Submission to Health and Environment Committee on Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2020

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School of Law and Justice

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Contact details

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Committee Secretary
Health and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Committee Secretary

Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2020

Thank you for the opportunity to provide a submission to the Health and Environment Committee's inquiry into the Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2020 (Qld), and for the extended time in which to make a submission.

This submission does not address particular provisions of the Amendment Bill. It outlines, for the committee's consideration, emerging legal theory about the juridical concept of human dignity as relevant to the exercise of legislative power. There are two implications: the need for a democratic procedure for the making of legislation; and a system of enacted law "adequate to the human dignity of the free and equal persons subject to it."[1]

Human dignity and public authority

When the subject matter of an exercise of legislative authority is health, Article 3 of the World Health Organisation's International Health Regulations (IHR) 2005 prescribes the implementation of health measures "with full respect for the dignity, human rights and fundamental freedoms of persons". The IHR 2005 is a global legal instrument directed to the prevention and control of the international spread of disease. It entered into force in June 2007 and has been given effect in Australia.[2]

Prescription in the IHR 2005 of human dignity as a shared value is consistent with modern constitutional practice. Currently, more than 150 nations refer to human dignity in their

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1 Jacob Weinrib *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press 2016) 15; Jeremy Waldron "Human Dignity—A Pervasive Value" (2019) New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper No. 19-51, 1.

2 *National Health Security Act 2007* (Cth); *Biosecurity Act 2015* (Cth); Belinda Bennett, Terry Carney and Richard Bailey "Emergency Powers and Pandemics: Federalism and Management of Public Health Emergencies in Australia" (2012) 31 UTLR 37; David J Carter "The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis" (2020) 43 UNSWLJ 117.

constitutional documents or public institutional arrangements.[3] Dignity has emerged as "the organising idea of a groundbreaking paradigm in public law", and "the significance of human dignity cannot be overstated."[4] In Queensland, although the *Constitution of Queensland 2001* does not refer explicitly to human dignity, it is a value invoked in the *Human Rights Act 2019* (Qld),[5] and in other legislation as an agreed standard or shared public good, such as in two provisions of the *Public Health Act 2005* (Qld).[6] Further, the implications of human dignity for a modern constitutional state are arguably inherent in the "fundamental legislative principles" set out in section 4 of the *Legislative Standards Act 1992* (Qld).

Dignitarian constitutional practice is informed by an emerging body of theory in which human dignity is understood as the right of each person to equal freedom.[7] Jacob Weinrib, in *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*, explains that "As free, each person has the right to determine the purposes that he or she will pursue. As equal, each person has a duty to pursue his or her purposes in a manner that respects the right of others to freedom."[8] Human dignity, Weinrib says, has been introduced "to make the exercise of public authority accountable to the human dignity of all who are subject to it", thus creating, sustaining and refining "a legal order in which the human dignity of each person forms a justiciable constraint on the exercise of all public authority".[9] It is important to note, however, that "lawyers did not invent such a major shift in political thinking. The people did that."[10] Weinrib further explains that as an agreed standard human dignity "requires the adoption of a democratic mode of lawgiving and a system of positive law that is adequate to the human dignity of the free and equal persons subject to it."[11]

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3 Waldron "Human Dignity—A Pervasive Value" (n 1) 2-3.

4 Weinrib *Dimensions of Dignity* (n 1) 1-2; Arthur Chaskalson "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *South African Journal on Human Rights* 196.

5 The Statement of Compatibility for the Amendment Bill addresses "the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom."

6 *Public Health Act 2005*, ss157Z, 157ZA.

7 Weinrib *Dimensions of Dignity* (n 1) 3; Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press 2013).

8 Weinrib *Dimensions of Dignity* (n 1) 7.

9 ibid 3; Waldron "Human Dignity—A Pervasive Value" (n 1) 1: human dignity is "an integrating idea across the whole range of constitutional considerations—structures as well as rights, empowerment as well as constraint."; Conor Gearty "Socio-Economic Right, Basic Needs, and Human Dignity: A Perspective from Law's Front Line" in McCrudden (ed) *Understanding Human Dignity* (n 7) 155-71.

10 "Preface by the Rt Hon the Baroness Hale of Richmond" in McCrudden (ed) *Understanding Human Dignity* (n 7) xvi.

11 Weinrib *Dimensions of Dignity* (n 1) 15.

Two implications for legislative authority

Human dignity's implications for exercises of legislative authority are consistent with principles of legislation developed over centuries, as explained by John Stuart Mill in 1871 in evidence to a Royal Commission examining the United Kingdom's *Contagious Diseases Acts*.[12] One paragraph from Mill's *Considerations on Representative Government* (regarded by Jeremy Waldron as "the most important book on democracy in our tradition")[13] is of direct relevance to human dignity and exercises of legislative power:[14]

… it is a personal injustice to withhold from anyone … the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth…. Every one is degraded … when other people … take upon themselves unlimited power to regulate his destiny…. Every one has a right to feel insulted by being made a nobody, and stamped as of no account.

Regarding, first, the need for a democratic mode of law giving, the essential, relevant principles in Australian jurisdictions are not often stated. They are that: law is made by the legislature;[15] the legislature may delegate legislative power but may not abdicate it;[16] and courts are vigilant to ensure powers delegated by the legislature are both validly exercised, and consistent with

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12 FB Smith "Ethics and Disease in the Late Nineteenth Century: The Contagious Diseases Acts" (1971) 15 *Historical Studies* 118–35; Jeremy Waldron "Mill on Liberty and on the Contagious Diseases Acts" in N Urbinati and A Zakaras (eds) *JS Mill's Political Thought: A Bicentennial Reassessment* (Cambridge University Press 2007) 11-42.

13 Jeremy Waldron *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 20.

14 John Stuart Mill "Considerations on Representative Government" in John Stuart Mill *On Liberty and Other Essays* (Oxford University Press 1998) 329, 335.

15 Cheryl Saunders "Papers on Parliament no. 66, Australian Democracy and Executive Law-making: Practice and Principle (Part II)" available at: www.aph.gov.au. Saunders states: "One of the most basic of all constitutional principles is that law is made by parliament. It is so basic that it is simply assumed, by the Australian and most other constitutions. At one level, the principle can be understood in symbolic terms. The power of the state to change the rules by which the whole community is bound is extraordinary, even though we take it for granted. As the only elected institution in the Australian system of government, parliament is the only body with sufficient legitimacy to exercise a power of this kind. If democracy is viewed in procedural terms, it is parliament that embodies the promise of democratic process, through which decisions are made to which all Australians can submit, whether they approve of the incumbent government or particular decisions or not.".

The *Queensland Legislation Handbook* available at Queensland Legislation Handbook - Department of the Premier and Cabinet (premiers.qld.gov.au) states at [1.1]: "In Australia, only a Parliament may make legislation or authorise the making of legislation."

16 Gerard Carney *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press 2006) (4.4); Denis Pearce and Stephen Argument *Delegated Legislation in Australia* (LexisNexis 5th ed 2017); *Stephens v WA Newspapers* [1994] HCA 45; 182 CLR 211; 124 ALR 80 (Mason CJ; Toohey, Gaudron, Brennan JJ).

constitutions and other statutes.[17] In a lecture presented to an Australian Parliament lecture series, Cheryl Saunders said that, "The requirement for law to be made by parliament, with all that flows from it, exists for the benefit of the people who will be subject to the law and from whom the authority to make new law derives. Without such a requirement, the rationales for respect for law fail."[18] In a discussion paper for a review of Part 7 of the *Statutory Instruments Act 1992* (Qld) (not currently available on the Queensland Parliament's website), the former Scrutiny of Legislation Committee referred to a High Court judgment in *Pfeiffer v Stevens*:[19]

In Australia, a legislature may delegate the process of lawmaking. Legislatures regularly do so to Ministers, officers in the Executive Government, judges and local government bodies. However, an assumption of the Constitution is that those who are bound by such delegated laws must be able to know, or readily to discover, the extent of their obligations. This requirement is specially relevant when a law imposes penal sanctions….

Subject to the federal Constitution, the State Constitution and any other applicable law, a State Parliament may permit a law of a State to be made, or its life extended, by delegation. But such are the presuppositions of the Constitution that the courts are vigilant for any democratic deficit.

In Queensland, these legislative principles are replicated in the Constitution and in statute law including in the *Parliament of Queensland Act 2001* (Qld), *Legislative Standards Act* and *Statutory Instruments Act*.[20] Under the principles and statute law, the legislature retains control and oversight of exercises of legislative power, even where a delegation of power is exercised to make a "statutory instrument" rather than "subordinate legislation".[21]

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17 *McEldowney v Ford* [1969] 2 All ER 1039 (Diplock LJ); *Swan Hill v Bradbury* (1937) 56 CLR 746 (Dixon J); *State of Queensland v Maryrorough Solar Pty Ltd* [2019] QCA 129; *Brett Cattle Company v Minister for Agriculture* [2020] FCA 732.

18 Cheryl Saunders "Papers on Parliament" (n 15): "In both composition and mode of operation, parliament is designed as the appropriate institution to carry out the high task of law-making. It comprises competing voices, representing diverse community views. It meets in public, requiring new laws to publically be justified in advance. The public proceedings of parliament also enable voters to hold their representatives to account for the stance that they take on particular decisions. Relative care is devoting to the drafting of laws made by the parliament, which are published in forms that are relatively accessible."

19 *Pfeiffer v Stevens* [2001] HCA 71; 209 CLR 57 [114], [119] (Kirby J, diss).

20 Section 4 of the *Legislative Standards Act* identifies that fundamental legislative principles require "legislation has sufficient regard to—(a) rights and liberties of individuals; and (b) the institution of Parliament". The Explanatory Notes to the Amending Bill do not address (b).

21 See *Statutory Instruments Act*, Parts 4 and 6. These matters have received some consideration in other jurisdictions: Julinda Beqiraj, Jean-Pierre Gauci, Nyasha Weinberg "The Rule of Law in Times of Health Crises" available at https://binghamcentre.biicl.org/publications/the-rule-of-law-in-times-of-health-crises; Senate Standing Committee for the Scrutiny of Delegated Legislation "Interim report: Exemption of delegated legislation from parliamentary oversight", 2 December 2020, available at Interim report – Parliament of Australia (aph.gov.au)

Regarding, second, a system of positive law (the body of legislation within a jurisdiction) adequate to the human dignity of the free and equal persons subject to it, a key principle stated by Charles Taylor is that in exercising public authority a state must remain neutral as between citizens and values.[22] Taylor identifies two questions: *What is really going on here? What type of society do we wish to have?* Legislation, Taylor explains, is never just about one thing as more than one shared good is sought in a modern political community;[23] for example, the IHR 2005 prescribes the implementation of health measures "with full respect for the dignity, human rights and fundamental freedoms of persons".

Conclusion

Early in the twenty-first century, Jeremy Waldron examined the evidence Mill gave to the Royal Commission on the *Contagious Diseases Acts*, identifying contemporary considerations regarding the exercise of legislative authority. Waldron's conclusions are founded in his substantial dignitarian literature.[24] They are: the unequal distribution of liberty should always be a concern even in apparently respectable legislative campaigns; and where legislation does not create equal freedom for all, it "deserves the closest scrutiny".[25]

Yours sincerely

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22 Charles Taylor *Modern Social Imaginaries* (Duke University Press, 2004) 170-1: "The modern imaginary contains a whole gamut of forms in complex interaction and potential mutual transition."; Charles Taylor "The Meaning of Secularism" (2010) *The Hedgehog Review* 23, 29; Charles Taylor "Why We Need a Radical Redefinition of Secularism" in Eduardo Mendieta and Jonathan Vanantwerpen (eds) *The Power of Religion in the Public Sphere: Judith Butler, Jürgen Habermas, Charles Taylor and Cornel West* (Columbia University Press, 2011) 35, 36;

23 Ibid. Plurality is identified by Hannah Arendt as the fact of politics: Hannah Arendt *On Revolution* (Penguin 1963) 175.

24 See, for example, Jeremy Waldron *The Dignity of Legislation* (Cambridge University Press 1999); Jeremy Waldron *Law and Disagreement* (Oxford University Press 1999); Jeremy Waldron *The Rule of Law and the Measure of Property* (Cambridge University Press 2012); Jeremy Waldron *Dignity, Rank, & Rights* (Oxford University Press 2015); Jeremy Waldron *One Another's Equals: The Basis of Human Equality* (Belknap Press 2017).

25 As for the *Contagious Diseases Acts*, Andrew Burrows argues that this should include post-legislative scrutiny: Andrew Burrows *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press 2018) 123-6.