

**Submission by two members of the Faculty of Law, Bond University to the Queensland Parliament
Legal Affairs and Community Safety Committee in relation to the *Human Rights Inquiry*.**

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SUMMARY OF MAJOR POINTS:

1. Queensland does need a *Human Rights Act* (HR Act). This submission advances three main arguments for this:
 - a. The enactment and implementation of a HR Act would improve accountability in government decision-making, which in turn has positive flow-on effects for both the economic and social well-being of Queenslanders. This is because such an enactment would enhance the 'rule of law' in Queensland and the rule of law is essential to effective representative government. This is particularly the case given the absence of a bill of rights in the federal constitutional framework.
 - b. There is a need to improve human rights protection in Queensland, particularly for vulnerable members of our society.
 - c. Human rights and basic constitutional literacy in Australia, including Queensland, is poor. The enactment of further human rights protections in Queensland would assist in improving human rights literacy, which, in itself, can assist in preventing the enactment of measures and making of decisions that erode human rights. This in turn will lead to an improvement in community engagement in governance.
2. This submission offers suggestions for objectives and other details related to the proposed HR Act.
3. Although this submission supports the introduction of a HR Act in Queensland, this should not be taken as support for legislative human rights protections over constitutionally entrenched protections. Rather, our submission should be read in the context that in the absence of any consideration of a constitutionally entrenched model, we support the introduction of a legislative human rights regime.

INTRODUCTORY COMMENTS

1. As a matter of first principles, 'to have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules'.¹ In most developed nations, such 'governing rules' take the form of a Bill for Rights or a Charter of Rights. Australia, however, does not have a Bill of Rights. Further, the *Australian Constitution* was not drafted with a view to protect individual rights. Instead it was concerned with the distribution of power between state parliaments and the Commonwealth parliament. The decision to not include a guarantee of equal protection before the law, for example, is also reflective of racist sentiments towards Indigenous persons and other minority groups at the time, that no longer have a place in Australia and Queensland today. Notably, due to a number of restrictions on the right to vote in elections, only 15 percent of the then total Australian population actually voted to approve the Australian Constitution.² The enactment of a HR Act is an opportunity to begin to provide Queenslanders with a human rights framework that is reflective of contemporary social values. This means the Queensland Government has a significant and crucial role to play in protecting the human rights of Queenslanders.
2. For this reason, we welcome the opportunity to make a submission to the Queensland Parliament Legal Affairs and Community Safety Committee on the Human Rights Inquiry on the potential for a *Human Rights Act (HR Act)* in Queensland.
3. We note at the outset that although this submission supports the introduction of a *HR Act* in Queensland, this should not be taken as support for legislative human rights protections over constitutionally entrenched protections. Rather, our submission should be read in the context that, in the absence of any consideration of a constitutionally entrenched model, we support the introduction of a HR Act.
4. This submission is intended to be made public.

PART ONE – DOES QLD NEED A HR ACT?

5. Our submission is that Queensland does need a HR Act. We endorse the submissions made by Professor George Williams and Daniel Reynolds, and also our colleague, Assistant Professor Jodie O'Leary.
6. This is for three main reasons:
 - (i) To increase accountability in government decision-making and legislative activity;
 - (ii) To strengthen human rights protections in Queensland, especially for vulnerable persons; and
 - (iii) To improve human rights and basic constitutional literacy.

Each of these three reasons is now further considered.

(i) Accountability, government decision-making and the rule of law

7. The enactment of a HR Act would improve accountability and government decision-making because it would provide tangible benchmarks against which the impacts of law can be measured. Accountability is an important concept in our public life because at all levels of government in Australia, the system functions as a representative democracy and electors have

¹ Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *The Journal of Value Inquiry* 243, 249, 270.

² Peter Botsman, *The Great Constitution Swindle: A Citizen's View of the Australian Constitution* (2000) 52.

the ability to hold their representatives to account.³ Decision-making should be undertaken on a transparent basis and decision-makers should be responsible for the decisions they make as they are exercising powers on behalf of the people and ‘those entrusted with public power are accountable to the public for the exercise of their trust’.⁴ The possibility of governments being held to account through the electoral process is the ultimate in ‘direct accountability’ but this mechanism can be subject to delays and has been described as a blunt tool in the face of a specific matter or grievance. Equally important are the processes which cumulatively can be described as ‘indirect accountability’,⁵ where the engagement of electors and oversight by institutions (such as courts, tribunals and ombudsman) can take place at any stage of the electoral cycle. The HR Act would form a crucial element of this indirect accountability network by allowing for review of proposed legislation and individual government decisions at the relevant time, rather than being consumed into broader campaign issues during election periods.

8. A HR Act in Queensland would ensure that a broader range of decisions and conduct are made on a fair and just basis, as in addition to requiring proposed legislation to be compatible the Act would also detail specific rights that should not be transgressed in government decision-making. If enacted, the HR Act should require all arms of government to act compatibly with, and to give proper consideration to, human rights when making decisions.
9. Like the Australian Capital Territory (ACT), the Queensland Parliament operates on a unicameral, rather than bicameral basis. The ACT, however, by virtue of section 122 of the Australian Constitution, is still subject to the oversight of the bicameral Federal Parliament. In Queensland, however, a unicameral legislature with no other oversight has in the past resulted in reduced parliamentary debate on legislative reforms that have had serious human rights implications. For example, the enactment of the *Vicious Lawless Association Disestablishment Act 2013* (Qld), while having the legitimate purpose of enhancing law enforcement, did not undergo sufficient scrutiny to ensure an adequate protection of civil and political rights, which was evident in substantial community backlash that ensued, and in the way the legislation was implemented. A *HR Act*, if it contained provisions requiring a statement of compatibility to accompany proposed legislative enactments and/or reform, for example, would ensure increased scrutiny of new legislative proposals, and therefore in more sustainable and balanced law and policy development.
10. The enactment of further human rights protections would enhance the rule of law in Queensland. This is important because the rule of law is essential for both economic and social prosperity. The importance of the rule of law is widely recognised both in domestic and international frameworks. It is inherently linked with human rights. For example, the preamble to the *Universal Declaration of Human Rights (UDHR)*,⁶ describes it as essential that ‘human rights should be protected by the rule of law’.⁷ Further, as the OECD has acknowledged, ‘[t]he rule of law and access to justice are crucial to the immediate upholding of law and order, and to human security imperatives, stability and development.’⁸ The rule of law, while a contested

³ Bannister J, Appleby G & Olijnyk A, *Government Accountability: Australian Administrative Law* (2015) 12.

⁴ Finn P, ‘Public trust and Public Accountability’, (1994) 3 *Griffith Law Review* 224, 228.

⁵ Feldman D, ‘Democracy, the Rule of Law and Judicial Review’, (1990) 19 *Federal Law Review* 1, 6.

⁶ *Universal Declaration on Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁷ *Universal Declaration on Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Preamble.

⁸ *OECD Development Assistance Committee*, ‘Issues Brief: Equal Access to Justice and the Rule of law’ (Report, Organisation for Economic Cooperation and Development, 2005).

<http://www.oecd.org/development/conflictandfragility/35785584.pdf>.

concept, at its very minimum requires the observance of the three basic principles set out below. These principles would be better served in Queensland by the enactment of a *HR Act* because:

a. The law must be both readily known and available, and certain and clear

This principle requires legal certainty. Legal certainty is described as ‘a central tenet of the rule of law as understood around the world’.⁹ The codification and express articulation of the human rights of Queenslanders would enhance legal certainty and predictability. Such certainty not only benefits the human rights of individuals, but also serves to provide stability that has flow-on benefits for the economy and society at large.

b. The law should be applied to all people equally, and operate uniformly in circumstances that are not materially different

Article 7 of the *Universal Declaration of Human Rights* explicitly states that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law’.¹⁰ This is particularly problematic for Queenslanders, and all Australians, because the *Australian Constitution* does not recognise a right to equality before the law. The enactment of a HR Act for Queensland would provide a further opportunity (beyond the *Anti-Discrimination Act 1991*) to advance the legal equality of Queenslanders, regardless of, for example, their race, sex, age, religion, sexual orientation or marital status.

c. There must be capacity for judicial review of executive action and the Executive arm of government should be subject to the law and any action undertaken by the Executive should be authorised by law.

It has been said that the ‘single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power’.¹¹ The connection between judicial review and independence and the rule of law can be understood as follows:

[i]f someone is accused of violating one of the general norms laid down, they should have an opportunity to request a hearing, make an argument, and confront the evidence before them prior to the application of any sanction associated with the norm. The rule of law is violated when the institutions that are supposed to embody these procedural safeguards are undermined. In this way the rule of law has become associated with political ideals such as the separation of powers and the independence of the judiciary.¹²

Depending on what model of HR Act was adopted by Queensland, there is an opportunity to provide for further judicial review on the basis of legislation having consequences for human rights. This does not mean that parliamentary sovereignty would be eroded. Rather, like Canada, a Queensland HR Act could permit legislation to derogate from human rights, as long as such derogation is consistent with the principles of a fair and just democratic society.

In short, the enactment of further human rights protections in Queensland has the potential to improve each of these three basic principles of the rule of law. In turn, this would enhance many aspects of the Queensland society by providing legal certainty and legal equality, and enhancing public confidence in the legal and judicial system.

⁹ James Maxeiner, ‘Some Realism About Legal Certainty in the Globalization of the Rule of Law’ in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer, 2010) 41.

¹⁰ *Universal Declaration on Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Art 7.

¹¹ Mortimer Sellers, ‘An Introduction to the Rule of Law in Comparative Perspective’ in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer, 2010) 1, 8.

¹² Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, 7.

(ii) To strengthen human rights protections in Queensland, especially for vulnerable persons

- 11.** Persons in Queensland may be particularly vulnerable in their interactions with the legal system because of their age, ethnicity, religion, membership of a minority group, disability, gender or mental health. Currently, the frameworks to protect such persons are inadequate. The enactment of a HR Act would improve parliamentary and judicial awareness of the need to understand how the law impacts upon vulnerable persons, and to provide such persons with a legal basis on which to assert their rights.
- 12.** There have some measures taken towards human rights protections in Queensland, such as in the *Anti-Discrimination Act 1991* (Qld) (the AD Act) and in the *Legislative Standards Act 1992* (Qld) (the LSA). Whilst important, these measures are, however, limited by their specific nature. In respect of the AD Act it only applies to individual decisions, while the *Legislative Standards Act* only applies to legislation. A HR Act would, by comparison, be more comprehensive and have greater capacity to directly benefit and protect those who need it because it would reinforce these existing protections and simultaneously apply to both individual decisions and proposed legislation.

(iii) Human rights and constitutional literacy

- 13.** Human rights and basic constitutional literacy in Australia, including Queensland, is poor. For example, a study in 2006 found that while '95% of people surveyed rated their rights as 'important', more than 60% incorrectly thought that Australia already had a charter or bill of rights in place'.¹³ The enactment of further human rights protections in Queensland would assist in improving human rights literacy, which, in itself, can assist in preventing the enactment of measures that erode human rights and in improving community engagement not only in human rights issues, but in the political process. This serves to enhance the effectiveness of representative democracy.
- 14.** As has been observed in relation to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), for example, articulating and codifying human rights in effective legislative and constitutional framework plays a 'constructive and influential role in fostering a culture of human rights'.¹⁴ In a similar vein, the Human Rights Commission has suggested that:

The Parliament needs to think about human rights when it makes laws. The Executive government needs to think about human rights when it develops policies. Public servants need to consider human rights when they provide services to the public, and when they make decisions affecting all of us. And courts need to be able to decide whether the treatment of people in Australia is in accordance with our human rights laws. A Human Rights Act can achieve all of these goals.¹⁵

¹³ Australian Human Rights Commission, '*Human rights – what do I need to know?*' < http://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/HR_ACT.doc >, 28.

¹⁴ David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58, 61.

¹⁵ Australian Human Rights Commission, '*Human rights – what do I need to know?*' < http://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/HR_ACT.doc >, 28.

PART TWO – ISSUES FOR THE HR ACT

a) The objectives of the legislation and rights to be protected

- 15. OBJECTIVES** – The objectives should specifically refer to broad aims, such as those contained in the Victorian Charter in section 1. The Victorian Charter in Part 2 contains 20 human rights, largely based on, but not identical to, the ICCPR. A HR Act in Queensland should articulate that all rights that are important but that the rights are not absolute and can be subject to reasonable limitations. A dialogue model for the HR Act should be adopted, as this will ensure that all Queenslanders can know the reasons if the HR Act is not complied with in the drafting of new legislation. The proposed HR Act should mirror the requirement in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) for all proposed legislation to be accompanied by a statement as to the human rights impact and compliance with the HR Act. Further, given the decision of the High Court of Australia in *Momcilovic v The Queen* (2011) 245 CLR 1, the HR Act should ensure some capacity for the Courts to impose legal consequences of incompatibility, so as to stay within the boundaries of exercises of judicial power.
- 16. RIGHTS** – The HR Act should, at the very least, mirror key component of international human rights law to which Australia is party. In particular, the *UDHR*,¹⁶ recognises two types of human rights: civil and political rights on the one hand, and economic, social and cultural rights, on the other.¹⁷ In order to codify these into legal obligations, two separate international covenants were adopted, ‘which, taken together, constitute the bedrock of the international normative regime for human rights’.¹⁸ These two conventions are the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Many other multilateral and regional treaties have been negotiated setting out human rights obligations, such as: the *International Convention on the Elimination of all Forms of Racial Discrimination*;¹⁹ the *International Covenant on Economic, Social and Cultural Rights*;²⁰ the *International Covenant on Civil and Political Rights*;²¹ the *Convention on the Elimination of All Forms of Discrimination Against Women*;²² the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;²³ the *Convention on the Rights of the Child*;²⁴ and the *Convention on the Rights of Persons with Disabilities*.²⁵ In short, a Queensland HR Act should, at the very least, mirror the rights found within these foundational documents, including the right to equality before the law and fair trial and due process rights. Drafters of any Queensland HR Act should also consider the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.
- 17.** The HR Act should state that it applies to all public authorities. In applying to all public authorities, the HR Act would therefore also apply to the Queensland Civil and Administrative Tribunal (QCAT). This should not be expected to be an issue, particularly given the statutory objectives of QCAT in section 3 of the *QCAT Act 2009* (Qld) and the existence of the QCAT Service Charter.

¹⁶ *Universal Declaration on Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹⁷ Phillip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 278.

¹⁸ *Ibid.*

¹⁹ Done at New York on 21 December 1965 ([1975] ATS 40).

²⁰ Done at New York on 16 December 1966 ([1976] ATS 5).

²¹ Done at New York on 16 December 1966 ([1980] ATS 23)

²² Done at New York on 18 December 1979 ([1983] ATS 9).

²³ Done at New York on 10 December 1984 ([1989] ATS 21)

²⁴ Done at New York on 20 November 1989 ([1991] ATS 4).

²⁵ Done at New York on 13 December 2006 ([2008] ATS 12).

18. Consistent with the approach taken to the Charter in Canada, all government or public authorities and tribunals would have a duty encouraged to apply and uphold the HR Act. This will also ensure any statutory human rights legislation remains a 'living document' which is supported across the breadth of state and local government authorities.
19. There may be questions which arise in the application of the HR Act to public authorities, given the range of government corporations and adoption of 'outsourcing' and 'contracting' of services which were traditionally provided by government. This issue will require careful consideration in respect of any definition of the term 'public authorities' in the HR Act. There are entities which are not strictly public but may nonetheless be suitable for inclusion. This is likely to be one of the more challenging issues for consideration.

Conclusion

20. This submission recommends the Queensland Parliament Legal Affairs and Community Safety Committee conclude that it is appropriate and desirable to legislate for HR Act in Queensland, other than through a constitutionally entrenched model (subject, of course, to our view that a constitutionally entrenched model is ultimately the preferred model).