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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

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Dear Ms Watson

Human Rights Inquiry – Submission

I am writing in response to the invitation to make a written submission regarding the human rights inquiry currently being undertaken by the Legal Affairs and Community Safety Committee ("the Committee"). Thank you for the invitation.

This submission addresses the Committee's terms of reference in a general manner, focusing on paragraph 2 of the terms of reference. The submission is made in my capacity as a Professor of Law at the TC Beirne School of Law. I have had experience teaching *Public International Law* over many years. I have also taught *International Human Rights Law*, *Administrative Law* and legal theory at the University of Queensland and *International Human Rights Law* (in its application in times of armed conflict) at the Australian National University. The opinions I express in this submission do not necessarily represent the official position of the University of Queensland.

As my expertise is predominantly in the area of International Law, I will not make specific recommendations regarding the operation and the effectiveness of the human rights legislation in Victoria and the Australian Capital Territory ("ACT").[1] The Committee is able to derive expert guidance from those individuals and bodies with direct experience of the operation of the legislation in Victoria and the ACT. Unfortunately I do not have expertise in relation to the operation of the Victorian and ACT legislation.

Instead, my submission will focus on the broader question whether Queensland should enact general human rights legislation to supplement existing legislation that protects human rights. This submission incorporates parts of the submission I made in 2009 to the National Human Rights Consultation chaired by Father Frank Brennan. In my view the report of the committee that undertook the 2009 National Human Rights Consultation made a powerful case for human rights reforms. I am of the view that the recommendations of that committee have relevance *mutatis mutandis* to the position in Queensland. Indeed, the absence of an upper House of Parliament in Queensland makes the case for legislation reforms along the lines recommended by the 2009 National Human Rights Consultation report all the more persuasive.

[1] In this regard I wish to acknowledge the submission of my colleague, Associate Professor Peter Billings. I have had the benefit of reading an earlier draft of the submission prepared by Associate Professor Billings.

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This submission will address the following issues:

1. Australia's obligations under international law to respect and ensure respect for human rights to all persons under Australia's jurisdiction (including through the enactment and enforcement of laws in Queensland);
2. Traditional concerns regarding civil liberties, the rule of law and separation of powers and their relevance to the enactment of general legislation protecting and ensuring respect for human rights in Queensland;
3. Recent developments warranting greater vigilance in relation to human rights; and
4. Consideration of various arguments offered against statutory bills of rights.

1. Australia's obligations under international law to respect and ensure respect for human rights to all persons under Australia's jurisdiction (including through the enactment and enforcement of laws in Queensland)

Australia's international legal obligations to respect and ensure respect for human rights obligations derive principally from treaties to which Australia is party. Through the exercise of Australian sovereignty, the Executive branch of the Federal government has participated in negotiation of international human rights treaties and has then subsequently signed and ratified those treaties. As a party to those treaties, Australia has international legal obligations to implement those treaties in good faith.

Australia is party to all of the major global human rights treaties, of which 7 were focused upon in the 2009 National Human Rights Consultation report:

The International Covenant on Civil and Political Rights, 1966 ("ICCPR");
The International Covenant on Economic, Social and Cultural Rights, 1966;
The Convention on the Elimination of Racial Discrimination, 1965;
The Convention Against Torture, 1984;
The Convention on the Elimination of Discrimination Against Women, 1979;
The Convention on the Rights of the Child, 1989; and
The Convention on the Rights of Persons with Disabilities, 2006.

There are a number of other important treaties to which Australia is party (in addition to the protocols to the above treaties). Other important treaties include the Genocide Convention, 1948, the Refugee Convention, 1951 and Protocol, 1967, and various International Labour Organisation conventions (addressing issues such as freedom of association and the right to bargain collectively).

Australia has also supported important soft law international declarations, including the Universal Declaration of Human Rights, 1948 ("UDHR") and the Declaration on the Rights of Indigenous Peoples, 2007.

The 7 global treaties and the Declaration on the Rights of Indigenous Peoples formed the basis of the recommendations of the 2009 National Human Rights Consultation (although the committee's recommendations were quite different for civil and political rights compared to economic, social and cultural rights set out in those instruments).

The 7 global treaties set out obligations in general terms. The generality (and sometimes vagueness) of those terms is reduced to some extent by the interpretative rules that apply to all international treaties. These rules include having regard to the drafting history of the treaties. The international community was engaged in negotiations on the ICCPR essentially from when work on the UDHR concluded in 1948 up until the adoption of the text of the ICCPR by the United Nations General Assembly in 1966. Records of those negotiations are readily available.

Judicial and quasi judicial application of those standards is also relevant. Provisions of the ICCPR have been considered by the International Court of Justice and the Human Rights Committee. The jurisprudence of regional bodies interpreting cognate provisions of regional treaties is also relevant.

One of the reasons for this vagueness in the treaties is the diversity in legal systems globally. National implementation of those standards which involves more detailed provisions responsive to local legal traditions etc is therefore natural and common. For example, this is precisely the way in which the general non-discrimination standards in the international treaties have been translated into more specific anti-discrimination legislation in Australia and the United Kingdom.

Despite recommendations from bodies such as the Human Rights Committee (in 2000 and 2009 – this committee supervises State compliance with obligations under the ICCPR) that Australia constitutionally entrench its human rights obligations, there is no reason in principle why a comprehensive legal framework protecting human rights cannot be established by multiple pieces of ordinary legislation. Determining compliance with Australia's international obligations through the enactment and enforcement of multiple legislative instruments may be more complex but it may nonetheless be sufficient. The more important question is: are there gaps in the implementation of Australia's international human rights obligations? Australia has an international legal obligation to ensure that there are no gaps including, relevantly, in each Australian jurisdiction.

In terms of potential gaps, areas of concern include security/anti-terrorism measures (including surveillance measures); the rights of indigenous Australians; the rights of all persons in detention including the treatment of those seeking asylum in Australia who have arrived irregularly; and property rights.[2] In terms of what already exists under Australian law, it is important to acknowledge that Australia already has human rights or equivalent legislation in every jurisdiction of Australia.[3]

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[2] The UDHR and the Convention on the Rights of Persons with Disabilities both require the protection of property rights. Under the Federal Constitution, property rights receive protection but the same protection does not exist in other Australian jurisdictions. This raises the potential anomaly that foreign corporations may have greater property right protections under bilateral investment treaties and free trade agreements entered into by Australia than do natural persons who reside in Australia and whose property rights are affected by State legislation. In relation to property rights in Queensland it is perhaps worth emphasising that the 1959 *Constitution (Declaration of Rights) Bill* (Qld) included a "just terms" provision (section 14) in relation to property acquisitions by the State of Queensland. Section 13 of the Bill included rights regarding the liberty of subjects but the Bill otherwise provided much narrower human rights protection than that envisaged by the UDHR.

[3] Australia's human rights obligations under international law are currently implemented in Queensland through a range of laws:

(a) The right to life (see, for example, Article 6 of the ICCPR) – Killing an individual (and related acts) gives rise to criminal and civil liability in all jurisdictions in Australia;

(b) Prohibition of torture (ICCPR Article 7) – Queensland legislation now expressly criminalises torture;

(c) Slavery (ICCPR Article 8) – The Commonwealth criminal code criminalises slavery and sexual servitude;

(d) Non-discrimination on the grounds of gender, race or disability (Articles 2, 3, 24, 26 and 27) – there is now an extensive body of legislation at in all Australian jurisdictions proscribing different forms of discrimination;

(e) Detention (ICCPR Article 9) – Australian superior courts all have the power to issue the writ of habeas corpus to free a person from detention that is not legally authorised;

(f) Privacy (ICCPR Article 17) – there exists privacy legislation in all Australian jurisdictions;

(g) Expression (ICCPR Article 19) – the law of defamation involves Australian courts balancing expression with protection of reputation;

(h) The right to vote (ICCPR Article 25) – the franchise is protected by legislation in all Australian jurisdictions;

The enactment of general legislation, as recommended by the 2009 National Human Rights Consultation report, and as enacted by the Victorian and ACT legislatures, remains potentially important, however, in order to avoid gaps in human rights protection in respect of each of these areas of concern. This concern regarding the avoidance of gaps in human rights protection is as relevant to Queensland as it is relevant to all other Australian jurisdictions that do not currently have general human rights legislation.

2. Traditional concerns regarding civil liberties, the rule of law and separation of powers and their relevance to the enactment of general legislation protecting and ensuring respect for human rights in Queensland

The avoidance of arbitrary exercises of power animates the rule of law and the doctrine of separation of powers. Lord Acton, in his letter of 5 April 1887 to Mandell Creighton, the author of "History of the Papacy during the period of Reformation", expressed a traditional concern for civil liberties:

> "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against the holders of power. Power tends to corrupt, and absolute power corrupts absolutely."[4]

It appears fashionable today in certain sections of the media to denigrate those advocating for respect for Australia's international human rights obligations as "bleeding hearts", or as representing the vested interests of a "human rights industry", or worse still, as somehow threatening Australia's national security.

Far from reflecting authentic Australian values, these attempts to denigrate international human rights standards and human rights advocates are themselves betraying Australia's Western liberal traditions and values. The statement of Lord Acton quoted above is again worth remembering. Another example was provided in 1941. In the darkest days of the Second World War, when the very survival of Britain and her Commonwealth was in doubt, the House of Lords delivered its judgment in *Liversidge v Anderson*.[5] The majority adopted a generous reading of a regulation that permitted the detention of persons in wartime Britain. It is important to emphasise that every conceivable terrorist threat that Australia currently confronts, and an armada of fishing boats carrying asylum seekers, would pale by comparison to the threat posed by Nazi Germany and her Axis allies to Britain and her Commonwealth in 1941. In spite of all of this, or perhaps because of it, Lord Atkin (who was born in Queensland) had this to say in the House of Lords in 1941 (when Lord Atkin was at the height of his intellectual powers):

> "In this country amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of Kings Bench in the time of Charles I.

(i) The right to property (see, for example, the UDHR Article 17; Disability Convention Article 12(4)) – Australian courts deal with the protection of property rights on a daily basis.

[4] Quoted by Lord Owen and Dr Jonathan Davidson in "Hubris syndrome: An acquired personality disorder? A study of US Presidents and UK Prime Ministers over the last 100 years" (2009) 132 Brain – A Journal of Neurology 1396 at 1405.

[5] [1942] AC 206.

> I protest, even if I do it alone, against a strained construction put upon words with the effect of giving an uncontrolled power of imprisonment to the Minister. To recapitulate: The words have only one meaning; they are used with that meaning in statements of the common law and in statutes; they have never been used in the sense now imputed to them; they are used in the defence regulations in the natural meaning; and when it is intended to express the meaning now imputed to them, different and apt words are used in the defence regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity or no such degree of public mischief as would lead to a non-natural construction.
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> I know of only one authority which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be master— that's all.' (Looking Glass, c. vi.) After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of opinion that they cannot, and that the case should be decided accordingly."[6]

Those were the words of Lord Atkin in his judgment delivered on 3 November 1941 from the room being temporarily used by the House of Lords in London due to damage done by German bombs.[7] His words suggest that it is not human rights advocates who are a threat to Australian values, it is those who would abandon hundreds of years of Western civil liberties for the sake of votes or the selling of newspapers.

Australia's international human rights obligations (including those enshrined in the UDHR, and set out the ICCPR) reflect the commitment of the drafters to these traditional civil liberties as well as the revulsion of those who witnessed the crimes of Nazi Germany and their consequences. These international human rights standards were also the work of hard-headed pragmatists who had lived through two world wars and the "Great Depression". Again in 1941 (and repeated in 1944), it was US President Franklin D Roosevelt who inspired what would become the UDHR when he referred in his State of the Union address to four freedoms. These four freedoms were expressly incorporated into the preamble of the Universal Declaration and permeate the entire declaration and are reflected in the subsequent global human rights treaties to which Australia is a party.

3. Recent developments warranting greater vigilance in relation to human rights

In addition to the traditional commitment to Western civil liberties, full implementation of Australia's international human rights obligations is also warranted by more recent developments. New insights in medical research appear to support greater restraint on Executive power. Lord David Owen, a former British Foreign Secretary, for example, has argued that extended periods of Executive leadership expose the holders of executive power to an acquired personality disorder that impairs judgment and threatens "proper government".[8]

Threats to "proper government" potentially posed by aspirants to Executive office have also been vividly illustrated throughout 2016. Donald Trump has made public statements that would have caused even the fictional US President Francis Underwood to blush. *The Economist* in late February 2016 observed that:

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[6] [1942] AC 206 at 244-245.

[7] For detailed background on Liversidge v Anderson, see RFV Heuston, Liversidge v Anderson in Retrospect (1970) 86 LQR 33; and Liversidge v Anderson: Two Footnotes (1971) 87 LQR 161.

[8] Owen and Davidson, "Hubris syndrome: An acquired personality disorder? A study of US Presidents and UK Prime Ministers over the last 100 years" (2009) 132 Brain – A Journal of Neurology 1396 at 1404.

> "Because each additional Trumpism seems a bit less shocking than the one before, there is a danger of becoming desensitised to his outbursts. To recap, he has referred to Mexicans crossing the border as rapists; called enthusiastically for the use of torture; hinted that Antonin Scalia, a Supreme Court justice, was murdered; proposed banning all Muslims from visiting America; advocated killing the families of terrorists; and repeated, approvingly, a damaging fiction that a century ago American soldiers in the Philippines dipped their ammunition in pigs' blood before executing Muslim rebels. At a recent rally he said he would like to punch a protester in the face. This is by no means an exhaustive list."[9]

The possibility that the free world will be led by a person prepared to make such public statements coincides with technological developments that allow mass surveillance of populations in ways that were inconceivable even a decade ago. The scale and the intrusiveness of mass surveillance technologies and their human rights implications are being increasingly recognised and debated. International human rights standards in relation to privacy, reflecting traditional commitments to civil liberties are an important part in striking an appropriate regulatory balance.[10]

4. Consideration of various arguments offered against statutory bills of rights

I will confine the remainder of my submission to addressing some of the arguments that have been deployed against statutory bills of rights.[11] The arguments are often interrelated, as are the responses. For the sake of convenience the arguments are grouped under 5 headings. The first four headings are all closely related.

a. Bills of rights are undemocratic

It has been argued that bills of rights are undemocratic as they constrain elected representatives from enacting legislation in conflict with human rights standards. Perhaps the most powerful response to the claim that bills of rights are undemocratic is the argument that there is nothing undemocratic about an enlightened majority being prepared to constrain itself by legislation from violating fundamental human rights in moments of weakness. An example of such an approach would be the enactment of legislation protecting an unpopular minority in circumstances where the enlightened majority fears that it may not be otherwise able resist the pressure to deny the enjoyment of human rights of the minority in the aftermath of a terrorist attack by a group linked to the unpopular minority. Professor Jeremy Waldron, a prominent legal critic of bills of rights finds arguments of this kind to be unpersuasive.[12] Professor Waldron explains his views in the following way:

> "We are familiar in personal ethics with the idea of 'pre-commitment'—the idea that an individual may have reason to impose on herself certain constraints so far as her future decisionmaking is concerned. Ulysses, for example, decided that he should be bound to the mast in order to resist the charms of the sirens, and he instructed his crew that 'if I beg you to release me, you must tighten and add to my bonds'. ... Similarly, a smoker trying to quit may hide her own cigarettes, and a heavy drinker may give her car keys to a friend at the beginning of a party with strict instructions not to return them when they are requested at

[9] See The Economist, London, 27 February 2016, www.economist.com/news/leaders/21693579-front-runner-unfit-lead-great-political-party-let-alone-america-time-fire-trump.

[10] See, for example, Report of the Special Rapporteur on the right to privacy, Joseph A Cannataci, 8 March 2016, Human Rights Council, UN Doc A/HRC/31/64.

[11] The following section is adapted from the submission I made to the 2009 National Human Rights Consultation.

[12] Jeremy Waldron, A Right-Based Critique of Constitutional Rights (1993) 13 Oxford Journal of Legal Studies 18.

> midnight. These forms of pre-commitment strike us as the epitome of self-governance rather than as a derogation from that ideal. So, similarly, it may be said, an electorate could decide collectively to bind itself in advance to resist the siren charms of rights violations in the future. Aware, as much as the smoker or the drinker, of the temptations of wrong or irrational action under pressure, the people of a society might in a lucid moment put themselves under certain constitutional disabilities — disabilities which serve the same function in relation to democratic values as strategies like hiding the cigarettes or handing the car keys to a friend serve in relation to the smoker's or the drinker's autonomy. The analogy is an interesting one, but it is not ultimately persuasive. In the cases of individual pre-commitment, the person is imagined to be quite certain, in her lucid moments, about the actions she wants to avoid and the basis of their undesirability. The smoker knows that smoking is damaging her health and she can give a clear explanation in terms of the pathology of addiction of why she still craves a smoke notwithstanding her possession of that knowledge. The drinker knows at the beginning of the evening that her judgment at midnight about her own ability to drive safely will be seriously impaired. But the case we are dealing with is that of a society whose members disagree, even in their 'lucid' moments, about what rights they have, how they are to be conceived, and what weight they are to be given in relation to other values. They need not appeal to aberrations in rationality to explain these disagreements; they are … sufficiently explained by the subject-matter itself. A pre-commitment in these circumstances, then, is not the triumph of pre-emptive rationality that it appears to be in the smoker's or in the drinker's case. It is rather the artificially sustained ascendancy of one view in the polity over other views whilst the philosophical issue between them remains unresolved. A better individual analogy (than the case of the drinker or the smoker) might be the following. A person who is torn between competing religious beliefs opts decisively one day for the faith of a particular sect. She commits herself utterly to that religion and she abjures forever the private library of theological books in her house that had excited her uncertainty in the past. Indeed she locks the library and gives the keys to a friend with instructions never to return them, not even on demand. But the doubts in her own mind never go away ('Maybe Tillich was right after all ...'), and a few months later she asks for the keys. Should the friend return them? It is clear, I think, for a number of reasons, that this is quite a different case from withholding the car keys from the drunk driver. Both involve forms of pre-commitment. But in the theological case, for the friend to sustain the pre-commitment would be, as it were, for her to take sides in a dispute between two or more conflicting selves (or two or more conflicting aspects of the self) of the agent in question, in a way that is simply not determined by any recognizable criteria of pathology or other mental aberration. To uphold the pre-commitment is to sustain the temporary ascendancy of one self (or one aspect of the self) at the time the library keys were given away, and to neglect the fact that the self that demands them back has an equal claim to respect for its way of dealing with the vicissitudes of theological uncertainty."[13]

As already noted, human rights standards under international law owe their existence primarily to the response to the horrors of Auschwitz and Bergen-Belsen and have little to do with the court room battles surrounding cases such as *Brown v Board of Education*.[14] Pre-commitments to preserve the prohibitions of torture and arbitrary killing (that Donald Trump is openly challenging) are more analogous to the pre-commitments in the smoking and drinking examples given by Professor Waldron. It is only by moving the locus of the debate away from fundamental standards upon which there is much greater consensus, towards standards upon which there is reasonable disagreement

[13] Ibid, 47-48 (footnotes not reproduced).

[14] 347 US 483 (1954). This is the United States constitutional decision of that country's Supreme Court requiring the ending racial segregation in schools.

(ie questions of theology), that Professor Waldron is able to make this point. Certainly there are no bright lines separating different standards. But this is not to deny the continuing relevance of the pre-commitment idea in relation to fundamental rights upon which there is broad consensus in times of relative tranquillity. Professor Waldron's argument ultimately supports the restriction of bills of rights to the protection of rights considered fundamental by the international community.

b. Bills of rights smuggle in standards and values that the majority in the community are unaware of at the time of their enactment

One can immediately agree that vague standards allow much greater discretion (and power) to the interpreters of those standards and allow them to "smuggle in" standards and values that are not apparent on the face of the vague standards. This is not, however, a problem unique to human rights standards nor is it one that human rights standards are incapable of minimising or avoiding. On the more general problem it is worthwhile noting the Delphic terms of section 92 of the Australian Constitution.[15] As already noted, a bill of rights based on the language of the international treaties to which Australia is party is able to be interpreted in accordance with the accepted rules of interpretation applicable to international treaties.[16] International jurisprudence emanating from bodies such as the Human Rights Committee and the European Court of Human Rights would also be relevant. Textual controversy will no doubt remain but it will not be fundamentally different to the controversy surrounding, for example, trade treaties (which are increasingly impacting on governance within States). It is incumbent upon advocates for bills of rights to increase public awareness of these issues of interpretation and of the areas upon which there is consensus regarding the meaning and content of international human rights standards. If this is done then this criticism can be addressed.

c. A bill of rights will transfer too much power to unelected judges

Criticisms of this kind take various forms. At one extreme the criticism appears to question whether it is possible for an elected parliament to effectively control judges at all. It is submitted that this type of criticism, which ultimately depends on the ethics of individual judges, can be rejected in Australia on empirical grounds. A more nuanced argument is that there is something particular about human rights standards that brings out the worst anti-democratic instincts in judges.[17] Critics have pointed to what might be described as judicial promiscuity in New Zealand and the United Kingdom when human rights legislation is being interpreted. I am unable to offer detailed comment on the position in New Zealand but in relation to the United Kingdom there appears to be a danger that this more nuanced argument simply collapses into the more extreme argument that was rejected above. Chief Justice Spigelman has pointed out the link between the interpretation of UK human rights legislation by the House of Lords and the interpretative approach taken by the courts in the UK under broader (and still largely economic) standards of the European Union (EU).[18] If, as

[15] The key part of the provision reads simply that "... trade, commerce, and intercourse among the States ... shall be absolutely free...".

[16] Enshrined in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, 1969.

[17] See, for example, James Allan, Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century (2006) 17 Kings' College Law Journal 1.

[18] See "The Application of Quasi-Constitutional Laws, Second Lecture in the 2008 McPherson Lectures, Statutory Interpretation and Human Rights by The Honourable JJ Spigelman AC, Chief Justice of New South Wales, University of Queensland, Brisbane, 11 March 2008", p20. Available at http://www.supremecourt.justice.nsw.gov.au/Documents/spigelman_speeches_2008.pdf, visited 18 April 2016.

suggested by Professor Lindell,[19] the interpretative approach to human rights in the United Kingdom developed in a non-human rights EU context then this may be a criticism that is simply irrelevant for Australia. Much will also depend on the wording of specific provisions of any bill of rights. Interpretative approaches adopted in the UK have not been adopted in Victoria and the ACT due to differences in the drafting of the relevant provisions.

d. "Notwithstanding clauses" cannot be drafted in a way that allows legislatures to effectively rely upon them

Notwithstanding clauses are promoted by advocates of bills of rights as a means by which to demonstrate respect for the democratic process in human rights instruments. Such clauses recognise the entitlement of parliaments to pass law notwithstanding a finding that the laws violate human rights standards. Critics have raised doubts about whether such clauses really do address democratic concerns with there even being a suggestion that it is impossible to draft such a clause that properly protects the legislature's freedom of action. Professor Waldron is one of a number of critics who have made this point.[20] According to Professor Waldron:

> "Jeffrey Goldsworthy has suggested that the 'notwithstanding' provision provides a sufficient answer to those of us who worry, on democratic grounds, about the practice of strong judicial review. Jeffrey Goldsworthy, Judicial Review, Legislative Override, and Democracy, 38 Wake Forest L. Rev. 451, 454-59 (2003). It matters not, he says, that the provision is rarely used.
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> > [S]urely that is the electorate's democratic prerogative, which Waldron would be bound to respect. It would not be open to him to object that an ingenuous electorate is likely to be deceived by the specious objectivity of constitutionalised rights, or dazzled by the mystique of the judiciary--by a naive faith in judges' expert legal skills, superior wisdom, and impartiality. That objection would reflect precisely the same lack of faith in the electorate's capacity for enlightened self-government that motivates proponents of constitutionally entrenched rights.
>
> Id. at 456-57. I believe that the real problem is that section 33 [of the Canadian Charter of Rights and Freedoms] requires the legislature to misrepresent its position on rights. To legislate notwithstanding the Charter is a way of saying that you do not think Charter rights have the importance that the Charter says they have. But the characteristic stand-off between courts and legislatures does not involve one group of people (judges) who think Charter rights are important and another group of people (legislators) who do not. What it usually involves is groups of people (legislative majorities and minorities, and judicial majorities and minorities) all of whom think Charter rights are important, though they disagree about how the relevant rights are to be understood. Goldsworthy acknowledges this:
>
> > When the judiciary ... is expected to disagree with the legislature as to the 'true' meaning and effect of Charter provisions, the legislature cannot ensure that its view will prevail without appearing to override the Charter itself. And that is vulnerable to the politically lethal objection that the legislature is openly and self-confessedly subverting constitutional rights.

[19] Geoffrey Lindell, The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom? (2006) 17 Public Law Review 188.

[20] Jeremy Waldron, The Core of the Case Against Judicial Review (2006) 115 Yale Law Journal 1346.

> Id. at 467. However, maybe there is no form of words that can avoid this difficulty. As a matter of practical politics, the legislature is always somewhat at the mercy of the courts' public declarations about the meaning of the society's Bill or Charter of Rights."[21]

The suggestion that there may be no form of words to achieve such a purpose is a surprising confession coming as it does from a lawyer. One is entitled to be sceptical of such claims. On a more practical and pragmatic level the problem may not simply arise in Australia. Our parliaments appear more robust and the Federal Parliament has demonstrated no great reluctance in legislating to suspend the operation of the *Racial Discrimination Act* 1975 (Cth) in support of the Northern Territory Emergency Response. Sections of the media in Australia have been openly questioning whether Australia should comply with its international human rights obligations and the Australian Human Rights Commissioner has been relentlessly attacked for, *inter alia*, reminding members of the Executive of Australia's international human rights obligations. There is no good reason to doubt that a notwithstanding clause in Queensland legislation could be drafted in a way that would allow the Queensland Parliament to effectively rely upon it.[22]

e. Bills of rights are unnecessary in Australia which has successfully protected human rights through the functioning of traditional democratic institutions and an independent legal system that recognises common law rights and freedoms

The experience within Australia in recent years makes it difficult to maintain this position. I have heard argument that the *Human Rights Act* 1998 (UK) has had a negative impact in terms of human rights protection following the terrorist attacks in the US and subsequently in the UK. Given that Australia's legislative response to terrorist threats has been in some ways more restrictive of the enjoyment of human rights than the UK's response, if anything Australia's current legal position compared to the UK illustrates the utility of a human rights Act.

Conclusions

In my submission a strong case can be made for a general bill of rights enacted through ordinary legislation which will ensure the avoidance of gaps in legislative implementation of international human rights obligations in Queensland. For similar reasons to those articulated in the 2009 National Human Rights Consultation report, general human rights legislation recommended by that report should be enacted in Queensland. This would ensure respect for Australia's international human rights obligations and would be consistent with traditional commitments to civil liberties.[23] It would also address new potential threats of abuse of Executive power. Theoretical arguments advanced against the enactment, through ordinary legislation, of a bill of rights, are unpersuasive. The Victorian and ACT legislation illustrate that perceived risks associated with the UK and New Zealand legislation can be avoided. The successful operation of one aspect of the recommendations of the 2009 National Human Rights Consultation, namely the review process undertaken by the

[21] Ibid, 1357, footnote 34.

[22] In my submission, a more significant concern regarding "notwithstanding clauses" is the effect of party discipline on the operation of such clauses. A better balance between *principle* based and *power* based modes of dispute resolution would be a requirement in a "notwithstanding clause" that when legislating in accordance with the clause parliamentary representatives should be required to vote according to conscience and not subject to party discipline.

[23] In this regard, it is also relevant to note similarities between human rights interpretative provisions of the common law principle of legality. On the potential relevance of international human rights standards to the principle of legality, see David Dyzenhaus, Murray Hunt and Michael Taggart, The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation (2001) 1 Oxford University Commonwealth Law Journal 5.

Parliamentary Joint Committee on Human Rights, demonstrates the utility of this recommendation.[24] Other recommendations contained in the report of the committee that undertook the 2009 National Human Rights Consultation could be applied, *mutatis mutandis*, in Queensland.

In 1959, the Executive branch of the Queensland government drafted a bill of rights of albeit limited scope.[25] The absence of an upper House of Parliament in Queensland increases the possibility of unrestrained power, exacerbating the risks that Lord Owen and others have identified. If there was a case for restraints on the power of the Executive in Queensland in 1959, recent developments in Australia and the US suggest that the case for a statutory bill of rights in Queensland is even stronger today.

Australia has accepted international human rights obligations under international law. We take the benefits that international legal regulation offers us in terms of trade and resource development (for example under the 1982 Law of the Sea Convention). Respect for substantive human rights obligations is required by our commitment to the international legal system. To the extent that gaps remain in terms of implementation of those international legal obligations, I support the enactment of a general human rights Act in Queensland that seeks to close those gaps.

Yours sincerely

Professor Anthony E Cassimatis
Director, Centre for Public, International and Comparative Law
17 April 2016

[24] In this regard I would endorse the submission to the Committee of Associate Professor Billings.
[25] The *Constitution (Declaration of Rights) Bill 1959 (Qld)*.