Submission to the Legal Affairs and Community Safety Committee re the Human Rights Inquiry

By Professor James Allan

This submission relates to this committee's terms of reference, the main one of which is to inquire into whether it is appropriate and desirable to legislate for a statutory bill of rights (which is being labelled as a Human Rights Act using the British terminology).

My submission is that it is plainly not appropriate, for both substantive and procedural reasons. Let me begin with the latter. I have gone back and checked and before the last election there was nothing in the Labor Party's 2014 platform or manifesto about a bill of rights of any sort. Nothing. Certainly no voter was alerted upfront before casting his or her vote that this was a party platform before the last election in 2015. Rather this was the result of post-election (so after the voters had had their say) negotiations with Mr. Wellington. It then magically appeared in Labor's 2015 state platform.

Regardless of one's view on the substantive merits of this potential move – and mine is that it is a very bad idea for basic democratic reasons to hand power to unelected judges to make a host of calls, including over what are 'reasonable' legislative responses – the way this is being done is illegitimate. By way of comparison, consider the desired move to four year terms and set election dates. I was opposed to this. But after the event I can scarcely complain. People were notified. Everyone counted the same. We all got a say. My view did not prevail.

This present process looks nothing like that. No notice was given before the election. Now there is a committee process that will receive from the public the whole gamut of opinions ranging from A almost to B. Put differently, this process is almost perfectly designed *not* to receive the public's views on whether to enact a statutory bill of rights but rather simply the views of a very small coterie of groups with what disinterested observers would consider to be a vested interest in the outcome. It comes close to being a sham process, which is why I thought long and hard about whether to make a submission. I have been conducting small little surveys of people around where I live and at the university and amongst some students of law at UQ and the general awareness of this committee process is next to zero. If the Labor Party now wishes to enact a statutory bill of rights then the legitimate thing to do, on just about any understanding of democracy, is to take it to an election, or to have a referendum. Surely four year terms are no more consequential or important in terms of how Queenslanders are governed than is the imposition of a bill of rights. The procedure that was good for the term-limit goose ought to be good, too, for the bill of rights gander.

So in procedural terms nothing about this present process is in my view appropriate. Or desirable. As I said, it looks like a way to retrospectively provide a veneer of legitimacy to what is in fact a foregone conclusion.

Now to the substance of the proposal. I will be brief, as I have written extensively on the issue of bills of rights (both entrenched and statutory versions) in academic peer review journals around the world and will simply

provide a list of a few of the more relevant of these in an appendix at the end of this submission.

The core problem with any bill of rights is how it enervates democracy. That, in fact, is the very point of these instruments. If you buy a bill of rights you are, in some form or other, simply buying the views of a coterie of unelected judges or committees of ex-lawyers. If these unelected judges had no greater say or input under a bill of rights than they do without one then for proponents there would be no point in enacting one. Yes, this 'greater input by unelected judges' aspect of a statutory bill of rights will be downplayed – at least before one is actually in place and operative. But that is the design and point of the instrument. Nor can this democratic concern be convincingly side-stepped by claiming that statutory bills of rights leave parliament just as sovereign as before its enactment. Consider the United Kingdom's Human Rights Act. The British judges operating their version of a statutory bill of rights (and the genealogy of these instruments flows from Canada's entrenched 1982 Charter of Rights through to New Zealand's 1990 statutory bill of rights which rejected the Canadian model but kept various provisions such as the Cdn. s.1/NZ s.5 abridging or 'reasonable limits' provision on to the UK's 1998 Human Rights Act which as far as the operative provisions go took much from NZ's model – but not the abridging provision – finally on to Victoria's Charter of Rights and Responsibilities which is a bizarre amalgam of the NZ and UK models) have become so powerful that Professor Aileen Kavanagh of Oxford University now thinks the top UK judges are as powerful as the top US judges in terms of getting their own way against the elected legislature. (See Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* Cambridge U. Press, 2009). Certainly the leading UK decision of *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (affirmed again and again since) that judges can ignore the clear

intentions of parliament and read words in to statutes, and out, is staggering to me, and breaches just about every aspect of the rule of law going. So to repeat, the judges of the UK operating a statutory bill of rights are seen as just as powerful vis-à-vis the elected legislature as the US judges operating an entrenched model. This is not something to which the George Williams and various human rights centres of the world like to draw attention.

At this point those downplaying the potency of statutory bills of rights attempt to distinguish the UK model due to various factors such the EU and the European Convention. Better to consider New Zealand's bill of rights they say. Fine. And it is true that the New Zealand judges have not become as powerful as the UK judges. But that it is to say they have not reached the heady heights of US and Canadian judges. The Kiwi top judges are still far more powerful than they were before the enactment of their 1990 statutory bill of rights. Again, to repeat myself, if these bill of rights instruments made no difference to judicial power and effected no alterations to the relative powers of parliament and the judiciary, it is wholly unclear why proponents would be investing so much time and efforts in having them enacted. But for an attack on the New Zealand bill of rights from very much a left of centre political perspective see Professor John Smillie's 'Who Wants Juristocracy?' (2006) 11 *Otago Law Review* 183. Professor Smillie catalogues how this statutory bill of rights is undemocratic; how it leaves society-wide decisions with an institutionally suboptimal judiciary; how it encourages judicial activism (for instance, in New Zealand, see *Taylor v AG* [2015] NZHC 1706 for a recent example or *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 for quite a stunning case of activism soon after enactment of this statutory bill of rights); how such bills of rights cost significant amounts of money that could be spent elsewhere and deliver little save to lawyers, judges, criminals, and some articulate, well-

educated members of the professional class (pp. 187-189 of Smillie's article). Professor Smillie also notes how the New Zealand Bill of Rights Act had resulted in 'the courts' intrusion into controversial political issues [thus bringing] the judges into conflict with the politicians' (p. 186 Smillie, and in fn. 16 on that same page Smillie refers to 'the sharp public debate between Chief Justice, Dame Sian Elias , and the Deputy Prime Minister [from the Labour Party, I note] Dr Michael Cullen, concerning the foundation and status of the doctrine of parliamentary sovereignty'.

So much for claims about how statutory bills of rights are impotent and leave unaffected the powers of the elected legislature. Or claims that over in New Zealand the statutory bill of rights has not diminished parliamentary sovereignty. Such claims are, in my view, bunk.

I will not here run through all of the problems with Victoria's statutory bill of rights as my 2006 *Melbourne University Law Review* article listed in the appendix below does that and I stand by all my claims there. Let me just note here that there is a significant problem with Victorian-style s.7 (or NZ s. 5) abridging or 'reasonable limits' provisions in the context of any statutory bill of rights which also contains a 'reading down' (or 'do anything you judges can to give this other statute what you consider to be a rights-respecting reading') provision. The problem of how to reconcile the two provisions has haunted the NZ judges. (See *R v Hansen* [2007] 3 NZLR 1 and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 and *Ministry of Transport v Noort* [1992] 3 NZLR 260.) The same is true in this country as this issue was one of the fundamental ones in the leading HCA case of *Momcilovic v The Queen* (2011) 245 CLR 1. And even after that case it is difficult to know where things

stand. And that is without mentioning the potential Separation of Powers problems.

Let me conclude by saying this is a terrible substantive idea. It is also being pursued in a highly suspect way in procedural terms. I submit that it is inappropriate in both senses, though I concede that it will give me something to do in the near future in terms of doing what I can to point out its flaws in the newspapers and other media.

James Allan,

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Appendix – Selection of Author's Academic Publications re bills of rights

1. *Against statutory bills of rights as seen in New Zealand, the UK and Victoria*

"Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky" in (eds. T. Campbell, K. Ewing and A. Tomkins) The Legal Protection of Human Rights: Sceptical Essays (Oxford University Press, 2011), 108-126

"The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticisms" (2006) 30 Melbourne University Law Review No.3, 906-922

"Pusillanimous Parliamentarians" (2015) 30 Australian Parliamentary Review 155-163

"You Don't Always Get What You Pay For: No Bill of Rights for Australia" (2010) 24 New Zealand Universities Law Review 179-196

"Siren Songs and Myths in the Bill of Rights Debate" (2008) 49 Papers on Parliament 25- 40

"Interpreting Statutory Bills of Rights: The Deleterious Effects of 'Do The Right Thing' Thinking" in (ed. R. Bigwood) The Statute: Making and Meaning (LexisNexis, 2004), 285-298

"Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990", (2000) 9 Otago Law Review, No. 4, 613-632

2. *Against bills of rights generally*

"The Idea of Human Rights" (2013) 25 Bond Law Review 1-12

"The Three 'R's of Recent Australian Judicial Activism: Roach, Rowe and (no) 'Riginalism" (2012) 36 Melbourne University Law Review 743-782

"Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby" (2009) 33 Melbourne University Law Review 1032-1057

"Human Rights – Can We Afford to Leave Them to the Judges?" (2005) 16 Commonwealth Judicial Journal 4-10

"An Unashamed Majoritarian" (2004) 27 Dalhousie Law Journal, No. 2, 537-553

"A Modest Proposal", (2003) 23 Oxford Journal of Legal Studies, No. 2, 197-210

"A Defence of the Status Quo" in (eds. Campbell, Goldsworthy and Stone) Protecting Human Rights: Instruments and Institutions (Oxford University Press, 2003), 175-194

"Rights, Paternalism, Constitutions and Judges" in (eds. G. Huscroft and P. Rishworth) Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing, 2002), 29-46

"The Effect of a Statutory Bill of Rights Where Parliament is Sovereign: The Lesson from New Zealand" in (eds. Campbell, Ewing and Tomkins) Sceptical Essays on The Human Rights Act 1998 (Oxford University Press, 2001), 375-390

"Bills of Rights and Judicial Power — A Liberal's Quandary", (1996) 16 Oxford Journal of Legal Studies, 337-352