Speech By

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HUMAN RIGHTS BILL

Mr JANETZKI (Toowoomba South—LNP) (4.17 pm): I rise to address the Human Rights Bill, which was introduced by the Attorney-General on 31 October 2018. In Australia, currently only Victoria and the ACT have adopted human rights legislation. New Zealand and the United Kingdom both have statutory bills of rights, which largely Victoria copied.

The bill before us contains 23 human rights and brings about four major reforms. Firstly, the government must have regard to human rights principles when drafting laws. All legislation proposed by the parliament, including private members' bills, must be accompanied by a statement of compatibility with human rights.

Secondly, public entities must have regard to the human rights of the people they are dealing with, especially when making important decisions that affect their lives. Such entities are broadly defined and include government entities, public servants, the QPS, local governments and even private companies undertaking work for Queensland government entities where they are performing functions of the state.

Thirdly, courts are granted involvement by virtue of part 3 division 3. If in a proceeding a statutory provision cannot be interpreted in a way compatible with human rights, the court may make a declaration of incompatibility which is then referred to the relevant minister, who must prepare a written response, and the respective parliamentary portfolio committee.

Finally, any person can make a complaint to the newly named Human Rights Commission if they believe their human rights have been breached. The commission will receive complaints from aggrieved persons about public entities acting in a way that is not consistent with human rights. An aggrieved person may also seek judicial review of that decision by seeking a declaration of unlawfulness from the Supreme Court.

The Legal Affairs and Community Safety Committee delivered its report on 4 February 2019 recommending that the bill be passed. Opposition members submitted a statement of reservation. The LNP will not be supporting the bill on the grounds that I will shortly outline. I will also seek to move one amendment during the consideration in detail.

Politicians often talk about protecting the vulnerable in our community. I certainly do and this is the place where we debate how best to do that. It is a worthy aspiration and regularly cited by many of us in this chamber as a reason for seeking to enter public life. I acknowledge the strong support for the bill from many submitters advocating for the vulnerable in our community, including the Endeavour Foundation, Disability Law Queensland, People with Disability Australia, Children and Young People with Disability Australia and a range of lawyer organisations. The problem we face is that there is no evidence to suggest that a human rights act has provided any additional protection or helped service delivery to the vulnerable throughout the world. Here in Queensland across numerous parliamentary committee processes no-one has been able to persuasively articulate the inadequacies in our current system that fail our most vulnerable.

Queensland already has a robust system for protecting the vulnerable from poor bureaucratic decision-making through a well-resourced and professional Public Service, the capacity for judicial review of administrative decisions and an outstanding judiciary. The Queensland Ombudsman keeps a close eye on the Public Service and has proven to be a strong check on bureaucratic decision-making. Of course, sitting above all this are the implied and express freedoms and rights contained in the common law and our Constitution. Indeed, these freedoms and rights go back to the Magna Carta in 1215 and have been built upon throughout the centuries. They are constitutionally, legislatively and judicially entrenched governing notions such as just terms for compulsorily acquired property; freedom from arbitrary arrest and detention; freedom of expression; freedom of religion; freedom of association; rights associated with the protection of the accused and prisoners; and controls managing police powers of search, arrest, investigation, the gathering of evidence and, ultimately, the admissibility of that evidence in court.

Queenslanders today have a right to privacy; freedom of movement; freedom of peaceful assembly; freedom of thought, conscience and religion; the right to own and acquire property; the right to vote in democratic elections; the right to social welfare; the right to protections in the workplace; the right to rest and recreation; the right to a clean environment; the right to an education. There are rights protecting children and the right to equality regardless of gender, age, parental status, impairment, sexuality, race, religion or creed.

From this extensive list of rights I think it is safe to argue that our rights and freedoms have been very well defended by this place and our judicial system for 160 years. That is why there has been very little, if any, public push for a human rights act in Queensland. There is no outcry or clamour. The truth is that the opposition has had very little, if any, correspondence or requests for meetings to discuss the bill. There is no burning desire for change and I believe that is because our system is well balanced as it stands today. There is, of course, always room for improvement, but there is no justification for the tilting of the balance of our separation of powers in the fashion as proposed and contemplated by this bill.

The opposition's concerns with this bill are rooted also in deep philosophical moorings that have spanned centuries. In Australia these foundations have been supported by many eminent jurists and politicians, among them the current Governor of Queensland, former chief justice Paul De Jersey; former governor-general of Australia Sir Ninian Stephen; Sir Harry Gibbs, former chief justice of the High Court; Justice Patrick Keane, currently serving on the High Court; former prime minister John Howard; Professor Geoffrey Blainey; the current federal Attorney-General, Christian Porter; and two quite notable Labor figures, former Queensland premier Peter Beattie and former New South Wales premier Bob Carr.

Former New South Wales premier Bob Carr has written widely on this topic. I remember when reading his thoughtful book *Thoughtlines: Reflections of a Public Man* in the early 2000s that he was always taken with the dangers of the introduction of a human rights act or a bill of rights in Australia. In a *Canberra Times* article from August 2001 he says—

I object because a bill of rights transfers decision on major policy issues from the legislature to the judiciary. It is not possible to draft a bill of rights that gives clear cut answers to every case.

These are issues that should be decided by an elected parliament, not by judges who are not directly accountable to the people. Furthermore courts operate within an adversarial process. Matters only arise before them when there is a dispute and judgements are made on the basis of particular facts. Decisions are therefore piecemeal in nature and cannot take into account all issues relevant to determining policy. In short a court is not an appropriate forum for making these decisions.

Carr goes on—

A bill of rights included in the Constitution in 1901 would most likely have enshrined the White Australia policy. Even when a bill of rights is not constitutionally entrenched and can therefore be changed by legislation—

which is similar to the bill we are examining today—

the political reality is that it is given 'quasi constitutional status' and is almost impossible to amend.

The opposition's primary objection is that the bill infringes orthodox principles of statutory construction by requiring courts to interpret the bill's provisions in a way that is compatible or most compatible with another act, that is, the human rights listed in the bill. This will constitute a significant change in the relationship between the courts and the parliament and will increase the relative power of the courts. This will occur because the rights contained in the bill are very abstract and leave open to debate their particular application in any particular situation. For example, clause 16 refers to the right to life. It states—

Every person has the right to life and has the right not to be arbitrarily deprived of life.

If we take this example to its natural conclusion, it means that in one form or another there must be a right to deliberately deprive somebody of life. I am intrigued as to whether someone is able to explain under what circumstances this might arise.

Virtually all laws seek to protect rights in one way or another and all laws interfere with rights in some way. Resourceful lawyers will be able to devise human rights arguments both for and against just about any conceivable law. Judges will then decide which arguments to accept and which to reject. For example, Amnesty International are concerned that the bill does not sufficiently protect the rights of young people convicted of crimes and that it may be possible they could be incarcerated with adults. Amnesty has recognised that the bill is so ambiguous that it is unclear what its effect will be. Accordingly, they are lobbying for changes to clarify that children cannot be imprisoned with adults.

If the bill is uncertain in this instance, then it is arguable that it is uncertain in every other instance as well. It is irresponsible law-making to enact a law the practical meaning of which no-one knows. Rights are always best protected by carefully drafted legislation. The bill will introduce vagueness and uncertainty into the law. It is possible that the express legislative intent of the parliament might be ignored by unelected judges—sometimes colourfully named committees of ex-lawyers. Again, as Bob Carr has argued—

Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgement is correct. If it is unacceptable the community can make its views known at elections. A bill of rights is an admission of the failure of parliaments, governments and the people to behave reasonably, responsibly and respectfully.

I turn now to the basis for the opposition amendment. The declaration of incompatibility will impair the institutional integrity of the Supreme Court as it goes beyond the court's ordinary duty to only make observations in their judgements. The issuing of the declaration of compatibility to the relevant parliamentary portfolio committee and minister will result in a significant change in the relationship between the court, the parliament and the executive which thereby distorts the separation of powers relationship. This in turn will politicise litigation and indirectly allow courts to be involved in political decision-making. The Queensland Law Society has raised concerns in this regard, observing that any human right incompatibility should be contained within a judicial officer's judgement.

The bill will distort the proper functioning of the courts by asking judges to evaluate legislation against broad standards, which ultimately results in the court being embroiled in political controversies. It will politicise the judiciary and impair their ability to uphold the rule of law. The circus that was the appointment process of Brett Kavanaugh to the United States Supreme Court may well be replicated here in different forms in the decades ahead.

The concern with regard to our opposition amendment will be addressed by the proposed removal of part 3, division 3, excepting clause 48, which would remove the power of the court to make a declaration that a statutory provision cannot be interpreted in a way that is compatible with human rights. This will address many of the criticisms in relation to the declaration of incompatibility impairing the institutional integrity of the Supreme Court, as it goes beyond the court's ordinary duty to only make observations in their judgements. I will speak further on this matter during consideration in detail. I do note that a declaration would not currently affect the validity of the relevant statutory provision or create a cause of action. A declaration of compatibility would compel the relevant minister to prepare a written response and table it in parliament.

As has already been mentioned by the Attorney-General, the constitutional validity of the Victorian charter equivalent of declarations of incompatibility was considered by the High Court in Momcilovic v the Queen. In a 4-3 judgement the High Court upheld the constitutional validity of section 36 of the Victorian charter, which is the equivalent of this bill's section 53. Although the High Court held that it was merely a mechanism for the court to direct the legislature to a deviation between a state law and a human right in the charter, it remained parliament's ultimate responsibility to determine the law it enacts. Notably, some judges of the High Court raised uncertainty as to how the declaration may operate in the future.

I note that the Queensland Law Society holds concerns that the functions set out in clause 53 of the bill may be perceived not to fit within a judicial officer's role. They expressed their concerns in relation to the involvement of judicial officers in making declarations of incompatibility and the subsequent referral of those declarations to the Attorney-General and relevant parliamentary committees. The QLS states that the substance of a declaration of incomparability could be contained within a judicial officer's judgement.

There will be practical implications and some absurdities that, although provocative, do need to be shared during this debate. When practising as a lawyer in the United Kingdom in the mid-2000s I saw the operation of the Human Rights Act—there passed in 1998—in operation. At that stage many

people in the United Kingdom were alarmed by the ever-encroaching power of Europe through decisions that, although delivered in Strasbourg, would have application right across Britain. There are some observations that ought to be made in this regard.

There the Human Rights Act had an impact on the United Kingdom government's counterterrorism legislation. It is widely accepted that judges are now required to police constitutional boundaries which would have been unthinkable there 40 years ago. Too often human rights have become associated with unmeritorious individuals pursuing claims that do not command public support: the schoolboy arsonist permitted back into the schoolroom because enforcing discipline apparently denied his right to education; the convicted rapist paid £4,000 compensation because his second appeal was delayed; the burglar given taxpayers' money to sue the man whose house he broke into; and a convicted serial killer allowed hardcore pornography in prison because of his right to information and freedom of expression.

In 2006 Labour prime minister Tony Blair described a Human Rights Act judgement about a group who hijacked a plane as an 'abuse of common sense'. The Human Rights Act protected terrorists and hate preachers such as Abu Hamza who, at a time when he was advocating radical Islam and violence within UK cities, initially could not be deported. Contributors to the *Journal of the Royal Society of Medicine* articulated that the Human Rights Act there impinges on several areas of medical practice including life-and-death issues, mental health, confidentiality and access to treatment. Perhaps its greatest impact in clinical practice is in the area of end-of-life decision-making and the withholding and withdrawal of life-prolonging treatment.

Across the Atlantic there is a famous case in Ontario, Canada, known as Askov's decision. There it was determined that delays in excess of six to eight months between committal and trial were unacceptable. As a result, someone charged with conspiracy to commit extortion was given a permanent stay of proceedings because of a delay in excess of six to eight months. In that case it was some 23 months. Furthermore, over the next couple of years 47,000 charges were either dismissed, stayed or held over, never to reappear in the courts. The charges that were dropped included thousands of drink-driving charges and a number of serious assault and serious sexual assault charges. Imagine the problems that may arise for any government, especially in circumstances where—we now know—there would be substantial delays in our justice system. These are deliberately provocative examples but they highlight how human rights legislation can play out—unforeseen, but with serious consequences.

Back in Australia during the parliamentary committee process in relation to this bill the Women's Legal Service noted that there is no right that recognises victims of crime while defendants are protected. Bob Carr wrote about an Australian prisoner who went to court a few years ago claiming that his human rights were violated under the International Covenant on Civil and Political Rights. His complaint was that there was not enough choice on the prison's vegetarian menu. Notorious Queensland armed robber and violent escapee prisoner Brendan Abbott made a complaint to the United Nations many years ago arguing that he was subjected to harsh and inhumane treatment. The list is endless.

There are other concerns that ought to be raised in my contribution. They pertain to potential issues arising from the special privileging of certain rights rather than the full implementation of rights protected by the International Covenant on Civil and Political Rights. The government has said that the rationale for the bill is that it applies to all laws and all administration within Queensland. If that is so, then there can be no justification for removing some topics outside of the bill such as the killing of an unborn child. Further, there is an argument that amendments should be made so that the bill expressly affirms, among other things, that the state has a duty to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions and that freedom of expression may only be limited by laws to the extent that it constitutes incitement to discrimination, hostility or violence. Queensland's religious and racial vilification law is not limited in this way and therefore contravenes the protection of freedom of expression under article 19 of the ICCPR.

While individuals cannot bring rights challenges as a sole cause of action, they have the option to attach it to a judicial review or lodge complaints with the Human Rights Commission. In light of articulate rights advocates pressing for a stand-alone right to bring actions, it is not likely to remain this way for long. No threshold for complaints has been set, and it is therefore likely to encourage frivolous complaints and ensure the proliferation of vexatious complaints and the ensuing lawyers' picnic.

I would argue that state and national governments of all political persuasions have delivered the citizens of Queensland a high standard of individual rights. Our parliament should constantly be considering how best to protect the rights and freedoms of its citizens. Our most vulnerable deserve nothing less. Such rights and freedoms are ever changing. Rights that people may argue are important

today may well be irrelevant in decades to come. The founders of our nation realised this in the 1890s when it was decided not to implement a bill of rights. In 1944 and 1988 referenda proposing amendments to the Australian Constitution relating to various freedoms were defeated. Instead, human rights in Queensland have been protected by a rigorous Westminster system, legislative instruments, the common law and independent judiciary, a strong Public Service backed, in Queensland's case, by the Queensland Ombudsman and, importantly, a free and forthright media. Let's continue to support this system as it has stood the test of time, delivering abundant rights and freedoms for all citizens in our great state.