

TOWNSVILLE COMMUNITY LEGAL SERVICE INC.

Including:
GENERAL LEGAL SERVICE
WELFARE RIGHTS SERVICE
FINANCIAL COUNSELLING SERVICE

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11/3/98

The Research Director
Legal, Constitutional and
Administrative Review Committee
Parliament House
Brisbane Qld 4000


**RE: ISSUES PAPER NO. 3, SEPTEMBER 1997 - THE PRESERVATION AND
ENHANCEMENT OF INDIVIDUALS' RIGHTS AND FREEDOMS: SHOULD
QUEENSLAND ADOPT A BILL OF RIGHTS?**

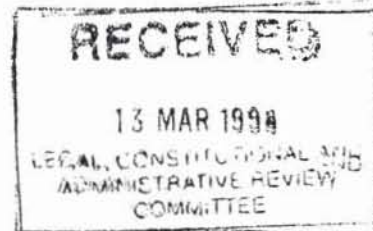
I enclose the submission of the Townsville Community Legal Service Inc.

I acknowledge that submissions were due 14 November 1997, however I confirm that in view of the short time frame in which to reply to the submission, we were granted an extension by your office to make this submission.

I only hope that the proposals contained in the paper do not receive the same fate as EARC's Report handed down in August 1993. It is imperative that Queensland has a Bill of Rights at the earliest opportunity and I urge you to campaign the government strongly to consider the proposals and to draft a Bill the adoption of the people by referendum. I note that it would be preferable if the Bill had the bipartisan support of the main political parties, given the history of referendums in Australia without bipartisan support..

Yours faithfully
Townsville Community Legal Service Inc.

per: 
Principal Solicitor



LEGISLATIVE ASSEMBLY OF QUEENSLAND

**LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE
REVIEW COMMITTEE**

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

RESPONSE TO ISSUES PAPER NO. 3

TOWNSVILLE COMMUNITY LEGAL SERVICE INC.

MARCH 1998

TABLE OF CONTENTS

Introduction 2

Issues for Consideration

Issue 1 4

Issue 2 10

Issue 3 11

Issue 4 18

Issue 5 19

Issue 6 20

PART A - EXECUTIVE SUMMARY

Issue 1

Queensland does need a Bill of Rights. The protections offered by the common law and statute law are inadequate. A Bill of Rights must be enacted to give the people of Queensland guaranteed and entrenched legal protection to rights which are not currently entrenched or guaranteed.

Issue 2

The Queensland parliament has the primary responsibility to address the gaps in the common law and legislation which fail to protect human rights and freedoms and as such the Parliament should introduce legislation to fill those gaps as a matter of priority.

Issue 3

A Queensland Bill of Rights should protect a wide range of rights, including both individual and community rights, and should particularly include civil, political, economic, social, cultural and community rights. All of the rights from the EARC draft should be included as a minimum standard.

Issue 4

It is desirable that a Bill of Rights contain economic, social, cultural and community rights. No economic, social, cultural and community rights should not be enforceable rights. It is possible to make economic, social, cultural and community rights enforceable yet such a task is fraught with difficulty and conflict. Any inclusion of economic, social, cultural and community rights as unenforceable rights does not downgrade the spirit of those rights but does hinder the ability of the individual to rely on those rights.

Issue 5

TCLS supports the recommendation of EARC to provide for the bill of rights to be submitted to a referendum for entrenchment in the Qld constitution after a specific number of years of operation as an ordinary Act. However, TCLS would prefer that it be submitted after 3 years instead of the proposed 5 to 7 years. A Queensland Bill of Rights should be a supreme law without any override provision and a Bill of Rights should not simply be a Act of Parliament like the New Zealand model.

Issue 6

A Queensland Bill of Rights must be enforceable. A mere declaration of rights would provide no practical protections and would be of minimal benefit given that Australia has been a signatory of numerous international human rights instruments containing declarations of rights, such as the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights.

INTRODUCTION

TCLS congratulates the Committee for its excellent standard of Issues Paper No. 3 - The Preservation and Enhancement of Individuals' Rights and Freedoms: Should Queensland Adopt a Bill of Rights. However, TCLS questions the necessity for undertaking this inquiry given that the Electoral and Administrative Review Commission (EARC) had already undertaken a comprehensive inquiry, culminating in its report in August 1993 containing recommendations for the creation of a Bill of Rights by the Queensland Parliament. TCLS notes that the EARC Report included a draft Bill for Parliament to consider. At the very least, if the Committee was required to review the EARC Report, TCLS respectfully questions why this was not carried out at the time of publication of the EARC Report, namely August 1993, rather than in September 1997 - over four years later.

Undoubtedly, a Bill of Rights involves a significant change in Queensland law, and therefore such change must involve an ample review process including considerable public consultation. However, TCLS submits that the review undertaken by EARC was more than adequate in this regard. If the delay is due merely to changes in government then in our view that is a shame for the people of Queensland.

TCLS is particularly interested to make a submission because we are a service which is located in and or near a regional, remote and rural community. Whilst North Queensland has similar experiences regarding human rights issues, it also has unique experiences, and therefore it is important that as part of such an inquiry, the views of communities in regional , remote and rural areas are sought.

We **enclose** a brochure describing the nature of our service. It is of particular importance to emphasise that TCLS is an independent, non-profit, community organisation funded mainly by the Commonwealth Government. TCLS is managed by volunteers who are representative of the community. TCLS may be described as a regional, rural and remote community legal centre. Regional and remote because we are situated in and expected to service a community situated

in a regional and remote geographical area. Townsville is often considered to be the regional capital of North Queensland because of its location. It therefore has a relatively large public and private infrastructure with a growing population now exceeding 140,000. Rural because TCLS is theoretically expected to provide services to the area broadly known as North Queensland (as opposed to Central or Far North Queensland). This area may be easily defined via Telstra's zoning of the 077 area code. It is a diverse and large demographic area which includes the Gulf region west to the Gulf of Carpentaria and the Northern Territory border, south to Mackay, east to the Palm Islands and north to Cardwell.

TCLS began as an unfunded service run by volunteers in 1991 and obtained funding to employ two staff in 1992. In our experience, having assisted over 14,000 clients with legal advice and or casework, and having being involved in numerous relevant community legal education, community development and law reform projects over the past 5 years, there is no doubt that the law in Queensland fails to provide adequate protection to individuals.

In making this submission particularly relevant for our community, we has provided some hypothetical and or real examples of issues encountered in our community. TCLS has for a number of years adopted a focus on human rights issues as part of its service provision, including:-

- assisting clients who have been victims of human rights abuses with legal representation where a test case or public interest case issue exists;
- providing educational workshops or publications for the general public or for particular groups who we have perceived to be vulnerable, disadvantaged and or minority groups in the community;
- participating in relevant law reform activities.

The following are some examples of the human rights issues which have affected the community in North Queensland and that TCLS has had some involvement.

We have highlighted examples of incidents affecting disadvantaged, vulnerable or powerless members of the community, particularly minority groups, such as Aboriginal and Torres Strait Islander people, children and young people, people of non-English speaking background and people with a disability. Whilst the common law, such as the law of negligence, may in some cases have provided some recourse for the survivors of some of these human rights abuses, the lack of a Bill of Rights meant that many potential rights of action for breaches of fundamental human rights and freedoms were not enforceable.

There has been two significant inquiries into treatment of patients or residents in institutions in our community who have psychiatric or intellectual and or physical disability .

On 26 February, 1991, Commissioner William J Carter, QC, presented a report to the Minister for Health regarding an inquiry into the Townsville General Hospital Psychiatric Unit (Ward 10B). The Commissioner found that many of the patients were treated in a manner that was negligent or unsafe. A bill of rights may have provided victims and survivors with additional and clearer enforceable civil and political rights, such as the right to life, liberty and security of the person; the right to privacy; if in custody (i.e. involuntary admission) the right to be treated humanely and with respect for the inherent dignity of all persons; to freedom from discrimination; to freedom from torture, cruel, inhumane or degrading treatment or punishment; to refuse any medical treatment and not to be deprived of property. Basic economic and social rights were also clearly breached, such as the right to a standard of living adequate for the persons physical and psychological wellbeing.

The Health Rights Commission recently presented its report to the Minister for Health (which was subsequently referred to the Minister for Family Services) regarding allegations including abuse and financial mismanagement against the Cootharinga Society of North Queensland (Cootharinga). Cootharinga is an institution which provides accommodation to persons with physical and intellectual disability. If some of these allegations are proven, such as allegations of holding people in cages as punishments for behavioural problems and the provision of

medical treatment without consent, then a bill of rights could provide significant additional rights.

Aboriginal and Torres Strait Islander people are undoubtedly the most disadvantaged members of our community. In our submission, most citizens would view as "given", many of the rights listed in the draft bill of rights proposed by EARC and would be surprised to hear that many of those rights are not entrenched or do not exist, let alone that many of them have been breached in Australia. However, Aboriginal and Torres Strait Islander people are regularly denied such rights in North Queensland. The Principal Solicitor of TCLS completed a three month contract for the Queensland Anti-Discrimination Commission in 1997 and as part of his duties, travelled to Aboriginal communities throughout the Gulf region. He received complaints of, inter alia, the widespread abuse or denial of basic human rights against communities, including race discrimination in the workplace and the provision of goods and services; the right to privacy, liberty, equal protection of and against the law, and basic rights in respect of criminal procedure and criminal proceedings. He witnessed communities where a system of apartheid was entrenched and where basic economic and social rights to an adequate standard of living were non-existent. In some communities, particularly reserves the conditions are no different to some of the worst conditions in Third World countries.

Townsville/Thuringowa has a large population of Aboriginal and Torres Strait Islander people who are homeless and living in extreme poverty. Further, the Royal Commission into Deaths in Custody illustrated the significant bias against Aboriginal and Torres Strait Islander people involved in the criminal justice process. The Townsville Correctional Centre and local watch houses has had a high number of deaths in custody occurring. We have had numerous complaints from Aboriginal and Torres Strait Islander people regarding their treatment during the investigation process and whilst being held in custody.

We submit that the necessity for the community and cultural rights recommended by EARC in clause 41 of its report are fundamentally important in view of the socio-economic position in Australia, recent attacks by governments on the rights of

Aboriginal and Torres Strait Islander people, including the lack of an adequate response to the Stolen Generation Inquiry.

We submit that an alarming trend of governments is their apparent obsession with the issue of law and order. This obsession has seen significant reductions in the rights and freedoms of individuals. The toughest politicians on crime appear to get favourable support from the media and the electorate, and therefore, in our view some governments are irresponsibly passing unnecessarily tough laws. This obsession with law and order illustrates the need for an entrenched bill of rights which would prevent populist governments introducing draconian legislation that is both unnecessary and breaches accepted human rights. It is unnecessary, in our submission because despite the communities fear of crime, there has been a general decrease in the crime rate in most areas.

For example, the Northern Territory, a policy of 'one strike your out' has been introduced as law. This means that any juvenile or adult convicted of certain property offences must go to jail for a minimum term and the Court has no discretion as to sentencing. We **enclose** a critique of this law from the Alternative Law Journal for your information which illustrates the ways in which this policy offends basic human rights. In Queensland, the *Police Powers Bill*, the *Criminal Code*, *Penalty and Sentences Act* and the *Juvenile Justice Act* have all resulted in major amendments to the sentencing principles, police powers and the introduction of some alarming new offences, such as an offence for graffiti which has a potentially high imprisonment sentence for a conviction.

The *Police Powers Bill* has also introduced a "move on power" which empowers the police to move people on if they are 'causing anxiety to a reasonable person entering or leaving a place'. This provision is in our submission too broad and creates the potential for individuals, particularly some of the most vulnerable members of our community, to be moved on because they are causing anxiety. For example, a person in a wheel chair who has cerebral palsy and is stationed outside a business in the Finders Street Mall eating lunch could be liable to be moved on because their behaviour may not be acceptable to the larger community. Simi-

larly, a homeless youth dressed in unusual clothing or jewellery walking through a major shopping centre such as the Stockland Plaza could also be moved on for similar reasons, even though neither of these individuals is causing any disturbance. Whilst these powers and their enforcement in the examples given may breach numerous international instruments such as the International Covenant on Civil and Political Rights (the ICCPR) and the Convention on the Rights of the Child (the CROC) there is no legislation in place nor any common law rights which would protect the individuals affected. Enforceable Bill of Rights such as the right to liberty, freedom of movement and discrimination would protect people from such legislation.

The *Police Powers Bill* also contains provisions which enable the police greater discretion for the time to questions suspects. These provisions could breach a persons rights under a bill of rights to be promptly taken to a court and to be dealt with according to law. In our experience, children and young people, particularly Aboriginal and Torres Strait Islander people, are often targeted by the police for attention, particularly in public places, often without reasonable excuse but based on wrongful assumptions, stereotypes or simply because of their appearance. Due to their age, maturity, and other factors they are often more vulnerable to abuse than other members of the community.

The Local Council has been particularly vigilant in the application of strident law and order policies. *Local Law 51* which criminalises public drinking culminated in a complaint by a group of park people to the Human Rights and Equal Opportunity Commission (HREOC) alleging the discriminatory application of this law against homeless and Aboriginal people living in parks. The complaint was made on the grounds of race and disability. We have also received a number of complaints from young people, various individuals and community groups against the council alleging that they have been discriminated against in the application of laws regulating behaviour in the Mall. This includes breaching their rights to liberty and privacy, being arbitrarily taken into custody, to freely express religious beliefs, to freedom of thought, freedom of speech, to disseminate information, to freedom of association, to freedom of peaceful assembly, to freedom of movement, and to

freedom from discrimination. Whilst the right of a council to regulate activity in public places is not questioned because it enables the public to have peaceful and safe public places, this right has been used unlawfully in some instances by being used discriminatorily or excessively. For example, a person singing Christian songs and handing out religious material was prosecuted, and a person assembling to express his views about a range of social justice issues was arrested and held in custody. Neither of these individuals appeared to be causing any disturbance. Numerous groups have also complained that they have been denied applications to hold peaceful assemblies, rallies or displays in the Mall. The council has a blanket policy which prohibits groups from using any public space in the mall for any cultural, religious or political purpose. Whilst we submit that this policy is unjustified in itself, we have also had complaints that the policy is applied selectively in that groups such as the Salvation Army have been granted permits.

We have received complaints from gay and lesbian people of discrimination and harassment against various government agencies, as well as unfair treatment by police during the investigation process and whilst being held in custody. A specific educational workshop was provided to the community providing information about their rights when dealing with police and their rights under the anti-discrimination laws in response to these complaints.

We have had a litany of complaints from people from non-English speaking background who have been taken into custody but have not understood the reasons for being there as well as complaints of discrimination. The recent so-called "race debate" which seems to have derived from the "Hanson factor" has resulted in an increase in the number of complaints of discrimination on the basis of race, particularly in the workplace and the provisions of goods and services. Whilst we have anti-discrimination laws in Queensland, an entrenched right to freedom from discrimination is critical for the reasons already given. Nazi Germany is often given as an example of what can occur in a democratic civilised nation if its government supports a racist policy against one race or culture or religious group, such as the Jewish community. If the present policies of Hanson which are designed to disadvantage Aboriginal and Islander people and migrants ever became law, a bill of

rights would provide protection to those people via the independent arm of government, namely the judiciary.

In making this submission, TCLS will now address the issues raised by the Committee in the order set out by the Committee.

ISSUES FOR CONSIDERATION

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?

Yes. We do not believe it is necessary in this submission to raise the arguments for and against the enactment of a Bill of Rights because this has been amply done in other reviews, including the EARC Report, the Senate Standing Committee on Constitutional and Legal Affairs Exposure Report titled *A Bill of Rights for Australia*, the Australian Constitutional Commission's Final Report and the Human Rights & Equal Opportunity Commission and Centre for International and Public Law's Report titled *Towards an Australian Bill of Rights*.

In our view the judiciary, parliament and international human rights instruments have in the past, and continue to, fail to provide adequate protection of individuals' human rights and freedoms in Queensland.

Whilst the judiciary has provided piecemeal protections in some areas, such as the common law rights inherited from England, such as the Magna Carta, they have played a limited role in protecting human rights. In turn, whilst there has been a significant increase in the number of human rights protections created by parliament in Queensland, such as the *Peaceful Assembly Act*, and the *Anti-Discrimination Act*, parliament has not provided adequate legislation akin to a Bill of Rights which provides comprehensive protection of at least an individuals' civil and political rights.

The greatest weakness of the judiciary, parliament and international legal instruments is that none of them entrench any legal right unlike a written constitution or Bill of Rights which provides so-called "means and form" mechanisms. The principles of parliamentary sovereignty mean that any protection created by the judiciary is at the whim of parliament's power to legislate away any such protection. Stark examples are the current Commonwealth *Native Title Amendment Act 1997*

which extinguishes numerous native title rights created in the Wik and Mabo decisions. Furthermore, parliamentary sovereignty also means that any protections created at any time by parliament are at the whim of the next government which may be of different political persuasion to the last. It is almost "par for the course" that with any change in government comes a change in policy which often translates into significant legislative changes. For example, the Commonwealth Government has reduced funding to HREOC by 45% and as part of the necessary implementation of the *Native Title Amendment Act 1997*, it intends to change important parts of the *Racial Discrimination Act 1975*. Until the recent High Court decision in Teoh's case, it was always understood that the signing by a country of international treaties or conventions did not have any binding legal effect on the country until domestic legislation is passed. As another example of the effect of the principles of parliamentary sovereignty, the Commonwealth has recently introduced the *Administrative Decisions (Effect of International Instruments) Bill 1997* which will remove the effect of the Teoh decision, and reinforce what was the legal understanding of the legal effect of international instruments on Australia. The current war on crime by all governments of all political persuasions is a classic example of how governments have recently breached a raft of fundamental human rights relating to criminal investigation, custody, being charged and arrested, and standards of criminal procedure.

2. If a bill of rights is not introduced in Queensland, what specific rights should be included?

The Queensland parliament has the primary responsibility to address the gaps in the common law and legislation which fail to protect human rights and freedoms and as such the Parliament should introduce legislation to fill those gaps as a matter of priority.

Whilst TCLS believes that it is paramount that the Commonwealth Government has the primary responsibility to establish a Bill of Rights within the constitution, Queensland also has a responsibility to protect individuals' rights and freedoms in Queensland. Further, given the greater legal and political impediments in establishing a Bill of Rights within the Commonwealth constitution, there is a greater responsibility on the Queensland Parliament to implement such protection which may also set an example for other States and ultimately the Commonwealth to follow.

3. If a bill of rights is recommended for Queensland, what specific rights should or should not be included?

TCLS supports almost all of the recommendations of EARC regarding the content of civil and political rights in the bill of rights save for the following exception:-

TCLS submits that the civil and political rights should be enforceable against the private sector. With the increasing privatisation of government services as part of the current economic rationalist policies, many government services do not exist. In any event, we believe that the arguments against application against the private sector outweighed the benefits. Paste arguments from privacy submission.

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

Inclusion of Economic, Social and Cultural Rights

TCLS submits that economic, social and cultural rights should be included in a Queensland Bill of Rights. TCLS submits that the proposal by the Electoral and Administrative Review Commission (EARC) in relation to economic, social and cultural rights should be adopted by the Legislative Assembly. EARC's proposal was that the Bill of Rights bill should include economic, social and cultural rights. The Commission's report stated:

The Commission does not seek to break new ground in this area except to the extent that any Bill of Rights ought, in the Commission's view, place a positive obligation on the State to formulate policies which are consistent with the fundamental rights and freedoms of the Queensland people.....the Commission is concerned with fostering a general awareness that certain rights and freedoms are essential to the dignity of the person even if their enforcement cannot be ensured. The authorities in developed countries have always treated the implementation of economic and social rights on a different footing to civil and political rights in part because economic and social rights are not justiciable, or enforceable in the courts. The Commission is concerned that any unenforceable statement of economic, social, cultural and community rights should be in positive terms and place a responsibility on the government to respect fundamental rights and freedoms. In conclusion, the Commission is of the opinion that fundamental rights and freedoms should be included in any Bill whether enforceable or not. A right is no less essential to the dignity of the person because it happens to fall within a particular category of rights. More importantly, its inclusion in a Bill of Rights as a criterion for government policy means that the government cannot easily disregard the right, or give priority to a policy which conflicts with the right.¹

TCLS makes the following additional comments about economic, social and cul-

¹ Electoral and Administrative Review Commission, Report on Review of the preservation and enhancement of individual's rights and freedoms, EARC, Brisbane, August 1993, p. 25.

tural rights.

The fundamental international statement on economic, social and cultural rights is contained within the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICESCR, combined with the International Covenant on Civil and Political Rights (ICCPR) make up what is often known as the "International Bill of Human Rights". The ICESCR was ratified by Australia on the 10 December 1975. Generally speaking, the obligations contained within the ICESCR are considered to be less forceful than those within the ICCPR. Economic, social and cultural rights are often called "second generation" rights and there has been extensive debate on whether or not a Bill of Rights should contain such rights.

As the issues paper illustrates, economic, social and cultural rights include the following rights :

- standard of adequate living, sometimes characterised as "*welfare rights*"² including: reasonable access to social welfare; reasonable hospital and medical care; reasonable housing.
- gainful work;
- work under safe and hygienic conditions;
- receive reasonable remuneration for work;
- equal remuneration for the same work;
- equal employment opportunity;
- reasonable access to legal assistance;
- live in a safe and non-violent society;

2. Ibid, p. 324.

- freedom of family structure, including: to marry; to live in a de facto relationship; establish a family regardless of marital status; personal autonomy over reproductive matters, including: control fertility, decide in number and spacing of children;
- reasonable access to child care.

In examining whether or not these economic, social and cultural rights should be included in the context of a Bill of Rights, commentators have often echoed the traditional or conservative sentiments that, inclusion of such rights would make a Bill of Rights "unmanageable"³ and that such rights have only ever been poorly articulated and remain unclear, inevitably causing uncertainty.

Other criticisms have included the more general protest that including such rights would make the Judiciary too powerful and take power away from the rightful owners, the sovereign parliament.

It is often suggested that only civil and political rights should be included in any Bill of Rights. In response to that, Hughes (1994) argues that:

Civil and Political rights are all very well in their place, so the argument goes, but many people may have more urgent concerns, for example food and shelter.⁴

Interestingly, the United States Bill of Rights does not contain any of these rights, focussing instead on civil and political rights. Canada's Charter of Rights and Freedoms contains only cultural rights, however it has been commented that the debate about inclusion of economic and social rights continues.

3. Alston, P, An Australian Bill of Rights: By design or Default, in Towards an Australian Bill of Rights, Alston, P (Ed), Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, p.14-15.

4. Hughes, C.A, An Australian Bill of Rights: Some key issues, in Towards an Australian Bill of Rights, Alston, P (Ed), Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, p.171.

Inclusion of Community Rights

TCLS submits that community rights should be included in a Queensland Bill of Rights. TCLS submits that the proposal by the Electoral and Administrative Review Commission (EARC) in relation to community rights should be adopted by the Legislative Assembly. This proposal was that Community rights should be included in a Queensland Bill of Rights.

Community and cultural rights have been called third generation rights, and are claims made by the community, being collective rights as opposed to first and second generation rights which are claims made on behalf of the individual.

A problem which has been raised in relation to third generation rights is that they might in fact conflict with first and/or second generation rights. O'Neill and Handley (1994) argue that, for example, exercise of an individual's rights of free association, assembly and expression may be considered in conflict with the community's right to peace and security.⁵

Another concern with third generation rights has been the inability of the international community to provide clarity about what these third generation rights embody and how they should be defined.

Community Rights include:

- political, economic, social and cultural development;
- environmental protection and conservation;
- ecologically sustainable development.

5. O'Neill, N. and Handley, R, Retreat from Injustice - Human Rights in Australian Law, The Federation Press, Annandale NSW, 1994, p.21.

• **If economic, social, cultural and community rights are to be included, should they be enforceable rights?**

Aside from the overall debate about placing too much power in the hands of the Judiciary through creation of Bill of Rights, there has long been a debate about what sorts of rights should be included and also which rights should be enforceable. Amongst those who support the adoption and creation of a Bill of Rights, a common approach to what rights should be enforceable has been to make Civil and Political rights enforceable, whilst making economic, social, cultural and community rights unenforceable.

Enforceability of Economic, Social and Cultural Rights

The issue of whether or not economic, social and cultural rights should be enforceable is indeed a controversial one. The EARC proposal was that such rights, as embodied within clauses 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, were not intended to be enforceable, despite the fact that they are contained within the proposed legislation.

Hughes (1994) states that:

It is easy to say that many such rights are unenforceable, but often what may be required is merely the creation of the relevant duty. It may not help very much to declare that all infants have a right to a low mortality rate, but it may make it more effective by imposing a duty on government authorities to provide clean water or a district nurse.⁶

On the other hand, by playing the devil's advocate, Hughes also recognises that :

prescribing such duties may also introduce counter-productive rigidities in fixing the pattern of overall government activity. Further, one may itemise such rights

6. Hughes, C.A, An Australian Bill of Rights: Some key issues, in Towards an Australian Bill of Rights, Alston, P (Ed), Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, p. 172.

*in such detail as to introduce too much rigidity and deny policy-makers what might be thought their proper function of ethically balancing conflicting claims and interests.*⁷

Enforceability of Community Rights

The issue of whether or not Community rights should be enforceable is also a controversial one. The EARC proposal was that such rights, as embodied within clauses 44 and 45 were not intended to be enforceable, despite the fact that they are contained within the proposed legislation. TCLS submits that a Queensland Bill of Rights should contain Community rights as in the above proposed bill.

• Is it possible to make economic, social, cultural and community rights enforceable?

Yes it is, however TCLS makes no specific submissions about how those right should be created as enforceable rights.

• Does the inclusion of economic, social, cultural and community rights without making them enforceable actually give the impression of downgrading those rights?

Yes it does give that impression, however, TCLS would reiterate the comments made by the EARC in their report:

*In conclusion, the Commission is of the opinion that fundamental rights and freedoms should be included in any Bill whether enforceable or not . A right is no less essential to the dignity of the person because it happens to fall within a particular category of rights. More importantly, its inclusion in a Bill of Rights as a criterion for government policy means that the government cannot easily disregard the right, or give priority to a policy which conflicts with the right.*⁸

7. *ibid*, p. 172.

8. *ibid*, p. 25.

5. To what degree, if at all, should the Bill of Rights be entrenched (be made difficult to amend)?

This has also been a most controversial issue. Essentially, a Bill of Rights can be entrenched or non-entrenched. Internationally, Canada and the United States both have entrenched bills of rights, whereas, New Zealand has a Bill of Rights in simple legislative form. The New Zealand model originally proposed in 1985 contained a "double entrenchment" clause, however the final form of the *Bill of Rights Act 1990* is as a non-entrenched Bill of Rights. The primary reason was that it might fetter the sacrosanct power of the parliament.⁹

Commentators have attacked non-entrenched bills of rights as being inferior, or having low status.¹⁰ On the other hand, other commentators have argued that, notwithstanding a non-entrenched Bill of Rights' inability to invalidate other divergent or anomalous legislation - as expressed by section 4 of the *Bill of Rights Act 1990*, an Act of Parliament is a powerful tool nonetheless. In effect, those commentators are saying that an Act of Parliament which positively sets out rights and freedoms should not be undervalued, and particularly because it doesn't go that one step further of impliedly revoking or repealing legislation in conflict with those prescribed rights and freedoms. Those same commentators argue that the Courts recognise the inherent "constitutional" quality and spirit of the Act and therefore will ensure that purposive interpretation follows from any matters which arise under the Act.

TCLS supports the recommendation of EARC to provide for the bill of rights to be submitted to a referendum for entrenchment in the Qld constitution after a specific number of years of operation as an ordinary Act. However, TCLS would prefer that it be submitted after 3 years instead of the proposed 5 to 7 years, so that in the words of EARC, Queenslanders can enjoy the full benefits of the rights as soon as possible. This process of phasing in entrenchment enables the community to

9. *ibid*, p. 236.

10. *ibid*, p. 238.

experience the impact of a bill of rights and to familiarise itself with the rights.

TCLS does not believe that the absence of an "override provision" in a bill of rights would transfer too much power into the hands of the judiciary in legal proceedings. In any democracies which adhere to the principles of the separation of powers, the judiciary has always been viewed as a legitimate arm of government with law making powers. More importantly, one of the major advantages of the judiciary as the interpreter of a Bill of Rights is that they are perceived to have the necessary skills to apply the law fairly and impartially. Moreover, it has caused no difficulty for the United States judiciary which has had an entrenched Bill of Rights for over two centuries.

For the same reasons already given in response to issue 1, TCLS submits that failure to entrench a Bill of Rights could leave it open for changing governments to water down the provisions for political reasons. Infinite examples could be given of populist governments changing laws which may for example protect individual human rights and freedoms, particularly a minority or disadvantaged group, such as indigenous Australians or youth because it is seen as politically popular. TCLS supports EARC's submission enabling the bill of rights to prevail over and invalidate subsequent inconsistent Acts and to delete any provision enabling parliament to override the bill of rights by express legislation.

Furthermore, EARC's draft bill of rights contains a clause which means the rights are not absolute. TCLS submits that this so-called justified limitations clause will adequately address any need for the judiciary to address any difficulties that the bill may cause in its practical implementation.

• Should any Queensland Bill of Rights be supreme law unable to be overridden by legislation of the Queensland Parliament?

TCLS notes that the report of EARC suggested that an override provision was not widely supported by the community and in fact those who made submissions

were, "less than enthusiastic about the idea."¹¹

The override provision in the Canadian Charter of Rights and Freedoms has a limited effect, and does not apply to democratic, political, mobility and language rights. Furthermore, anecdotal reports seem to suggest that the override provision is rarely used by the Canadian Parliament.¹² Nonetheless, such a provision exists.

EARC recommended that "a Queensland Bill of Rights should not include provision for Parliament to expressly override any provisions of the Bill of Rights."¹³

TCLS agrees with the recommendations of EARC and submits that there should not be an override provision.

• 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?

11. Electoral and Administrative Review Commission, Report on Review of the preservation and enhancement of individual's rights and freedoms, EARC, Brisbane, August 1993, p. 58.

12. *ibid*, p. 59.

13. *ibid*, p.60.

Issue 6

The Bill of Rights must be enforceable. A mere declaration of rights would provide no practical protections and would be of minimal benefit given that Australia has been a signatory of numerous international human rights instruments containing declarations of rights, such as the UDHR and the ICCPR.

All of the recognised common law and equitable remedies should be available to individuals taking action for a breach of any right created by the Bill of Rights. Perhaps, the courts should be given a broad discretion as has been recommended by EARC, namely "*as the court sees fit*". However, it is well recognised that the ordinary courts are not accessible to most potential litigants because they lack the means to pursue their claim and there is no legal aid funding available to assist with their claim. Accordingly, the Queensland Anti-Discrimination Commission and the Queensland Anti-Discrimination Tribunal could be appropriate quasi-judicial bodies with jurisdiction to deal with complaints against the Bill of Rights.

TCLS supports the provision recommended by EARC that evidence obtained in breach of the bill of rights be automatically excluded.