ANTI-DISCRIMINATION COMMISSION QUEENSLAND

SUBMISSION TO LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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

Preliminary

The Anti-Discrimination Commission Queensland (ADCQ) is established under the *Anti-Discrimination Act* 1991 and has two key statutory functions. First, it is the forum through which alleged complaints of unlawful discrimination are reported and dealt with according to law. Secondly, the Commission has a statutory mandate to promote discussion of human rights issues generally throughout the community. It is in this latter educative capacity that the Commission provides a submission to the Parliamentary Committee's inquiry about the desirability or otherwise of a State Bill of Rights.

This educative role of the Commission is expressly contained in section 235 of the Act which sets out the Commission's functions. In particular, the mandate is derived from the following subsections of that section:

> *(e) to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act;...*
>
> *(i) to promote an understanding and acceptance, and the public discussion, of human rights in Queensland;...*
>
> *(l) to take any such action incidental or conducive to the discharge of the above functions.*

Approach and Rationale

The Commission is supportive of a State Bill of Rights as a means through which human rights in this State can be further advanced and promoted. A complete submission supporting such a view no doubt should include a discussion on the types of rights that should be included in such a Bill. However, such a submission, whilst time consuming to develop, would be lengthy indeed. Upon reading both the Report by the Electoral and Administrative Review Committee and the Issues Paper No. 3 of the Legal, Constitutional and Administrative Review Committee, it is clear that the central questions to the debate are:

(1) Should Queensland adopt a Bill of Rights? and

(2) If "Yes" to (1), what rights should it contain?

The Commission believes that addressing (2) is futile at this stage unless (1) is answered in the affirmative by the Committee. At this early stage of the debate, the Commission is therefore confining its commentary to the threshold issue contained in (1). Should the Committee, in the course of its deliberations, reach a conclusion supporting a Bill of Rights for this State, the Anti-Discrimination Commission would welcome a further opportunity to make a submission about the contents of a Rights Charter or make an oral submission in any public hearings conducted by the Committee.

Should Queensland Adopt a Bill of Rights?

As noted in the EARC Issues Paper No.20, the question of a Bill of Rights has been debated at the federal level on three occasions and in Queensland on one previous occasion under the lead of the Nicklin Government. The stated commitment of the Government at the time was *"to embody in the constitution provisions which follow those laid down in the Declaration of Human Rights of the General Assembly of the United Nations, and we will enact that such provisions can only be repealed or altered by the sanction of a majority of the people determined at a referendum."*

The policy document further stated that the provisions will be designed to

> *"(a) protect our democratic political institutions;*
>
> *(b) protect the basic democratic political rights of the people;*
>
> *(c) secure the freedom of the individual and the protection of his property from unjust acquisition;*
>
> *(d) maintain a completely independent judiciary."*

It is important to note that whilst the three federal attempts at introducing a Bill of Rights was certainly done by a non-conservative government at the time, in fact possibly the first initiation or mobilisation towards a Bill of Rights was done in the State of Queensland by a conservative government. This historical fact, although not of major significance, is important to dispense with one of the principal myths that ordinarily surround debate about a Bill of Rights. That myth of course is that support for a Bill of Rights is often invalidly assumed to be supported by those with non-conservative political persuasions.

This myth is even more so dispensed when one notes that support for a Bill of Rights in recent times has come from traditional conservative forces. The two previous Chief Justices of the High Court, Sir Harry Gibbs and Sir Anthony Mason, were initial opponents to a Bill of Rights when they were first appointed to the High Court. Both Justices had a moderate approach to the role of the High Court and were certainly not aligned with the proponents of "judicial activism". However, both Justices in the last five years have strongly supported publicly the need for a Bill of Rights.

It is therefore important in the Commission's view to have in the public domain a correction of the invalid tendency within the broader community to assume that the question is often divided along party lines. Certainly the history of the debates in this country, and in particular the recent discussions, are factual dispensations of that myth.

However, possibly the most common argument that has been raised by opponents to a Bill of Rights is the argument concerning the supremacy of Parliament and that our system of Government relies upon the common law as a sanctum for the protection of rights. This theory argues that rights protection in our legal system is derived from Parliamentary action and the evolution of the common law.

The Commission refutes that argument from a number of points. First, that the Parliament itself is the initiator by enacting a Bill of Rights in fact is consistent with the fundamental rule of Parliamentary supremacy. Put simply, a Bill of Rights cannot be forthcoming without the Parliament exercising its supreme role to make laws for the "peace order and good government" of the State of Queensland.

Secondly, and perhaps more importantly, to view the evolution of the common law as in some sense involving the judiciary miraculously "finding" the law that was always there is a myth. For the common law is often called "judge - made" law and there are numerous precedents in branches of the law which have their genesis from ground breaking decisions of the courts. The whole area of torts law was developed by judges. When the decision of the court in the celebrated case of *Donohue v Stevens*, which held manufacturers can potentially be liable for any harm to consumers as a result of their negligent actions, it caused much shock and controversy within industrialised English society at the time. However, all talk of that new styled liability at the time did not impede the progress of the corporate world. It is perhaps ironic that now, that area of torts law, which at the time was ground-breaking controversy, is now cited as part of the sacrosanct 'traditions' of the 'incrementally moderate' common law. Major developments in the law have never in history been borne with the apparent ease that alleged defenders of the institution of common law traditions would have us believe.

The development of new areas of law, particularly law which has much significance to the social infrastructure generally rather than a small quadrant of it, has rarely occurred without some jolt in history. This is so whether it be judge made law or statute based law. The question of a Bill of Rights should therefore not be embroiled in an arbitrary and invalid appeal to the apparent 'staid moderate and safe approach' of the common law as opposed to an allegedly risk-ridden, uncertain and daring approach of a statute based charter of rights.

The debate in Australia about a Bill of Rights has significantly advanced and can no longer be sustained by a simplistic division along political lines or along arbitrary lines of "common law versus judicial legislation".

The focus and debate about a Bill of Rights in Australia equally has seen fit to change of late with the advocates of the common law system, seriously questioning the role and function of that system in any case. In many respects those advocates who in the past have expounded the sanctimonious traditions of the common law now find themselves

questioning that very system because of the increasing precedence it has set in advancing and discovering new found human rights on a constitutional basis. Within the space of some five years the High Court has upheld rights to political speech (*Nationwide News* case) to counsel in criminal cases (*Deitrich*) to native title (*Mabo* and *Wik*) and to the incorporation of internationally recognised human rights norms into the domestic scheme via the concept of a legitimate expectation in *Teoh's* case.

As Philip Alston points out in his introduction to the book "Towards an Australian Bill of Rights" .....

> *There are two processes, operating partly in tandem and partly quite separately which will, in the absence of any deliberate act on the part of the government and people of Australia to adopt such a Bill, conspire to bring about a defacto Bill of Rights. The first is the inevitable evolution of the judicial role in protecting individuals rights in response to changing attitudes within society, the rapid evolution of human rights jurisprudence in other common law jurisdictions, and the emergence of a range of new or urgent threats to the enjoyment of human rights within Australia.*
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> *The second process is the influence of the International human rights regime and of the commitment which Australia and all other developed nations have undertaken viz-a-viz the international community. The views expressed by the United National Human Rights Committee in April 1994 in relation to the Tasmanian anti-sodomy laws are no more than a limited manifestation of the pressures which will inexorably be generated upon Australia in the years ahead, to comply with those minimum standards of human dignity which successive Australian governments have undertaken to respect.*
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> *Each of these default options, as they may reasonably be called, has been the subject of significant criticisms. The arguments put by the critics are by no means without merit and warrant careful consideration in the present context. It is suggested in this analysis, however, that the most effective means of mitigating the undesirable consequences are identified by at least a reasonable cross-section of the critics is to bite the bullet and adopt a Bill of Rights, albeit one which in both content and form seeks to take account of the concerns that have been expressed. In this way neither of the two default options would be permitted to prevail."*

In other words the debate has significantly taken a turn whereby the advocates of the common law system now have taken a contrary position and are expressing concern, if not reluctance, at the tendency of the Courts to introduce and implement new rights that have until now been undiscovered at common law. On the one hand advocates of the common law are to some extent caught by the argument of their own design - having always argued that the development or recognition of rights should be left to the common law, yet when the common law does actively move on protecting rights the defenders of that system have now become intent on criticising the very institution they so aggressively defended. In many respects, as Alston pointed out, the enactment of a Bill of Rights may be seen as upholding the principles of supremacy of Parliament in that it will set the parameters for judicial activism.

From the point of view of advancing human rights the recent precedents that have been set over the last five years demonstrate that the common law is quite apt and able to advance rights. In some respects the proponents of the traditional common law view may well be merging with the advocates of a statutory based rights regime in the form of a Bill of Rights. For those who support a Bill of Rights, the advantage is that rights recognition does not depend upon the "luck of the draw" of the issue coming before a Court but is there indeed from the outset. The common law is developed notoriously slow. A contemporary example would be how long the common law has taken - some 200 years - to finally recognise rights of Indigenous Australians in the form of native title. Perhaps if those rights had been recognised from the outset as many countries have done, the fierce disputation over compensation and the like might well not have occurred.

Coupled with this activism and preparedness of Courts to introduce the concept of implied rights, the other aspect of change as Alston has rightly pointed out is the major significance of the International human rights regime on the domestic scene. With the advances in technology and the cyberspace, the world is becoming an increasingly small place. Our performance and participation in that world sphere, *reluctant though* some may be to acknowledge, is necessary and critical.

Indeed the adoption of a Bill of Rights seems to be indicative of the advanced level and sophistication of a democratic system of government. The lead democratic institutions of the world all have Bills of Rights. Perhaps the institution which is most akin to the federalist structure of the Australian system is Canada. The Canadian Constitution was amended to incorporate a Charter of Rights and the majority of the Canadian provinces (the equivalent of States in Australia) have reciprocal Charters or Bills of Rights. New Zealand in the last decade enacted a Bill of Rights, India has one, as has Papua New Guinea.

Perhaps more pertinently, all of the newly created democratic institutions have incorporated Bills of Rights or Charters of Rights and Freedoms. Perhaps the most notable reference is the South African precedent. The European Convention on Human Rights has meant that some 76 countries have accepted the human rights committee based complaints procedure. Surprisingly when one analyses the cases that have come before the European Human Rights Committee, it is in fact Britain - the apparent predecessor of the Australian system - which has come under the most scrutiny and criticism from the European Union. Even Britain at the present moment is transforming its adherence to the common law system and is apparently moving toward the recognition of the right to privacy through legislation.

The performance at the international level, however, should not be seen as an excuse for a State to deny its responsibility in relation to the enactment of a Bill of Rights. As is noted above, most of the provinces of Canada have reciprocated the federal legislation with Charters of Rights in some form. More importantly Australia through its routine reports to the various United Nations Committees has repeatedly been questioned about its enactment of a Bill of Rights. In particular, when Australia issued its first report under the International Covenant on Civil and Political Rights, some

fifteen years ago in 1982, the United Nations Human Rights Committee posed a very pointed question - Member Vincent asked of the Australian delegation:

> *To give effect to the Covenant many State parties have supplemented their legislation by a Bill of Rights either in the form of a separate instrument or built into their constitution. The question currently at issue in the United Kingdom was whether Parliament should enact such a Bill incorporating, for instance, the provisions of the European Convention on Human Rights. That seemed to be the most direct and satisfactory way of implementing Article 2, Paragraph 2, of the Covenant. Presumably there would be insuperable constitutional problems in enacting a federal Bill of Rights in Australia, but he wondered whether the States themselves considered the possibility of enacting their own Bills of Rights.*

Clearly the international human rights regime is well aware of the particular nuances arising within the Australian federalist structure and in fact have raised the question of any State action in this area. It would be an achievement of some prominence and significance were the State of Queensland to lead by example in this area and enact its own State Bill of Rights.

Is there already sufficient protection in Queensland legislation for human rights?

In the Issues Paper at paragraph 3.4 it is noted that the Committee acknowledges a number of rights based legislation currently in existence in Queensland. Of particular relevance to this Commission is of course the *Anti-Discrimination Act 1991*. However, it needs to be pointed out that the *Anti-Discrimination Act* only deals with but one aspect - namely the right to equality of treatment of the rights ordinarily recognised in a Bill of Rights. Additionally, in dealing with that right of equality, the *Anti-Discrimination Act* only provides limited coverage in that it prohibits discrimination on particular grounds in particular confined areas of activity. In other words its coverage is limited and will not address all forms of alleged acts of discrimination. By its very nature the Act is also complaint driven. Essentially the *Anti-Discrimination Act* simply upholds the principle that in a number of the public aspects of our lives we ought not be treated less favourably because of irrelevant considerations such as skin colour, gender, age and the like.

Bills of Rights ordinarily deal with the regulation of government action *viz-a-viz* the individual. Through Bills of Rights the parameters of State activity in intervening or encroaching upon the rights of citizens is limited. A Bill of Rights sets out as a general statement of principle the boundaries upon which government can encroach upon the rights that are germane to every citizen. The reach of a Bill of Rights is therefore much wider than the coverage afforded by the *Anti-Discrimination Act* and addresses not just the right to equality but a number of other individual rights and freedoms that are customarily contained in such documents and constitute the whole array of what is commonly termed civil and political rights.

Equally, all of the other pieces of legislative enactments listed at paragraph 3.4 only deal with a very small quadrant of the rights of citizens and do not cumulatively or exhaustively cover the gamut of civil and political rights ordinarily contained in

documents like a Bill of Rights. A Bill of Rights, however, has a much more broad-brush approach to the regulation of rights and essentially entails constraints being placed upon government activity *viz-a-viz* every citizen. For this reason it would be erroneous to assume that the enhancement of individual rights and freedoms is adequately addressed through the current legislative enactments.

Summary

In summary the position of the Anti-Discrimination Commission is to support the enactment of a Bill of Rights at the State level. The Commission has attempted to outline a number of refutations to the common arguments put forward by opponents to Bills of Rights. Indeed the thrust of the Commission's view is that a Bill of Rights will provide a reasonable, statutory-based outline of the parameters of government intervention to the rights of citizens and possibly be a constraint on judicial activism. The Commission has confined its submission to the threshold question of the desirability or otherwise of a Bill of Rights, deliberately refraining from a discussion about the types of rights that should be included in such a charter.

Should the Committee be of the view that indeed a State Bill of Rights is desirable then the Commission would welcome an opportunity to further explore through subsequent submissions or representations the contents of such a document.