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18 April 2016

By email: lacsc@parliament.qld.gov.au

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

Dear Sir / Madam

Human Rights Inquiry

Thank you for the opportunity to make submissions regarding the current inquiry as to whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland. We respectfully agree with the recommendations[1] of the National Human Rights Consultation Committee ("NHRC") favouring the introduction of a Human Rights Act of the kind adopted in New Zealand,[2] the United Kingdom[3] and, closer to home, Victoria[4] and the Australian Capital Territory ("ACT")[5] which have all adopted the "dialogue" model of human rights.

The respective reviews of the Victorian[6] and ACT[7] statutes have been more than encouraging, and provide strong support for the introduction of a Queensland equivalent. In our view the 20 protected rights in the Victorian example[8] should be given similar effect within a Queensland equivalent statute. However, unlike the ACT legislation, the Victorian Charter makes no provision for compensation in the event of wrongful conviction and punishment. Given that Queensland is currently the only Australian state to have guidelines for applications to the Attorney-General to request post-conviction DNA testing within a framework of review of wrongful conviction, an initiative driven largely by the Griffith University Innocence Project, we would respectfully urge the Committee to consider the inclusion of a statutory right to compensation for wrongful conviction as a necessary and desirable feature of any Queensland Human Rights legislation.

Further, in our view a model similar to the Canadian Charter of Rights and Freedoms, where all legislation would be read subject to the human rights set out in a Federal Human Rights Act,[9] would be preferable to the proposed dialogue model. This position is consistent with that of the former High Court Justice, the Honourable Mr Michael McHugh AC, QC ("The Hon Michael McHugh"), who has publicly opined that the Canadian model would have a stronger enforcement framework, in that the onus would be on the government and parliament to respond to a judicial decision if they wanted a particular law to continue in operation, and individuals bringing claims would have judicially enforceable rights and remedies.[10]

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[1] National Human Rights Consultation Report, Chapter 11, *Statutory Models of a Human Rights Protection: A Comparison* (2009), page 303 ("National Human Rights Consultation Report").
[2] *Bill of Rights Act* 1990 (NZ).
[3] *Human Rights Act 1998* (c 42) (UK).
[4] *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
[5] *Human Rights Act* 2004 (ACT).
[6] Recently observed by the Honourable Justice Margaret McMurdo AC, President, Court of Appeal, Supreme Court of Queensland in her Honour's publication, 'A Human Rights Act for Queensland?' at the University of the Sunshine Coast Inaugural Oration, 23 September 2015, p 14.
[7] As above n 1, National Human Rights Consultation Report, 255-256.
[8] As above n 6, p 12.
[9] As above n 1, National Human Rights Consultation Report, 300-301 and cited in n 8 at p 8.
[10] 'A Human Rights Act, the courts and the Constitution', The Hon. Michael McHugh AC, QC Presentation given at the Australian Human Rights Commission, 5 March 2009, p 8.

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That being said, it occurs to the writer that there may be scope to improve the "dialogue model" in light of The Hon Michael McHugh's comments. In that regard, in commenting on s.10 of the draft Charter of Rights, the *New Matilda Bill* in the Federal context,[11] The Hon Michael McHugh has observed:

> "Whatever model of human rights is adopted in this country, adoption of the s.10 limitation is essential. Together with the objective four pronged test laid down by the Supreme Court of Canada in *Hislop*, it provides a compelling answer to those opponents of human rights legislation who believe that giving courts the power to determine whether legislation interferes with human rights will make an unelected judiciary the governors of Australia."[12]
>
> ...
>
> There is a considerable body of decisions on the Canadian equivalent of s.10 (1) which is found in Section 1 of the *Canadian Charter of Rights and Freedoms*. The most recent and authoritative decision on this limitation on a Charter right is *Canada (Attorney-General) v Hislop* where six members of the Supreme Court of Canada said:
>
> > "Under s. 1, the government has the burden to demonstrate that a discriminatory provision is a reasonable limit on a s. 15(1) *Charter* right. If it meets this burden, the law will be saved as being a demonstrably justified reasonable limit on that right.
> >
> > The framework for a s. 1 analysis is the well-known *Oakes* test (see *R. v. Oakes*). The *Oakes* test may be formulated as two main tests with subtests under the second branch, but it may be easier to think of it in terms of four independent tests. If the legislation fails under any one test, it cannot be justified. The four tests ask the following questions:
>
> (1) Is the objective of the legislation pressing and substantial?
>
> (2) Is there a rational connection between the government's legislation and its objective?
>
> (3) Does the government's legislation minimally impair the *Charter* right or freedom at stake?
>
> (4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?"
>
> Thus, the effect of s.10 is that the rights to which s 4 refer must give way to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Section 10 introduces a proportionality test which balances the rational needs of society against the human rights of individuals. The four prong test re-formulated in *Canada (Attorney-General) v Hislop* is objective and similar to tests that courts in this country, particularly the High Court, already use in the constitutional area. As Pamela Tate SC, the Solicitor-General for Victoria has said of the proportionality test in the human right area:
>
> > "This approach exposes the Benthamite flaw of considering human rights as absolute and inalienable and substitutes in its place a reasoned and logical approach to the justification of interferences with human rights."[13]

(references omitted)

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[11] Ibid, p 3.
[12] Ibid, p 8-9.
[13] Ibid, p 7-8.

Accordingly, the four pronged test laid down by the Supreme Court of Canada in *Hislop* is potentially both necessary and desirable, and should be a relevant consideration in this debate. While McHugh's comments occurred in the context of a consideration of federal law,[14] it seems a similar proportionality test could easily be constructed and incorporated into a Queensland Human Rights Statute to create a more robust framework of enforcement which would impose an active burden on the Queensland parliament rather than relying on a retrospective ruling by the courts.

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Matt Jackson
LAWYER

[14] As above n 10, p 3.