



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

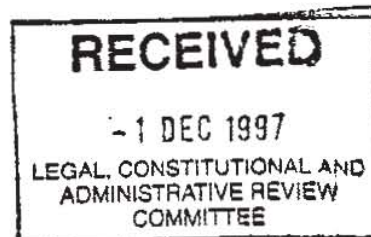
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28 November 1997

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



Attention: Ms Kerryn Newton

Dear Kerryn

RE: THE PRESERVATION AND ENHANCEMENT OF INDIVIDUALS' RIGHTS AND FREEDOMS: SHOULD QUEENSLAND ADOPT A BILL OF RIGHTS?

We refer to our previous discussions in relation to the above.

Please find enclosed the Council's submission with respect to the bill of rights.

We look forward to being able to express the Council's submissions orally at an appropriate time.

Please do not hesitate to contact Ian Dearden should you wish to discuss the matter further

Yours faithfully
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

IAN DEARDEN
(President)

SUBMISSION TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

ISSUES PAPER NO 3

THE PRESERVATION AND ENHANCEMENT OF INDIVIDUALS' RIGHTS AND FREEDOMS: SHOULD QUEENSLAND ADOPT A BILL OF RIGHTS?

INTRODUCTION

The Queensland Council for Civil Liberties ('QCCL') welcomes the opportunity to make a submission to this Committee with respect to the EARC report on "Review of the Preservation and Enhancement of Individuals' Rights and Freedoms" presented to the Queensland Parliament in August 1993 but to date not considered by any committee of the Queensland Parliament.

This submission addresses the issues for consideration set out at page 14 of the Issues Paper.

1. ***Does Queensland need a bill of rights to protect individuals' human rights and freedoms in Queensland or does the common law and specific statute law provide adequate protection?***

QCCL has a firm and unshakeable view that the protection of individual rights in Queensland cannot be left to the vagaries of the common law, nor the occasional impulse of governments to enact specific legislation which on occasions has the effect of protecting individual rights. In our view, it is clear that a bill of rights, appropriately entrenched, is the only mechanism (short of an all encompassing 'bill of rights' enacted as part of a Commonwealth constitution or as Commonwealth legislation) which will serve as adequate protection of individual rights and freedoms in Queensland.

In the submission QCCL made to EARC in 1992, we summarised our position as follows:

1. A bill of rights should be enacted to give legal protection to rights which presently are not legally guaranteed, and to better protect existing rights against erosion.
2. A Queensland bill of rights should be limited to civil and political rights.
3. A Queensland bill of rights should provide for the government to intervene for the protection of rights and freedoms generally.
4. Notwithstanding the responsibilities of the Commonwealth, Queensland also should bear responsibility for the preservation and enhancement of fundamental rights.
5. The enactment of the bill of rights would not remove the need for specific human rights legislation to be passed. Instead it would provide a standard against which specific human rights legislation will be measured. It also would provide protection in the absence of specific human rights legislation by enabling legislation or administrative action to be invalidated to the extent that it infringed the rights guaranteed by the bill of rights.
6. Until the bill of rights becomes a well-accepted feature of our public life and its full implications are able to be assessed, a power should exist for the Parliament to expressly override the application of the bill of rights in specific legislation. However, such a power should be clearly circumscribed. The procedures contained in s.33 of the Canadian Charter provide some restraint upon a Parliament from permanently overriding the application of the bill of rights.
7. A bill of rights would not result in the politicisation of the judiciary. The courts would still face the same policy issues which they confront at present in adjudicating difficult issues which impinge upon individual rights and freedoms. Instead, the courts would have the formal legal foundation upon which to better protect individual rights and freedoms.
8. The rights and freedoms contained in the bill of rights should be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
9. The bill of rights should be enforceable. An unenforceable declaration of rights would be little more than window dressing.
10. Individuals should be able to pursue a full range of remedies for violations of the bill of rights in the ordinary courts. However, many individuals may lack the inclination or the resources to pursue civil actions in the courts. Therefore,

a Human Rights Commission (most appropriately the Anti-Discrimination Commission Queensland) should exist to enforce the bill of rights and, in appropriate cases, to intervene in proceedings.

QCCL believes that a specific bill of rights for Queensland is warranted because State legislation confers enormous powers upon officials to restrict and violate rights and freedoms. Although the inclination to leave the protection of rights for the Commonwealth is an understandable one, because it is preferable that rights and freedoms should be enjoyed by all Australians, this is no reason to delay the enactment of a Queensland bill of rights. Because the laws of the States have an enormous potential to impinge upon the enjoyment of human rights, the States (in particular Queensland) should be at the forefront of protecting human rights.

The common law and specific statute law do not, in our view, provide adequate protection. What judges or Parliament give (by way of common law or specific statutory protection) can just as easily be taken away at a judicial whim or at the whim of Parliament. As has frequently been stated, if the Queensland Parliament decided tomorrow that all blue eyed baby boys were to be put to death at birth, there is quite simply no protection in Queensland against such a proposition (other than of course political pressure).

2. *If a bill of rights is not introduced in Queensland, what other steps, if any, should be taken to enhance and preserve individuals' human rights and freedoms?*

Given that QCCL considers that the introduction of a bill of rights is the appropriate step to adequately protect the human rights and freedoms of Queenslanders, we do not believe that there is any other single step which can be taken, either legislatively or extra-legislatively which will provide the same protection.

Having said that, we have supported the introduction of legislation which protects individual rights, in particular the *Anti-Discrimination Act 1991*, *Judicial Review Act 1992*, *Freedom of Information Act 1992* and *Peaceful Assembly Act 1992*. This legislation, together with the power of the Ombudsman under the *Parliamentary Commissioner Act 1974*, represent important legislative protection of individuals' rights. However, any of these acts, being ordinary acts of the Queensland Parliament, can be overridden at any time.

QCCL also supported the introduction of the *Legislative Standards Act* (which contains the 'fundamental legislative principles') but considers that the failure to entrench those 'fundamental legislative principles' such that they are a guideline but not a ground for challenge, makes them an ineffective method for the protection of individual rights. The 'Scrutiny of Legislation Committee' is to be commended, however, for its endeavours in seeking to bring to the attention of parliamentarians legislation which breaches the 'fundamental legislative principles' contained in *the Legislative Standards Act*.

For example, proposals put forward by the Minister for Corrective Services, the Honourable Russell Cooper, in November 1997, to provide (among other things) for the strip searching of visitors to prisons, and the ability to 'shoot to kill' escaping prisoners, represent examples which, in the view of QCCL, clearly breach fundamental rights which we consider should be entrenched into a bill of rights in Queensland, and would enable the overriding of such extraordinary proposals if enacted in legislation.

Whether or not a bill of rights is introduced in Queensland, the ongoing need to introduce legislation which enhances and preserves individuals' human rights and freedoms should result in further legislation to protect those rights and freedoms.

3. ***If a bill of rights is recommended for Queensland, what specific rights should or should not be included?***
- ***Should it contain all the rights contained in EARC's draft bill of rights?***
 - ***Are there any rights not included in EARC's draft bill of rights which should be contained in a Queensland bill of rights?***

QCCL believes that a Queensland bill of rights should commence with a statement of the philosophical basis for the recognition of the rights set out in the bill, using a formulation which identifies the fact that, although the rights are derived from sources including the Universal Declaration on Human Rights ('UDHR'), they are formulated with a view to ensuring their enjoyment in the legal and cultural environment of Queensland.

The bill of rights should commence with a statement of principle denouncing any discriminatory application of the rights and freedoms contained in the bill of rights, in accordance with the wording of the UDHR.

QCCL considers that if a bill of rights is recommended for Queensland, it should contain all the rights contained in EARC's draft bill of rights.

In addition, we consider that the provisions of clause 27(b) or (c) should be further defined to entrench a person's right to freedom from discrimination on the basis of their transgenderist status. This would require consequential amendment of the *Anti-Discrimination Act 1991*.

QCCL supports the proposition that a bill of rights not be entrenched by way of a referendum for a period of five years, which would enable any final clarification of the rights to be contained in the bill to be arrived at during that time.

4. *Is it desirable that a bill of rights contain economic, social, cultural or community rights?*
- *If economic, social, cultural and/or community rights are to be included, should they be enforceable rights?*
 - *Is it possible to make economic, social, cultural or community rights enforceable?*
 - *Does the inclusion of economic, social, cultural and community rights without making them enforceable actually give the impression of downgrading those rights?*

QCCL now considers that economic, social, cultural and/or community rights, if included in a bill of rights, should be enforceable. We consider that it is possible to make these rights enforceable, and we note that some at least of these rights are enforceable in other jurisdictions (eg Canada and New Zealand).

In our view, including such rights without making them enforceable (in contrast to the enforceable rights contained in a bill of rights) gives the impression that these rights are less important. Clearly in legal terms, any lack of enforceability gives them declaratory but not justiciable force.

5. *To what degree, if at all, should the bill of rights be entrenched (be made difficult to amend)?*
- *Should any Queensland bill of rights be supreme law unable to be overridden by legislation of the Queensland Parliament?*
 - *Would the absence of any "override provision" in a bill of rights transfer too much power into the hands of the judiciary in legal proceedings?*
 - *Should any Queensland bill of rights simply be another Act of Parliament such as the New Zealand model?*

QCCL believes that an appropriate mechanism to introduce a bill of rights in Queensland would be to allow for a period of say five years a power to exist in the Queensland Parliament to expressly override the application of the bill of rights in specific legislation, although that power should be clearly circumscribed.

QCCL believes that after a period of five years, the bill of rights should then be entrenched in the Queensland constitution through a referendum which would make the bill of rights incapable of being overridden by legislation of the Queensland Parliament, and would require a referendum in order to alter the bill of rights.

In our view, the absence of any 'override provision' does not transfer too much power into the hands of the judiciary and legal proceedings. Many of the matters which would be the subject of the bill of rights are presently the subject of litigation before the courts. The courts grapple with such issues and the course of determining the common law and interpreting statutes. In determining the rights of citizens and, in particular, adjudicating any disputes between the State and its citizens, the judiciary is already involved in determining often controversial issues which might be regarded as broadly 'political'.

Rather than resorting to innovation in attempting to protect individual rights and freedoms, as currently occurs, the courts would have a formal legal foundation upon which to better protect individual rights and freedoms. It would not, in our view, result in a politicisation of the judiciary, but rather calls on the judiciary to interpret a particular act of Parliament, in this case, a bill of rights, a function to which the judiciary has long been accustomed. To the extent that any bill of rights operates as a 'transfer of power from electorate representatives to judges', this transfer is one sanctioned by the Parliament itself.

As set out above, QCCL believes although in the short term there is value in a bill of rights remaining an act of Parliament pending the Queensland political system becoming accustomed to it, it should in due course be entrenched to ensure that it is not able to be overridden by Queensland Parliamentary legislation, subject of course the option of changing it by referendum (given that it would be entrenched by referendum).

6. *What remedies should be available for contravention of any bill of rights? For example, should any evidence obtained in breach of any Queensland bill of rights be automatically excluded or should the judiciary have a discretion as to its admission?*

QCCL considers that the enforcement of rights pursuant to a bill of rights should be justiciable by ordinary proceedings in the courts. QCCL also sees a role for a quasi-judicial or administrative body (the obvious candidate for this position would be the Anti-Discrimination Commission Queensland) to investigate alleged breaches of human rights and to enforce the bill of rights. Individuals should be able to pursue a full range of remedies for violations of the bill of rights in the ordinary course. However, many individuals may lack the inclination or the resources to do so. Therefore, the Anti-Discrimination Commission Queensland should have a specific legislative fiat to enforce the bill of rights and, in appropriate cases, to intervene in proceedings.

There should be no restriction in the types of remedies which a court may apply in enforcing a bill of rights.

There should be sufficient legal aid resources (appropriately funded) to enable ordinary citizens to enforce a bill of rights. A government funded public interest advocacy centre should be established to investigate and litigate test cases.

CONCLUSION

QCCL commends the Legal, Constitutional and Administrative Review Committee for carrying through (albeit after a lengthy delay) the work of the Electoral and Administrative Review Commission, and trusts that the Committee will recommend to the Queensland Parliament that it introduce the draft bill of rights prepared by EARC as a matter of priority. It is clear in 1997 that the need to preserve and enhance the

rights and freedoms of individuals is just as important as it was in 1993 and no doubt the need for a bill of rights in Queensland will continue for the foreseeable future.

PREPARED ON BEHALF OF QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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