Submission to

The Legal Affairs and Community Safety Committee Human Rights Inquiry

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Submitted by

The Queensland Greens

State Office, Albion Peace Centre, 102 McDonald Rd., WINDSOR, Qld., 4030
PO Box 661, ALBION DC, QLD 4010. Phone: (07) 3357 8458 Email: office@qld.greens.org.au www.qld.greens.org.au

1. Summary and Recommendations

The Queensland Greens emphasise the urgency of, and need for, human rights law reform in Queensland through the adoption of a human rights act to address significant gaps in legal protections of human rights.

In this regard, the Queensland Greens make the following **recommendations** to the Inquiry:

1. That the Queensland Parliament adopt a human rights act for Queensland consistent with a dialogue model.
2. That the Act protect all appropriate civil and political rights, economic, social and cultural rights, intergenerational rights, and environmental rights.
3. That the people of Queensland be given an opportunity to have their say on specific inclusions, and be able to propose additional rights they believe Queensland should uniquely protect.

2. Effectiveness of current human rights protections in Queensland

Opponents of a human rights act will argue that our political and legal systems provide sufficient safeguards already and that the rights and liberties of Queenslanders are best protected by the absence of such "invasive" legislation. These opponents will point to the separation of powers, responsible government, or the very nature of representative democracy as if these are enough to protect those least privileged in our society. Notwithstanding the fact that these ideals almost never work in practice as well as they do in principle, there is nothing to say that a well-drafted and sensible human rights act could not further protect and enshrine these civil ideals. Elections are rarely fought on issues such as the provision of more effective welfare to those less fortunate or protecting the poorest in our society, and even high-profile issues like protecting the Great Barrier Reef fail to remain at the front of voters' minds in the polling booth. A human rights act is needed to ensure that the rights of the minority are not forgotten and will provide an appropriate balance to the 'tyranny of the majority' that the sovereignty of parliament can perpetrate.

This is not the first time we have had this debate in Queensland. In 1998, the Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee report, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* recommended against adopting a bill of rights or human rights act in Queensland. The Committee reported that while it recognised that human rights protection in Queensland could be improved, it feared that a bill of rights or human rights act would restrict the sovereignty of the Queensland Parliament.[1] However, with the benefit of the ACT and Victorian experience of a human rights dialogue model, we now know that fears that the judiciary would usurp the roles of the executive and the legislature are unfounded.[2]

Adopting a human rights act consistent with the dialogue model would facilitate a focus on the human rights of Queenslanders by each arm of government, curtailing society's power to infringe on an individual's human rights.

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[1] Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* (1998) 52-54.

[2] National Human RIghts Consultation, *National Human Rights Consultation Report* (2009) 256, 261.

Those who argue against a human rights act for Queensland are advocating for a society that is able to infringe upon the basic human rights of its members. These voices argue from a place of privilege and social safety, already shielded from the rights violations that a human rights act seeks to protect by their wealth, standing, or lot in life. In determining if Queensland needs a human rights act the Queensland Greens ask that the Inquiry heed the cries of the unprivileged, the oppressed and the downtrodden; those who need society's protection and support more, and who can only be protected by a human rights act that enables them to affordably and quickly rectify the indignities many suffer on a daily basis.

In Queensland right now, there are people suffering because there is no effective mechanism available to them to ensure decisions are made with their human rights, liberties and dignities taken into account. The most well-meaning public servant will sometimes be forced to consider budget constraints or resource availability over making the most appropriate determination. Whilst judicial review is sometimes available, the process is complicated and expensive, requiring legal representation that is either unaffordable or unavailable. Similarly, our unicameral Parliament, without the oversight of a House of Review, can pass legislation infringing on the rights of our people with no recourse or restraint until the threat of an election looms. Even our much lauded committee system is completely hobbled by a supermajority in Parliament, as we saw after the 2011 election. A half-hearted solution, like the *Federal Human Rights (Parliamentary Scrutiny) Act 2011*, fails if Parliament considers human rights irrelevant and there is no mechanism for individuals to challenge that determination.

As if to highlight all the failings borne of our system, in 2013, the Queensland Government introduced the *Vicious Lawless Association Disestablishment Act*, ostensibly to protect Queenslanders from the threat (real or not) of organised crime and violence in our State. The Act overturned hundreds of years of common law protections and legal principles that opponents of a human rights act argue sufficiently protect our less fortunate. Organisations could be declared criminal by simple regulation, and to be a "criminal organisation", the Executive did not need prove any criminal intent. The test for being a criminal organisation was poorly defined, and an individual could be deemed to "associate" with an organisation by either being a member or simply meeting other participants more than once.[3] Once deemed an "associate", the penalties for committing an offence were increased, with mandatory sentencing requirements imposed on judges, regardless of the individual's circumstances.[4] The presumption of bail was reversed[5], defendants had to demonstrate why their imprisonment was not justified and organisations had to prove that they were not formed with criminal intent, in a shameful and horrifying reversal of the onus of proof.[6] Individuals were targeted in social situations like pubs without any provocation and were charged with no more than being members of these so-called "criminal organisations" and meeting in public. These laws undermined the impartiality and independence of the judiciary and ultimately undermined the public's faith in the entire legal system.

The VLAD laws were not subject to significant scrutiny. The Government of the day held a supermajority in Parliament, and the public were not widely consulted on the impact of such infringement on their civil liberties. Legislation was rushed through the system by a Government wanting to be seen to be "tough on crime" regardless of the social cost. Absent a human rights act there was nothing stopping the Government trampling over the rights of Queenslanders without any need to justify themselves outside of base rhetoric. This is only one very high-profile example of executive overreach that threatens the lives, rights and liberties of Queenslanders every day, in big cases, right down to the most mundane.

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[3] *Vicious Lawless Association Disestablishment Act* 2013 (QLD), s4(a)-(d)
[4] *Vicious Lawless Association Disestablishment Act* 2013 (QLD), s5(1)(a)-(c), s6(c) and s7(1)(a)-(c)
[5] *Bail Act 1890* (QLD) s 16(3A)
[6] *Vicious Lawless Association Disestablishment Act* 2013 (QLD), s5(2)

Queensland needs a comprehensive approach to human rights. Queensland needs to ensure that all legislation is made compatible with human rights norms, that determinations and decisions are made consistent with the human rights of those affected by them, that individuals are able to affordably resolve violations of their rights, and that moving forward, Queenslanders are imbued with the knowledge that the system does protect them and that they can have faith in the decision-makers affecting their lives.

3. Operation and effectiveness of human rights legislation in Australia and internationally

This section will address Terms of Reference 2b and 2d on the domestic and international operation and effectiveness of human rights legislation, and historical and contemporary reviews and inquiries on human rights legislation. It will consider the Victorian human rights legislation, Australian Capital Territory human rights legislation, and make reference to ordinary statute internationally (with particular attention given to New Zealand and the United Kingdom). Reference to relevant reviews and inquiries will be made throughout.

3.1 Domestic Human Rights Legislation

The Queensland Greens consider that the experience of Victoria and the ACT provide ample evidence of the benefits that introducing a human rights act will have for Queensland.

The main domestic legislative sources of human rights are: Victoria, through the *Charter of Human Rights and Responsibilities Act 2006* (Vic); and, the ACT through the *Human Rights Act 2004* (ACT).

Both Acts operate on what is known as a dialogue model, which facilitates interaction between the executive, legislature and judiciary on the issue of human rights by providing each arm with prompts to consider human rights obligations in the legislative process.

Broadly the steps created by a dialogue model are as follows.

Statement of compatibility

Both the ACT and Victoria introduced a mechanism whereby bills are assessed as to their compatibility with the rights set out in their respective human rights acts. A bill presented to parliament must be accompanied by this statement of compatibility. However, should a bill be assessed as not compatible with a human right, this does not affect its validity once passed in either jurisdiction. The federal government has adopted this element of the human rights framework.

Interpretive provisions

Both the ACT and Victorian Acts contain provisions requiring that courts interpret legislation consistent with human rights so far as is possible while remaining consistent with the purpose of the provision.

Cause of Action

Initially, neither the ACT nor the Victorian Human Rights framework enabled a complainant a cause of action for an infringement of a human right. However, the ACT amended its legislation to create a cause of action for complainants. There are calls in Victoria for similar amendments to be made.[7]

Both Victoria and the ACT government's report that introducing a human rights act has improved the legislative process by ensuring human rights considerations are top of mind when developing public policy.[8]

[7] National Human RIghts Consultation, *National Human Rights Consultation Report* (2009) 262.
[8] National Human RIghts Consultation, *National Human Rights Consultation Report* (2009) 255, 261.

The Queensland Greens submit that Queensland can learn from the ACT and Victorian experience by introducing a cause of action with a human rights act to ensure that Queenslanders are able to protect their rights.

The Queensland Greens note the submission of Professor George Williams and Mr Daniel Reynolds, and the three suggested reforms put forward therein for 'effective remedy,' 'legislative scrutiny', and 'judicial interpretation'.[9] Williams' original research on the small number of cases arising in Victoria and the ACT dealing with matters arising under their respective human rights legislation demonstrates that such legislation does not result in a dramatic inflation in litigation against the government. It merely provides a clear and direct cause of action for existing meritorious grievances, and does not burden the courts or government with responding to new, previously unbased, legal action. We also espouse Williams' aspiration that Queensland seize the opportunity now held 'to gain the best-drafted human rights act in the country', and we add, internationally.[10]

3.2 Ordinary Statute Internationally

The Queensland Greens note that enacting human rights legislation by way of ordinary statute is a lesser level of entrenchment than the 'Bill of Rights' model utilised in Canada, the United States, and South Africa, as it is still capable of amendment by normal parliamentary process without the need to resort to a referendum.

The two most common references to countries containing ordinary human rights statutes are the United Kingdom and New Zealand.

3.2.1. The New Zealand Bill of Rights Act 1990 (NZ)

The major source of New Zealand human rights legislation is contained across three Acts: the *Human Rights Act 1993* (NZ), the *New Zealand Bill of Rights Act 1990* (NZ), and the *New Zealand Bill of Rights Amendment Act 2011* (NZ). The naming of the Acts is inconsistent with global understanding as the *Human Rights Act 1993* (NZ) is more akin to the Queensland Anti-Discrimination Act, and the *New Zealand Bill of Rights Act 1990* (NZ) represents the potential model for a Queensland human rights act. The Queensland Greens see this spread of rights across multiple pieces of legislation as undesirable. Instead we support a comprehensive human rights act that acts as a single source of human rights and which is easily accessible to, and understood by, Queenslanders.

3.2.2 The United Kingdom Human Rights Act 1998 (UK)

Before considering the operation and effectiveness of the *Human Rights Act 1998* (UK), the Queensland Greens draw attention to the legal status of the *Human Rights Act 1998* (UK) and contemporary political sentiment existing in relation to it in the United Kingdom. First, it is relevant that the United Kingdom lacks a written constitution[11] and that their constitutional jurisprudence has thereby developed through multiple legislative and common law sources assigned a special, or constitutional, status. Despite being commonly cited as an ordinary statute in discussion and appearing as one in its form, the *Human Rights Act 1998* (UK) United Kingdom is considered among such sources and regarded as a special, or constitutional, statute.[12]

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[9] Williams and Reynolds, 'Human Rights Inquiry' (Human Rights Inquiry Submission Number 006, 11/03/16).
[10] Williams and Reynolds, 'Human Rights Inquiry' (Human Rights Inquiry Submission Number 006, 11/03/16).
[11] *Commonwealth of Australia Constitution Act 1900.*
[12] *Thoburn v Sunderland City Council* [2003] 1 QB 151, 186 [62], (Laws LJ) "a hierarchy of Acts of Parliament: as it were ordinary statutes and constitutional statutes.... The special status of constitutional statutes follows the special status of constitutional rights. Examples are... the Human Rights Act 1998."

Second, the purpose of the *Human Rights Act 1998* (UK) is to give effect to the Council of Europe's *European Convention of Human Rights,*[13] which confers jurisdiction on the European Court of Human Rights to hear appeals in certain circumstances. This jurisdiction and results of its exercise, like the United Kingdom's membership of the European Union and jurisdiction of the Court of Justice of the European Union, is politically contested. This is due to conservative concern with the purported erosion of sovereignty to various European systems, partly motivated by the rise of Euroscepticism, which has resulted in considerable politicisation of human rights.[14] Moreover, the current prime minister, David Cameron, has proposed to repeal the *Human Rights Act 1998* (UK) and replace it with a 'British Bill of Rights,' which is expected to entail a radically reduced list of human rights. Therefore, when discussing the United Kingdom model, it is important to remember this context as instructive of how human rights can become deeply misconceived and contested. Therefore, human rights legislation requires comprehensive public and governmental education to successfully transition to a culture of respect for human rights. We hope and expect that the bipartisan composition of the Committee will foster a political culture of mature and reasoned human rights discussion. It is necessary to de-politicise the space of human rights for a human rights act to be functional and responsibly communicated to the public.

The Queensland Greens submit that, despite the above-mentioned differences, the United Kingdom model maintains a high level of usefulness in assessing the possible courses for a possible Queensland human rights act. The United Kingdom model of enacting human rights by special statute pre-dates Australian approaches by almost a decade and thus has developed a significant and useful body of research on its effectiveness.

4. Recommended objectives of a human rights act for Queensland

The Queensland Greens recommend the following inclusions in a human rights act for Queensland:

- all inclusions determined under international law to be non-derogable and absolute (regardless of whether Queensland has jurisdiction over the constitutional heads of power under which the right would be enacted or violated), and that these inclusions are restated in a special category as non-derogable and absolute, pursuant to Article 4 of the *International Covenant on Civil and Political Rights* and customary international law, including but not limited to:
    - the right to juridical personality, life, and equal and humane treatment before the law;
    - the right to a name, identity, and nationality, and to participation in public life;
    - the right to freedom of, and to freely change, thought, conscience and religion;
    - the right to be free from torture and other cruel, inhuman or degrading punishment;
    - the right to be free from slavery, genocide, enforced disappearance and arbitrary detention;
    - the right to be free from imprisonment on grounds solely of the inability to fulfil a contractual obligation; and,
    - the right to be free of prosecution under retroactive criminal legislation.

[13] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 29 February 2016], hereafter referred to as the '*European Convention*.'

[14] Colm O'cinneide, "The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'," *University College London,* Institute for the Human Rights Working Paper Series, Working Paper No 1, Available at: https://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o_cinneide [Accessed 29 February 2016].

- all inclusions required of Australia under any ratified treaties (regardless of their transformation by the Federal Parliament), and, where possible, with reference to relevant Optional Protocols, including but not limited to:
    - Universal Declaration of Human Rights;
    - International Covenant on Civil and Political Rights;
    - International Covenant on Economic, Social and Cultural Rights;
    - International Convention on the Elimination of All forms of Racial Discrimination;
    - Convention on the Elimination of All Forms of Discrimination Against Women;
    - Convention on the Prevention and Punishment of the Crime of Genocide;
    - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
    - Convention on the Rights of the Child;
    - Convention on the Rights of Persons with Disabilities;
    - United Nations Declaration on the Rights of Indigenous People; and,
    - Principles relating to the Status of National Institutions
- all relevant inclusions from major international human rights instruments which Australia has not yet ratified, including but not limited to:
    - International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and,
    - International Convention for the Protection of All Persons from Enforced Disappearance
- several additional rights that the Queensland Greens believe to be important to a progressive and uniquely Queensland Human Rights Act including:
    - the right of all people to have their vote equal in value to all others' votes, and to representation that reflects as near as practicable the principle of one vote, one value (with reference to the decisions in *McGinty v Western Australia (1996) 186 CLR 140* and *Roach v Electoral Commissioner (2007) 239 ALR 1*, and decision of the Full Court of the Federal Court (and the dissenting decision of Kirby J in the High Court decision) in *Mulholland v AEC (2003) 198 ALR 278*)
    - the right to private and accurate information, health care and support in regards to making decisions concerning gender identity and reproduction, and to do so free of discrimination, coercion and violence (with reference to the 1994 Cairo Programme of Action)
    - the right to communication to enable the exercise of democratic political participation in our society, and of diverse cultures, identities and forms at the individual and societal level (with reference to the UNESCO MacBride Commission Report of 1980)
    - the right to self-determination (insofar as such a right cannot be used to deconstruct territorial integrity of a state per the Canadian decision in *Reference Re Succession of Quebec [1998] 2 SCR 217*)

- the right to protect and promote culture inclusive of social, cultural, religious and spiritual practices and communitarian property rights (per the *Declaration of Rights of Indigenous People*, the *ILO Indigenous and Tribal Peoples Convention* and *Mabo v Queensland (no. 2) (1992) 175 CLR 1*),
- the right that all people have to participate in and enjoy economic, social, cultural and political development in such a manner to equitably meet the development and environment rights of present and future generations (per Principle 3 of the *Rio Declaration)*
- the right to a healthy environment, and to the protection of and improvement upon that environment as a precondition for the enjoyment of all other rights (per Weeramantry's separate opinion in *Gabcikovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 92*, and several National Constitutions)
- the right to intergenerational equity, fairness and sustainability to ensure future Queenslanders can enjoy all rights enshrined in the Act to a reasonably equal standard (with reference to Principle 16 of the *Rio Declaration*)
- the joint rights to water, sanitation and an adequate standard of living (as established jointly and severally from the *International Covenant on Economic, Social and Cultural Rights)*