14th November 1997

The Research Director
Legal, Constitutional and Administrative
Review Committee
Parliament House
BRISBANE QLD 4000

Dear Sir

Re: Call for submissions in respect of EARC Report

Please find enclosed copy of the "Submission" forwarded by facsimile transmission today in response to the call for submissions made in Issues Paper No.3 issued by the committee in September 1997.

The enclosed copy has been corrected to remove certain typographical errors contained in the copy forwarded by facsimile transmission.

Yours faithfully,

B.J. CLARKE

SUBMISSIONS

to

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

concerning

E.A.R.C.'s proposal for a Queensland Bill of Rights

Call for Submissions

These submissions are submitted in response to Issues Paper No. 3 issued by the committee in September 1997.

The Case against the EARC Bill Argued

The proposals set out in section 9 of the Issues Paper arise from recommendations made by EARC. Arguments in favour of those proposals have been set out by EARC itself in its Report. These submissions will endeavour to show that those arguments are not convincing.

These submissions reject the EARC proposal. In doing so it has not been necessary to take a stand "for" or "against" bills of rights in general. Like all practical questions, it all depends of the particular proposal.

The following submissions, in any event, are made upon the basis that *Magna Carta*, the *Bill of Rights of 1688*, the *Declaration of Independence of 1776*, or the *Bill of Rights* forming part of the U.S. Constitution, or even the *Declaration of the Rights of Man* etc., have all been great things and even to be imitated if possible. But the EARC proposal, when looked at on its merits as a specific proposal, turns out to be (to put it bluntly) a radically bad attempt at a bill of rights.

Preliminary

The ground traversed in the EARC Report Part 5 (pp. 48-68) is as old as Adam. They talk of "rights" rather than use more old-fashioned words like "justice" but they mean the same thing. Everyone agrees, and should agree, that justice must be done all of the time. All the subsidiary matters talked about ("parliamentary sovereignty" "fundamental rights" and even "democracy") are all in the final analysis good things because they promote justice.

The terminology chosen by the EARC Report for this debate ("rights" rather than "justice") gives the appearance that there is something new. Instead it merely muddies the waters. The term "right" can properly be used in different ways and its meaning will vary according to the different way it is used. Everyone is entitled to defend their position or action as just in all the circumstances. They can raise a "claim of right". The EARC Report confuses and confounds "claims of rights" with "rights" in the strongest meaning of that expression, i.e. "justified claims of right".

When various persons made submissions to EARC (as they did) that "rights" should never be overridden, they meant that justice should never be overridden. They did not mean that every claim of right had to be accepted. No one will say that an individual who insists on the letter of his claim when the good of the whole of which

that individual forms part requires a different decision, is acting justly. Such an individual is acting unjustly. In such a case the individual's "claim" is overridden, but justice is not "overridden". On the contrary, justice prevails.

It is greatly to be regretted that when EARC admitted the substance of the argument just sketched (as it did) it did so, in a fashion that clouded the issue further. The EARC Report is accompanied by a draft "*Bill of Rights Bill 1993*". The crucial provision in this respect is the following:-

> "10. The rights stated in this Act apply generally and are subject only to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society."

It would have been more accurate to say:-

> "10. No one will have any rights unless the claims of right which they and their fellows make unless those claims are demonstrably justifiable in a free and democratic society."

Claims of right become true rights when made in a way and as part of a structure that promotes justifiable claims. Above all this is done by the statutes of the Parliament. Why should there be a presumption that the people and the Parliament has set out to "override rights" rather than to promote them. In a democratic society the presumption is the other way.

Why are the many of the proponents of undefined "rights" so unsure of the justice of their own case that they need to hide behind the reversal of the onus of proof that the draft s.10 proposes?

What is the Substance of EARC's Proposal?

The matter should be looked at with common sense, avoiding the academic and theoretical complications EARC has tied itself up in. What is the substance of the draft bill? What is it really trying to get at? Why indeed is there a call for special "legislation" of any sort" And why now? What is the "politics" (in the broadest sense) of the EARC recommendation?

There is nothing "political" (in the narrow sense) or "partisan" about the EARC Report. It addresses the issues on a level that transcends party politics in all ordinary sense of that expression. That is a good thing because it allows the Committee to approach the "broad policy" consideration of the EARC Report in a bi-partisan way. These submissions also attempt to transcend the level of party politics and engage EARC on its own level.

A Description of the EARC Bill

The bill looks innocuous enough. Depending on how they are counted, there are something like ONE HUNDRED AND TWENTY SIX (126) rights enumerated, consisting of EIGHTY-EIGHT (88) "civil and political rights", TWENTY-ONE (21) "economic and social" rights and SEVENTEEN (17) "community and cultural" rights. The "rights" enumerated are expressly (and significantly) said not to be

exhaustively stated (s.8). Thus, merely by its size, the bill bears little outward resemblance to the short and pithy declarations of the *Bill of Rights of 1688*, the *Declaration of Independence of 1776*, or the *Bill of Rights* forming part of the U.S. Constitution, or even the *Declaration of the Rights of Man* of 1791.

It does, however, have a marked similarity to the *Weimar Constitution of August 1919*, adopted in Germany after its defeat in World War I. The inclusion of rights of "Communal life" and "Economic Life" was a new departure in that Constitution. EARC's proposal perhaps contains a further new departure in respect of "cultural rights.

Why the new approach?

When members of the committee examine the "rights" some will be more familiar than others. But on the whole, they will be able to say that they have "*heard it all before*", because proposals for ordinary statutory reform, justified on the basis of one or other of the general propositions in the EARC bill have been repeatedly made over the years. The committee should uses that past experience. Some of those proposals, usually the sensible ones, have been adopted. Some have not.

Experience shows that not all the proponents of the ones that have failed have accepted the result. In many cases they explain their failure, not on the basis of the want of merits in their proposals, but on the basis of some alleged defect in the (so-called) "process" of parliamentary reform.

The EARC proposal is a change of tactics for legislative reform for the dissatisfied, even disaffected, reformers. The new tactic falls into two parts:-

1. To push for general *legislative* acceptance of broad propositions, formulated widely enough to incorporate the desired changes, but without descending to the particulars. (Many of the failed proposals failed because they proved too controversial or even obnoxious, when it came down to looking at the application of the general rule to practical cases.)

2. Leave the teasing out of the consequences to a *judicial*, rather than a *legislative* process.

The preamble to the EARC Bill (see particularly para. 5) reads as an implicit assertion that there has been a failure hitherto of "the Government" (whatever that is intended to mean in this context) to "support and promote" rights. The sub-text seems to be that this is so because there had been no one like EARC to tell them what the people's rights are. It sets the tone of the Bill.

Why does one parliament need to tell the people, and later parliaments, what the rights of the people are? What is the "educative" role of parliaments (see preamble (6))? Did the people of Queensland have to wait until EARC came along to know they had rights and what they were? Are the people's rights the special province of "experts" like EARC?

Evidently there are persons who hold the view that the people need such "experts" as guardians. And such persons, having failed to persuade the people in the court of public opinion and having failed to persuade the representatives of the people in parliament, are logical when they ask for a "change of venue" and try to shift the arena to the ordinary courts.

Why legislate "enforceability" of any sort?

The EARC Bill tries to have its cake and eat it on the question of enforceability. By sub-s. 4(2), it makes the "rights" in Part 3 enforceable by the Supreme Court. Yet in sub-s.4(4)(b) it "encourages" persons to assert rights in ways that do not involve legal process or proceedings!

Common sense and past experience demonstrates that the weaker party, having failed to obtain what (in their opinion) is an adequate response through dialogue, will always fly to the Courts. And today there are sources of funding for them to do it. Indeed one of the "quasi-rights" the Bill gives, is the "right" to such funding (see s.36).

The simple fact is that the Bill is intended to over-ride ordinary State legislation (s.6) and (subject to important exceptions) to be enforceable against all persons performing public functions (s.4). It promises more rigid enforceability in the not too distant future. The "economic and social" rights and "community and cultural" rights do, it is true, fall into a slightly different category. They are not intended to be enforceable (or not yet anyway). But see the comments on them below.

What is the Consequence of "enforceability" of any sort?

"Enforceability" of any sort transfers the arena in which the most important political questions are determined from the parliament to the Courts. Every important political question can be re-framed as a question of "human rights". It is only a question of the degree of ingenuity of the lawyer involved.

Despite EARC's pious hopes to the contrary (reflected in sub-ss. 4(4)(b) and 5(2)(b)), in actual practice the substance of the proposal put forward by EARC is and will be *judicial review of the substance, not form, of the Acts of the Queensland Parliament* (and all subordinate acts and decision for which that Parliament has responsibility or supervision, directly or indirectly).

In the EARC bill, the issue, to repeat, would <u>not</u> be whether Parliament (or its subordinate) had followed procedural justice in adopting the rule in question (as e.g. under the *Judicial Review Act* 1990), but whether the parliament had paid adequate regard to the substantive justice, i.e. the justice underlying the various formulations or general rules as to human rights set out on pages 10 to 12 of the Issues Paper.

Why is it necessary for the judiciary to sit as a "Court of Appeal" over parliament? Is the judiciary qualified to do so? And if it now is, will it be likely to remain so? And how would it affect the ordinary functions of the Judiciary as accepted impartial umpires for ordinary cases? These are the questions.

Are Courts more just than parliaments?

The EARC Report refers (in para. 5.30) to a submission which amounts to saying parliaments are made up of human beings. Will the judiciary not be? And once they are subjected to the stresses that the broad political issues that "human rights questions" inevitably involve, will they not act like human beings?

If "human rights" questions could be reduced to "legal questions", that would have been done long ago. The reason why there are both parliaments and Courts is because people have always known that "to do justice "to legal questions, you need a body that proceeds like a Court while "to do justice" to questions of human rights you need a body that acts like a parliament.

Thus, the true formulation of Issue 1 raised by the committee requires the EARC proposal to be looked at for what it is, a proposal for *a new form of judicial review.*

Issue 1: Is EARC's Bill of Rights needed or desirable? No.

Excessive and Inappropriate Power to Judiciary: The EARC proposal would force upon the judiciary an excessive power which the judiciary themselves would not want and which they could not appropriately exercise. The judiciary would not want it because of the injustice and other shortcomings involved in such a proposal. They could not do it because the questions are not legal questions. Consider the following:

1. The Courts would be sitting to review a decision of a party (the parliament) without having before it, or any realistic possibility of knowing or obtaining, the evidence and concerns that the parliament had before and which led it to take the decision to adopt the rule under challenge.

   Such review would be in stark contrast to the judicial review, undertaken by the courts as part of their administrative jurisdiction, under the *Judicial Review Act 1992*. In such instances, the court has, or can obtain the relevant materials that were before the decision maker. It also does not, as a matter of course, substitute its judgment, for that of the decision maker.

2. Normally, Review will occur in litigation between private persons, or between a private person and a minor government official. In other words, if proceedings in which neither party would be in a position adequately to defend the public interest, as opposed to their private interest.

   Moreover, the issue will usually arise in circumstances calling for a swift resolution of the issue (in the interest of the immediate parties) and without allowing time for the sort of inquest which would be required to do justice to an issue involving the overturning of the considered view of the Parliament.

3. Questions of justice fall into two parts:

   a. Questions of policy which normally fall within the extraordinary jurisdiction of the Parliament;

   b. Questions of law and fact which fall within the ordinary jurisdiction of the ordinary Courts.

   The EARC Bill provides that the rights declared are subject only "to any reasonable limits declared by law" that are "demonstrably justifiable in a free and democratic society" (see s.10). The section (significantly) does not make the Parliament the final judge of what limits are "reasonable".

4. In substance, the EARC bill is a parliamentary delegation of parliamentary authority to the courts to determine policy issues. As such it preserves the "formal" supremacy of parliament, but what about the substance? And how in practice will the judiciary go about resolving the policy questions? As policy questions they are outside the proper expertise of the judiciary.

5. The likely answer is relatively simple in the case of the new type of legislation proposed by EARC, because it happens (although to a much more limited extent) under similar regimes in other countries, such as the U.S. Fourteenth Amendment. The judges will decide the policy question as they decide all other questions outside their own special field. They will admit (formally or informally) the opinions of so-called "experts".

   There is a large, willing and growing body of academics in Law Schools, Humanities Departments and other sections of Universities who would be willing to come forward as experts on what "human rights" are and what they require. They have no difficulty in knowing what is politically correct.

6. The party whose decision is under review (the Parliament) would not, to repeat, be a party before the court and thus not in a position to defend the correctness of its own decision by argument. In normal judicial review, a court would never (as a matter of natural justice) proceed in the absence of a relevant party.

7. The judges are not by training or experience possessed of any special expertise for determining if and when or in what circumstances modifications are called for in the public interest to the general rules as to human rights to meet the exigencies of the particular case. The tendency of the courts will inevitably be, as their training and experience encourages them, to apply general rules generally and without exception. The presumption will be that the provision of the parliament is to be struck down.

8. The potentially "party-political" nature of a significant part of the questions which will arise in the exercise of the proposed jurisdiction is likely to result in mostly uninformed but inevitable public and other media criticism of the

judiciary, and individual members of the judiciary. Such criticism lower their ability to perform their ordinary function as the known and acknowledged impartial umpires to preside over criminal and civil trial. It is also intrinsically unfair, because the judiciary are restrained from answering back.

9. Generally, the proposal shares the limitation of all forms of judicial review. And in this instance that limitation is a fundamental defect. Judicial review only allows rules to be struck down, not to be replaced by the proper rule. The rule to be followed must be re-formulated by the parliament (or the appropriate subordinate authority). This will be difficult in relation to cases arising before the Court struck down the old rule. The general principle to prevent retrospective legislation, may come into operation to prevent parliament adopting the proper rule with retroactive effect. Because of these limitations, the underlying merits of past cases may be expected in the normal course to go unattended.

Issue 2: On-going Improvement of Statutes? Yes.

Statutes such as those outlined in part 3.4 of the Issues Paper give the judiciary a framework within which they can act positively to implement substantive justice under the law. It could be said that for a right, such as the "right to bail", proposed by EARC, if it is to become a reality and not remain a right on paper, a specific statute such as the *Bail Act 1980* must be adopted if the issues involved are to be comprehensively addressed.

In the absence of a structure provided by statutes such as the *Bail Act* and the *Criminal Code*, disputes in particular cases will degenerate into insoluble conflicts between general propositions instead of considered, careful and limited applications of general principles to the special circumstances and facts of a given case.

Issue 3: The Contents of any "Bill of Rights"

When regarded as general rules, all of the statements set out in the Issues Paper are, in themselves, very worthy aspirations (although they arguably differ in weight and importance). However, when regarded as precise formulations suitable for embodiment in a statute, and therefore for the strict legal interpretation (which statutes must necessarily have to be given legal effect), probably none of the general rules set out in the Issues Paper is exempt from serious criticism.

Such criticism could be made either internally, with respect to the formulation of a given rule, or generally, by reason of the fact that each particular rule necessarily singles out one aspect of justice, while leaving the others unstated.

EARC has not adequately addressed this problem merely by saying (in effect): "*Please don't go to Court*".

Issue 4: Should the Bill contain the "unenforceable" rights suggested?

The Absurdity of "Rights not intended to be enforceable": It could be said that to propose, as EARC does, the inclusion of "rights not intended to be enforceable" (in relation to economic, social, cultural and community matters) is self contradictory and absurd. It would appear so to common sense, and not merely to lawyers.

Real Meaning may be "Rights not presently intended to be enforceable": On one view, the only reasonable interpretation of the inclusion of such "rights" along with enforceable rights, is that it amounts to a promise to convert these "rights" into enforceable rights, as and when the occasion or opportunity permits.

Such action will create high expectations in respect of deeply felt issues relating to justice which future parliaments, through no fault of their own, may simply be unable to fulfil. Whether such expectations should be created is a matter for parliament's judgment and a matter for the Committee to consider.

The inability, at the present time, to formulate non-controversial statements of these particular "rights" need not be due to any existing or present deficiencies of draftsmanship on the part of EARC, or others who in the past have endeavoured to address such issues. It may be intrinsic to the subject matter itself.

Risk of Utopianism: There are, particularly among academic lawyers (rather than among legal practitioners), those who claim that the existing "Conflict of Law" doctrines, are, in principle, capable of development and expansion so that every person may be permitted to follow a practice (alone and in community) a different law (in the full cultural and religious content of that law) as a "personal law". However, it must be conceded that even if such an elaboration is possible, it is now, and for the foreseeable future is likely to remain, "on the drawing board".

Issue 5: Entrenchment?

Entrenchment happens whether formally adopted or not: When a law or decision is struck down under any" Bill of Rights" style legislation, the true legal effect is, as noted above, in fact strictly limited. But the public perceptions of its effect are not so limited.

The court (as already pointed out) does not undertake a fresh formulation of a rule which would not offend the requirements of the "bill of rights". The task of re-formulation (if any) is left to the parliament. The question for this committee is whether the role of parliament will be assisted or hindered by the existence of such prior judicial determinations on particular sets of facts.

Even on the Canadian or N.Z. models, there is much to be said for the view that past judicial decisions will inevitably obtain a privileged status beyond their intrinsic merits. The effect of such decisions on public opinion may be to precipitate a solidification of opinion in one particular direction, simply on the basis of respect for past decisions, rather than on intrinsic merits of the case. When particular decisions

become "graven in stone", the flexible response called for by change in circumstances can be made more difficult.

If the committee need an example of how a particular judicial decision interpreting an ordinary statute can become almost impossible (politically) to reverse or correct, all that need be said is: Look at *Wik*!

Over-ride Provisions are Illusory Safeguards for Parliamentary Flexibility: The Canadian model provides for express legislative over-ride. That is an admission that the public interest will call for the exercise of a legislative over-ride. In the absence of a "bill of rights" calls for legislation are simply considered in the context of what the public interest requires at the time. But even when an "over-ride provision" is in existence, there is a potential that public attention will be distracted from the substantive question, namely what the public interest requires in the particular case, to the spurious contention that the over-ride is in fact a **deprivation** of rights, already judicially recognised in the most serious and formal way (by striking down earlier legislation).

Issue 6: Admissibility of "tainted" evidence"

The sheer number and breadth of the number of rights proposed prevents any workable general rule that "tainted" evidence be automatically excluded. A discretion is called for.

In conclusion: *Magna Carta*, the *Bill of Rights of 1688*, the *Declaration of Independence of 1776* inspired solid statutory action to implement rights in practice. EARC 's proposal abandons the solid approach that succeeded in the past.

I commend these submissions to the Committee.

B. J. CLARKE
Barrister-at-law

Chambers,
17th Level MLC Centre,
George St, BRISBANE.

14th November, 1997.