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17 April 2016

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

***Human Rights Inquiry***

I wish to provide the following general comments for the Committee's consideration during its inquiry into whether Queensland should have a Human Rights Act.

1. Essentially, the purpose of a "Bill of Rights" is to protect the citizenry from excessive and arbitrary interference and action from a government, its institutions and officials. As once pointed out by the renowned constitutional scholar A V Dicey, the citizens are the true political sovereigns of the state.[1] Therefore, a Bill of Rights functions as a check and balance on the power of the citizens' governing and representative institutions – notably the executive but also Parliament – from unduly limiting or infringing citizens' collective and individual rights and liberties.

2. A Bill of Rights can either establish the rights that are to be protected from excessive government action or give recognition to the pre-existing rights that are protected. Generally, rights protected under a Bill of Rights include the fundamental political, social, workplace, and personal rights which are necessary for the existence and maintenance of a democratic, cohesive and stable society.

3. Historically, a Bill of Rights such as exists in the United States was not deemed necessary in Australia since it was considered that Parliament and the common law would restrain the executive from infringing and unduly limiting individuals' basic rights and freedoms.[2]

4. The assumption that Parliament and the common law restrains executive government and its institutions from infringing and unduly limiting individuals' basic freedoms influenced the 1998 Legal, Administrative and Constitutional Review Committee (LCARC) of the Legislative Assembly to recommend that a bill of rights in any form should not be adopted in Queensland.[3]

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[1] Cited in Funnell, W., 2001, *Government by Fiat*, UNSW Ltd, Sydney, p. 2
The former Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly similarly recognised that the people of Queensland are "*the actual font of sovereign power in this State*" (LCARC Report No 31, October 2001, p. 7, <http://www.parliament.qld.gov.au/documents/committees/LJSC/2001/Report-31.pdf>). In addition, the High Court of Australia has recognised that ultimate sovereignty rests with the people: Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at para 17 per Deane and Toohey JJ; Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at para 37 per Mason CJ; Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 at para 13 per Deane J.

[2] Williams, G. 2007, *A Charter of Rights for Australia*, UNSW Press, Sydney, pp. 18, 53
It is noted that another, underlying reason for the Commonwealth Constitution not including equal protection and due process guarantees was because at the time of its drafting the Australian colonies wanted to retain their ability to limit the employment of Asian workers (see Williams, G. 2007, *A Charter of Rights for Australia*, UNSW Press, Sydney, p. 53 and French, R. 2010, *Protecting Human Rights Without a Bill of Rights*, John Marshall Law School, Chicago, pp. 3-4, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>).

[3] Legal, Constitutional and Administrative Review Committee, Queensland Legislative Assembly, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, Report No. 12, November 1998, <https://www.parliament.qld.gov.au/documents/committees/LJSC/1997/bill-of-rights/Report-12.pdf>

5. LCARC gave a number of reasons for its recommendation including that a range of mechanisms already exist for protecting rights (such as national and international agreements, Parliament and the common law), and that the proposal would see the inappropriate transfer of power from the Parliament to an unelected judiciary. LCARC advocated a program of community education about human rights. It also called for more consistent compliance by Government and its agencies with fundamental legislative principles (FLPs) under the *Legislative Standards Act 1992* in the development of legislation, policy-making generally, and in administrative decision-making. In accepting LCARC's recommendation the then Government stated that "… *The existing system of rights protection in Queensland, including constitutional rights, legislation, the common law, and the system of parliamentary democracy, provides effective protection for individuals' rights and freedoms*."[4]

6. It has now been 18 years since LCARC delivered its recommendations. At the time of LCARC's report, no Australian jurisdiction had introduced a human rights statute.[5] However, this situation has now changed with Human Rights legislation being enacted in the Australian Capital Territory and Victoria. While Queensland should not adopt a human rights statute simply because other Australian jurisdictions have done so,[6] the passage of time since 1998 makes it appropriate to consider whether the rationale followed by LCARC and the assumptions it made in recommending against a Bill of Rights continue to be relevant for Queensland's contemporary circumstances.

7. LCARC's view was that "… *The need for a Queensland Bill of Rights and what such a bill might contain if introduced also relies on an assessment of how well rights are protected under existing arrangements in Queensland*."[7] Using this statement as a touchstone, the following points may be made.

8. First, LCARC assumed that citizens' rights will of necessity be protected by Parliament. However, this assumption was always questionable given the impact of political party discipline in Parliament which has meant that it is restrained in performing such a role. Party discipline has an even more noticeable impact in unicameral parliamentary systems, such as in Queensland, where the executive is able to prevail over and control the Parliament. On this point the Clerk of the Queensland Parliament, in a recent submission to the Finance and Administration Committee of the Legislative Assembly, made the following observation:

   … *The ability for governments to remove their members from* [parliamentary] *committees, act as a powerful incentive to 'toe the party line' on committees. (For example, government appointed members of the Parliamentary Crime and Misconduct Committee were removed in 2013.)*[8]

   In recognition of the implications of Queensland's unicameral parliamentary system the Finance and Administration Committee, following its recommendation for a referendum to be held for

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[4] Government Response to LCARC Report No. 12, 1998, <https://www.parliament.qld.gov.au/documents/committees/LJSC/1997/bill-of-rights/gr-rpt12final.pdf>

[5] LCARC Report No. 12, November 1998, p. 17

[6] One of the benefits of federalism such as exists in Australia is that it "… *allows policies and services to be tailored to meet the needs of people and communities they directly affect. Differences in climate, geography, demography, culture, resources and industry across our nation mean that different approaches are needed to meet local needs. Federalism accommodates these differences and brings democracy closer to the people, allowing them to influence the decisions that affect them most.*" (Twomey, A. & Withers, G., 2007, p. 4, <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>). Another writer has observed, "*Federalism allows and encourages experimentation in political, social and economic matters. It is more conducive to rational progress because it enables the results of different approaches to be compared easily.*" (Walker, G. 2001,<http://www.onlineopinion.com.au/view.asp?article=1265>).

[7] LCARC Report No. 12, November 1998, p. 17

[8] Clerk of the Parliament, October 2015, submission number 43, p. 2, Finance and Administration Committee, Inquiry into whether Queensland should adopt fixed four-year parliamentary terms, <https://www.parliament.qld.gov.au/documents/committees/FAC/2015/I4-Intro4yearterms/submissions/043.pdf>

the State to adopt fixed four-year parliamentary terms, concluded that the parliamentary committee system needed to be strengthened to scrutinise the decisions and actions of the executive "… *to reinforce the role of parliament and democracy*."[9] Notably implicit in the recommendation for the strengthening of the parliamentary committee system was an acknowledgment that the current system is not strong enough; otherwise there would have been no need for it to be further strengthened.

From the public record it is noted that the current debate about whether Queensland needs a Human Rights Act originally arose from a range of concerns expressed during the term of the previous State Government.[10] Had the Parliament and executive of the time been subject to more effective check and balance mechanisms, including with respect to citizens' rights and liberties, it is possible that the particular adverse issues and incidents giving rise to such concerns would not have eventuated.

9. Second, while LCARC was confident that the common law would protect individuals' rights and liberties, it also recognised that "… *the protection of rights offered by the common law and by statutes are, in themselves, unsystematic and incomplete. Within the common law there is, for example, no right to such things as religious expression or to privacy … existing common law rights have been, and continue to be, provided in a piecemeal manner*…"[11] LCARC also conceded that the common law can be overridden by specific words to that effect in Acts of Parliament.[12]

10. Third, LCARC was confident that adherence by Government and its agencies to fundamental legislative principles (FLPs) as articulated under the *Legislative Standards Act 1992* would ensure that individuals' rights and liberties would be respected. Indeed, of Queensland's unicameral system LCARC specifically noted that "… *ensuring sufficient regard to FLPs is a positive, proactive way to encourage the preservation and enhancement of individuals' rights and freedoms, which is especially important given the unicameral nature of the Queensland Parliament.*"[13] LCARC also spoke about the role of the former Scrutiny of Legislation Committee whose task was to review proposed legislation for compliance with FLPs. LCARC noted how the Scrutiny of Legislation Committee could not "… *strike out a provision because it does not have 'sufficient regard to' the rights and liberties of individuals. This is ultimately a question for Parliament. However, the committee does appeal to Ministers to change their position on certain rights issues, and seeks to enhance debate in Parliament on issues regarding the rights and liberties of individuals*."[14]

While the former Scrutiny of Legislation Committee may have been able to persuade some Ministers to change their position on certain rights issues, the fact remains that FLPs are not absolute, are not enforceable, and only require that "sufficient regard" be given. Indeed, FLPs can be overridden if a legislative proposal is deemed to be in the "public interest",[15] itself a notoriously subjective concept.[16] In fact, LCARC also recognised that non-compliance with FLPs does not allow an individual to challenge executive action or legislation but did not consider that

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[9] Finance and Administration Committee, Queensland Legislative Assembly, *Inquiry into the introduction of four year terms for the Queensland Parliament*, Report No. 16, November 2015, p. 57

[10] For example:
<http://www.brisbanetimes.com.au/queensland/great-leap-backward-for-queensland-interstate-lawyers-slam-jarrod-bleijies-reforms-20140325-35gdg.html#ixzz31vjRvfTD>;
<http://www.brisbanetimes.com.au/queensland/queensland-needs-human-rights-bill-civil-libertatians-20150105-12icmd.html>;
<http://www.couriermail.com.au/news/queensland-state-election-2015/queensland-election-2015-peter-wellington-to-push-for-bill-of-rights/story-fnr8vuu5-1227215177692>;
<http://www.brisbanetimes.com.au/queensland/parliamentary-inquiry-in-to-human-rights-act-for-queensland-20150915-gjng8k.html>

[11] LCARC Report No. 12, November 1998, pp. 19, 26

[12] Ibid, p. 24

[13] Ibid, p. 66

[14] Ibid, p. 66

[15] See OQPC FLP Notebook, pp. 1, 9, 138, <https://www.legislation.qld.gov.au/Leg_Info/publications/FLPNotebook.pdf>

[16] Freiberg, A., 2010, *The Tools of Regulation*, The Federation Press, Sydney, pp. 6-7

legislation, once enacted, should be open to challenge because of such non-compliance.[17] In short, FLPs are not an adequate mechanism for ensuring the protection of citizens' fundamental rights and liberties.

11. Fourth, at the time LCARC made its recommendation against adoption of a Bill of Rights, Queensland had maximum three-year parliamentary terms. Maximum three-year terms were originally introduced in 1890 to enhance accountability and responsiveness of members of Parliament to their electors. When the undemocratic (unelected) Legislative Council was abolished in 1922, three-year terms were retained to ensure there was no danger to the interests of the people as a consequence of the adoption of unicameralism. The maximum three-year term arrangement was constitutionally entrenched in 1934 to ensure it could only be changed by a vote of the people at a referendum. Recently, Queensland voted to adopt fixed four-year parliamentary terms. While some of the arguments in favour of this move included that longer terms will reduce election costs, promote better policy making, provide more certainty for business, and bring the State into line with other Australian jurisdictions, one significant disadvantage is that a government which disregards citizens' rights and liberties will have longer to do so than under the former arrangement. It might be argued that such a government will still likely find itself despatched at the following election; however, even if this was to occur, the damage caused to communities and individuals by such a government remaining in office for an additional year could be considerable and outweigh any savings that may have been expected.

12. As mentioned earlier, LCARC's view was that "… *The need for a Queensland Bill of Rights and what such a bill might contain if introduced also relies on an assessment of how well rights are protected under existing arrangements in Queensland*."[18] The previous discussion has seen that LCARC's confidence in the ability of mechanisms such as Parliament and FLPs may have been unduly idealised given the reality and impact of Queensland's unicameral parliamentary arrangements and the fact that FLPs are not absolute and can be overridden in the "public interest". Therefore, it is legitimate to reconsider the question of whether Queensland needs to have a Bill of Rights (or a Human Rights Act) in light of contemporary circumstances and needs. As well, the latest constitutional development which will see Queensland adopting fixed four-year parliamentary terms while retaining its unicameral parliamentary status adds a further imperative for reconsidering this issue. An additional point is that any statute for the protection or recognition of fundamental citizen rights and liberties also needs to be granted special status. It should not be something to which "sufficient regard" only needs to be given (as is the case of FLPs) and it should not be able to be amended or repealed like an ordinary Act of Parliament.

13. However, in saying this, care would be needed to ensure any rights incorporated into or recognised under a Queensland "Bill of Rights" did not have any unintended adverse consequences. The importance in this regard is illustrated by the following example. The 1988 final report of the Constitutional Commission recommended that the Commonwealth Constitution be amended to include the traditional prohibition against double jeopardy. At that time the advances in DNA technology known today were not anticipated. However, science has progressed to the point where DNA technology can now be used to identify criminals even if they had been previously acquitted by the courts. As a result, a number of Australian States (South Australia, New South Wales, Queensland) have introduced legal reforms since 2002 to allow the retrial in certain situations of persons who have previously been acquitted where DNA evidence establishes the need for such action.[19] Such reforms would not have been possible had the recommendations of the 1988 Constitutional Commission been supported all the way through to

[17] LCARC Report No. 12, November 1998, pp. 64, 66
[18] Ibid, p. 17
[19] <http://www.autrefoisacquit.info/html/history.html#rvcarroll>

constitutional change. This example highlights the need to ensure that incorporation or recognition of any particular rights under a Bill of Rights or Human Rights Act would not have unintended, adverse future consequences.

I trust the above comments and observations will assist the Committee during its inquiry.

Yours sincerely

Don Willis