

**INTERNATIONAL COMMISSION OF JURISTS
(QUEENSLAND BRANCH)**

Submission to the Legal, Constitutional and Administrative Review Committee

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

PRELIMINARY

The International Commission of Jurists (Queensland Branch) is a non-profit association, consisting of over 60 Queensland lawyers, legal academics, judges and other people committed to furthering human rights issues (as recognised in international human rights covenants) and the rule of law.

The Queensland Branch of the International Commission of Jurists ('the ICJ') is part of the Australian Section, which, in turn, is affiliated with the international body which is based in Geneva, Switzerland.

The ICJ thanks the Legal, Constitutional and Administrative Review Committee ('the LCARC') of the Parliament of Queensland for this opportunity to make submissions to its Bill of Rights review. The ICJ regards the Bill of Rights review as an important issue of significant public concern.

Approach

Given that the Queensland Branch of the ICJ is an entirely voluntary organisation without full-time staff and limited resources, there has only been time for the ICJ to prepare a brief submission in response to the LCARC Bill of Rights *Issues Paper*.

Moreover, given that most of the issues surrounding proposals to introduce a Bill of Rights in Queensland have already been exhaustively canvassed by the Electoral and Administrative Review Commission (EARC), over the period 1992 - 1993, culminating with the release of the EARC *Bill of Rights Report* in August 1993, the ICJ has formed the view that there is very little to be gained by the ICJ now re-traversing each of the issues originally raised in the EARC *Bill of Rights Report*.

Instead, and because of time constraints, the ICJ has chosen to confine itself to the provision of 'short answers' in response to each of the questions posed on page 14 of the LCARC Bill of Rights *Issues Paper*, in the hope that this approach will be sufficient to provide the LCARC with an appreciation of the ICJ's broad position on each of these discrete issues.

However, the ICJ would be only too happy to provide the LCARC with additional assistance, in the form of further and better particulars in relation to any of the various issues raised herein in the ICJ's submission, at some later juncture should that be required by the LCARC.

Question 1: Does Queensland need a Bill of Rights to protect individuals' human rights?

Yes.

The ICJ wishes to provide its strongest support for the introduction of a Bill of Rights in Queensland. The ICJ regards the introduction of a Bill of Rights as an important additional rights protecting step for the following kinds of reasons:

- (i) Although the common law already gives various rights and protections to Australian citizens, common law rights remain largely implicit and unspecified. Moreover, these rights are only cast in stark relief on a case by case basis. Therefore, these rights remain relatively unknown - and perhaps even unknowable - among ordinary members of the public.
- (ii) Because the common law is retroactive and essentially develops on a case by case basis, the common law is not always able to be the most useful tool in terms of its having a capacity to provide forward looking assistance to State policy makers. Equally, common law rights are largely 'overridable' by government.
- (iii) Although the fundamental legislative principles (FLPs) contained in the *Legislative Standards Act (1992)* help to ensure that Queensland legislation does not unnecessarily infringe certain individual rights, the level of ~~rights~~ protection afforded to citizens by the FLPs is necessarily limited in nature. The FLPs are merely an internal mechanism to assist government departments and the Parliamentary Counsel when drafting legislation. The principles contained in the FLPs do not extend to policy or bureaucratic decision making, and the FLPs are not sufficiently prominent or symbolic to be able to provide a wider educational role within government..

- (iv) Because Queensland has a unicameral parliamentary system, there are, at present, rather limited checks upon the exercise of power by executive government. In the continued absence of an upper house in Queensland, a Bill of Rights may provide an additional brake against the potential excesses of executive government.
- (v) The ICJ considers that a Bill of Rights will have an important inspirational and educational role, particularly in its initial years. This may serve to assist in the general enhancement in the quality of governance in Queensland and may assist to heighten 'rights awareness' among Queensland citizens. The ICJ considers that the kind of additional consciousness of rights that a Bill of Rights may provide will ultimately serve to improve public policy making by providing a broad frame of reference within which policy-makers will act. At the same time, a Bill of Rights will provide a new and more specific touchstone against which the actions of government may be assessed.
- (vi) A Bill of Rights can entrench fundamental rights, and can be drafted in a way that is rational and complete, thereby overcoming the current ad hoc and piecemeal approach of existing common law rights that are then partially complimented by some further specific legislative rights.
- (vii) Finally, while we support a Bill of Rights for Queensland, we recognise that rights must always be balanced against competing rights. We recommend that the Committee consider a 'justifiable limitations' clause such as that used under the Canadian Charter of Rights. In this way, both the individual and social aspects of human rights can be accorded more practical status by being subject to broader considerations.

Question 2: If a Bill of Rights is not introduced in Queensland, what other steps, if any, should be taken?

The ICJ believes that a variety of improvements can cheaply and sensibly be made, with or without a Bill of Rights. That is, we recommend the following steps be taken, irrespective of whether a Bill of Rights is ultimately enacted in Queensland:

(i) There must be further improvements in the quality and availability of administrative law remedies in Queensland. Furthermore, there is still a compelling need for further improvements to the general calibre of parliamentary governance in Queensland:

- Queensland really requires a State-based Administrative Appeals Tribunal (AAT).
- Queensland does not, as yet, have a properly effective Parliamentary committee system.
- there is still considerable scope for improvement in the processes of public consultation utilised within government.
- Rather sadly, Queensland has a long history of lack of respect for rights - even individual/political rights. Even in recent times there have been instances where government decision making has instanced a disregard for fundamental rights. Until such time as there is fundamental cultural and attitudinal change, this problem may not be rectified.

It is in this context that the ICJ suggests that any proposal to ~~introduce a~~ Bill of Rights to Queensland must therefore be seen as simply one part of a package of wider reforms designed to also improve these other important aspects of parliamentary governance.

- (ii) The ICJ considers that the Queensland Parliament must enact legislation to further advance the principles espoused by the High Court in *Teoh's case* - so that at State level, administrators and other government decision makers will be required to at least take into consideration relevant human rights matters to which Australia is now committed.

Question 3: If a Bill of Rights is recommended, what specific rights should or should not be included?

We do not propose to go through each right contained in the draft EARC Bill of Rights bill. Obviously, in practice, the final content of the *Bill of Rights* should be settled after a fulsome process of community and political debate. However, the ICJ's firm position is that any Bill of Rights that is introduced in Queensland should, as a basic minimum, include all the fundamental human rights that are contained in international human rights declarations to which Australia is now an international signatory ie:

- the Universal Declaration of Human Rights;
- the International Convention on Civil and Political Rights; and
- the International Convention on Economic, Social and Cultural Rights.

In particular, the ICJ strongly supports the EARC recommendation that both the 'preamble', and the 'objects' section of the Bill of Rights should aim to direct judges and others who are required to interpret the Bill of Rights to the source of these rights in international law, and hence to the growing body of international human rights jurisprudence that now surrounds these rights.

We would note, however, that the above three international instruments envisage individual rights, as opposed to collective or communal rights. This raises two concerns which we believe should be considered prior to the enactment of any Bill of Rights. The first is that not all human rights are in fact individual in nature. Over the last decade there has been a growing recognition in international law of the

rights of collectives. With respect to Australia, this is particularly important in the context of Australia's Indigenous population, who hold collective rights under custom which are recognised by the common law. In some cases, the recognition or enforcement of collective, rather than individual, rights will be more appropriate. An Indigenous group's custom may not recognise individual rights with respect to a particular issue, for example, native title.

The second point of concern is allied to the first, and relates to the imposition or enforcement of western notions of human rights on Indigenous groups. We would note that this was an issue which caused some controversy at the time of the enactment of the Canadian Charter of Rights. We recommend that some consultation be undertaken with Indigenous groups in Queensland on this issue prior to the enactment of a Bill of Rights.

One limitation of the draft Bill recognised by the ICJ is that it conceives of rights only as something individual citizens hold against the State. However, the ICJ wishes to raise as a concern that such an approach to rights may be self-limiting, and ultimately, a factor that works to deny adequate rights protection to Australian citizens. In this context, it must be borne in mind that we now reside in an era in which large corporations and particularly the mass media are capable of making substantial incursions upon the rights of individuals, even cornerstone individual civil and political rights.

For example, the right to privacy and the right to movement can, in the modern era, be significantly threatened by powerful non-government organisations exercising non-public powers. Of even more immediate concern, we now live in an era of the 'contract State', whereby much government service provision is being provided via the mechanism of service 'out-sourcing' to the non-government sector, in contexts whereby it is not always clear that such services are being provided under the aegis of the State. As such, the ICJ suggests that it may be artificial and unrealistic for Bill of Rights-type documents to be drafted in such a manner that rights discourse is

limited in reference to a simple bi-polar relationship between the State and the Individual.

Instead, the ICJ wishes to advocate that fundamental civil and political rights that are contained in any Bill of Rights need to be framed in such a manner that they are enforceable against whomever may breach them. The modern State must now be defined more expansively to include not just the Crown as a legal entity, but also the community acting under the Umbrella of the State. As such, the ICJ recommends that Part 3 rights be enforceable, wherever applicable, against all persons.

For pragmatic reasons, the ICJ recognises that rights which make economic demands upon government (such as many of the economic and social rights in Part 4) may be less easy to enforce, much less even to quantify. To a degree, we recognise that many of the 'Part 4' rights have not been as well developed in human rights jurisprudence as the older 'Part 3' rights.

However, that is not to say that the 'Part 4' rights are not still important goals or aspirations. No politician or reasonable member of our society would deny them (noting however that clause 38(3), whilst enacting in effect a civil right for individual women, may be controversial to some people for religious reasons). We therefore strongly support some aspirational enactment of rights that are, by and large, part of Australia's assumed obligations under the ICESCR.

The ICJ believes that the legal unenforceability of Part 4 rights in EARC's draft bill achieves this aspirational goal: such rights will be able to be referred to by citizens and community groups in lobbying governments and others. They will become, in time, an accepted and better understood part of political and social discourse, and hopefully will thereby come to be respected more rather than treated as mere political rhetoric.

'Part 5' rights are also aspirational. In relation to indigenous people, these rights are clearly justified by both international and federal law. They are in fact akin to Part 3 rights, as they are capable of being seen as limitations on state power designed to protect the interests of a definable ('individual') group.

Some other 'Part 5' rights may appear to trammel on primarily federal matters (eg author/moral rights), but are nonetheless part of our international obligations. Further, some aspects of Part 5 (eg cl 41(c)) are more like Part 4 rights, in that they mandate economic rights which in reality, depend on the particular level of economic development and prosperity of the state.

For these reasons we also recommend adopting the EARC bill's approach of including Part 5 rights, albeit in a non-legally enforceable form, for the aspirational reasons outlined above.

One last matter. We would also support the adoption of the EARC recommendation that the Queensland Constitution recognise the independence of the judiciary. Recent events have highlighted the value of such a right.

Question 4: **Is it desirable that a Bill of Rights contain economic, social, cultural or community rights?**

The ICJ reiterates its recommendation (above) that 'Part 4' and 'Part 5' rights have intrinsic value, whether or not they are enforceable, and that enacting them, even without enforceability, will have value. Non-enforceability does not imply legal irrelevance. Judges and legal practitioners may refer to them when they are considering difficult questions of statutory interpretation, for instance, or when developing the common law.

To that end, we recommend that any Bill of Rights include a clause which makes 'Part 4' rights relevant in the process of statutory interpretation or in the development of the common law as reflective of community standards.

It must be remembered that 'Part 4' and 'Part 5' rights reflect not just international human rights law, but, by and large, are no less part of our community's goals and fundamental standards than are the 'Part 2' rights.

We in passing however note that clause 5 of the EARC bill contradicts some aspects of Part 5 (for instance clause 44(2) as it stands is unclearly drafted - what does a 'right to object' mean if no 'Part 5' rights are enforceable by legal process).

Question 5: To what degree, if at all, should the Bill of Rights be entrenched?

In principle any Bill of Rights needs to be a fundamental legal document - and hence entrenched.

Whilst there is clearly constitutional uncertainty about the exact degree to which either the *Australia Act* or manner and form provisions can be used to entrench a Bill of Rights, we support the use of such provisions in the first instance to attempt to entrench the Bill. Failing that, the ICJ supports the original idea that the Bill be enacted with a 5 year sunrise period.

The ICJ does not support a Bill of Rights being 'overridable' by Parliament with a simple stroke of the legislative pen: to allow that would allow knee-jerk political reaction to individual cases to override the orderly development and interpretation of these rights.

Question 6: What remedies should be available for contravention of any Bill of Rights?

We recommend that administrative law remedies (eg injunctions, the equivalents of prerogative writs as now contained in the *Judicial Review Act*) and declarations be available to the courts to render Part 3 rights enforceable.

Further, with regard to questions of court procedure (eg: the admissibility of evidence gained in contravention of the Rights) we recommend that the courts should be bound, in both criminal and civil trials, to enforce 'Part 3' rights where applicable.

We make no comment about whether alternative or extra remedies (beyond clause 4) should be incorporated in the Bill. In particular, we do not comment on whether there should be a right to damages merely because of a breach of the enforceable rights in the Bill, nor do we comment on whether there should be a rights to some form of 'merits review' based on the Bill.