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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

26 November 2018

Dear Committee Secretary,

Human Rights Bill

Submission by Professor Nicholas Aroney and Professor Richard Ekins

I. Introduction

1. Thank you for the opportunity to make a submission to this committee.
2. In 2016, we made a submission to the Human Rights Inquiry (see Appendix). In that submission we recommended that the Queensland Parliament should not enact a Human Rights Act. Our reasons were several.
3. Firstly, respect for human rights does not require enactment of a statutory charter of rights. Human rights are best protected by carefully drafted legislation which specifically addresses particular issues in a manner that gives certainty to all those affected by the law. The enactment of abstract 'rights' does the very opposite, because it introduces vagueness and uncertainty into the law.
4. Secondly, charters of rights distort the proper functioning of the courts. They invite judges to evaluate legislation against standards that are so broad that they amount to an open-ended assessment of whether the law ought to have been enacted. This entangles courts in what are essentially political controversies, undermining public confidence in their political impartiality and impairing their ability to uphold the rule of law.

5. Thirdly, statutory charters of rights do not produce dialogue. All real-life political contests concern confrontations between competing rights, interests and objectives. The ability and willingness of parties to engage in genuine deliberation over contested political matters is dependent on factors that have nothing to do with the existence of a charter of rights. The *Charter of Rights and Responsibilities* in Victoria has not made genuine dialogue any more likely than it otherwise would have been.

6. Fourthly, charters of rights are a kind of constitutional statute because they regulate the making, administration and adjudication of law. Constitutional statutes should not ordinarily be enacted without bipartisan support because they constitute the ground-rules of our democratic system.

7. These were our reasons in principle for opposing the enactment of a statutory charter of rights in Queensland. Having now carefully reviewed the Human Rights Bill, we continue to think they are good reasons for Parliament not to enact such a Bill.

8. In the remainder of this submission we consider the Human Rights Bill under the following headings:

   (i) Constitutional Change and Legislative Process

   (ii) The Explanatory Memorandum

   (iii) The Scope of the Bill

   (iv) Definition and Limitation of Rights

   (v) The Bill's Operative Provisions

II. Constitutional Change and Legislative Process

9. The Committee's report, *Inquiry into a possible Human Rights Act for Queensland*, was tabled on 30 June 2016. The Committee was unable to agree on whether it would be appropriate or desirable to have a Human Rights Act in Queensland: the government members supported it, while the non-government members opposed it. The decision of the Government to introduce a Human Rights Act despite the disagreement of non-government members of the Committee underscores a structural weakness in Queensland's constitutional framework. Governments are able to push constitutional legislation through Queensland's unicameral Parliament without the broad consensus that would normally be secured if the consent of a democratically-elected second chamber was required. We urge the Government, the Committee and the Parliament, not to concur in the enactment of a Human Rights Act without bipartisan support.

10. The Explanatory Memorandum accompanying the Human Rights Bill states that the stakeholder organisations consulted on the Bill prior to its finalisation were 'very supportive of the Bill based on the model of the Victorian Charter' (page 11). The organisations listed are far from representative of the great diversity of groups in our society who have a legitimate interest in the content of the Bill. The selectivity of the organisations consulted in the drafting process underscores the structural weaknesses in Queensland's system of government. A bill purporting to protect the rights of all Queenslanders has been

drafted in consultation with only some sectors of the community. This is ironic, given that a professed purpose of the Bill is to improve the legislative process. In our respectful submission, this failure to consult widely has exposed the Bill to numerous drafting problems, which we detail below.

III. The Explanatory Memorandum

11. The Explanatory Memorandum to the Human Rights Bill makes several problematic claims. Firstly, it asserts that the Bill 'will maintain the existing relationship between the courts, the Parliament and the executive (government)' (page 3). However, with respect, this is simply untrue. The Bill will change the relationship between courts, Parliament and executive in at least four major ways:

    (i) Courts routinely uphold the rights that individuals have against one another and against public bodies. However, the abstraction of the rights set out in the Bill and the fact that those rights are subject to limits on very general grounds (clause 13) is unusual and will require courts to choose what these rights are to mean. This is a novel and far-reaching empowerment of the courts.

    (ii) Courts are presently under a duty to interpret statutory provisions in accordance with orthodox principles of statutory construction. These principles are complex, and include the principle of legality, but do not include a duty to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way that is compatible, or most compatible with the human rights listed in the Human Rights Bill (clause 48(1) and (2)). Introducing this new interpretive direction will constitute a significant change in the relationship between the courts and the Parliament and will increase the relative power of the courts.

    (iii) Courts are currently at liberty to make observations in the course of their judgments which draw the attention of the Parliament to anomalies in the law that emerge in the cases that come before them. However, the Human Rights Bill contains a clause that will authorise the Supreme Court to issue a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights (clause 53(2)). The issue of such a declaration places the relevant portfolio committee of the Parliament under an obligation to consider and report on the declaration (clause 57) and the relevant Minister to prepare and table a written response to the declaration (clause 56). This will constitute a significant change in the relationship between the Supreme Court, the Parliament and the executive. It will politicise litigation, arming courts to participate in democratic politics, exposing them to political criticism.

    (iv) Clause 58, which makes it unlawful for a public entity 'to act or make a decision in a way that is not compatible with human rights' or 'in making a decision, to fail to give proper consideration to a human right relevant to the decision' will also constitute a significant change in the relationship between the courts and the executive, particularly because such unlawfulness can be a ground on which a person may seek relief from a court pursuant to the requirements of clause 59.

12. The Explanatory Memorandum states that the aim of the Bill is to consolidate and establish statutory protections for human rights recognised under international law drawn from the ICCPR, ICESCR, and UDHR (page 2). Notably, however, some important rights in the ICCPR are excluded, but no reason is offered for their exclusion. For example, pursuant to article 18.4 of the ICCPR, Australia is under an international law obligation to have respect for 'the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions'. However, the Human Rights Bill only incorporates the rights referred to in article 18.1 and 18.2. No explanation of the omission of article 18.4 is offered in the Explanatory Memorandum even though it is claimed that clause 20 is modelled on article 18.

13. The Explanatory Memorandum acknowledges that 'human rights are not absolute and may be subject under law to reasonable limits' (page 5). However, rather than adopt the carefully-defined limitations clauses that appear in particular provisions of the ICCPR, the Bill adopts a vague and open-ended limitations clause which provides significantly less protection for certain rights and which allows the courts much wider leeway in determining where the balance should lie (clause 13). For example, article 18.3 of the ICCPR states that 'freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Further, article 19.3 of the ICCPR states that the right to freedom of expression 'carries with it special duties and responsibilities' and 'may therefore be subject to certain restrictions'; however, these restrictions 'shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals'. Clause 13 is much more open-ended and does not focus on the requirement that limitations and restrictions be 'necessary' and does not include the particular purposes for which they may be enacted, including the protection of the fundamental rights and freedoms of others. We detail our further concerns with the limitations clause below. Our point here is that this is a selective approach to the incorporation of international human rights principles into the Human Rights Bill, which belies the Explanatory Memorandum's claims and may devalue some rights that are affirmed in international law.

14. The Explanatory Memorandum indicates that the Bill will apply to the 'development of policy and legislation' and 'all public sector decision-making' (page 6). The Human Rights Bill, if enacted, will accordingly apply to all statutes and statutory instruments, whether passed or made before and after the commencement of the Act (clause 108). However, again without explanation, some matters are arbitrarily excluded from the Bill's application. For example, clause 106 says that nothing in the Act will affect 'any law relating to termination of pregnancy or the killing of an unborn child'. This contradicts the suggestion that the Bill offers a '*comprehensive* statement of human rights', in the spirit of the UDHR, as claimed by the Explanatory Memorandum.

15. Finally, the Explanatory Memorandum (pages 1, 6, 10, 11) emphasises that one of the stated objectives of the Bill is to promote a 'dialogue' between the judiciary, the legislature and

the executive about the nature, meaning and scope of human rights (clause 3). The Bill is evidently modelled on the Victorian and ACT Charters in this respect. However, as four justices of the High Court of Australia pointed out in *Momcilovic v The Queen*, to describe the relationship between the three branches in terms of 'dialogue' is 'inapposite', 'inaccurate' and 'apt to mislead' because it suggests that non-judicial functions are being conferred on the courts in a manner that is unconstitutional.[1] This gives rise to two problems. First, the Bill is drafted in terms that the High Court has said are inaccurate and misleading. This is poor drafting practice. Second, noting that the Bill confers more discretion on the courts than the Victorian Charter, this increases the risk that it could be found unconstitutional.

IV. The Scope of the Bill

16. The scope of the Bill is obscure. To whom does it apply? The Bill imposes obligations on "public entities", which are defined in clauses 9 and 10. However, that definition is a placeholder, inviting and requiring subsequent judicial choice as to what entities shall be taken to be public entities. Not every case will be uncertain, of course, but it will often be unclear who is subject to the duties the Bill introduces. Conferring a right on a person is meaningless without imposing duties on some other person or body. It is an abdication of legislative responsibility to leave to courts the choice of who shall be duty-bearers, for this will determine how far the rights introduced by the Bill extend.

17. The drafting of the Bill suggests some awareness of this problem. For example, the Bill defines 'public entity' to include 'an entity whose functions are, or include, functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise)' (clause 9(1)(h)). However, recognising that this definition could readily be interpreted to include a very wide array of entities to which it is considered the Bill should not apply, the Bill further specifies that a 'non-State school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State'. Such specification is welcome insofar as it means Parliament would itself be settling, clearly and on the face of the Bill, the question of the Bill's application to non-State schools. But what of other entities which perform functions which might possibly bring it within clause 9(1)(h)? The specific exclusion of non-State schools may generate uncertainty about whether any particular entity falls within the general definition or is somehow analogous to non-State schools. The obscurity in the scope of 'public entity' under clause 9 is exacerbated by the terms of clause 58(3), which indirectly imply that some religious bodies may, at least in some circumstances, fall within the definition. This further complicates and confuses the question of which bodies are public entities. It also raises the question whether the exemption for religious bodies contained in clause 58(3) should colour the interpretation of the right to freedom of religion in clause 20. Clause 58(3) applies only 'to bodies established for a religious purpose' and only to

[1] *Momcilovic v The Queen* (2011) 245 CLR 1, 67-8 (French CJ), 84 (Gummow J), 207 (Crennan and Kiefel JJ).

acts or decisions 'done or made in accordance with the doctrine of the religion' which are 'necessary to avoid offending the religious sensitivities of the people of the religion'. Does this mean that the right to freedom of religion applies to such bodies? If so, how does this relate to the note to clause 11(2), which states that '[a] corporation does not have human rights'? All of this illustrates a general and pervasive problem with the Bill: that will introduce changes to the law of such uncertainty that even the Parliament itself cannot predict or define them with clarity.

18. Clause 60 provides for entities that are not public entities to make themselves subject to the obligations the Bill imposes. This is a very surprising provision. It would have unpredictable consequences on the law applicable to such bodies, for it would engage the interpretive obligation and the procedural obligations concerning human rights litigation (on which we say more below). It is also, with respect, an entirely unnecessary and perverse provision. Private bodies are free to bind themselves to treat others in particular ways by way of the machinery of private law. They should not be invited to bind themselves to the state, even with the option of withdrawal, in ways that invite and require further state supervision and control, often by way of adjudication. Inevitably this would place political pressure on private bodies to bind themselves in this way, with the false inference being that unless they submitted to state control in this way they disdained human rights.

19. The Bill's specification that corporations have no rights under the Bill is doubtless driven by a fear that the alternative would be corporate use of the Bill's machinery to challenge regulation and otherwise protect commercial interests. The fear is a reasonable one but the remedy is problematic. Much of social life is undertaken through corporate form, not only for-profit arrangements, but also many not-for-profit social, religious and charitable organisations. This appears to be acknowledged by clause 20(1)(b) in so far as it recognises that freedom of religion includes freedom to demonstrate one's religion 'as part of a community' and clause 22(2) in so far as it recognises the right to 'freedom of association'. Social, religious and charitable groups often use the corporate form to organise themselves. It is through such corporations that they exercise their rights to associate and pursue their religious, social or charitable goals. As a consequence, it is often such corporations that are best placed to assert and to insist upon respect for rights. The Bill's unqualified statement that corporations do not have human rights risks undermining the effective exercise of individual human rights because it is through corporations that individual rights to freedom of association and freedom of religion are often realised. It also creates uncertainty as to whether a corporation may be able benefit from rights-protective provisions of the Bill when it is the means by which individuals are exercising their communal and associational rights as recognised in clauses 20 and 22.

20. The exclusion of corporations from the scope of the Bill's protections may also introduce unprincipled distinctions. The right to property is an obvious example. Clause 24(1) states that 'persons have the right to own property alone or in association with others'. One might reason that if a group of people choose to associate by forming a corporation, then the corporation is entitled to the right not to be arbitrarily deprived of its property in contravention of clause 24(2). However, the note to clause 11(2) suggests that the

corporation is not entitled to this right. If this is the case then the right to property is itself rendered arbitrary in the exclusion of its application to such corporations. Why should property held by an individual in his or her own name receive protection while property held by a corporation owned and controlled by that same individual does not? The Bill would provide radically differential protection to property-owners in a way that cannot be justified in principle or in practice.

V. Definition and Limitation of Rights

21. The rights the Bill affirms are all qualified by the limitation provision in clause 13. This provision is a laundry list of considerations that might be relevant to the reasonableness of a limit on a right. Strikingly, however, it includes no mention of the need to protect the rights of others, even though this is often a justifiable reason why the state limits a right. However, the range of considerations set out in clause 13 do not stipulate a particular legal test which judges may apply by way of legal training or technique to determine how a law might be interpreted compatibly with human rights, or whether it is capable of being so interpreted. Instead, clause 13 offers judges an open-ended framework for lawmaking choice, for reasoning about what should be done by way of statute and administrative action, and about the standards of justice and decency that should govern our public life. These are political questions that are properly the domain of elected branches of the government.

22. The rights set out in the Human Rights Bill are familiar from international instruments, although with some important omissions (as noted above). However, while international instruments understandably articulate human rights principles in highly abstract form, it does not follow that domestic legislation should be framed in similarly general and abstract terms. Responsible law-making involves the application of general principles of justice to specific situations and contexts in a manner that is clear and unambiguous, enabling citizens to understand the content of the law and regulate their behaviour accordingly. No statute can be entirely free of uncertainty, but legislation which articulates an array of human rights standards at the highest level of generality produces avoidable uncertainty in the law which can only be resolved by expensive, burdensome and often protracted litigation. But the Bill does precisely this by articulating an array of abstract rights and leaving their interpretation, ultimately, to the courts. Partly in recognition of the unpredictability that this will cause, the Bill sometimes includes qualifications and exceptions intended to help resolve the uncertainty. But this is understandably sporadic and limited. For it is not humanly possible to do so systematically and comprehensively within the compass of a single bill. That is why statutes ordinarily address only particular, clearly-defined topics and why they are only enacted following careful consultation and deliberation focussed on the specific issues that arise within those topics. In what follows, we illustrate this point with respect to several of the rights contained in the Bill.

23. Clause 15 addresses the issue of equality and non-discrimination in five distinct and highly abstract formulations. Anti-discrimination laws are specific about the particular grounds upon which, and areas of activity within which discrimination is made unlawful. The

formulations in clause 15 are not specified in this way. They refer only to 'discrimination'. Clause 15(4) says that 'every person has the right to equal and effective protection against discrimination'. Is this limited to the particular grounds and areas of unlawful discrimination contained, for example, in the *Anti-Discrimination Act 1991* (Qld), or does it authorise the courts to extend anti-discrimination principles into new areas of activity and new grounds of differential treatment? Is it limited to the procedures and remedies set out in the *Anti-Discrimination Act* or does it licence the courts to fashion additional procedures and remedies? The experience in the United States, Canada and elsewhere is that such articulations of 'rights' tend to implicate courts in deciding whether the substance of a law is consistent with the principle of equality. This is a central, recurring and very often controversial moral question which should be for legislatures to determine. Courts have no special competence to decide that some distinction drawn between persons is or is not justifiable. And the making of such distinctions, the introduction of particular rules for particular circumstances, is the very essence of responsible lawmaking properly undertaken by democratically accountable legislatures.

24. Clause 18(3) introduces a detailed specification of the right not to be made to perform forced or compulsory labour in order to avoid subsequent misunderstanding of the abstract statement of the right in clause 18(2). We take no view on its merits of this specification but we note that the Parliament could provide such a specification in relation to almost all of these rights — and indeed past Parliaments have done so in other legislation. These specifications may be controversial — we note that some groups, like Amnesty International, have been very critical of some of the Bill's provisions — but the alternative to undertaking this task is simply to postpone to a later date, and to transfer to a court, the task of choosing what the right shall require. It is this type of postponement and transfer that the Bill resists in clause 18(3) and in other clauses of the Bill (such as clause 107 which protects native title legislation from the Bill's reach). But the balance of the Bill — the whole point of it — is to introduce vague propositions about rights and their limitations and to authorise courts to give them meaning. This is a major transfer of lawmaking power to the courts. Worse, it is a transfer that requires the law to be made in the course of adjudication, *after* the parties have acted, and to be made in a form that is not fit to regulate subsequent action, insofar as it lacks the clarity and stability of legislation. The Bill breaches the principle of the rule of law in this respect.

25. Clause 26 concerns children. Subclause (1) affirms that families are fundamental to society and are entitled to protection. This is a true and important moral principle but is not yet a workable legal proposition. Subclause (2) asserts that a child has the right to the protection the child needs, which is in the best interests of the child, because the child is a child. This is a very general proposition (awkwardly expressed), which will require extensive specification of the kind that judges are not well-placed to undertake. It is the sort of matter that ought to be handled by detailed legislation similar to the *Child Protection Act 1999*. Subclause (3) affirms a right to a name and to be registered as having been born. This has the merit of being relatively specific and narrow, but is still much more limited than the detailed scheme one would find in a statute addressing this matter comprehensively.

26. Clauses 36 and 37 are weak guarantees of socio-economic rights. The right to education is underspecified and is a poor cousin to legislation squarely addressing the rights and entitlements that citizens ought to have in relation to education. The provision makes justiciable the question of the adequacy of educational provision and the equity of its extension to particular persons. This is not something a court ought to decide because it involves questions of distributive justice, which can only be evaluated from a perspective that takes the resources and needs of the entire community into account. But in the hands of judges, the right can only collapsed into some form of right to non-discrimination, which is affirmed anyway in various places in the Bill. The law already prohibits discrimination in the provision of education and health care as with other public services. The rights to education and health are therefore either redundant or may serve as an engine for inventing new grounds of challenge to policy decisions concerning matters of distributive justice. But determination of such matters ought not to be outsourced to courts. They are neither competent nor equipped to make responsible decisions about such matters.

VI. The Bill's Operative Provisions

27. We turn now to the operative provisions of the Bill — that is, to the machinery by which the Bill aims to ensure that rights are upheld in law. Clause 38 requires members of Parliament introducing private members bills and Ministers introducing government bills to prepare statements as to the compatibility of such bills with human rights. Clause 42 provides that a failure to comply with the Bill's requirement that legislators certify compatibility with human rights will not invalidate the legislation subsequently enacted. However, the Bill does not address the risk that these certificates may be relied on in litigation. In the UK, courts have at times reasoned that because the Minister certified that proposed legislation conformed to rights judges were entitled to impose a very strained meaning on the statute in order to secure the result the judges thought respected rights.[2] In other words, the provision of a certificate emboldened more radical interpretation.

28. Clause 43, which makes provision for legislative override, is highly problematic. The Bill is framed on the presupposition that legislation that does not conform to the rights affirmed in the Bill remains valid. For this reason, there is no need for the legislature to expressly declare that legislation 'has effect' despite being incompatible with the Bill (clause 43(1)): whatever the Parliament enacts is simply valid, and therefore effective according to its terms. Although clause 43 is framed in this initially confusing way, clause 45 later explains that the effect of an override declaration is to enable Parliament to suspend the application of the Bill for a period of five years, during which time the Supreme Court cannot make a declaration of incompatibility under clause 53 and is not required to interpret the legislation in a way that is compatible with human rights under clause 48. Several problems arise. Among them the first is that clause 43 does not contemplate the situation where the Supreme Court and a future Parliament have formed different views as to whether legislation is in fact compatible with human rights. The note to clause 43(4) says that override declarations will only be made in exceptional circumstances such as war, state of

[2] *R v A (No 2)* [2002] 1 A.C. 25

emergency or similar crisis. This magnifies the significance of court-made declarations of incompatibility and limits the scope for parliamentary override declarations. The Bill does not contemplate the possibility that members of Parliament and judges of the Supreme Court may simply have different views about whether legislation is compatible with human rights. In this respect, the Bill goes much further than the Victorian Charter, which refers only to Supreme Court declarations of 'inconsistent interpretation' (section 36). Secondly, the scheme also implies that at the expiry of the five-year period the meaning of the legislation may change, when the interpretive direction comes into operation. This suggests that the interpretive direction is envisaged as a lawmaking power. It is startling that the Bill contemplates the meaning of a statute changing without further legislative action. This, too, would be productive of uncertainty and potential confusion.

29. The general problem with the scheme envisaged by the Bill is that it seems mysterious why Parliament would ever reasonably choose to legislate inconsistently with human rights (as reasonably limited). The answer, at least in the UK and likely in Queensland too if the Bill is enacted, is that talk of human rights tends to collapse to judicial decisions about human rights.[3] One likely effect of the Bill is to privilege judicial views about human rights and to force others to frame political and moral arguments in legal terms. This distorts public discourse and empowers lawyers.

30. Clause 48 empowers judges to interpret statutory provisions compatibly with human rights. For reasons we have explained, this will inevitably introduce major uncertainty into Queensland law. There is also every prospect that, over time, judges will be encouraged to understand the provision to empower them to change the meanings of statutes and will struggle to articulate principled limits on so doing. Clause 48(2) goes even further. It provides that even if a statutory provision cannot be interpreted compatibly with human rights, the provision must be interpreted in a way that is 'most compatible'. This will encourage a tendency to view the clause as conferring a power on judges to change the law to an extent that is unprecedented in Australia (the Victorian and ACT Charters do not have a corresponding provision), but very much in evidence in the UK.

31. Clause 48(4)(b) purports to secure the validity of secondary legislation but does not address the risk that empowering statutes will routinely be read down so that secondary legislation is held to be outside its scope and invalid. This practice is common in other jurisdictions.

32. Clause 49 makes provision for questions involving the Bill, especially questions involving rights-consistent interpretation of statutes, to be transferred to the Supreme Court. The Bill may envisage this as an exceptional state of affairs but it is in fact likely to arise in a great many cases. In addition, clauses 50 and 51 provide for the Attorney General and the Human Rights Commission to be joined to proceedings involving the Bill. This is a sensible provision in one way, at least in relation to the Attorney General. However, it confirms that the Bill will transform adjudication from a dispute between two parties into an occasion for political argument and judicial lawmaking. Over time it is likely that in many cases still

[3] Janet Hiebert, "Governing Like Judges?" in Tom Campbell, K.D. Ewing, and Adam Tomkins, eds., *Sceptical Essays on Human Rights* (OUP, 2011), 40

more parties will be granted permission to intervene — this is clearly evident in the UK — with the court process degenerating into a kind of law commission.[4]

33. Clauses 53 and 54 imply that no one may apply to the court for a declaration of incompatibility. Instead, a declaration may only be granted as a side-effect of other proceedings, in which the question of rights-consistent interpretation has arisen. This is a sensible limitation which aims to avoid parties seeking to use the court to put political pressure on Parliament. However, it is unlikely to succeed. Some parties, campaigning groups and others, will frame disputes in order to provide the courts with the opportunity or responsibility to denounce legislation. And the courts are likely to permit de facto applications for such declarations, especially if a declaration becomes understood to be a kind of remedy for a rights breach, as in other jurisdictions. Earlier this month the NZ Supreme Court held that it had jurisdiction to declare legislation incompatible with the NZ Bill of Rights, notwithstanding the absence of any statutory power to this effect.[5] It is likely that Queensland courts, whom the Bill would empower to this end, would permit applications to secure a declaration. The effect of this would inevitably be to make court processes a secondary means of political contest. This is partly the point of a statutory bill of rights. The cost is that it politicises the courts and legalises political discourse (privileging lawyers in democratic life).

34. Clause 58(1)(a) is unsurprising. If the Bill introduces rights then public bodies should not be at liberty to depart from them. However, clause 58(1)(b) is remarkable and goes well beyond the statutory bills of rights of other countries. The provision modelled on the Victoria Charter (section 38(1)) would make it unlawful for a public body to fail to give proper consideration to a human right even if its decision and action is entirely consistent with that human right. This provision would cast a shadow of legal doubt over the actions of public bodies and is likely to force them to think and act like human rights lawyers in the course of deciding how best to act. The UK courts briefly toyed with this possibility but in the end comprehensively rejected it.[6] The risks to the rule of law in this provision are very real; so is the risk of distorting public deliberation.

35. Clause 58(3) limits the application of subclause (1) in relation to bodies established for religious purposes whose acts are in accordance with religious doctrine and are necessary to avoid offending the religious sensitivities of the people of the religion. As noted earlier, this raises questions about the meaning of the right to freedom of religion referred to in clause 20. However, it also a problematic provision in its own right. If the body acts in accordance with its religious doctrine why is that not sufficient to justify its action? Why also require the need to avoid offence? Although Australian legislation sometimes makes provision along these lines in particular contexts, there is no warrant in international human rights law for it.

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[4] John Finnis, "Judicial Power: Past, Present, Future" in Richard Ekins (ed.) *Judicial Power and the Balance of Our Constitution* (Policy Exchange, London, 2018)

[5] *Attorney General v Taylor* [2018] NZSC 104

[6] *R (Begum) v Denbigh High School* [2006] UKHL 15

APPENDIX

SUBMISSION TO HUMAN RIGHTS INQUIRY BY PROFESSOR NICHOLAS ARONEY AND PROFESSOR RICHARD EKINS

18 APRIL 2016

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

18 April 2016

Dear Research Director,

Human Rights Inquiry
Submission by Professor Nicholas Aroney and Professor Richard Ekins

1. Thank you for the opportunity to make a submission to this inquiry. In our opinion, the Queensland Parliament should not enact a Human Rights Act. Our reasons are several. In our submission, respect for human rights does not require advocacy of a statutory charter of rights. Indeed, the 'rights' introduced into law by statutory charters of rights lack the form of good law. They encourage decision-making by the courts that is undisciplined. They distort the proper functioning of legislatures. Contrary to the claims of their proponents, statutory charters of rights do not produce dialogue. Charters of rights are a kind of constitutional statute that shapes the making and adjudication of law. They should not be introduced without bipartisan support. Human rights are better protected by a properly-functioning democratic system of government. More would be achieved if a democratically elected upper house were reintroduced into Queensland.

Introduction

2. Queensland enjoys a robustly democratic system of government. Policies of government are routinely subjected to scrutiny in the Parliament, in the media and, increasingly, through many diverse forms of electronic communication. Political parties propose alternative policies for consideration by the people of Queensland and the political contest is open and vigorous. On occasion, governments adopt policies or introduce legislation that, in the view of their opponents, unduly interferes with human rights. This is alleged to occur on all sides of politics. Much of the contestation is based on differing ideologies and values, although all sides in Queensland politics recognise the value of our democratic system of government and acknowledge the importance of certain basic human rights.

3. In this context, while Queensland governments of all persuasions have, in our opinion, occasionally introduced legislation that has unjustly interfered with human rights, the introduction of a Charter of Rights or Human Rights Act is not the best solution to the problem. In this submission we outline several reasons why this is the case.

4. Our submission draws on published research and our own work on the philosophical and practical difficulties created when Parliament attempts to protect human rights by introducing abstract rights principles into the law.

'Human rights' are not the same thing as 'human rights law'

5. The question of whether to enact a statutory bill of rights is not a question about whether human rights should be protected or respected. Whatever the law may say, people are entitled in justice to certain absolute rights that should never be violated. Every decent legal system recognises and secures those absolute rights in some way. However, the absolute rights that should be protected by law cannot simply be equated with the abstract descriptions of rights routinely contained in statutory bills of rights.

6. To understand this point, it is important to be clear about the meaning of 'rights'. The term can mean many different things. It can refer to what are commonly called 'human rights', meaning those rights to which every human being is entitled by virtue of their identity as a human being. It can also refer to 'legal rights', meaning those rights to which a person is legally entitled within a particular system of law. Human rights and legal rights are not the same thing. A society can have a statute called a 'Human Rights Act' and yet fail to protect human rights, and a society can adequately protect human rights without a Human Rights Act. For example, the United Kingdom did not fail to protect rights before the Human Rights Act 1998 came into force in October 2000. After that Act came into force British law contained a new measure concerning human rights, a measure that might be thought, in retrospect, helpful or unhelpful. But the Act was not a watershed marking out a community that suddenly decided to respect human rights.[7]

7. It is also important to distinguish between the particular lists of rights that are commonly contained in Human Rights Acts and the legal entitlements they create. The rights contained in such Acts are expressed in general and abstract terms, such as 'freedom of expression' and 'freedom of association'.[8] However, no viable and just legal system can affirm that such 'rights' are to be enjoyed without limitation. Freedom of expression, for example, must be limited to enable wrongs such as defamation, perjury and obscenity to be prohibited by law. Indeed, on many occasions the abstract rights referred to in Human Rights Acts will be in conflict with each other. For example, someone's 'right to freedom of expression' may conflict with another person's 'right not to have his or her reputation unlawfully

[7] The Hon Dyson Heydon QC, a former Justice of the High Court of Australia, makes a related point in his article 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 *Law Quarterly Review* 392, a copy of which is attached as Appendix A to this submission. See also his judgment in *Momcilovic v R* [2011] HCA 34, at [380-381], which explains that the rights affirmed in abstract form in bills of rights have been protected – in much more detailed, coherent, workable form – for hundreds of years by the common law and ordinary legislation.

[8] Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 15(2) and 16(2).

attacked'.[9] Accordingly, all Human Rights Acts include provisions that allow the 'rights' referred to in the Act to be limited.[10]

8. The practical application of a Human Rights Act almost always involves the consideration of legitimate limits on the abstract rights listed in the Act. The lists of rights contained in statutory bills of rights do not define, in themselves, the legal entitlements that citizens enjoy or should enjoy. Those legal entitlements depend upon the consideration of other, sometimes competing rights, as well as the possibility of legitimate limitations on such rights. This applies not only to Human Rights Acts, but also to the 'human rights' protected by international rights instruments. The International Covenant on Civil and Political Rights (1966), for example, includes the 'right to freedom of expression',[11] but also states that this right may be 'subject to certain restrictions'.[12] The internationally-recognised right to freedom of expression is therefore not absolute. The human right to which all persons are absolutely entitled is a more precisely and narrowly defined right that does not involve a breach of the rights or reputations of others and is limited by laws that are necessary for the protection of national security, public order or public health and morals.[13]

9. In short, the abstract rights affirmed in a statutory bill of rights do not state conclusively what justice truly requires. These abstract formulations require limitation and they invite argument about how best to apply them in light of other rights and other important considerations. Reasonable people disagree about what rights require in particular controversies – this is a persistent and unavoidable feature of politics.[14] It follows, as Professor John Griffith has argued, that abstract rights formulations are 'the statement of a political conflict pretending to be a resolution of it'.[15] Like many other scholarly critics of bills of rights we are not sceptical about human rights themselves. But respect for human rights is severable from advocacy of bills of rights. The question for decision is not whether one should respect human rights – that is an easy question. The question is whether bills of rights are a prudent or proper way of protecting human rights. In our submission, in places like Queensland, with reasonably good parliamentary arrangements and robust democratic politics, bills of rights are not a good way of protecting rights.[16]

How statutory bills of rights work

10. Statutory bills of rights share a common form. The New Zealand Bill of Rights Act 1990 was an early exemplar, influencing the design and operation of the Human Rights Act 1998 in the United Kingdom. The more recent Victorian and ACT legislation was expressly framed with these examples in mind. Statutory bills of rights introduce into law a set of generally worded rights, subject to limitations (either to a series of particular limitations or

[9] Ibid ss 15(2) and 13(b).
[10] Ibid s 7(2).
[11] Art 19(2).
[12] Art 19(3).
[13] Art 19(3)(a) and (b).
[14] Jeremy Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999).
[15] JAG Griffith 'The Political Constitution' (1979) 42 *Modern Law Review* 1.
[16] See further Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 83 and Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

to one general limitation clause). These rights (suitably limited) can be relied on in court and their breach by the executive may be sanctioned by judicial action. However, the rights in question do not *bind* the legislature, and the executive acts lawfully if its action is grounded in other legislation – even if the court thinks that this other legislation is itself inconsistent with the rights affirmed in the bill of rights.

11. Importantly, a statutory bill of rights does not authorise courts to invalidate other legislation. But it does require courts to strive to interpret other legislation consistently with the bill of rights. And it may require that if such an interpretation is not possible, the court is to declare the legislation inconsistent with rights thus placing political pressure on the government and legislature to change the law.

The rights introduced into law by statutory bills of rights lack the form of good law

12. Justice should be secured in a manner that is consistent with the rule of law. The way to give legal effect to human rights – the pattern of just relationships that should govern social life – is by way of clear, prospective, coherent legal rules, which settle authoritatively what should or should not be done. The abolition of slavery, the protection of unions from common law action, and the reform of laws governing domestic abuse, to mention only a few examples, all required clear *legislative* action to change the existing law in some specific, authoritative way. Legislatures are under a moral duty only to change the law in ways that conform to the demanding requirements of the rule of law ideal.

13. Statutory bills of rights fail to conform to the rule of law ideal. This is because the adoption of a statutory bill of rights does not change the law in clear, predictable ways. Indeed, the only predictable change that it makes is to undermine the clarity of *other* law. With rare exceptions, the rights affirmed in a bill of rights require further elaboration, especially by way of a general proportionality test. And, as Professor John Finnis and Professor Grégoire Webber, among many others, have demonstrated, the application of proportionality tests is not a technical, legal exercise but instead involves open-ended moral and political reasoning.[17] The problem with this is not just that it is an inappropriate function for a court to undertake – although it is – but that the content of the new legal rights is not settled until the court makes its moral choice. And whatever one court chooses a later court may unsettle. The legislature that enacts a statutory bill of rights is in one sense signing a blank cheque and authorising judges to fill in the blanks. Strictly, the legislature may retain authority to amend the bill of rights, but in practice this is a very difficult task. Thus, enacting a bill of rights introduces into the law an unclear, uncertain set of legal relationships.

[17] John Finnis, 'Human Rights and Their Enforcement', in John Finnis (ed), *Human Rights & Common Good: Collected Essays Volume III* (2011), 19 (originally published as 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 *Proceedings of the British Academy* 303; Grégoire Webber, *The Negotiable Constitution* (Cambridge, CUP, 2009); Grégoire Webber, 'Rights and the rule of law in the balance' (2013) 129 *Law Quarterly Review* 399; Timothy Endicott, Proportionality and Incommensurability', in Grant Huscroft, Brad Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 311.

14. The legal effect of a statutory bill of rights turns in large part on the application of the requirement, contained in most statutory bills of rights, that judges must strive to interpret other legislation consistently with the bill of rights. The effect of this requirement can be more or less radical. In New Zealand, for the most part the effect has not been radical,[18] although there are still many cases in which courts have relied on the provision to misinterpret statutes by departing from their intended meaning.[19] However, in the United Kingdom the courts have taken the requirement to authorise them to impose meanings on statutes that the enacting the legislature clearly did *not* intend.[20] For Victoria and the ACT, a more circumspect approach has been mandated by the High Court of Australia, at least for the time being.[21] However, over time, especially if more Australian jurisdictions were to adopt statutory bills of rights, there is every prospect that a more activist approach will emerge. The experience of legal systems worldwide is that when courts are given power to apply bills of rights to legislation, a kind of 'juristocracy' results.[22] There is no reason to be confident that Australian jurisdictions will remain outliers in this respect. Already many human rights lawyers – both practising and academic – are advocating for human rights activism in Australian law. One only has to peruse the various human rights law journals published in Australia to see the point. Statutory bills of rights encourage activist elements in the legal profession to press for judicial intervention in support of politically-contested moral and political positions. This is objectionable simply on the ground that it transforms the judiciary into a law-making, instead of a law-interpreting, institution. But our point here is that it also contributes to significant legal uncertainty. This is clear in the British experience,[23] and there is no reason to be confident that it will not happen, over the long run, in Australia as well.

Human rights law adjudication is often undisciplined

15. Judges are well-suited to upholding clear legal rights. They are much less well-suited to having to choose the content of legal rights, including choosing how best to limit some general right in order to protect other rights or important interests. These are essentially legislative responsibilities and they are best discharged by a legislative assembly, led by a government with advice and support from the civil service. These responsibilities should not be undertaken in the heat of adjudication, when the judge is, understandably, concerned with the parties before him or her and unable to take a responsible view of wider concerns.

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[18] The leading case is now *R v Hansen* [2007] 3 NZLR 1.

[19] See, for example, *In the matter of application by A M M and K J O (Adoption)* HC Wellington, CIV-2010-485-328, 24 June 2010.

[20] The leading case is *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The effect of the requirement can be seen in particularly glaring fashion in *R v A (No 2)* [2002] 1 AC 45 where the court undermined rape shield legislation. The legislation had limited the power of trial judges to permit cross-examination of complainants in sexual offence trials; the court relied on the Human Rights Act in effect to restore the trial judge's discretion to permit cross-examination whenever he thinks it justified.

[21] *Momcilovic v R* [2011] HCA 34

[22] Ran Hirschl, *Towards Juristocracy; The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004); Jeffrey Goldsworthy, 'Losing Faith in Democracy' *Quadrant*, 25 May 2015.

[23] Philip Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System', in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis 2011) 189.

Judgments decide particular cases, rather than laying down general rules, and while a line of judgments *may* disclose a clear rule this is often very difficult to discern. Further, judgments in human rights law cases are particularly contentious and are vulnerable to being overturned by later courts simply on the grounds that they were wrongly decided: precedent has much less force here than in the ordinary common law. There is also a clear bias in human rights law adjudication in favour of particular judicial discretion and against general rules.[24] This impairs the judicial capacity to make law fit for the rule of law and is a powerful reason for judicial power to be kept within traditional bounds.

16. Statutory bills of rights impose on judges a novel responsibility to make the open-ended law-making choices that are properly for the legislature and to impose those choices on the executive by way of judicial review and on the legislature by (a) misinterpreting other legislation that the legislature enacts and (b) declaring other legislation to be incompatible with fundamental rights and hence to bring political pressure to bear on the political authorities to change the law. Many judges are, or will be, understandably uneasy about these new obligations and will have to determine how best to carry out these tasks in ways that do not undermine their traditional function. This tension (traced with care by Lord Justice Elias in the United Kingdom[25]) makes the temperament of the particular judge very important. The outcome of particular cases may turn on how confident judges are of their competence and of the legitimacy of their making legislative choices or in exercising substantive oversight of the merits of executive action.

17. The main way in which judges will mediate their new responsibilities to oversee the justice of legislation and executive action is by way of the doctrine of proportionality. This doctrine promises to structure rights adjudication, to make it predictable or principled and to avoid it collapsing into the judge's own moral and political reasoning. These promises are groundless.[26] Some judges will be relatively restrained in determining whether some official action breaches rights, but the extent of restraint will turn on the particular judge's wider moral and political views or on his or her temperament. Further, in any particular case, it is open to judges to calibrate the intensity of review, to find that the government has or has not breached rights. This calibration is quite likely to be politically driven. The proportionality analysis that is at the heart of modern rights adjudication makes that adjudication undisciplined. The judicial role under a statutory bill of rights is starkly different to the traditional task of upholding clear legal right.

18. One implication of this lack of discipline is that politically unpopular groups may well fail to be protected as they should be. In a recent British case, the Supreme Court failed to extend to pro-life midwives the protections for conscience that the Human Rights Act

[24] Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Brad Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 343; Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 *Law Quarterly Review* 426.

[25] Lord Justice Elias, 'Are Judges Becoming too Political?' (2014) 3 *Cambridge Journal of International and Comparative Law* 1.

[26] Francisco Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49; Grant Huscroft, 'Proportionality and Pretence' (2014) 29 *Constitutional Commentary* 229.

appears to guarantee.[27] The problem was not that the court considered the matter and decided against the midwives, who sought to rely on the protections in the Abortion Act against any duty to have to participate in abortion. Rather, the court avoided considering the matter at all, tacitly deciding against the claimants. The extent to which the courts conscientiously apply the protections that the bill of rights nominally introduces will vary from case to case and from claimant to claimant. The unclear, unsettled structure of the bill of rights provides excellent cover for such aberrant judging.[28]

Human rights charters license judicial law-making

19. Authorising judges to declare legislative and executive action incompatible with abstract human rights formulations (as opposed to clearly specified, concrete legal rights) distorts judicial decision-making. It does so in several ways.

20. Judges are appointed for their ability to apply the law impartially to the case at hand. Their expertise consists in being able to interpret and apply relevant common law and statutory law to the particular disputes that are brought before them by parties to litigation. The principal mode of reasoning in which they engage is abductive: it involves determination whether the particular case at hand falls into a particular legal category. For example, a judge may have to determine whether, on the evidence adduced before the court, a person has driven a motor vehicle without due care and attention.[29] To make such a determination, the judge has to form a view of the proper *meaning* of 'due care and attention', but not whether drivers *should* be required to drive with due care and attention, for this is something that has been determined by the legislature.

21. In such a context, however, a human rights charter requires judges do two further things: first, to determine whether a requirement that people drive motor vehicles with due care and attention is consistent with the abstract human rights and limiting principles contained in the charter and, second, to determine whether the meaning of 'due care and attention' needs to be interpreted, not according to its ordinary sense and meaning, but in a manner that makes it consistent with the judge's assessment of what the human rights charter requires.[30] Although this is perhaps a trivial example, and it may be unlikely that a charter of rights will make much of a difference to the adjudication of cases about driving without due care and attention, a charter of rights does this to the application of *every statute* enacted by the legislature.

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[27] Greater Glasgow Health Board v Doogan and Another [2014] UKSC 68; [2015] A.C. 640.

[28] For more detail, see Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34(2) *University of Queensland Law Journal, The* 217, a copy of which is attached to this submission as Appendix B. See also John Finnis, 'Judicial Power: Past, Present and Future', Policy Exchange lecture at Gray's Inn, London, 20 October 2015 (http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/), introduced by the Lord Chancellor of England and Wales.

[29] Transport Operations (Road Use Management) Act 1995 (Qld) s 83.

[30] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press, 2009); Richard Ekins, 'Rights, Interpretation and the Rule of Law' in Richard Ekins (ed.) *Modern Challenges to the Rule of Law* (LexisNexis 2011) 165; Richard Ekins and Philip Sales 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 *Law Quarterly Review* 217.

22. Often the judgements made by Parliament when enacting laws involve sharply contested political debate. A charter of rights requires judges to participate in such debates. This undermines their ability to undertake their very important role of applying the law to particular cases in an impartial manner and in a manner that maintains the confidence of the community. When judges take sides in political debates it undermines public confidence in their ability to make decisions that are independent of the executive government and without prejudice or bias to the interests of the parties to the dispute. We do not mean to say that judges are able to decide cases without adopting morally-informed views about the meaning of legislation, but it does mean that if they are given an institutional role in commenting on the desirability of controversial legislation this will often embroil them in political debate and therefore undermine public confidence in their ability to perform their core functions of deciding cases in an impartial manner.

Human rights charters distort the proper functioning of legislatures

23. Authorising judges to declare legislation incompatible with human rights also distorts the proper functioning of legislatures.

24. First, it requires democratic deliberation to be reframed in legalistic terms. One main consequence of the introduction of a charter of rights is to present moral and political controversies as if they cannot be decided properly without legal learning – namely, interpretation of the text of the charter, classification of particular cases by reference to existing legal doctrines, application of the apparently technical idea of proportionality, and (especially) reading and digesting earlier judgments. Lawyers are trained to work with these materials and to think and talk in this way. Hence, lawyers are able to frame arguments in these terms, notwithstanding that, as we say, human rights law is in fact quite different to other fields of law in the extent to which it is undisciplined and unpredictable. But ordinary citizens and their representatives in parliament who lack legal training are not equipped to participate in this discourse or to frame their arguments in this way. They may tend to reason more directly, going straight to the practical consequences of proposed legislation and to the justice or fairness of those consequences.[31] Our point is emphatically not that non-lawyers do not think about rights or justice. Rather our point is that human rights law functions in large part as an exclusive language, which arbitrarily excludes and disarms non-lawyers. Introducing a charter of rights increases the rhetorical and tactical advantages that lawyers, and well-resourced groups with access to legal resources, have over other participants in political debate. This is inconsistent with basic democratic principle, which requires public deliberation about what should be done in which all citizens may participate equally.

25. Second, if politically-motivated litigants are able to secure a declaration of incompatibility from a court under a charter of rights, this gives them an unfair advantage in political debate. The case for a statutory bill of rights is that it will empower the relatively

[31] This is quite likely a virtue of the political process. Courts may be poorly placed to determine what rights truly require in part because of their focus on legal materials. See Jeremy Waldron, 'Judges as moral reasoners' (2009) 7 *International Journal of Constitutional Law* 2.

marginalised and dispossessed, making it harder for the majority to ignore them. Much more likely, however, is that the well-connected and well-resourced, whose prejudices and predispositions are often shared by judges, will be given a second way of influencing the political process. This is what has happened with assisted suicide. The question of whether to ban assisted suicide is a difficult moral and political issue about which society is often closely divided. In the United Kingdom and elsewhere judges have been invited to lend, and to some extent have lent, support to the campaign to overturn the ban. But the arguments for reforming the law have not been ignored or overlooked. The impact of the Human Rights Act has been to improperly support one side in the controversy, all because this is what chimes with the moral views of a majority of judges. In this way, statutory bills of rights give an unfair advantage to political groups whose moral or political views happen to coincide with those of judges.

Human rights charters do not produce dialogue

26. The Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic) were meant to create a 'dialogue' between the three branches of government. A close examination of the case law and subsequent political debate in the State of Victoria suggests that the Charter of Rights has not contributed meaningfully to dialogue or deliberation. This is because, on most questions of public import, agreement on an abstract set of words contained in a statutory bill of rights does nothing to resolve debate. Differences of opinion in political and moral matters are caused by differences in underlying philosophy and values which inform the way in which the language of a statutory bill of rights is interpreted and applied.

27. This is borne out by a recent study into the practical effect of the Charter of Rights in relation to freedom of religion in Victoria undertaken by one of the authors of this submission, Professor Aroney, with Professor Paul Babie of Adelaide University and Dr Joel Harrison of Macquarie University. A copy of the study is attached to this submission as Appendix C.[32] Aroney, Babie and Harrison found that, rather than contribute to the protection of freedom of religion in Victoria, the Charter of Rights has contributed to an environment in which many people of religious faith felt that their freedom to practice their religion was increasingly under threat.

28. Several cases have been decided in Victoria under the influence of the Charter of Rights. In their study, Aroney, Babie and Harrison found that the Charter of Rights played virtually no substantive role in protecting freedom of religion in those cases. The real determinants of the decisions of the courts lay elsewhere. Indeed, in one particular case, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,[33] freedom of religion was better protected by those judges (of the Victorian Court of Appeal) who found that the Charter of

[32] The study is to be published as a chapter in a forthcoming book under the title: 'Religious Freedom under the Charters', in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, forthcoming 2016).

[33] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010), affd (2014) 308 ALR 615, leave to appeal denied [2014] HCATrans 289 (12 December 2014).

Rights did *not* apply to the case at hand than the one judge (of the Victorian Civil and Administrative Tribunal) who found that it *did* apply. And even in relation to those judges who found that the Charter did not apply, two of them still adopted a very narrow and restrictive view of religious freedom. This was because, even though all of the judges recognised that competing human rights were at stake in the case, the real determinants of the decision had nothing to do with whether human rights were or were not taken into consideration. What really determined the outcome was the particular perspective from which each judge approached the case. The *Cobaw* case thus demonstrates that what really matters in the application of human rights laws, such as human rights charters and antidiscrimination laws, is not so much the language in which such rights are enshrined, but the attitudes and philosophies of the judges who apply the law. Human rights laws, much more so than other types of laws, call on judges to apply their own value judgements to the case at hand. It is better that these value judgements are made in a democratically accountable way in the Parliament.

29. Aroney, Babie and Harrison found that the main areas of contention in Victoria in relation to the protection of religious freedom concerned the interpretation of Victoria's antidiscrimination laws. With or without a Charter of Rights, it is widely recognised that this debate involves an unresolved clash between two competing ideals: equality of treatment and freedom of religion and freedom of association. The Victorian Charter of Rights is *meant* to protect all of these rights equally. However, in political deliberation about Victoria's antidiscrimination laws, no way has been found to interpret the laws or craft a set of reforms that does justice to all of the 'rights' concerned, particularly as these are assessed from the perspectives of those most affected by antidiscrimination laws. Aroney, Babie and Harrison found that submissions to the two reviews of the Victorian Charter of Human Rights that addressed the intersection of these competing rights demonstrated very little engagement of argument or meeting of issues. Proponents of the various views about the nature and scope of those rights made submissions that only very rarely addressed the concerns of those who took a different point of view. In this way, instead of facilitating dialogue, the Victorian Charter has presided over a context in which each side 'talks past the other', showing very little ability to understand or engage with the reasons being advanced by the other side.

30. Similar findings have been made in other countries. Professor Andrew Geddis has argued that there is no clear evidence that the New Zealand Bill of Rights Act has contributed to the development of a 'culture of justification' within public authorities.[34] Of all the Australian states, Queensland is especially analogous to New Zealand. Both have unicameral parliaments, and both have had, as a result, long-standing reputations for an executive-dominated system of government.[35] The real problem in New Zealand, as in

[34] Andrew Geddis, 'Inter-Institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 88, 100.

[35] See, further, Nicholas Aroney and Steve Thomas, 'A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand?' [2012] *New Zealand Law Review* 403.

Queensland, is the absence of a democratically-elected upper house, an issue to which we return below.

Human rights can and should be protected by Parliament

31. Statutory bills of rights are a very poor substitute for targeted legislation addressing particular social ills and introducing new legal regimes to put them right. At best, statutory bills of rights will do no harm. More likely, they will transform the constitutional position of the courts, will distort legal culture and public democratic deliberation, will undermine the rule of law, and will make it possible for courts to neglect or overlook persons whose legal rights may be in real danger.

32. Parliaments, and parliamentary committees, have several advantages over courts in testing the appropriateness and proportionality of laws. First, they are not restricted to making determinations in particular cases brought before them. They can initiate inquiries on their own motion, and can return to the same subject again and again if they regard it as necessary. Second, they are not restricted to considering evidence submitted by the parties to a case that must meet the formal requirements of legally admissibility. Unlike courts, they can have regard to all manner of factors and considerations, whatever their nature, weighing them in their deliberations as they think appropriate. Third, they can publicise their findings and stimulate public debate in ways and to an extent that is not possible for the courts. Judges are properly expected to be circumspect in their public utterances, whereas members of Parliament are entirely free to disseminate and promote their views as they wish. Fourth, especially in circumstances where the parliamentary system ensures that the government is not in a position to control them, parliamentary committees frequently demonstrate an independence of judgment and a willingness to scrutinise government policies, actions and proposed legislation that is not generally shared by the courts.

33. These characteristics of parliamentary scrutiny of government and government policies can be demonstrated by many particular examples. Professor Adam Tomkins has shown, in relation to the UK government's counterterrorism legislation for example, that the British Parliament, not the courts, has proven to be the most effective means of protecting human rights.[36] Courts, he observes, are prone to accepting a government's assessment of nature and extent of terrorist threats, but the parliamentary Joint Committee on Human Rights has challenged the government's assessment.[37] Indeed, parliamentary committees can show themselves willing to wage a war of attrition in the defence of human rights.[38] Professor Tomkins concludes that:

> even in an area as difficult and unpromising as national security and counter-terrorism, the evidence of recent years in the United Kingdom, at least, is that parliamentary committees such as the JCHR are more committed guardians of our human rights than are the appeal courts.[39]

[36] Adam Tomkins, 'Parliament, Human Rights, and Counter-Terrorism' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 13, 13-15.

[37] Ibid, 26.

[38] Ibid, 27.

[39] Ibid 39.

34. Of course, this occurred in the context of the British Human Rights Act. However, as Professor Carolyn Evans and Professor Simon Evans have shown, with or without a charter of rights, human rights are taken into consideration by members of Parliament when debating policy and legislation.[40] Rather, the main effect of a charter of rights is a regrettable 'juridification' of political debate: participants are forced to present their arguments in legalistic terms and trained lawyers are given an artificial advantage in the clash of ideas and values that is the stuff of parliamentary politics. Indeed, analyses of how charters of rights affect bureaucratic and political behaviour suggest that even 'weak' bills of rights encourage cautious executives to avoid proposing legislation that might be considered inconsistent with judicial decisions. As Professor Janet Hiebert has argued, human rights laws induce parliamentarians to 'govern like judges' by producing 'legalistic legislation which distorts policy and political judgments regarding human rights concerns'.[41] This juridification of politics is inconsistent with good government, with democratic politics and with the rule of law, not least since it inevitably invites the politicisation of the judiciary and judicial appointments.

Queensland's Unicameral Parliament

35. While the existence of an upper house is no panacea, if the Queensland Parliament had a second chamber democratically elected on a proportionate basis, the Executive Government would not routinely be in a position to force its legislation through the Parliament by relying on the strict system of party discipline that operates in Queensland. Many statutes passed by the Queensland Parliament that have been objected to on human rights grounds would never have been enacted, or would have been enacted in vastly different form, if Queensland Governments had to secure the agreement of either the opposition or crossbench members of a second house of Parliament. As detailed work on the performance of upper houses in the other Australian states has demonstrated, the existence of a second chamber prevents Executive Governments from dominating the Parliament to the extent that routinely occurs in Queensland. In addition, a democratically elected second chamber of Parliament makes the committee system much more secure and facilitates a much better quality of deliberation and debate within the Parliament and across the community as a whole.[42]

36. In the United Kingdom, the House of Lords contributes substantially to the effective work done by Parliament in scrutinising government policy and in legislating effectively. This contribution includes the work of the Lords alone, as in the Constitution Committee, but also involves cooperation with the Commons, whether in the form of the Joint Committee

[40] Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection', in Tom Campbell, K D Ewing and Adam Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329.

[41] Janet Hiebert, 'Governing Like Judges?' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 41.

[42] See Nicholas Aroney, Scott Prasser and John Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008); Nicholas Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29(2) *Adelaide Law Review* 205.

on Human Rights and other joint committees or by less formal cooperation. Recent scholarship confirms that a bicameral Parliament such as the Westminster Parliament is not a rubberstamp and does contribute effectively to the legislative process.[43] Sound parliamentary process makes provision for concerns about legislation proposed by the executive to be articulated and pressed. An upper house is often an important part of such a process.

Conclusions

37. A Human Rights Act, although not constitutionally entrenched, is constitutional in nature because it functions as a means by which political deliberation is regulated and controlled. Because a Human Rights Act is constitutional in nature it should only to be enacted with the support of all of the major segments of political opinion within the state. It should not be enacted solely with the support of the Executive Government of the day. As an essential component of the constitutional architecture of the state, a Human Rights Act should at the least also have the support of the opposition and crossbench parties in the Parliament.

38. In our submission, a statutory charter of rights is unnecessary, pointless and dangerous. It is unnecessary because human rights can and should be protected by the Parliament. It is pointless because charters of rights do not produce dialogue. It is dangerous because charters of rights encourage undisciplined law-making by the courts and distort the proper functioning of legislatures. Charters of rights undermine good government and responsible law-making and they imperil democracy and the rule of law.

39. By world standards, Queensland is a place where human rights are generally well respected. It is important to bear this in mind, as many countries that have bills of rights have much poorer human rights records. This is not an appeal for complacency. Rather, it demonstrates that charters of rights do not guarantee the protection of human rights. As Sir Harry Gibbs argued many years ago, 'If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it.'[44]

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[43] Susanna Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 Parliamentary Affairs 694; Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2015) *Governance* (forthcoming).

[44] Sydney Morning Herald, 12 December 1984.

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