QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

Chair
Legal Affairs and Community Safety Committee

By Email: LACSC@parliament.qld.gov.au

Dear Sir,

Human Rights Bill

Please accept this submission in relation to this Bill.

The QCCL is an organisation of volunteers, established in 1967. It campaigns for the civil liberties and civil rights of Queenslanders. In particular, it seeks the implementation in Queensland of the Universal Declaration of Human Rights. This Bill represents a major step awards that end.

For this reason, the QCCL congratulates the government on this Bill and calls upon all sides of politics to support this measure, which will bring benefits to all Queenslanders.

The first attempt to pass a Bill of Rights in Australia occurred in Queensland in December 1959, when the then conservative Premier, Frank Nicklin, introduced the *Constitution (Declaration of Rights) Bill*, which was supposed to "secure the blessings of liberty to our people and our posterity". Rights to be protected by the bill included, the right of a person who was arrested to be informed of the reason for their arrest; the right to obtain legal assistance and to have recourse to habeas corpus. There was to be a guarantee against the compulsory acquisition of property, otherwise than on just terms. The bill was heavily criticised for giving too much power to Judges and subsequently lapsed[1].

In 1968, the late Jim Kelly, first President of QCCL, articulated the case for a Bill of Rights. Fifty years later the QCCL is pleased to welcome the introduction by the Palaszczuk Government of a Human Rights Act which will provide comprehensive protection for civil liberties.

The Bill contains a set of fundamental rights that nobody could reasonably object to: the right to life, freedom of speech, freedom from torture, privacy, the right to private property and equality before the law.

The Bill goes further than those in other States to include a right to education and health and a right to make a complaint to the Human Rights Commission, where the Commission will try to settle the dispute

[1] For more information see Ross Fitzgerald *From 1915 to the early 1980s* UQP 1984 pp 557-8

1. CRITICISMS

However there are a number of significant weaknesses in the Bill.

1.1. No stand-alone cause of action for damages

The current Bill, like the Victorian Charter allows a rights-based cause of action only on the back of existing legal claims. The QCCL submits that this is a significant weakness. In Victoria, this situation was intended to reduce litigation but has instead resulted in lengthier and more complex cases.[2] In 2008, the ACT introduced section 40C(2) into their Charter which permitted an individual right of action. Based on research conducted by Professor George Williams AO, while there was a spike in the number of cases concerning breach of the Charter in 2009, this was not sustained. Prior to the introduction of section 40C(2), the percentage of ACT cases mentioning the Charter was just below 8%, and as of 2015 it sits just below 10%.[3] This refutes arguments that an individual cause of action in a human rights charter would lead to a flood of litigation.

As we have said on a number of occasions, it would be a tragedy to pass legislation designed to enhance the protection of human rights, if the effect of that legislation was to diminish respect for human rights. It remains our concern, that a Human Rights Act that does not contain an adequate enforcement mechanism runs that very risk.

For that reason, **we urge the Committee to recommend the Bill be amended to include a standalone right to bring proceedings for breach of the Act in any court of competent jurisdiction. Furthermore, the cause of action should enable the plaintiff to recover compensation.**

1.2. Sections 126 and 183

We understand, that both these provisions are designed to deal with particular difficulties facing the government at the current time. Section 183 deals with the need to segregate some children in detention centres and section 126 is to deal with the current overcrowding in prisons.

We accept that the government has some difficulties in these areas. The argument has been put, that if these provisions do not exist, the government will have no choice but to build more prisons. We would certainly not want that result.

Having said all that, it seems to us that the factors which these provisions allow the relevant decision makers to take into account, are fully accommodated in section 13 of the Bill. For that reason, our starting point is that the specific provisions are unnecessary.

Having said that, we acknowledge that these provisions are narrowly tailored. However, if they are to remain, **it is our submission that the committee should recommend that the sections be limited to a specific time period by a sunset clause** and that the government should commit itself to a clear program for overcoming the issues which have made these provisions necessary during that period of time.

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[2] Law Institute of Victoria, Submission No 79 to the Independent Reviewer, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Vic), 19.
[3] Professor George Williams AO, 'Submission to Human Rights Act Inquiry', 11 March 2016.

1.3. Definition of Public Entity

It is our view, that the definition of public entity is too narrow. In an age of increasing outsourcing of the provision of fundamental government services**, it is our submission that the committee should recommend that the legislation be amended to apply to all bodies, whether public or private, which provide government services under contract with government or using government funds.** If a broad definition is not used, the risk is run the legislation will be increasingly ineffectual because its scope of application will reduce as outsourcing increases.

In addition this has the potential to bring within the scope of the legislation, private schools and aged care facilities.

We have in the past argued that the provisions in the *Education (General Provisions) Act* providing for a review of decisions to exclude students, should apply to private schools. The issue here is that given the potential adverse consequences for a student of expulsion, they should have a right of external review. The fact that a school is a private school in no way diminishes the importance of the existence of such a right. The same argument applies by analogy here.

We know, about the increasing level of abuse of elderly people in aged care facilities. Their position would be greatly improved by the application of this Act to aged care facilities.

1.4. Corporations

It seems to the Council with respect the proposition that human rights can never inhere in corporations arises out of a confusion. Most critics of the proposition that human rights can inhere in corporations seek in effect to say that all corporations have commercial interests. This is of course a nonsense. The QCCL is a corporation. It is not run for a profit. Most political parties these days are corporations. They are not run for commercial interests. Whilst it is of course legally and ethically relevant to consider a person's motive in determining the ethical and moral responsibility for their conduct, their motive is not at the end of the day finally determinative of the issue. In any event the fact that a body is a corporation and has commercial interests does not mean that it should not share in the human rights of natural persons where in the modern context it is necessary that corporations share in those rights to ensure that everyone fully benefits from those rights. The obvious example is, the right of freedom of speech. Almost all modern media, whether mainstream or not is conducted by or through corporations.

In the end then **the Council submits that the committee should recommend that the Bill be amended to provide for, the situational model for determining whether or not a corporation is entitled to human rights contained in the South African Constitution and the New Zealand Bill of Rights.**

2. THE CASE FOR AND AGAINST A HUMAN RIGHTS ACT

Whilst it has been done on a number of occasions, it is appropriate to revisit the in principle arguments about a Human Rights Act.

2.1. The case against

There are concerns that a Human Rights Act would involve significant political and social costs. These concerns can be summarised as follows:

1. Diminishing of parliamentary sovereignty
2. Involving courts in public controversy
3. Ineffectiveness of a Human Rights Act.

The Council disagrees with each of these concerns and seeks to rebut them in turn.

In respect of the first concern, the Council agrees with opponents to a Human Rights Act who state that the final say in matters should lie with elected officials. It is for this reason that a statutory Human Rights Act is an appropriate means of both protecting human rights and maintaining parliamentary sovereignty. Under this model a court cannot strike down legislation. It can only make a ruling of incompatibility and refer the matter to the Parliament. This leaves the final say on the issue to the parliament. In fact, the model proposed here is even more favourable to parliamentary sovereignty than, for example, the Canadian Charter of Rights where the parliament must take a positive step in order to overturn a decision of the court that a piece of legislation breaches the Charter. Under the statutory model the parliament can do absolutely nothing and the law will not change.

In regards to the second concern, the Council notes that the courts have always had to make difficult policy decisions. Some of them have been quite radical including the reform of the common law to accommodate the laissez faire economic and industrial system of the eighteenth century. Even the daily work of the courts in determining negligence questions has the potential to draw the courts into controversial areas. The Council does not believe that the courts will lose public confidence through the implementation of a Human Rights Act.

Finally, in regards to the observation of the ineffectiveness of Human Rights Act, the Council concedes as a matter of historical fact that there have been such instruments in dictatorships such as Stalinist Russia and Zimbabwe. Similarly, the American Bill of Rights did not prevent the mass internment of Japanese during World War II, nor prevent Abraham Lincoln from suspending habeas corpus during America's civil war and detaining 10,000 people. However, it must be identified that it was not the politicians who desegregated the schools in the south of America – it was the African Americans who challenged desegregation in the Supreme Court. This is a perfect example of how a human rights instrument provided a peg for the disadvantaged to hang their hat on, so to speak.

A Human Rights Act is not a panacea. It will only work if there is a culture supporting human rights and sufficient political activism to ensure that human rights are in fact respected. Robert Dahl, an American political thinker, argued that the effect of a Bill of Rights may over time be to diminish the strength of the norms in the political culture because the participants no longer feel the need to practice self-restraint because the courts can be relied upon to prevent the violation of fundamental rights and liberties.[4] The Human Rights Act should not have that effect because legislation held to be incompatible with the Act will only be repealed if the politicians decide to do so. It may indeed still need political action to ensure that this occurs and an accompanying strong human rights culture to guide such action.

2.2. Benefits of adopting a Human Rights Act

In the Council's view there are three strong arguments for a Human Rights Act.

The first major improvement that a Human Rights Act would bring is a comprehensive protection for human rights. Of course this Bill does not cover all rights, but for those it does it will provide protection in areas not currently covered by specific legislation or the common law.

[4] Robert Dahl, *Democracy and its Critics*, Yale: Yale University Press.

A Human Rights Act, even without a statutory cause of action would give disaffected, disadvantaged, marginalized and other aggrieved persons in society a place to redress their grievances.[5] With breaches of human rights judicially enforceable an incentive is created to avoid non-compliance and rights considerations are entrenched into policies and practices.

Thirdly, a Human Rights Act, by giving legal recognition to certain fundamental rights helps create a culture in which law-makers and the executive become educated about them and more respectful of them. It provides a catalyst for best practice standards and policy reviews in government without placing an unreasonable constraint on decision makers. This has been proven by the Victorian experience, which is well illustrated by the Public Interest Law Clearing House's 2011 report which stated that 11 out of the 20 cases discussed were resolved through negotiation with the others being referred to Victorian Civil and Administrative Tribunal (VCAT). [6] The report highlights the usefulness of a charter in shifting away from 'one size fits all' policy decisions in complex cases to evaluations based on individual circumstances. Further, as public body decisions are not always consistent, a charter provides a common set of standards to be applied, supported by recourse to the courts if necessary.

3. SUMMARY

A Human Rights Act is not a panacea, ultimately only an active citizenry can protect our rights and liberties. However, the Act will provide a new tool that citizens of this State can use to protect themselves. Perhaps more importantly, it will force decision-makers to consider the particular circumstances of each individual, about whom they have to make a decision. That must result in better decisions and better government.

Despite our criticisms, we are of the view that this Bill represents a bold reform and this is not the time to allow the perfect to be the enemy of the good.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
26 November 2018

[5] Gareth Evans, 1973, 'An Australian Bill of Rights?' *45(1) The Australian Quarterly* 4, 15.
[6] PILCH: Homeless Person's Legal Clinic, 'Charting the Right Course: Submission to the Inquiry into the Charter of Human Rights and Responsibilities', 6 June 2011.

APPENDIX

Responsibilities

Some argue that an Act such as this should include responsibilities as well as rights. In our view the argument for the inclusion of an express statement of duties or responsibilities in the Human Rights Act is entirely misconceived.

The system of human rights already recognises that there are competing human interests which must be balanced against one another. That system, the Universal Declaration of Human Rights, already seeks to set out the principles upon which competing interests are to be reconciled.

Lord Bingham, former senior Lord of the United Kingdom, in his speech to the Human Rights Law Resource Centre on 9 December 2008 at page 7, quoted the following remark of the European Court of Human Rights "The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, par. 5). The search for this balance is inherent in the whole of the Convention" SPORRONG AND LÖNNROTH v. SWEDEN (Application no. 7151/75; 7152/75).

His Lordship went on to say that

> "This is a comment of the European Human Rights Court in relation to the human rights convention of the European community but it applies as much to the national system of human rights.

The Council endorses the position of the Joint Committee of the UK Parliament in its report on a Bill of Rights for the UK that:

> "Human rights are rights which people enjoy by virtue of being human: they cannot be made contingent on the fulfilment of responsibilities. The moment you seek to make a person or persons' entitlement to human rights contingent on their performance of certain arbitrary moral or other obligations you destroy the whole concept of human rights."

As Hohfeld and other scholars have adequately demonstrated you cannot have rights without duties or responsibilities. The concept of human rights in fact involves rights and duties on others, including the State. An express statement is accordingly not required.

Furthermore, a distinction needs to be made between correlative and non-correlative duties. For example, the right to life and the right property give rise to correlated duties in the form of duty not to murder and duty not to steal. In other words, those duties can be derived directly from the right. By way of contrast non-correlative duties, exist free of any right. For example such a duty might be that an individual must "serve his national community by placing his physical and intellectual abilities at its service". Such duties, of such a broad nature are so disconnected from individual rights, that they are not constrained by those rights. In any conflict between such duties and rights, the rights are likely to be swamped. These types of duties are unnecessarily vague and are usually used in the service of political or economic expediency.

In short, in a liberal political order, there are some rights which precede the state and to which the state is subject. Vague, freestanding duties overwhelm such rights. The legitimate duties are those which flow directly from rights.