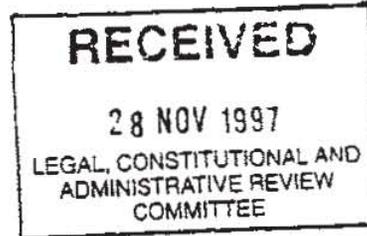


Women's Legal Service Inc



**Submission on the Queensland Legal, Constitutional &
Administrative Review Committee
Issues Paper No. 3:**

***The Preservation and Enhancement of Individuals'
Rights and Freedoms:
Should Queensland Adopt a Bill of Rights?***

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Introduction

The Queensland Women's Legal Service Incorporated (WLS) is a feminist organisation developed and operated by women for women. Our work is grounded in and informed by women's experiences, particularly in regard to the legal and justice system. We recognise the extent to which violence impacts upon the lives of women, at all levels of the legal system. We seek to bring about change so that women's experiences are validated within and become an integral part of the framework of the justice system.

The principles of our guiding statement are reflected at an international level, as evidenced by various conventions and declarations of the United Nations.

The WLS has been in operation for 13 years and last year purchased a house to permanently accommodate the service, in itself a major achievement. We view the purchase of our own premises as a political statement because so many of our clients never have and never will be able to fully exercise property rights, as is the case for women all around the world. For many of our members this is the only real estate to which they will ever be able to claim ownership.

The WLS provides legal advice, information, referral and representation to women in Queensland. During 1996/97 legal advice and assistance was provided to more than 6000 women. We also endeavour to play a significant role in facilitating legal and social change by participating in community legal education and law reform activities.

The knowledge and expertise of our staff, management committee and volunteers is heavily utilised in all activities of the WLS. Staff, members

of management committee and volunteers have a variety of qualifications, interests and expertise. They include lawyers, domestic violence workers, social workers, public sector workers, undergraduate and postgraduate students, community workers, resource workers, administrators and a host of other professionals and concerned women.

Free evening advice sessions are conducted three times each week, staffed by volunteers. Currently the WLS has approximately 115 volunteers including legal and support workers, who are drawn from private legal practice, government, welfare services and students. Volunteers also play a part in the development of law reform submissions.

The WLS is therefore in a strong position to respond to the question of whether Queensland ought to have a Bill of Rights in order to enhance and protect the rights and freedoms of individuals. The views of the WLS are based on our years of knowledge of the experience of women with the legal and justice system and hence reflect a significant and unique perspective. This submission has been endorsed by the staff and management committee of the Women's Legal Service.

Overview

The Queensland Women's Legal Service Incorporated (WLS) believes that the common law and specific statute law provides inadequate protection of individuals' human rights and freedoms. In particular, the client and law reform work of the WLS clearly demonstrates that the common law and specific statute law has disadvantaged and discriminated against women. The WLS therefore supports the introduction of any measure designed to enhance the experience of women generally in our community as well as to protect women's rights, particularly in regard to equality before the law. A Bill of Rights is one way in which such enhancement and protection of the rights of women could be achieved. Therefore the WLS supports a full investigation into and community consideration of the introduction of a Bill of Rights in Queensland. We also support the concept of a Bill of Rights.

In supporting such a step the WLS wishes to make the point that while such initiatives are to be welcomed and supported in a State jurisdiction, it is nonetheless a serious matter that should concern the Federal Government. Human rights and freedoms are so fundamental that they deserve protection at a national level and the WLS strongly recommends that the review in Queensland be provided as a model to the

Commonwealth, particularly during this period of increased constitutional debate in the community as a result of the imminent Constitutional Convention.

While the WLS welcomes the opportunity to make a submission in response to the Legal, Constitutional and Administrative Review Committee (LCARC) Issues Paper No. 3 we are concerned at the lack of public debate about the critical social, legal and political issues raised. In such an environment we fear submissions to the review may be entering a virtual vacuum, devoid of acceptable levels of community involvement and understanding. Nonetheless we seek participation and would welcome continuing this by, for example, an appearance at any public hearing.

Specific Comments

As discussed above, because of our concerns about the process of this review the WLS is reluctant at this stage to provide detailed and specific comment. Nonetheless we are of the belief that several central matters deserve attention at this time. Our comments on these can be found below.

Equality Clause

The WLS believes it is fundamental for any effective Bill of Rights to include a strong equality clause. The Report of the Australian Law Reform Commission (ALRC) in 1994 on *Equality Before the Law: Women's Equality* observed that:

Most submissions supported the entrenchment of an equality guarantee in the Constitution, either on its own or as a Bill of Rights. (p.61)

One of the most contemporary examples of an equality clause is that of the Bill of Rights part of the Constitution of the Republic of South Africa. The significance of that clause in the Bill of Rights is demonstrated by the fact that it is the first specific provision conferring human rights contained in that document.

Equality

9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The discrimination grounds included in sub-clause 9(3) - particularly gender, sex, pregnancy, sexual orientation and conscience - are of critical importance to women and should be included in any rights mechanism. The Queensland *Anti-Discrimination Act 1991* also recognises particular grounds of discrimination, as does other State and Federal legislation. These standards are now accepted by community and government and should be included in any Queensland Bill of Rights.

In any event, the inclusion of an appropriate equality guarantee is vital in any mechanism that seeks to protect and enhance the rights and freedoms of individuals. With regard to women an equality guarantee would:

- confirm that women have a right to equality in law;
- express government commitment to achieving women's equality;
- recognise and affirm commitment to implementing international standards;
- recognise and acknowledge diversity;
- recognise the importance and promote the use of special measures as a means of assisting women to secure equality; and
- promote recognition and acceptance within the community of the principle of the equality of women and men.

Violence And Women

The work of the WLS in client assistance and law reform clearly demonstrates the effect and impact of violence on women. Violence in both the public and private spheres is a significant contributing factor to women's continued inequality and is a fundamental issue in terms of women's rights.

The ALRC Report identified violence as an equality issue:

Violence violates, undermines and negates equality. The law's failure to deal effectively with men's violence against women denies women the equal protection of the law and the equal enjoyment of human rights and fundamental freedoms. (p.71)

In the international arena the impact of violence against women has also been recognised, most notably in the United Nations Declaration on the Elimination of Violence Against Women which, in Article 1, provides the following definition:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or *in private life*. [emphasis added]

Recognising that violence affects women in both public and *private* spheres is crucial to any effective Bill of Rights or other similar mechanism. The Bill of Rights of the Constitution of the Republic of South Africa acknowledges this in its protection of freedom and security of the person, which includes the right:

12(1)(c) to be free from all forms of violence from either public or *private* sources [emphasis added]

The WLS strongly believes the recognition of violence as an integral part of inequality must be reflected in any Bill of Rights. It could be achieved through an equality guarantee that specifically recognises the role that violence plays in women's inequality. This would require government and the legal system to respond more fairly and effectively to violence against women.

A Bill of Rights should allow citizens to challenge the social structure when it does not serve their legitimate needs. If violence against women is acknowledged in a Bill of Rights it would allow women to test the system where it has failed them in respect of preventing, curtailing or adequately responding to violence against them. The recognition of violence in a Bill of Rights would ensure that when women access the justice system the courts are able to acknowledge and act in accordance with an acceptance of the effects of violence.

Hierarchy of Rights

The WLS supports the inclusion of social, economic, cultural and community rights in any rights mechanism. While civil and political rights are essential for the protection and enhancement of individuals' rights and freedoms, other classes of rights are also vital, partly as educative standards that contribute to the creation of a human rights culture. It is also well understood that distinctions between categories of rights contribute to the perpetuation of inequality. It is now accepted that the continued distinction between so-called "enforceable" rights and "non-enforceable" rights unfairly discriminates against women and reflects the lack of recognition of women's experiences, needs and claims. It is often the case that unenforceable rights are those most relevant to women and would therefore contribute to the enhancement of women's lives if they could be accessed and asserted.

The standard arguments in relation to the unenforceability of social, cultural, economic and community rights include consideration of the impact on the State, particularly the economic costs involved. However, this is a narrow and stereotypical view that maintains State complicity in women's inequality. There needs to be an acceptance of the responsibilities of the State in regard to such rights, particularly because the distinction serves to perpetuate the very injustices and rights abuses against which human rights mechanisms are designed to safeguard.

The Bill of Rights part of the Constitution of the Republic of South Africa contains certain socio-economic rights that are "at least to some extent justifiable (ie, can be protected by the courts) and can be negatively protected from improper invasion." (p.10). These provisions include s.26 Housing, s.27 Health care, food, water and social security, s.28 Children and s.29 Education. Other similar rights include s.24 Environment, s.30 Language and culture and s.31 Cultural, religious and linguistic communities. Inclusion of such rights demonstrates their importance to

individuals and communities everywhere. Any Queensland Bill of Rights should include similar acknowledgment.

Furthermore, it is important that economic, social, cultural and community rights be included in any Bill of Rights, even if they are not enforceable. Their inclusion would ensure that the courts, when making decisions regarding enforceable civil and political rights, take into consideration other rights and thus avoid decisions that conflict with them.

Reproductive Freedoms

Reproductive rights and freedoms are recognised as fundamental to women's rights. The WLS believes that when women are denied the right to control their own fertility, other rights and freedoms are also infringed. Recognition of reproductive freedom is thus crucial to the enhancement and protection of women's rights.

The protection afforded by the Bill of Rights part of the Constitution of the Republic of South Africa in regard to bodily and psychological integrity states:

12(2) Everyone has the right to bodily and psychological integrity, which includes the right -

- (a) to make decisions regarding reproduction;
- (b) to security in and control over their body ...

The WLS supports protection of such rights in a Bill of Rights mechanism in Queensland. The right to personal autonomy over reproductive matters was recommended in the EARC proposal (clause 38) and the WLS supports that recommendation. In particular, the WLS supports the inclusion of a clause similar to sub-clause 38(3) which reflects much of the wording of article 16 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. This sub-clause describes certain features which must be considered to be included in the "right to personal autonomy over reproductive matters":

- (3)(a) the right of a female to control her own fertility;

- (b) the right to decide freely and responsibly on the number and spacing of the children and to have reasonable access to information, education and means to enable the exercise of this right.

The EARC proposal also recognised the impact of parental responsibilities on the assertion of individuals' rights and freedoms. In particular the need for rights to access child care was recommended so as to enable the exercise of other rights and freedoms (clause 39). The "tyranny" of child care prevents many women from fully exercising other rights and therefore effectively excludes women from full social participation. The wider community is then deprived of the full potential of women's contribution to the complex fabric of society.

Aboriginal and Torres Strait Islander People

As indicated above the WLS supports elements of the EARC Bill of Rights proposal. The EARC recommendations in relation to the rights of Aboriginal and Torres Strait Islander people and communities (clause 41) are especially supported. While the EARC proposal does not go far enough, the WLS agrees that the enhancement and protection of the rights and freedoms of indigenous Australians is of paramount importance.

Environmental Rights

The WLS also supports inclusion of environment rights in any Bill of Rights mechanism as proposed by clauses 44 & 45 of the EARC document.

Other Measures

The WLS believes that mechanisms other than a Bill of Rights should also be investigated and considered. In particular, the proposal of the ALRC in relation to an Equality Act is supported but an enforceable Bill of Rights is preferred. Enhancement of administrative law mechanisms, particularly in relation to the standing of individuals and organisations, is also supported.

The New Zealand model deserves careful consideration because, despite its unentrenched status, it has achieved significant protection and enhancement of the rights and freedoms of New Zealanders. Of particular interest is s.6 of the NZ *Bill of Rights Act 1990*, which requires that:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The effect of this provision is significant although the integrity of existing laws is substantially protected by the operation of s.4 which says that:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or effective; or
- (b) Decline to apply any provision of the enactment -
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The WLS strongly supports the inclusion of a provision similar to that of s.6 of the *NZ Bill of Rights Act*.

Remedies

The issue of remedies is complex and dependent on the choice of mechanism. Whatever option is proposed, the WLS believes that the courts should not be fettered as to appropriate remedies. Again, developments in the increasing jurisprudence of the *NZ Bill of Rights Act* show that the courts can and will decide suitable remedial relief, depending on the nature of the case and the facts presented. Decisions are also influenced by the Act's requirement that the courts interpret the meaning of statutes according to the *Bill of Rights Act*. More specifically, remedies should not be restricted to decisions of an administrative law nature. The scope, impact and effectiveness of a Bill of Rights would be detrimentally affected by unnecessary or unreasonable fetters on court action.

Conclusion

The Women's Legal Service supports the introduction of legislative and other steps to enhance and preserve individuals' rights and freedoms. The concept of a Bill of Rights is supported, particularly if it sufficiently recognises and addresses fundamental matters crucial to overcoming women's continued inequality, disadvantage and discrimination. However,

it is essential that extensive community consultation and debate be part of the process. While the WLS acknowledges the opportunity for community involvement in the Electoral and Administrative Review Commission's Review of the Preservation and Enhancement of Individuals' Rights and Freedoms, we also recognise that this occurred some time ago and is therefore selective. Renewed opportunities are essential if Queensland is to consider the introduction of a Bill of Rights.

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