and agencies, the justice system and the media. To remedy these deficiencies, recommendations made in the Fitzgerald report aimed to 're-invent Westminster democracy in Queensland'. Recommendations were directed to 'allowing permanent institutions and systems to operate in the ways intended in a democratic society'. A rebalancing was proposed in the relationship between Parliament, the Government and the people, to provide greater parliamentary control over the executive and to create opportunities for the people of Queensland to know about and influence public policy, including legislative policy.

The Fitzgerald report recommended implementation of its recommendations by two bodies to be established: the Criminal Justice Commission and the Electoral and Administrative Review

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<sup>2</sup> *Legislative Standards Act 1992* (Qld), s 4

<sup>3</sup> Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989.

<sup>4</sup> Raymond Evans, *A history of Queensland* (2007) 248

<sup>5</sup> Hon AM Bligh MP, *Queensland Parliamentary Debates (Hansard)*, 19 June 2009, 1145

<sup>6</sup> Tony Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989)

Commission (EARC). The Queensland Parliament established two committees to examine respectively the reports of the post-Fitzgerald commissions.

Both EARC and the Parliamentary Committee for Electoral and Administrative Review (PCEAR) undertook public engagement in a way never previously experienced in Queensland. They provided Queensland people with many opportunities to deliberate on reform. EARC fostered deliberation by inviting submissions both in response to issues papers and to the submissions of others and by holding public seminars and public hearings throughout Queensland. Where possible, proposed draft legislation was tabled by EARC with its reports. As a result, despite the rapid and marked change effected by the post-Fitzgerald reforms, the level of acceptance by Queenslanders was high.

Drawing the attention of the Queensland Parliament to the then forthcoming twenty-year anniversary of the tabling of the Fitzgerald report, the Queensland Premier recently stated:<sup>7</sup>

*The 3rd of July will mark 20 years since the Fitzgerald inquiry report was tabled in this parliament in 1989. After two years of inquiry, including 238 sitting days, 339 witnesses, 2,304 exhibits and 21,504 pages of transcript, Tony Fitzgerald delivered his report—a damning revelation of corruption at the highest levels of the Queensland police force and within the government of the day. The inquiry was a turning point in the public life of our state.*

*It laid out the road map for a new era of accountability in Queensland. In many ways, the Fitzgerald inquiry was Queensland's Berlin Wall. It washed away an old regime and heralded in a new era. Nothing on Queensland's political landscape has been the same since.*

#### Recommendations regarding parliamentary committees

In respect of parliamentary practices, the Fitzgerald report identified a number of deficiencies, such as a lack of parliamentary sitting time, poor scrutiny of executive government, few opportunities for non-Government members to affect legislation and the fast-tracking of the passage of legislation. Regarding the relationship between parliament and the executive, a lack of accountability arose in part, from executive dominance of both the legislature and all aspects of government.<sup>8</sup> The role of parliamentary committees in making Parliament accountable to the people was emphasised:<sup>9</sup>

*Parliament is meant to be the forum in which the necessity and worth of proposed laws ... can be debated. It should also serve as an inquest in which all or any aspects of public administration can be raised...*

*The operation of the party system in an unicameral assembly, the continuing growth in the scale and extent of Government activity, and the increasing complexities of policy making affect the ability of Parliament to review the Government's legislative activity or public administration.*

*If Parliament is to perform this vital role, procedures which allow it to obtain and analyse information are essential.*

*Elsewhere, the effective and efficient operation of Parliament has been enhanced by the setting up of all-party policy and investigatory committees. The committees have become a vital and energetic part of giving effect to the democratic process particularly in respect of complex issues. They serve as Parliament's research arm and as an independent source of information to aid proper Parliamentary debate.*

*Scrutiny of Government legislative activity and of public administration is more effective as a consequence.*

More specifically, in relation to legislative scrutiny by parliamentary committees, a recommendation was that committees should have:<sup>10</sup>

*... the power to conduct public hearings, as well as the power to investigate and obtain information and documents and, where appropriate, accept and report on petitions and complaints. The legislative process should allow sufficient time for the involvement of parliamentary committees, having regard particularly to members' general parliamentary duties, including attending to their constituencies.*

*The skills individual members bring to Parliament are often inadequate for the analysis of complex public accounts and transactions and scrutiny of major legislation. A Parliamentary Committee at times may need, and must be able to obtain, independent expert staff and consultants.*

<sup>7</sup> Hon AM Bligh MP, *Queensland Parliamentary Debates (Hansard)*, 19 June 2009, 1145.

<sup>8</sup> Scott Prasser, 'The state of democracy in Queensland' (2007), [www.on-line.opinion.com.au](http://www.on-line.opinion.com.au) at 22 June 2009

<sup>9</sup> Tony Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 123

<sup>10</sup> Tony Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 124-5

EARC duties included to advise Parliament on the implementation of a 'comprehensive system of parliamentary committees to monitor the efficiency of Government'.<sup>11</sup> In 1992, EARC conducted a review of committees and published a report containing recommendations for legislation establishing a new system of parliamentary committees.<sup>12</sup> An earlier EARC report regarding the Office of the Parliamentary Counsel, discussed below, had recommended the establishment in Queensland of a committee with responsibility to scrutinise bills and subordinate legislation.

The EARC recommendations were supported by the PCEAR, although PCEAR recommended a system of six specialist committees, rather than the generalist committees proposed by EARC. The PCEAR advised the Parliament that the committee system it proposed would 'be focused more on scrutiny and accountability rather than general policy inquiry'.<sup>13</sup>

### Recommendations regarding legislation

The Fitzgerald report contained a recommendation that EARC 'review the role and functions of the Parliamentary Counsel'.<sup>14</sup> In 1990-91, EARC conducted its review, reporting to Parliament that:<sup>15</sup>

*The principal focus of the review has been the drafting and advisory functions of the OPC, particularly in relation to the OPC's role in providing independent advice on matters involving fundamental legislative principles, that is, principles relating to the maintenance of rights and liberties, the provision of adequate redress to citizens aggrieved by administrative decisions and the maintenance of effective parliamentary sovereignty over delegated legislation.*

It was in this report that EARC identified a need for a parliamentary scrutiny of legislation committee. The Queensland Parliament's first Parliamentary Committee of Subordinate Legislation had been established by resolution in November 1975, with responsibility to examine subordinate legislation but not bills. The EARC recommendation was for a committee with broader responsibility to examine the application of 'fundamental legislative principles' to both bills and subordinate legislation:<sup>16</sup>

*In the course of the review, it became apparent to the Commission that no system of checks and balances in the making of legislation would be complete without an effective role for Parliament in drawing attention to bills before the Legislative Assembly that appeared to infringe fundamental principles.*

*Accordingly, the scope of the review was extended by the Commission to examine the adequacy of present Parliamentary procedures for reviewing bills and subordinate legislation for impact on rights and liberties, and principles of parliamentary sovereignty. The recommendation in this Report for the establishment of a new Parliamentary Committee responsible for scrutinising bills and subordinate legislation in terms of these matters is a significant outcome of this review. This recommendation will require additional resources to be made available to Parliament in order to provide the proposed Committee with effective research and administrative support.*

Again, the recommendation made by EARC was endorsed the PCEAR.<sup>17</sup>

## **Are we there yet?**

The twenty-year milestone in the post-Fitzgerald era provides an opportunity to evaluate progress on the journey towards scrutiny and accountability in Queensland.

In respect of Fitzgerald recommendations generally, twenty years on, all major recommendations regarding public sector accountability have been implemented. This progress was outlined by the Queensland Premier in her Ministerial Statement:<sup>18</sup>

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<sup>11</sup> Electoral and Administrative Review Act 1989 (Qld), s 2.10 and schedule

<sup>12</sup> Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (1992)

<sup>13</sup> Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Report on Review of Parliamentary Committees*, Report No. 19 (1993)

<sup>14</sup> Tony Fitzgerald, *Report of a Commission of Inquiry pursuant to orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 371

<sup>15</sup> Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.20]

<sup>16</sup> Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel* (1991) [1.25]-[1.26]

<sup>17</sup> Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Report on Office of Parliamentary Counsel*, Report No. 19 (1991)

<sup>18</sup> Hon AM Bligh MP, *Queensland Parliamentary Debates (Hansard)*, 19 June 2009, 1145-6. The Premier also identified two further reforms: a lobbyist code of conduct and a new offence of misconduct in public office. The latter, together

Queensland now has a Crime and Misconduct Commission—a standing commission of inquiry to investigate official misconduct in the public sector and police misconduct. The Auditor-General, the Ombudsman, the Information Commissioner, the Integrity Commissioner and whistleblower protection have all increased public sector accountability and made the government more open to public scrutiny. We have published a Ministerial Code of Conduct and Ministerial Handbook to guide ministers in their duties and there is a Ministerial Services section within my department to closely monitor all ministerial expenditure and that of the opposition. Electoral reforms have been introduced to banish the rigged electoral gerrymanders of the past. Parliament has been reformed, with members being required to declare their pecuniary interests on a public register, while a code of ethical standards guides members of parliament in their duties.

Some post-Fitzgerald reforms have themselves undergone review and further reform in recent times; for example:

- the *Right to Information Act 2009* (Qld) replaced the *Freedom of Information Act 1992* (Qld); and
- amalgamations of local governments under the *Local Government Reform Implementation Act 2007* (Qld), following amalgamations based on an EARC inquiry.

In scrutiny of legislation, EARC and PCEAR recommendations were given effect in the *Parliamentary Committees Act 1995* (Qld). The Act established a Scrutiny of Legislation Committee to replace the Committee of Subordinate Legislation which had been established by resolution in 1975. The new statutory committee was conferred with responsibility to examine bills and subordinate legislation. In addition, the legislation required the committee to monitor the operation of certain statutory provisions regarding legislation.

The *Parliamentary Committees Act* also established a wider system of statutory committees with specified responsibilities. When a *Parliament of Queensland Act 2001* (Qld) was passed to complement a re-drafted *Constitution of Queensland 2001*, it replaced the *Parliamentary Committees Act* but retained the existing parliamentary committee system. Then, in 2009, one of the first actions of the newly-returned Bligh Government was to restructure the parliamentary committee system by way of resolution of Legislative Assembly and the *Parliament of Queensland Amendment Act 2009* (Qld). Generally, the Queensland Parliament now has nine committees with responsibilities roughly comprising a mix of portfolio-based and oversight committees. The responsibilities of the Scrutiny of Legislation Committee did not change in the restructure.

In 2007, an examination of Queensland's Legislative Assembly since Fitzgerald was conducted by Dr Janet Ransley of Griffith University's School of Criminology and Criminal Justice. Dr Ransley found that, with the exception of the Scrutiny of Legislation Committee, parliamentary committees in Queensland do little real scrutiny:<sup>19</sup>

*Protection of civil liberties is mainly achieved through the Scrutiny of Legislation Committee... [T]his is a particularly active committee with a significant accountability mandate, to review all legislation and delegated legislation for compliance with fundamental legislative principles and other matters.*

Dr Ransley suggested the overall effectiveness of the Scrutiny of Legislation Committee functions was affected by inadequate ministerial and departmental responses to matters raised by the committee.<sup>20</sup>

In late 2007, Professor Scott Prasser also assessed the progress towards accountability made in Queensland since the Fitzgerald inquiry, using three criteria of democratic governance.<sup>21</sup> One criterion was that, 'there are adequate means to assess the performance of government and processes of accountability are working'. In relation generally to the legislative process, Prof Prasser stated that, 'Legislation is still rushed in during all night sittings' and noted that the Local Government Reform Implementation Bill 2008 (Qld) to provide for amalgamation of local governments 'was rushed through in 14 hours'. In relation to parliamentary committees, Prof Prasser observed that:

*There are more parliamentary committees, but they remain heavily dominated by the party in government and steer clear of controversial issues.*

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with a general right of review of administrative decisions, was effected by legislation passed earlier this year, respectively, the *Public Service Amendment Act 2009* (Qld) and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

<sup>19</sup> Janet Ransley, 'Illusions of reform: Queensland's Legislative Assembly since Fitzgerald' in Nicholas Aroney, Scott Prasser and JR Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (2008) 259

<sup>20</sup> Janet Ransley, 'Illusions of reform: Queensland's Legislative Assembly since Fitzgerald' in Nicholas Aroney, Scott Prasser and JR Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (2008) 259

<sup>21</sup> Scott Prasser, 'The state of democracy in Queensland' (2007), [www.on-line-opinion.com.au](http://www.on-line-opinion.com.au) at 22 June 2009

## Present conditions

The twenty-year milestone also provides an opportunity to consider the way forward. In this respect, it is clear that the 21<sup>st</sup> century brings some new challenges regarding scrutiny and accountability. The challenges are not unique to Queensland and include but are not limited to: the large volume of legislation made by legislatures or under power delegated by them; management of contemporary relationships between government and people; and public expectations regarding communications with parliamentary committees.

### Large volumes of legislation

Shortly before retiring as Chief Justice of Australia, the Hon Murray Gleeson AC gave an address on the meaning of legislation in which he noted that, traditionally, our system of parliamentary democracy did not involve an expectation that Parliament would be 'a standing law reform agency constantly turning out detailed rules affecting the rights and obligations of citizens':<sup>22</sup>

*Its origins lay in the occasional need of the King to assembly representatives of his subjects (or representatives of the most important of them) in order to seek their consent to some measure (typically, the imposition of taxation) for which such consent was necessary, or at least desirable. Neither the Sovereign nor Parliament was expected to be concerned with constantly changing the common law. Alteration of the ancient laws and customs, rights and privileges of the people was regarded as subversive of good order. Law in general was something that was declared, not freshly made. Changing the law was not seen as an inherently worthy activity, whether it was undertaken by parliaments or judges.*

However, 'Making new law in all areas, civil and criminal, is a central part of the work of modern parliaments',<sup>23</sup> and while more Acts are passed and subordinate legislation is made each year, comparatively little legislation is repealed or expired. The large and increasing volume of legislation in each Australian jurisdiction is well illustrated by the Productivity Commission's data regarding the total stock of legislation – primary, subordinate and other legislative instruments – as at 31 December 2007.<sup>24</sup>

	Cwth	NSW	Vic	Qld	SA <sup>a</sup>	WA	Tas	NT	ACT
Acts	1279	1257	870	543	545	844	605	365	305
Pages	98486	32700	44214	49419	16525	40751	13254	16992	21771
Statutory rules	18000	388	556	319	558	761	1782	382	158
Pages	90000	7717	12625	15635	8526	22816	12071	4057	7763
Total pages	188486	40417	56839	70748	25403	63567	25325	21049	29534

These large volumes of legislation create difficulties for parliamentary scrutiny committees which must give rational, measured and full consideration to new law, primary and/or subordinate. Sufficient time and the strong commitment of committee members are required to meet committee responsibilities. Established and effective committee processes and adequate resourcing are important too.

### Management of relationships between government and citizen

In the 21<sup>st</sup> century few aspects of our daily lives are unaffected by legislation which, increasingly, regulates private behaviour as well as public conduct.<sup>25</sup> At the same time, our contemporary communities grow in their diversity. Together, these two factors enlarge the scope for debate about legislation, its effect upon competing rights and liberties and even the content of some rights.<sup>26</sup>

Matters determined by the Australian courts in recent years provide illustration of the effect of legislation upon fundamental rights and freedoms as 'law made by Parliament constitutes a rule

<sup>22</sup> The Hon Murray Gleeson AC, 'The meaning of legislation: Context, purpose and respect for fundamental rights' (2009) 20 *Public Law Review* 26

<sup>23</sup> The Hon Murray Gleeson AC, 'The meaning of legislation: Context, purpose and respect for fundamental rights' (2009) 20 *Public Law Review* 26, 27

<sup>24</sup> Australian Government Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality* (2008) 32

<sup>25</sup> Lord Norton of Louth, 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' in Alex Brazier (ed), *Parliament, Politics and Law Making* (2004) 5

<sup>26</sup> The Hon Murray Gleeson AC, 'The meaning of legislation: Context, purpose and respect for fundamental rights' (2009) 20 *Public Law Review* 26, 35

binding on [the private citizen] an enforceable by the executive power of the state'.<sup>27</sup> In *Evans v New South Wales*, the Full Federal Court stated:<sup>28</sup>

*Whatever debate there may be about particular rights there is little scope, even in contemporary society, that disputing that personal liberty, including freedom of speech, is regarded as fundamental subject to reasonable regulation for the purposes of an ordered society. The freedoms associated with personal liberty are not residual, ie what is left beyond the boundaries of legal regulation.*

At the 2007 Australia – New Zealand Scrutiny of Legislation conference, Mr Stephen Argument suggested that:<sup>29</sup>

*[A] large part of what legislative scrutiny committees do is to safeguard human rights and to manage the relationship between governments and their citizens, insofar as those rights and relationships are expressed through and affected by legislation.*

It was suggested that this is the case irrespective of the existence of human rights legislation or a charter.

In Queensland, where the scrutiny committee has responsibility to examine the application of fundamental legislative principles to legislation, the committee has a role in informing the Parliament about rights and liberties issues raised by bills and subordinate legislation. If Parliament's legislative function is seen as to consent to measures becoming law, the work of the scrutiny committee and the committee's accountability to the diversity of Queenslanders is vital. The consent of the Parliament conferred on behalf of the wider community regarding legislation creates law that will bind everyone.<sup>30</sup> Therefore, examination of legislation by scrutiny committees should enable the diversity of voices to be heard in the committee room and by those in the main chambers of parliament.

As noted by Halligan, Miller and Power in *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles*, some bills attract a high level of public interest. In 1996, for example, a Senate inquiry into the Euthanasia Laws Bill 1996 (Cth) attracted 12 577 submissions.<sup>31</sup> Public deliberation may increase in respect of these bills: from the public perspective because people want to have a say; and from the parliamentary committee perspective to ensure that parliamentary debate is informed by all relevant views. Again, structured and efficient committee processes are necessary to collate and examine the wealth of information and views that may be provided.

In the first decade of the 21<sup>st</sup> century, the Queensland Parliament has enacted a number of bills addressing matters which attract a high level of public interest; for example, the *Wild Rivers Act 2005* (Qld) and *Water Fluoridation Act 2008* (Qld).

### Public expectations

Recent events demonstrate that we live in rapidly changing communities linked to a dynamic world economy. One characteristic of contemporary communities in advanced democracies is a lower level of public confidence in traditional political institutions than in the past.<sup>32</sup> In 2006 the Hansard Society, for example, analysed the complex contemporary relationship between British citizens and their state in the following way:<sup>33</sup>

*[P]eople now approach politics and political institutions differently from how they once did. The way in which people participate in the democratic process has changed: many tend not to vote, as they see the commitments and actions of political institutions and politicians as divorced from the issues which affect them in their lives. Instead they sign petitions, attend meetings, boycott products, and hold demonstrations: political actions which are real, visible and born out of genuine political commitment, but which circumvent traditional mechanisms and*

<sup>27</sup> *Fothergill v Monarch Airlines* [1981] AC 251, 279 per Lord Diplock. See, for example, *Evans v New South Wales* [2008] FCAFC 130 and *Haneef* (2007) 163 FCR 414.

<sup>28</sup> *Evans v New South Wales* [2008] FCAFC 130 at [72].

<sup>29</sup> Stephen Argument, 'Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher' (2007) October *The Loophole* 66, 74

<sup>30</sup> Lord Norton of Louth, 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' in Alex Brazier (ed), *Parliament, Politics and Law Making* (2004) 5

<sup>31</sup> John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (2007) 174

<sup>32</sup> Nevil Johnson, 'What of Parliament's Future?' in Phillip Giddings (ed), *The Future of Parliament: Issues for a New Century* (2005) 20

<sup>33</sup> Declan McHugh and Phillip Parvin, *Neglecting Democracy* (2006), 10-11. It was published originally in 2005.

structures... *The problem is not widespread political apathy, but rather that a vital link that connected citizens to the state and the formal democratic process has been broken.*

To varying degrees, the conditions described by the Hansard Society face most parliamentary democracies in advanced countries. Citizens have become little more than occasional spectators of the workings of democratic institutions. They look beyond traditional mechanisms to have a say about matters affecting their rights or the exercise of public power. People communicate, share information and take action by way of immediate and interactive on-line and sms communities. The research demonstrates that younger people in particular have an expectation that if people want to hear their views, it is necessary to come to the young people's spaces.<sup>34</sup> An extreme illustration is provided by post-election dissent in Iran in June 2009, where political discussion and action has been facilitated by Facebook and Twitter.

Contemporary understandings and expectations regarding communication are challenging for parliamentary committees which, traditionally, have engaged with people by way of written reports, with a small number of witnesses invited to give evidence at public hearings.

## Navigating beyond the limits of the roadmap

In practical terms, all major Fitzgerald reforms regarding parliamentary scrutiny of legislation have been implemented. We have reached the limits of the roadmap. However, review of the principles underlying the Fitzgerald proposals indicates a way forward. And, as happened twenty years ago, Queensland can continue to learn from innovative yet workable practices developed elsewhere.

### ***Parliament is meant to be the forum in which the necessity and worth of proposed laws ... can be debated***

In a recent article the Chair of the National Human Rights Consultation considered 'the shaping of law, public policy and conversation in the public square'. Fr Frank Brennan SJ referred to President George Washington's Letter to the Quakers in 1789:<sup>35</sup>

*I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.*

Given present conditions, including those identified above, the 21<sup>st</sup> century brings new levels of complexity. However, as suggested by Washington, parliamentary democracy has always been more complex than giving effect to the will of whatever majority enjoys parliamentary power at a given time.<sup>36</sup> As described in *Evans v NSW*, parliament is the forum which determines reasonable regulation for the purposes of an ordered society. The parliament must, therefore, be clear about the effect of the legislative measures to which it is giving its consent on behalf of the community. The courts approach this 'working hypothesis of a liberal democracy' – the principle of legality – as a rule of statutory construction. In *Evans v NSW*, the Full Federal Court referred to the following description of the principle in the judgment of Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*:<sup>37</sup>

*The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.*

For parliamentary scrutiny of legislation committees this means that information provided to parliament regarding proposed legislation should assist the parliament to 'squarely confront what it is doing' when conferring assent upon legislation.

<sup>34</sup> Legal, Constitutional and Administrative Review Committee, *Voices & Votes: A Parliamentary Committee Inquiry into Young People Engaging in Democracy* (2006) 102-6

<sup>35</sup> Frank Brennan, 'Religion, Conscience and the Law' (2009) 53 (5) *Quadrant* 28, 29

<sup>36</sup> The Hon Murray Gleeson AC, 'The meaning of legislation: Context, purpose and respect for fundamental rights' (2009) 20 *Public Law Review* 26, 36

<sup>37</sup> At [72], *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

***If Parliament is to perform this vital role, procedures... to obtain and analyse information are essential; elsewhere all-party policy and investigative committees ... serve as Parliament's research arm and as an independent source of information to aid proper parliamentary debate***

In Queensland, we have had all-party committees since 1995. With the restructuring of the committee system in 2009, we have moved closer to the Fitzgerald vision of policy and investigative committees. Arguably, there is some scope for development if Queensland's committee system is compared with the far more comprehensive 'policy and investigative' system in place in New Zealand, also a unicameral parliament.

In terms of the scrutiny of legislation, there are opportunities to reconsider the process of making the law and, in particular, the engagement of Queensland people in the process. It is noted for example that, although the enactment of the *Right to Information Act 2009* (Qld) followed a lengthy independent review process including the publication of draft legislation, the same review process had been undertaken by EARC and PCEAR regarding the *Freedom of Information Act 1992* (Qld). Moreover, it may be argued that exposure drafts of legislation in Queensland are less common now than in the early 1990s when they were prepared regularly by EARC.

Regarding subordinate legislation, the experience of the scrutiny of legislation committee is that, beyond the statutory instrument, limited information is provided to the people of Queensland or the Parliament regarding consistency with fundamental legislative principles. The *Legislative Standards Act 1995* (Qld) requires explanatory notes be prepared for 'significant subordinate legislation' and that the notes outline public consultation undertaken. The tabling of explanatory notes therefore provides a rough estimation of the public consultation undertaken regarding subordinate legislation. In 2007, 181 instruments of subordinate legislation were made; fifteen of these were accompanied by explanatory notes. In 2008, the figures were 212 instruments and 15 explanatory notes. During these two years, the regulatory impact statement process was undertaken regarding approximately one in 30 instruments.<sup>38</sup> Accordingly, when subordinate legislation is made, generally the only document tabled in the Parliament is the instrument itself.

Considering the future of the Parliament of the United Kingdom and, in particular, the issues for a new century, Emeritus Fellow, Nuffield College, Oxford, Nevil Johnson acknowledged procedural reform may have reached its limits in the UK. He suggested the new century required a new approach:<sup>39</sup>

*Instead the challenge must be to think very hard about what Parliament can do, and what it cannot do, in present conditions. This means standing back from the preoccupations of politicians and officials who work the system as it is in order to focus instead on ways of embodying the underlying commitment to democratic government by consent in practices that society at large might understand and recognise as meeting some of its political needs.*

Innovative and workable initiatives in use elsewhere that might meet some of the needs of the people of Queensland include greater pre-legislative scrutiny of bills. This practice has been implemented by the UK Parliament. Similarly, on 18 May 2009, the Australian Parliament's then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs released an exposure draft of legislation on prescribed private funds. Comments were invited by 29 May 2009.<sup>40</sup> The UK experience is that increased use of pre-legislative scrutiny has led to more streamlined scrutiny once a bill is introduced into the Parliament.<sup>41</sup>

More innovatively, the scrutiny of legislation committee could trial 'wikis for draft legislation' along the lines of the model developed by the Centre for Democracy & Technology (CDT). It is aiming to encourage public participation in the drafting of legislation via an interactive, online experiment. Within this framework, the CDT's e-Privacy Act Amendment wiki allows anyone to read any part of the bill, change the language, provide feedback or simply open a discussion on any provision of the bill. CDT will then edit and moderate this process. If appropriate, CDT will incorporate suggestions in the final bill before submission to Congress.<sup>42</sup>

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<sup>38</sup> Figures are based on statistics compiled by the Scrutiny of Legislation Committee's secretariat.

<sup>39</sup> Nevil Johnson, 'What of Parliament's Future?' in Phillip Giddings (ed), *The Future of Parliament: Issues for a New Century* (2005) 19-20

<sup>40</sup> See: [www.treasury.gov.au](http://www.treasury.gov.au).

<sup>41</sup> Lord Norton of Louth, 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' in Alex Brazier (ed), *Parliament, Politics and Law Making* (2004) 7-9

<sup>42</sup> See: [www.ictparliament.org/index.php/recent-news/405-wikis-for-draft-legislation](http://www.ictparliament.org/index.php/recent-news/405-wikis-for-draft-legislation).

### ***Committees ... a vital and energetic part of giving effect to the democratic process particularly in respect of complex issues***

If legislative scrutiny committees provide opportunities for public deliberation about the impact of legislation on rights and the relationship between government and citizen, they will help make better law.<sup>43</sup> Committees have experience of being well-placed to consult, hold public hearings and to publish reports. Between 1997 and 1999, for example, nearly 2000 witnesses attended inquiries relating to bills conducted by Senate legislation committees; between 2000 and 2004, a further 2643 witnesses attended.<sup>44</sup>

The Queensland Parliament's Scrutiny of Legislation Committee sends a newsletter to its 'email subscribers' at the end of each sitting week advising of the bills to be examined in the forthcoming *Legislation Alert*. Information is provided regarding how to make a submission as well as a suggestion that views about a bill may be sent to any of the 89 members of the Legislative Assembly. The committee last held a public hearing regarding a bill in 1996.<sup>45</sup> In respect of subordinate legislation, the committee of the previous Parliament tabled a number of reports on subordinate legislation providing Parliament with information about matters the subject of public deliberation.<sup>46</sup> More generally, the Queensland Parliament's committee office has a community engagement toolkit, designed to be used internally to provide ideas and inspiration and as a record of committee experiences. In addition, the committee receives significant assistance from the Queensland Parliament's community engagement unit.

Argument suggests that scrutiny committees should do more to make the public aware of their role in respect of managing relationships between government and citizens: in doing so, scrutiny committees will help citizens understand their place in society and their relationship with government.<sup>47</sup> A simple approach, for example, is along the lines of the House of Representatives public seminar to be presented on Wednesday regarding committees.

However, public engagement of a more deliberative nature raises the challenge identified above: contemporary public expectations regarding communications with parliamentary committees. The expectation, Professor Stephen Coleman has suggested, is for two-way accountability, a creative and exciting use of new technologies of interactivity and the nurturing of genuine respect between 'players' and 'non-players'.<sup>48</sup>

Dr Lesley Clark MP, former Chair of PCEAR and then Chair of the Legal, Constitutional and Administrative Review Committee, advised the ASPG in 2006 that Queensland needs:<sup>49</sup>

*... a revitalisation of democracy, surely our most important task now, [which] requires a change in emphasis on the part of the parliament with priority being given to engaging with the community in a way that enables it to have a real influence.*

The Democratic Audit of Australia adopts as one of its four performance standards 'structures for public deliberation'. In respect of parliamentary performance, this standard relates to 'parliament's ability to model (or at least set an example for) political deliberation and to strengthen wider public deliberation'. Within the framework of the Democratic Audit, Professor John Uhr indicates:<sup>50</sup>

*The core idea here is that parliaments are indeed talking shops and that they have responsibility for strengthening not simply their own institutional process but wider public processes of political deliberation. A nation's political culture cannot be governed and ruled solely from the parliamentary centre. But parliaments can*

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<sup>43</sup> D Oliver et al, 'Parliament's Role and the Modernisation Agenda' in Phillip Giddings (ed), *The Future of Parliament: Issues for a New Century* (2005) 119

<sup>44</sup> John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (2007) 174-5

<sup>45</sup> The hearing was regarding the Juvenile Justice Legislation Amendment Bill 1996 (Qld).

<sup>46</sup> See, eg: Scrutiny of Legislation Committee, report no 33, *Local Government Amendment Regulation (No.2 ) 2007* (2007); and Scrutiny of Legislation Committee, report no 36, *Legal Profession (Transitional) Amendment Regulation 2007* (2008).

<sup>47</sup> Stephen Argument, 'Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher' (2007) October *The Loophole* 66, 74

<sup>48</sup> Stephen Coleman, *A Tale of Two Houses: the House of Commons, the Big Brother House and the People at Home* (2003) 757-8

<sup>49</sup> L Clark MP, Parliamentary committees in Queensland: Retrospect and prospects 15 years on ASPG (2006) 5, available at: [www.parliament.qld.gov.au/aspq](http://www.parliament.qld.gov.au/aspq)

<sup>50</sup> J Uhr, *How democratic is parliament? A case study in auditing the performance of parliament* (2005) 30

*do much to support, encourage and facilitate sources of public deliberation such as public broadcasters and other opinion-forming media. Parliament can itself model best practices of public deliberation, drawing non-state actors and groups into its participative processes so as to reframe government discourse into a more open and democratic shape.*

In respect of the Australian Parliament, for example, Professor Ian Marsh has suggested that Parliament 'provides the only setting where the scope for political consensus can be explored' and, in order to bridge the widening representation gap between the formal political system and the Australian community, it must facilitate a 'contemplative phase' in public debate.<sup>51</sup>

Processes adopted in the UK and New Zealand Parliaments provide possibilities. There, committees examining legislation commonly adopt a two-stage process of receiving written evidence and then, where appropriate, receiving oral evidence. This process is used also by committees in some Australian jurisdictions.

Benefits of adopting more deliberative procedures regarding legislative scrutiny could include:<sup>52</sup>

- improved understanding of the members of the committee of the bill by allowing a more deliberative stage with input from relevant (and competing) stakeholders;
- greater engagement with the public; and
- change in the way committees operate.

The latter benefit is described in the following way by Dr Phil Larkin:<sup>53</sup>

*It was hoped that the evidence stage would actually change the way committees operate. In place of the adversarialism and, ultimately, the executive dominance, of the standing committee system, it was hoped that this evidence-taking stage would create a different culture: 'Evidence-gathering is also, by its nature, a more consensual and collective activity rather than debate'. This is perhaps a contentious claim but the then-Leader of the House, and chair of the Modernisation Committee, modified it a little in debate: 'If consensus cannot be achieved, the process [of evidence taking] will highlight areas of division, which is an important part of the political dynamic'.*

## Conclusion

Twenty years ago in Queensland, Fitzgerald understood that 'democracy is more complex than giving effect to the will of whatever majority enjoys parliamentary power at a given time'. In the 21<sup>st</sup> century, with changed public expectations of legislatures, the Fitzgerald road map for accountability continues to provide direction, including in respect to the scrutiny of legislation. Queensland can continue to learn from innovative yet workable practices developed elsewhere, in particular 'to focus ... on ways of embodying the underlying commitment to democratic government by consent in practices that society at large might understand and recognise as meeting some of its political needs'. Scrutiny and accountability of government legislative activity would be more effective as a consequence.

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<sup>51</sup> Ian Marsh, *Australia's Representation Gap: A Role for Parliamentary Committees?* (2004) 5

<sup>52</sup> Phil Larkin, *The House of Representatives Committee System: The Changing Committee System of the British Parliament* (2008) 104, available at: [www.aph.gov.au/house/committee/20\\_anniversary](http://www.aph.gov.au/house/committee/20_anniversary)

<sup>53</sup> Phil Larkin, *The House of Representatives Committee System: The Changing Committee System of the British Parliament* (2008) 104, available at: [www.aph.gov.au/house/committee/20\\_anniversary](http://www.aph.gov.au/house/committee/20_anniversary)