Report No 12, November 1998

The preservation and enhancement of individuals' rights and freedoms in Queensland:

Should Queensland adopt a bill of rights?

LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?

November 1998

Report No 12

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	REPORTS	DATE TABLED
1.	Annual report 1995-96	8 August 1996
2.	Report on matters pertaining to the Electoral Commission of Queensland	8 August 1996
3.	Review of the Referendums Bill 1996	14 November 1996
4.	Truth in political advertising	3 December 1996
5.	Report on the Electoral Amendment Bill 1996	20 March 1997
6.	Report on the study tour relating to the preservation and enhancement of individuals' rights and freedoms and to privacy (31 March 1997—14 April 1997)	1 October 1997
7.	Annual report 1996-97	30 October 1997
8.	The Criminal Law (Sex Offenders Reporting) Bill 1997	25 February 1998
9.	Privacy in Queensland	9 April 1998
10.	Consolidation of the Queensland Constitution - Interim report	19 May 1998
11.	Annual report 1997-98	26 August 1998

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1.	Truth in political advertising	11 July 1996
2.	Privacy in Queensland	4 June 1997
3.	The preservation and enhancement of individuals' rights and freedoms: Should Queensland adopt a bill of rights?	1 October 1997

	INFORMATION PAPERS	DATE TABLED
1.	Upper Houses	27 November 1997

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* Mr Rappolt's resignation from Parliament was received by the Speaker of the Legislative Assembly on 4 November 1998.

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CHAIRMAN'S FOREWORD

This report stems from an inquiry by the former Electoral and Administrative Review Commission (EARC) which culminated in EARC's August 1993 *Report on Review of the preservation and enhancement of individuals' rights and freedoms*. In its report, EARC recommended that Queensland should adopt a bill of rights. EARC's proposed bill of rights was to contain an extensive array of rights, of which civil and political rights were to be enforceable in court by individuals against the government and its agencies.

EARC's rights report was the only one of its reports not to be reviewed by a parliamentary committee, and so our predecessor committee took on the task of reviewing the issues in EARC's report and EARC's proposed bill of rights. The former LCARC called for public submissions to its inquiry and undertook a substantial amount of research into relevant issues including a detailed study of Canada's constitutionally entrenched *Charter of Rights and Freedoms.*

The former LCARC was unable to finalise its inquiry before the 48th Parliament was dissolved. However, given the importance of this issue and the substantial amount of work that had been conducted in relation to the inquiry, it was one which we—as the LCARC of the 49th Parliament—decided to complete. Of course, we have benefited greatly from the research and other work completed by the former LCARC.

As the title of this and EARC's report suggests, this report is not solely concerned with the issue of whether Queensland should adopt a bill of rights. Instead, the focus is the preservation and enhancement of individuals' rights and freedoms. A bill of rights is one, albeit comprehensive, way in which individuals' rights and freedoms may be further enhanced.

A range of systems and mechanisms currently operate in Queensland to protect rights. The Commonwealth Constitution, specific rights-type legislation, pre-legislative processes, the common law and, increasingly, international law all operate in one way or another to protect rights. In combination, and within the overall operation of Queensland's system of parliamentary democracy, such mechanisms operate to protect—or at least provide a safety net for protecting—individuals' rights and freedoms. Although, admittedly, rights are protected to differing degrees and with different levels of enforceability.

We have considered whether a Queensland Bill of Rights is a necessary and/or desirable means to further preserve and enhance individuals' rights and freedoms in Queensland. Whether Queensland should adopt a bill of rights is a complex issue. We need to determine at the outset what the precise goal of a bill of rights might be. Decisions must also be made as to: what rights a bill of rights is to contain; whether it is to be enforceable or declaratory;, if it is to be enforceable, how it should be enforceable; and who it should be enforceable by and against. If a bill of rights is to be adopted we must decide whether it should form part of the State's Constitution or be in the form of ordinary legislation. All of these issues are integral to, and not subsequent to, the decision whether to adopt a bill of rights. We also need to be sure that a bill of rights would produce tangible benefits without inordinate, inappropriate costs.

Although none of the previous proposals for an Australian Bill of Rights have been successful, many other Western jurisdictions have adopted a bill of rights as either part of their Constitution or as ordinary legislation. Of course, this by itself is no reason for an Australian

jurisdiction, such as Queensland, to adopt a bill of rights. However, the experience in other jurisdictions is particularly instructive as to what we might expect in Queensland if we were to adopt a bill of rights.

The ultimate objective of a bill of rights should be to provide individuals with an effective basis upon which they can challenge legislative or governmental action which infringes their rights. In particular, this is important to those members of society who need it most; namely, the poor, marginalised, those effectively disenfranchised by their social, economic or other circumstances, and those who find themselves in trouble with the law. Whilst we naturally endorse the values that a bill of rights such as the one proposed by EARC enshrines—human dignity, life, liberty, security of the person, democratic participation, equality—we have come to the conclusion that a Queensland Bill of Rights, in any form, would not achieve this aim.

Moreover, we believe that even if a Queensland Bill of Rights was capable of achieving this aim, it would not be able to do so without inordinate legal, social and economic costs.

Our reasoning for not recommending the adoption of a bill of rights is based on the following conclusions.

- An enforceable Queensland Bill of Rights would most likely result in a significant and inappropriate transfer of power from the Parliament (the Queensland legislative body elected by the people) to an unelected judiciary. In the case of a constitutionally entrenched bill of rights, it would be the judiciary, not the Parliament, that ultimately decides the validity of legislation and governmental action. Judicial decisions that impose significant costs to society or that do not meet with general community acceptance would be extremely difficult to modify or reverse.

  New Zealand's experience with a statutory bill of rights also shows that a bill of rights need not be constitutional in form to effect a significant transfer of power.

- As a result of this shift, the judiciary will potentially find itself in a position where it is making far more controversial decisions of a policy nature; decisions affecting the entire community as to competing social and economic objectives. The judiciary may not be fully equipped to make many of these decisions. There is also a real likelihood that the judiciary will, as a result, become politicised. Another potential effect is that the existing high level of public confidence in the judiciary might be undermined if the public *perceive* that judges are making more 'political' decisions.

  If the judiciary is to have an enhanced role which a bill of rights brings, then a careful review would have to be undertaken of the way in which judges are appointed and educated, and of the resources that are available to assist them in their decision-making.

- The potential consequences of an enforceable bill of rights—the litigation generated, court time utilised, challenges to legislation and administration, the impact on existing areas of the law etc—are impossible to estimate. Although, the Canadian experience provides some instructive and cautionary insight in this regard.

- The experience in other jurisdictions, particularly Canada, also demonstrates that a bill of rights, rather than preserving and enhancing the rights of the people *most* in need of further rights protection, might in fact have the opposite effect and benefit those *least* in need. Prohibitive legal costs associated with enforcing one's rights under a bill of rights (whether constitutional or statutory) might effectively see the utility of a bill of rights being restricted to wealthy and corporate citizens. Yet the *public* costs

associated with a bill of rights—such as maintaining court machinery and repairing successfully-challenged regulatory schemes—will be costs borne by *all* members of society.

- A bill of rights is limited in its effective coverage given a diminishing 'public' sector and an increasingly powerful private sector. Yet to try and expand the operation of a bill of rights to appropriately cover newly privatised entities, entities with which the government has contracted, and powerful corporate entities is an extremely difficult task, given the complex definitional issues which arise.
- There are not readily identifiable solutions to other issues that would arise such as: what rights should be included in a bill of rights; which of those rights should be enforceable; how a balance can be struck between specific and general terminology used in defining those rights; how to overcome the effect of 'codifying' and 'freezing' the enunciated rights; and the effect that a bill of rights would have on existing common law provisions.

However, our conclusion not to recommend the adoption of a bill of rights in any form is not to say that we believe the current system of rights protection in Queensland is perfect. Certainly, there is room for improvement. In particular, the current system is complex. It is difficult for citizens to identify what their rights are, where those rights are sourced, and how they might enforce their rights. What became very clear to us throughout our deliberations was that in many cases rights education is the key to people being able to access their existing rights.

Accordingly, we have sought to identify ways in which rights protection in Queensland could be enhanced other than by a bill of rights. Our recommendations in this regard are centred around two primary concepts:

- ensuring wide-spread education of members of our community about their rights; and
- enhancing a rights culture or consciousness in State and local government policy, law and decision-makers.

In other words, we have focussed on a 'bottom up' rather than 'top down' approach.

Stemming from this first concept, we have produced as part of this inquiry what we believe to be a unique document, namely, a handbook titled *Queenslander Basic Rights.* This handbook, which we have prepared on the basis of advice from Associate Professor Bryan Horrigan of the Queensland University of Technology Faculty of Law, seeks to unravel the complexity of rights protection by explaining to citizens:

- what their basic rights are and where those rights come from;
- how they might find more information about their rights and enforcing them; and
- how they might go about expanding the protection currently afforded to their rights.

We believe that our handbook is a Queensland—possibly an Australian—first and we have made recommendations to ensure that our handbook becomes an integral and ongoing part of rights and civics education and information programs in schools, communities, workplaces, government and non-government organisations throughout the State.

On behalf of the current and former LCARC, I take this opportunity to thank all persons and organisations who dedicated their time, which in some cases was evidently considerable, to

meet with the committee in relation to this inquiry or to make written submissions to this important inquiry. As usual, public submissions have provided us with important guidance and insight into issues as they affect individual citizens and communities.

On behalf of the committee I also thank the committee's research staff—Ms Kerryn Newton (Research Director), Mr David Thannhauser (Senior Research Officer) and Ms Tania Jackman (Executive Assistant)—for assisting in the preparation of this report, and Associate Professor Bryan Horrigan of the Queensland University of Technology Faculty of Law for assisting in the preparation of the committee's handbook.

We trust that the government implements our recommendations contained in this report in their entirety in a timely manner.

Gary Fenlon MLA
Chair

11 November 1998

ABBREVIATIONS AND ACRONYMS USED IN THIS REPORT

ADCQ	Anti-Discrimination Commission, Queensland
CEO	Chief Executive Officer
EARC	Electoral and Administrative Review Commission
ECHR	European Convention on Human Rights
First Protocol	First Optional Protocol to the ICCPR
FLPs	fundamental legislative principles
GLWA	Gay and Lesbian Welfare Association
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists (Queensland Branch)
LCARC	Legal, Constitutional and Administrative Review Committee
OQPC	Office of the Queensland Parliamentary Counsel
PCEAR	Parliamentary Committee for Electoral and Administrative Review
QAMH	Queensland Association for Mental Health
QCCL	Queensland Council for Civil Liberties
rights report	EARC's *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*
RIS	regulatory impact statement
SOSE	studies of society and environment
TCLS	Townsville Community Legal Service
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United National Human Rights Committee

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Recommendation (p 54)

The committee recommends that the Queensland Government *not* adopt a bill of rights as proposed by the former Electoral and Administrative Review Commission in its 1993 *Report on the preservation and enhancement of individuals' rights and freedoms* or in any other form.

Recommendation (p 63)

The committee believes that it is important that:

- **there are education and information programs aimed at educating all Queensland citizens about their rights and responsibilities and the workings of democratic institutions in Queensland; and**
- **as an integral part of these education and information strategies, Queensland citizens have ready access to a single, easy-to-read document explaining the nature and limits of their existing rights and responsibilities.**

Therefore, as part of this inquiry, the committee has prepared a handbook, entitled *Queenslanders' Basic Rights,* which the committee will table as part of this report. This handbook sets out in a succinct, easy-to-read document the basic rights and freedoms currently enjoyed by Queenslanders, the source of those rights and the avenues pursuant to which individuals can seek to clarify, enforce and enhance their rights.

Accordingly, the committee recommends that this handbook form an integral part of rights and civics education and information programs in schools, communities, workplaces, government and non-government organisations throughout the State.

To ensure that this handbook becomes an ongoing fixture in human rights education and information programs in Queensland, the committee further recommends that:

- **the Legal, Constitutional and Administrative Review Committee have an on-going responsibility to table in Parliament an updated edition of the handbook as and when necessary, and be provided with adequate funding to fulfil this responsibility; and**
- **the Minister responsible for the *Parliamentary Committees Act 1995* (Qld) introduce a Bill into the Parliament to amend that Act to obligate the Legal, Constitutional and Administrative Review Committee to prepare and table updates of this handbook as and when necessary.**

Further, to ensure the wide dissemination of the handbook, the committee recommends that the Minister responsible for the *Parliamentary Committees Act 1995* arrange, coordinate and fund the wider printing and dissemination of the first and subsequent editions of the handbook, should its usage be widely accepted.

Finally, given the importance of all young Queenslanders receiving civics/rights education, the committee recommends that the Minister responsible for Education:

- **reports to Parliament on current and planned strategies to ensure that *every* school student in Queensland has exposure to effective civics education which includes components about citizens' rights and responsibilities;**
- **ensures that the committee's handbook becomes an integral part of civics education in Queensland schools; and**
- **ensures the development of documents ancillary to the committee's handbook for use by teachers when, or in association with, teaching about the handbook's contents.**

Conclusion (p 69)

The committee reiterates that it is important that the Chief Executive Officer of each State Government department and agency, ensures that there is within their organisation, appropriate strategies, measures and procedures in place to ensure:

- **awareness of, and compliance with, fundamental legislative principles by public officers so that the rights and liberties of individuals are given due regard by officers in the development of legislation; and**
- **awareness of, and commitment to, the rights and liberties of individuals by public officers in their non-legislative policy development and administrative decision-making.**

The committee believes that it is only through such measures that the observance of individuals' rights and liberties will become truly entrenched in public sector practices including legislative processes, non-legislative policy development and administrative decision-making.

Whilst the committee is not advocating a detailed review of fundamental legislative principles or the Scrutiny of Legislation Committee's role in relation to ensuring compliance with them, the committee believes that there is a strong argument for ensuring a high level of departmental compliance with, and commitment to, fundamental legislative principle objectives. This commitment should not only be in relation to the development of legislation, but in relation to policy-making generally and in administrative decision-making. The committee also believes that there is a strong argument for generally enhancing departmental consciousness in relation to observing individuals' rights and liberties.

Conclusion (p 77)

The committee notes that local government laws are currently:

- **not required to comply with fundamental legislative principles as set out in s 4 of the *Legislative Standards Act 1992* (Qld);**
- **not subject to scrutiny by the Scrutiny of Legislation Committee of the Queensland Parliament;**

- **not subject to disallowance by Parliament under Part 6 of the *Statutory Instruments Act 1992* (Qld); and**
- **not drafted by the Office of the Queensland Parliamentary Counsel.**

The committee is therefore concerned that the rights and liberties of individuals are not required to be given specific consideration in the local government law-making process.

The committee further notes that the Department of Communication and Information, Local Government and Planning is currently conducting an evaluation of the local law-making process but has not published any final report in this regard. Depending on the outcome of this evaluation, there might be a need for the Parliament or Queensland Government to undertake further inquiry into, and review of, the local government legislative process and its effect on individuals' rights and freedoms.

Such further inquiry might also incorporate a review of law-making by Aboriginal and Torres Strait Island councils and public university councils.

Finally, this committee's comments above about ensuring a high level of awareness of FLPs/rights by officers who draft legislation, develop non-legislative policies and make administrative decisions equally applies to law-making by local governments, Aboriginal and Torres Strait Island councils and public university councils.

1. INTRODUCTION

The Legal, Constitutional and Administrative Review Committee ('the committee' or 'LCARC') is established under the *Parliamentary Committees Act 1995* (Qld). The committee has four statutory areas of responsibility:

- administrative review reform;
- constitutional reform;
- electoral reform; and
- legal reform.

This report concerns both constitutional reform and legal reform and represents the conclusion of an inquiry initiated by the LCARC of the second session of the 48th Queensland Parliament (the 'former committee' or 'former LCARC').

1.1 BACKGROUND TO THIS INQUIRY AND THE WORK OF THE FORMER LCARC

In the landmark *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the 'Fitzgerald Report'),[1] Fitzgerald QC expressed concern about the legal protection of civil liberties in Queensland. Fitzgerald also identified a paucity of Queensland law relating to human rights and the capacity of individuals to challenge government decisions or actions that affected them.[2] The Electoral and Administrative Review Commission ('EARC') was established under the *Electoral and Administrative Review Act 1989* (Qld) to address such deficiencies. The function of EARC, as outlined in the Act, was to investigate and report on the public administration of the State, including matters arising out of the Fitzgerald Report.

EARC was to specifically report on matters listed in the schedule to its establishing Act. Item 1 of the schedule specified '*the preservation and enhancement of individuals' rights and freedoms*'. EARC had already handed down several reports that recommended various measures to improve the position of the individual *vis a vis* the state when it embarked on an extensive inquiry relating to this particular item in June 1992.[3]

The EARC review process involved the release of an issues paper and a call for public submissions (265 submissions were received by EARC), the holding of a public seminar and public hearings, and consultation with various interest groups. EARC's *Report on review of the preservation and enhancement of individuals' rights and freedoms* (EARC's 'rights report') was published in August 1993.[4]

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1 Government Printer, Brisbane, July 1989.

2 Notably, however, the focus of the Fitzgerald report was not the protection of human rights *per se* but on the prevention of systemic corruption.

3 Legislation originating from EARC reports that had been introduced into and passed by the Queensland Parliament by the time EARC undertook its bill of rights inquiry included the: *Judicial Review Act 1991; Freedom of Information Act 1992; Peaceful Assembly Act 1992*; *Legislative Standards Act 1992;* and the *Electoral Act 1992*. Subsequent Acts originating from EARC reports include the: *Whistleblowers Protection Act 1994;* the *Public Sector Ethics Act 1994;* and the *Parliamentary Committees Act 1995*.

4 Government Printer, Brisbane, August 1993.

In its report, EARC analysed the adequacy of existing human rights protection in Queensland and reviewed the potential benefits and shortcomings of introducing a bill of rights as a further means of preserving and enhancing individuals' rights and freedoms in the State. EARC also considered various features which might be appropriate in a Queensland Bill of Rights and studied which particular rights should be included in any such bill. After considering the relevant issues, EARC recommended that Queensland adopt a bill of rights and attached a draft Queensland Bill of Rights 1993 to its report (reproduced as **Appendix F** of this report).

EARC's rights report was the only EARC report not to have been considered by EARC's oversight committee, the Parliamentary Committee for Electoral and Administrative Review (PCEAR), which was disbanded in mid-1995. This was noted by the former LCARC soon after it was established and, pursuant to its constitutional and legal reform responsibilities[5], the former LCARC decided to undertake a review of EARC's rights report and EARC's proposed bill of rights.

The former LCARC also noted that there had been a number of relevant developments since EARC's report was published and that these should be taken into account in its inquiry. Such developments included:

- the passing of the *Parliamentary Committees Act* in 1995 which enhanced Queensland's parliamentary committee system and established the Scrutiny of Legislation Committee (which absorbed the functions of the former Subordinate Legislation Committee) to scrutinise the consistency of bills and subordinate legislation with fundamental legislative principles (FLPs).[6] FLPs require that legislation has sufficient regard to rights and liberties of individuals and to the institution of Parliament;
- subsequent High Court consideration of that Court's 'implied rights' decisions of 1992 (including the applicability of the implied constitutional rights to state constitutions) and other developments in the common law, particularly as a result of judicial recognition of the increasing influence of international human rights law on Australia's domestic law;
- the inclusion of a bill of rights in the Constitution of the Republic of South Africa and proposals for rights contained in the European Convention on Human Rights to be formally recognised in the domestic law of the United Kingdom; and
- further developments in the jurisprudence relating to the *Canadian Charter of Rights and Freedoms 1982* and the *New Zealand Bill of Rights Act 1990*, both of which are highly relevant to considering any Queensland Bill of Rights.

The former LCARC had not finalised its bill of rights report when the 48th Parliament was dissolved in May 1998. (The former committee had given priority to its privacy and consolidation of the Constitution inquiries and directed its resources to reporting on those matters before the announcement of the then pending State election and dissolution of Parliament.)

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5 A (now expired) transitional provision of the *Parliamentary Committees Act 1995* recognised that the LCARC was effectively a successor to the PCEAR. Section 36 provided that if the PCEAR had not tabled a report about a report of the EARC, then the LCARC could deal with the EARC report in its place. Consideration of a bill of rights is nevertheless within LCARC's broad statutory jurisdiction.

6 FLPs are provided for in s 4 of the *Legislative Standards Act 1992*. FLPs and the Scrutiny of Legislation Committee are discussed further later in this report.

Nevertheless, in relation to this inquiry the former committee had:

- undertaken extensive research regarding such matters as the nature of rights, the manner in which they are or can be protected, the adequacy of existing rights protection in Queensland, the arguments for and against a Queensland Bill of Rights, and the operation of bills of rights in other comparable jurisdictions;
- decided that—because it would be highly desirable to see the *practical* operation of a bill of rights in a jurisdiction with a legal system comparable to that of Queensland—it should undertake a study tour of Canada.[7] The committee had considered studying the operation of New Zealand's 1990 statutory bill of rights, but decided that a study of the 1982 *Canadian Charter of Rights and Freedoms* ('the *Charter*') was preferable because it had been in operation for some fifteen years and because it followed Canada's 1960 statutory bill of rights. Further, the *Charter* had provided the basis for many of the provisions of both New Zealands's *Bill of Rights Act* and EARC's proposed bill of rights;
- accordingly undertaken a study tour of Canada and met with over 130 individuals during 25 meetings;
- tabled a 30-page *Report on the study tour relating to the preservation and enhancement of individuals' rights and freedoms and to privacy (31 March-14 April 1997)*;
- called for public submissions and released an issues paper in September 1997 titled *The preservation and enhancement of individuals' rights and freedoms: Should Queensland adopt a bill of rights?*;
- distributed over 900 issues papers directly to individuals and organisations that the committee believed might have an interest in the issue and a further 100 to people who requested them;
- analysed the 67 submissions that it received in response to its issues paper. Individuals and organisations who made submissions to the committee are listed in **Appendix A** of this report; and
- commenced drafting what was to be quite an extensive report.

1.2 THE CURRENT COMMITTEE'S APPROACH AND THE STRUCTURE OF THIS REPORT

Soon after this committee was established by resolution of the Legislative Assembly on 30 July 1998, it decided that it would finish the work of its predecessor in relation to this inquiry. This committee has based much of its deliberations on the research and discussions of, and submissions to, the former committee. This committee acknowledges its indebtedness to the former committee for such material and takes this opportunity to thank all those who provided submissions to, and met with, the former committee.

This committee has decided to keep this a relatively succinct report, although the myriad of interrelated matters considered by the committee in coming to its conclusions was by no

[7] Several commentators note the relevance of the Canadian experience to Australian considerations of a bill of rights. For example, B Gaze and M Jones, *Law, liberty and Australian democracy*, Law Book Company, Sydney, 1990, p 61: '*The Canadian experience provides the closest model for Australia of the potential benefits and pitfalls of going down this path* [of enacting a bill of rights], *and also of the wider effects of a bill of rights. It is particularly relevant because both countries have culture and legal systems which derive originally from the English common law tradition and similar federal political structures. The differences, however should not be lost sight of.*'

means simple or straightforward. In this regard, the committee has taken into consideration in its deliberations both the vast amount of material referred to in the bibliography to this report and, whilst not always explicitly recognised, the valuable comments made in submissions to its inquiry.

The committee has aimed to focus on concisely reporting its *reasoning* in coming to an answer to the question of whether Queensland should adopt a bill of rights.[8] The committee has decided that much of the factual background material and discussion about bills of rights is best left said in EARC's bill of rights report and in the ever-increasing number of quality articles and treatises that discuss the desirability of a bill of rights in Australia.[9]

However, one point which the committee should clarify is that it has approached this inquiry as one which does not solely concern the question of a bill of rights. Instead, as the title of EARC's rights report indicates, the central issue is the preservation and enhancement of individuals' rights and freedoms. A bill of rights is merely one, albeit comprehensive, way in which individuals' rights and freedoms may be further preserved and enhanced.

Accordingly, the committee's report is structured as follows.

In **chapter 2** the committee outlines essential background material to the question of protecting rights and the bill of rights option.

In **chapter 3** the committee examines the ways in which rights are currently protected in Queensland and assesses the adequacy of that overall protection.

The question of whether Queensland should adopt a bill of rights is addressed in **chapter 4** where the committee considers the arguments for and against a Queensland Bill of Rights and comes to a conclusion on the issue.

In **chapter 5** the committee considers and makes recommendations about specific, practical measures which should be undertaken in Queensland to further preserve and enhance individuals' rights and freedoms. The centrepiece of the committee's recommendations in chapter 5 is the call for, and supply of, a handbook on Queensland citizens' existing fundamental rights, entitled *Queenslanders' Basic Rights*. A copy of *Queenslanders' Basic Rights* is tabled with this report.

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8 See also the committee's issues paper for a brief overview of the existing rights protections in Queensland, a succinct listing of the arguments for and against a bill of rights and comparisons of the features of, and the rights contained in, EARC's proposed bill of rights and other existing or previously proposed bill of rights models. The committee's study tour report also contains background material.

9 The extent of this material is evident from the bibliography to this report.

2. MATTERS CONSIDERED BY THE COMMITTEE

The committee has had to consider number of matters in determining whether Queensland should adopt a bill of rights. In this chapter, the committee briefly canvasses these fundamental considerations.

2.1 THE NATURE OF RIGHTS

The concept of rights is difficult to define. As was evident from submissions to the committee, the term 'rights' may be used in a number of senses, such as (from the broadest to narrowest sense):

- '*a claim derived from some unspecified moral standard* [for example, from religion, ethics or from a belief about the nature of humanity] *or rule of law*' [if the latter, the right is enforceable in the courts];
- '*a claim recognised although not necessarily enforceable by law*'. This sense emphasises the residual nature of many rights (which are often termed freedoms), in that individuals all have rights to do as they wish to the extent that the activity is not restricted by law; and
- '*a claim not only recognised by law, but for violation of which the law provides a specific remedy*'. [10] For example, in Australia there is a common law right of a person to physical integrity in that, when the right is violated, the person has civil remedies such as assault and/or false imprisonment. As well, criminal prosecution might result.

The phrase 'human rights' would belong within the first sense as it essentially suggests fundamental moral rights held by all people at all times because of their humanity. However, whilst human rights are difficult to conclusively define,[11] a good understanding of human rights can be gained from considering the international community's Universal Declaration of Human Rights (UDHR), and the two treaties developed from the UDHR—the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three instruments (plus the ICCPR optional protocols) make up what is known as the 'International Bill of Rights'.[12]

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[10] From N O'Neill and R Handley, *Retreat from injustice: Human rights in Australian law*, Federation Press, Sydney, 1994, pp 22-24.

[11] As his Honour Brennan J noted in *Gerhardy v Brown* (1985) 159 CLR 70 at 126: '*an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some difference in the rights and freedoms that are conducive to their attainment.*'

[12] The UDHR was unanimously adopted by the General Assembly of the United Nations in 1948. The ICCPR and the ICESCR were both adopted by the United Nations in 1966. Australian ratified the ICCPR in 1980, the ICESCR in 1976 and the first optional protocol to the ICCPR in 1991. This protocol enables Australians to access the UN Human Rights Committee to obtain a ruling on an alleged infringement of the ICCPR when domestic remedies have been exhausted. These documents are readily available on the Internet from sites such as the 'Australia Treaty Series' on the main AUSTLII site at <http://www.austlii.edu.au>.

Different types of human rights are enshrined in the international covenants. Civil and political rights (also known as 'first generation rights') are reflected in the ICCPR. Civil rights (such as the rights to life, to liberty, to a fair trial, and to equality before the law) relate to the protection of the individual from oppression and state interference. Political rights (such as freedoms of speech, of peaceful assembly, of association and of thought) seek to ensure the individual's unhindered participation in society. Civil and political rights are also called 'negative rights' because they seek to restrain the state from infringing individuals' liberties.

Economic and social rights (also known as 'second generation rights') are embodied in the ICESCR. These include the right to work, to an adequate standard of living and education, to own property and to participate freely in the cultural life of the community. Social and economic rights are often called 'positive rights' in the sense that their provision and enjoyment depends on state intervention.

Some commentators argue that social and economic rights are aspirational rather than 'legal' in nature (that is, enforceable at law) because their fulfilment depends not only on political will but also on adequate government resources. Accordingly, when such rights are included in a domestic bill of rights they are often stated as being unenforceable. This suggestion is supported by traditional thought that only civil and political rights are appropriate for inclusion in a domestic bill of rights, and is indicated in the terminology and enforcement mechanisms contained in the ICCPR as opposed to the ICESCR.

However, other commentators argue that guaranteeing social and economic rights is essential in its own right. Yet others believe that the distinction between 'types' of rights is artificial in the first place.[13]

A 'third generation' of rights, applying to communities or groups rather than individuals, is also increasingly being recognised. These 'community rights' have been suggested to include rights to self-determination, to development, to a clean environment, and to peace.

2.2 BALANCING RIGHTS AND CONSIDERING RESPONSIBILITIES

Another important matter to raise at the outset of a report which discusses rights is the need to carefully balance the protection of individuals' rights against the interests of society. In addition, some individuals' rights may themselves compete with each other.

The committee, especially in light of its impression of the former committee's discussions in Canada, appreciates that rights are not absolute. Rights are relative to each other. For example, the rights to privacy and to freedom of expression may compete in a given circumstance. Rights are also relative to the legitimate social and economic interests of society as a whole (which, in turn, can effectively be taken to be an expression of group rights).

In other words, the public interest may in some circumstances outweigh certain rights and liberties of an individual. As explained in one discussion paper:

> *Living in a community entails acceptance of the community's interests and values. Individual and group rights have to be balanced with community rights. There are two basic constraints on individuals and group freedoms. One is the effect on others of an unfettered exercise of personal freedoms. No man is an island. Freedom of speech is not a licence to defame, nor does it entitle anyone without cause to cry*

[13] See, for example, P H Bailey, *Human rights: Australia in an international context*, Butterworths, Sydney, 1990, pp 13-14.

> *"Fire" in a crowded theatre. Freedom of religion may be modified in the public interest by other values so as to exclude polygamy or the practice of other particular religious beliefs. Freedom of assembly does not preclude the adoption of anti riot laws. The second constraint on individual and group freedoms comes from the community's interest in the balanced use of its limited resources. All resources are limited and we are constantly involved in making choices as to their use.*[14]

Thus, some rights should be subject to appropriate limitations. Finding an appropriate balance between competing rights or specifying 'just limitations' to certain rights can be a difficult task. As will become evident from the discussion in this report, many bills of rights expressly recognise the need for this balance, both in qualifications explicit in the wording of certain guaranteed rights and in a general statement that the rights are protected to the extent that they can be in a free and democratic society.

Difficult issues arise as to the extent to which the (elected) legislature *vis a vis* the (appointed) judiciary should be responsible for striking the balance in this important policy area.

In addition, the committee notes that the manner in which individual citizens behave also affects their fellow citizens. The committee sensed a strong sentiment in submissions that rights discussion should by necessity also include recognition of the importance of individuals' responsibilities.

2.3 POSSIBLE FEATURES OF BILLS OF RIGHTS

A bill of rights might be defined as a relatively succinct statement of rights which, because of its status or other features assigned to it, protects individuals' personal and private matters from government interference. Given their typical historical genesis (as documents forged after revolution or violent libratory struggle from a prior oppressive regime[15]), bills of rights have traditionally focussed on the protection of individuals' civil and political rights by limiting excessive state power.

However, bills of rights can come in many forms, can enshrine different types of rights and may feature different basic components. Proper consideration of the arguments for and against a bill of rights (and, indeed, the very arguments themselves) depends on such features.

A bill of rights can be enforceable or merely declaratory. A declaratory bill of rights would likely consist of principles intended to 'guide' action instead of being subsequently actionable in law. For example, a non-enforceable bill of rights might place obligations on government to at least consider the enunciated rights when developing legislation (or perhaps when undergoing certain other administrative activities) but it might not provide any means of recourse to individuals if government did not do so.

An enforceable bill of rights is one that is actionable, usually against the government—the executive, legislature and judiciary—and its agencies. Many people would consider enforceability vital if a bill is to be of any real consequence. But against whom, by whom and how a bill of rights can be enforced may differ. Bills of rights could possibly be enforceable *against* corporations and other legal entities and might also be enforceable *by* such bodies in addition to individuals.

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[14] Attorney-General's Department, *A Bill of Rights for the ACT?*, Canberra, 1993, para 12.

[15] For example, the *French Declaration of the Rights of Man* 1789, the United States *Bill of Rights* (made up of the first ten amendments to the Constitution adopted in 1787) and the British *Magna Carta* 1215 and *Bill of Rights* 1689.

Bills of rights might be enforceable via mechanisms other than, or in addition to, legal enforcement in the courts. An executive body such as a human rights commission or commissioner could conciliate or arbitrate complaints. It could consequently make recommendations or determinations. Alternatively, such a commission could promote the rights stated in the bill and 'monitor' government's adherence to them without adjudicating specific complaints.

Another dimension to bills of rights is whether they are 'constitutional'.

A bill of rights can be contained in normal legislation or be given enhanced status by being inserted into a country's (or state's) constitution. In the case of the latter, the bill of rights can become 'supreme law' that stands above the laws and practices of any particular government by being 'entrenched' in the constitution. Entrenchment is where the bill of rights is made difficult to alter by requiring that any bill that would amend or affect the bill of rights be subject to a special procedure. Such special procedure might entail approval at a referendum or passage only by a special (for example, two-thirds) majority in Parliament.[16]

If a bill of rights is entrenched:

- the rights themselves and how they are expressed are hard to change ('frozen' and inflexible from one point of view; protected from political expedience or ill-considered amendment from another); and
- the bill cannot usually be over-ridden by subsequent ordinary legislation that is inconsistent with the enshrined rights. In fact, such legislation (and other, administrative schemes and action) could be subject to review by the courts (judicial review) and invalidated as 'unconstitutional' by a superior court, such as the Supreme Court of Queensland.

Whether a bill of rights is constitutional or not appears to be an important factor in itself when people consider whether to support a bill of rights. This is because some people favour 'parliamentary sovereignty'—the idea that proper democracy stems from Parliament being supreme as an unchallengeable law-maker. Others favour 'constitutionalism' which is about enshrining what is considered as fundamental law in a constitution then subjecting the government of the day to the limitations expressed in that foundational document. The actions of government and the legislation of Parliament thereby become subject to review by a superior court acting as a 'protector' of the constitution and arbiter of constitutional issues.

A Queensland Bill of Rights, especially one that is constitutionally entrenched, would potentially change in a fundamental manner the governance of Queensland by altering the relationships between its institutions and the position of its citizens *vis a vis* the position of the state. A constitutional bill of rights poses all sorts of basic questions about the:

- State's existing constitutional arrangements (indeed, about the very nature of the polity);
- the proper function of a constitution; and
- the nature, and desirability, of any resultant changes to Queensland social, economic and political life.

[16] If provisions are not entrenched in a constitution then they can, like ordinary legislation, be explicitly or impliedly amended by later inconsistent legislation. Most of the provisions of the Queensland Constitution are not entrenched.

The system produced by a constitutional bill of rights, in the words of the 1988 Constitutional Commission, would be:

> *… a constitutional regime under which certain rights and freedoms are assured to individuals and secured against impairment by acts of government, including by laws to regulate the conduct of individuals in their dealings with one another, except where that impairment can be justified.*[17]

The main alternative to a constitutional bill of rights is a bill of rights enacted as an ordinary Act of Parliament. The *New Zealand Bill of Rights Act 1990* is such a bill of rights. Quasi-constitutional status might subsequently be accorded to a statutory bill of rights even though it is an ordinary Act of Parliament. This has occurred in New Zealand where the New Zealand Court of Appeal has tended to accord special deference to the provisions of the *New Zealand Bill of Rights Act*.

A bill of rights as an ordinary Act of Parliament was also introduced in Canada in 1960, some two decades before the Trudeau Government oversaw the entrenchment of the *Canadian Charter of Rights and Freedoms* into that country's *Constitution Act 1982.*

The *Charter* also demonstrates that entrenched bills of rights might contain a significant additional feature in the nature of an 'override' or 'notwithstanding' clause. Such a clause provides that later legislation *may* override the provisions of the bill of rights if that later legislation expressly states that intention.

A 'notwithstanding' clause provides a 'last preserve' for parliamentary sovereignty in a constitutionally entrenched bill of rights. Such a clause might be reverted to in times of emergency or when a government considers that an important part of its legislative program might be challengeable or has already been successfully challenged. Supporters believe that such a provision, whilst emphasising the notion that Parliament is the supreme law-making body, also requires Parliament to justify itself to the people each time that it seeks to override a guaranteed right. Detractors of override clauses argue that such provisions undermine the whole intent of a bill of rights; namely, to prevent legislative encroachment of fundamental rights and freedoms.

In practice though, Canadian governments rarely have invoked the clause (s 33 of the *Charter*), and continue to be loathe to use it because doing so is potentially highly politically unpalatable.

As already alluded to, bills of rights can also differ in the type of rights that they encompass and how those rights are expressed. A bill might seek only to protect civil and political rights or it might also include (enforceable or unenforceable) economic and social and/or community and cultural rights. In addition, there might be an express decision not to include certain rights. For example, the 1988 Constitutional Commission decided not to include in its proposed bill of rights those rights it considered particularly controversial or more likely to be divisive than socially cohesive, such as the right to life.

How the rights that are eventually chosen for inclusion are expressed is also extremely important to the ultimate operation of a bill of rights. Parliament might wish to tightly prescribe rights by drafting them in detail. Alternatively, Parliament might express the rights in general terms, thereby allowing more discretion on the part of the courts to decide what the

[17] Constitutional Commission, *Final report*, AGPS, Canberra, 1988, para 9.94.

rights might mean in the context of any particular circumstance that they are considering. Any particular enunciated right might also have in-built limitations or exceptions.

In addition, the bill of rights *as a whole* might be subject to a 'justified limitations' clause similar to cl 1 of the *Canadian Charter* and replicated in s 5 of the *New Zealand Bill of Rights Act*. That clause specifies that: *The rights and freedoms contained are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

It is hard not to see merit in such a clause being included in a bill of rights, particularly in an entrenched bill. A justified limitations clause makes it readily apparent that rights are not absolute. It helps courts, should they wish, to quickly proceed beyond considerations of whether a right *was breached* (which is often straightforward enough to establish) to consideration of whether that breach *is justified* in a free and democratic society.[18]

Thus, bills of rights are by no means standard in their form or in their effect. The committee is acutely aware that the possible features of a bill of rights—whether the bill is entrenched; whether the bill is enforceable or merely declaratory; which rights are to be included and how they are to be expressed—are not merely factors to be considered after a decision is made to proceed with a bill of rights. The particular features of any proposed bill of rights will determine the operation and effect of the proposal itself and need to play a part in any consideration of the bill from the outset.

Finally, it should be noted that a bill of rights need not be national in application. Most American states and Canadian provinces have bills of rights. The province of Saskatchewan in Canada introduced a bill of rights in 1945, preceding the Canadian national statutory bill of rights by some 15 years and the *Charter* by nearly four decades.

2.4 EARC'S PROPOSED BILL OF RIGHTS

As noted in chapter 1, this report encompasses a review of EARC's proposal that Queensland adopt a bill of rights. EARC attached a draft Queensland Bill of Rights 1993 (as Appendix A) to its report encapsulating its recommendations.[19] EARC's Bill of Rights is reproduced as **Appendix F** of this report. EARC recommended the bill be introduced initially as ordinary legislation with a view to its entrenchment in the Queensland Constitution (after approval at a referendum) following an operational trial period of five to seven years.

Features of EARC's draft Queensland Bill of Rights include:

- a wide array of civil and political rights (including many specific arrest and detention rights: see part 3 of the bill), economic and social rights (part 4) and community and cultural rights (part 5);

[18] Canadian jurisprudence on the clause is instructive. Once a challenger shows that their constitutional rights have been violated in some way, the onus of proving that a limitation is justified rests upon government. Government must satisfy the following criteria: (1) the objective of the government action/measure is sufficiently socially important and pressing; and (2) the means of the government action must be proportional to the importance of the objective, in that: (i) the measure is fair, not arbitrary, carefully designed and rationally connected to the objective; (ii) the means impairs the right as little as possible; and (iii) the effects of the measure are proportional to the objective: *R v Oakes* [1986] 1 SCR 103.

[19] A copy of EARC's Bill of Rights 1993 (along with Explanatory Memorandum) also appears on this committee's Internet site at <http://www.parliament.qld.gov.au>.

- civil and political rights (in part 3) that are legally enforceable:[20]
  - by individuals, corporations and other legal entities;
  - against the government (that is, the legislature, the executive and the judiciary) and its agencies (but not the private sector);[21]
  - in the Supreme Court or 'in any proceeding in which the right is relevant to an issue in the proceeding';
- non-enforceable economic and social rights (in part 4) and community and cultural rights (in part 5) which nevertheless are to act as guidelines for government policy and community behaviour;

  (The rights in parts 4 and 5 are declared by cl 5 as '*not enforceable merely because of this Act*'. Despite that, '*the Parliament: (a) urges the Queensland community generally to observe the rights contained in parts 4 and 5; and (b) encourages persons to assert the rights in ways that do not involve the legal process or proceedings.*')
- a drafting style that, in the words of EARC, '*strikes a balance between general and specific terminology*';
- all the rights are subject to such reasonable limits '*demonstrably justifiable in a free and democratic society*'; and
- a requirement on the Attorney-General to report proposed legislation that is inconsistent with the bill of rights to Parliament.

As an ordinary Act of Parliament pending entrenchment, EARC's bill was nevertheless intended to prevail over subsequent inconsistent Acts (unless the later Act expressly provided otherwise).[22] EARC recommended that, after trial, the bill be submitted to a referendum for entrenchment in the Queensland Constitution. Upon such entrenchment, the bill would operate automatically to prevail over subsequent inconsistent legislation.[23] EARC recommended against the inclusion of a 'notwithstanding' or Parliamentary override provision should the bill be entrenched.

The features of EARC's bill of rights and a comparison of those features with some other bills of rights are set out in **Appendix B** of this report. The specific rights contained in EARC's bill of rights and a comparison of those rights with those contained in some other bills of rights are set out in **Appendix C** of this report.

In light of the substantial consideration given to the specific content of EARC's draft bill of rights by people who made submissions to the committee and by people that the committee met with in Canada, **Appendix D** also outlines comments received by the committee that expressly refer to components of EARC's bill of rights.

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[20] Note, however, that not all the rights enforceable under Part 3 (Civil and political rights), such as cl 32 (Right to education), are what might be characterised as civil and political rights.

[21] At least that was EARC's stated intention. In practice, courts might not strictly limit cl 4(1)(b) of EARC's bill to 'government' agencies. Clause 4(1)(b) provides that civil and political rights must be observed by 'a person or body in performing a public function or exercising a public power under legislation ...' [in addition to the Legislature, Executive and Courts of Queensland: cl 4(1)(a)].

[22] It is by no means clear that, as an ordinary Act of Parliament, a Queensland Bill of Rights could legally have this effect on subsequent legislation.

[23] Clause 6 (Rights prevail over inconsistent legislation) apply to *all* the rights in the bill. This is in contrast with the enforceability provisions of the bill, cls 4 and 5, which differentiate between civil and political rights on the one hand (i.e. enforceable) and social and economic and cultural and community rights on the other hand (i.e. 'not enforceable merely because of this Act').

EARC's draft bill of rights clearly represents (especially should it become constitutionalised) a proposal for fundamentally changing the machinery of government in this State. Changes would become evident in the relationship between the State's basic legal/political institutions and the position of the citizen in relation to those institutions. The consequence of EARC's bill of rights would also impact on the validity of future government legislative and administrative schemes and on the criminal justice system generally.

2.5 PREVIOUS AUSTRALIAN PROPOSALS FOR A BILL OF RIGHTS

EARC's proposal regarding a bill of rights was not the first of its kind in Australia. The committee in its issues paper outlined a number of other Australian proposals for a bill of rights at both Commonwealth and state level.

Such proposals include the following.

- The Constitution (Declaration of Rights) Bill introduced in the Queensland Parliament in December 1959 by then Premier Nicklin. The bill sought to entrench democratic rights, the independence of the judiciary, and rights on arrest or detention but was abandoned because of opposition.
- Private Members' bills for a South Australian Bill of Rights introduced into that state's Parliament in 1972, 1973 and 1974. The bills did not become law.
- The Australian Bill of Rights Bill 1985 introduced into the House of Representatives by the former Attorney-General Lionel Bowen. The bill would have seen a bill of rights in the form of an ordinary Act of Parliament, breaches of which would have been investigated by the Human Rights and Equal Opportunity Commission.[24] The bill was passed by the House of Representatives but lapsed when withdrawn from the Senate following extensive and heated debate.

  (The 1985 bill followed two other failed Commonwealth attempts to introduce bills to give domestic effect to the ICCPR by Attorneys-General Lionel Murphy in 1973 and Gareth Evans in 1984.)
- An Australian Bill of Rights in the form of a new chapter VIA of the Commonwealth Constitution recommended in the 1988 *Final report* of the Constitutional Commission. The Commission had been established by the federal government in 1985 to report on the revision of the Commonwealth Constitution. The Commission's recommendation was not subsequently acted upon and was made despite the recommendation by its Advisory Committee on Individual and Democratic Rights that an extensive bill of rights not be enacted. A referendum which was held in September 1988 to insert into the Commonwealth Constitution some specific rights recommended by the Constitutional Commission in its *First report* failed.
- The Constitution (Declaration of Rights and Freedoms) Bill 1988 introduced into the Victorian Legislative Assembly. The bill, which subsequently lapsed, partially responded to a 1987 report[25] of the Legal and Constitutional Committee of the

[24] Before the 1985 Bill was introduced, the Senate referred the issue of a bill of rights to its Standing Committee on Constitutional and Legal Affairs. The committee's report *A Bill of Rights for Australia? An exposure report for the consideration of Senators* (AGPS, Canberra, November 1985) expressed there was *'no prospect in the foreseeable future'* that a constitutionally entrenched bill of rights would pass a referendum. Even if there was such a prospect, the committee stated that its preferred option was *ordinary* federal legislation to implement the ICCPR.

[25] Legal and Constitutional Committee of the Victorian Parliament, *Report on the desirability or otherwise of legislation defining and protecting human rights*, Government Printer, Melbourne, 1987.

Victorian Parliament. In its report, the committee recommended:

- the enactment of a Charter of Rights and Freedoms as a statement of directory principles to be used in developing legislation and guiding executive action but otherwise unenforceable by individuals; and

- scrutiny of government adherence to the Charter by a dedicated parliamentary committee.

- The 1996 Final Draft Constitution of the Sessional Committee on Constitutional Development of the Northern Territory Legislative Assembly containing (in Part 8) some specific rights provisions with respect to language, social, cultural and religious matters. That committee had considered the issue of a Northern Territory Bill of Rights but ultimately did not insert a bill of rights into its proposed new constitution for the Territory (should it become a state or otherwise).[26]
- Limited consideration of the insertion of some rights into the Commonwealth Constitution surrounding the Constitutional Convention in Canberra in February 1998. Whilst the Convention concerned Australia possibly becoming a republic, the question of acknowledging some basic values and rights in a new preamble to the Constitution was given cursory consideration. The Convention resolved that recognition of the following matters, amongst others, be considered for inclusion in a new preamble: the equality of all people before the law; gender equality; and recognition of the rights of Aboriginal people and Torres Strait Islanders. It is also possible that rights may play a role in the process that is now to follow the Convention.[27]

Appendices B and **C** summarise the various features of the 1985 Bowen Bill; the 1988 Constitutional Commission draft Bill; and the 1988 Victorian Constitution (Declaration of Rights and Freedoms) Bill.

2.6 BILLS OF RIGHTS IN OTHER COUNTRIES

As noted at the outset, many other nations have introduced bills of rights. The reasons for other countries adopting this measure are varied. Many bills of rights are products of historical events such as social or political upheavals or revolutions. Examples in this regard include: the *French Declaration of the Rights of Man* of 1789; the *Magna Carta* of 1215, which resulted from conflict between the King and feudal lords; and the *Bill of Rights* 1689, which enshrined the principles of parliamentary government arising out of the political struggles surrounding the English Civil War and the Glorious Revolution.

The United States Bill of Rights, which is perhaps the best known bill of rights, is also an example of a bill of rights which has arisen as a result of a country gaining independence from former imperial control.

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[26] Sessional Committee on Constitutional Development of the Northern Territory Legislative Assembly: *Final draft Constitution for the Northern Territory*, Government Printer, Darwin, December 1996, Part 8; *Discussion paper (no 8): A Northern Territory Bill of Rights?*, March 1995; *Addendum to the final draft Northern Territory Constitution.* These documents are available on the Internet at <http://www.nt.gov.au/lant/committees>.

[27] See page 3 of the *Communiqué* of the Convention which is available on the Internet at <http://www.dpmc.gov.au/convention/comm3.html>.

Bills of rights have also become common in the constitutions of those nations that gained independence after WWII, with the international human rights movement no doubt having a significant influence in this regard.

Similarly, a number of countries which have adopted systems of government based on the common law, including Canada and New Zealand, have adopted bills of rights. In fact, Australia is now one of the few Western democracies not to have either a statutory or constitutional statement of rights and freedoms for its citizens.

There is much disparity in the form of bills of rights across the various jurisdictions. The experience in some countries has also shown that the adoption of a bill of rights does not necessarily indicate a bona fide commitment by a government to the individual rights enshrined therein.

The committee summarises below some of the key features of national bills of rights which it (and its predecessor) has studied during the course of this inquiry.[28]

> **United States.** The origins of the US Bill of Rights are very much tied to the political circumstances surrounding confederation which came after independence. A number of anti-federalist states ratified the first US Constitution conditional on later amendments to include certain guarantees then existing in the majority of state constitutions. Madison, who was one of the 'federalist' convention delegates, was responsible for reducing the amendments proposed by the relevant states (not all of which dealt with individuals' freedoms) in order to ensure that they were contained to a manageable bill of rights which did not destabilise the new government.[29]
>
> As a result, the first US Congress finally approved twelve amendments to the 1787 constitution. Ten of those amendments, which became the Bill of Rights, were subsequently ratified, as required, by the states. The original amendments—which guarantee liberties including freedom of religion and belief, thought and opinion, association and assembly—have subsequently been supplemented with other amendments. These rights are enforceable against the US Government. Despite its beginnings—and indeed there was some support for constitutional rights safeguards—and the generality of its provisions, the US Bill of Rights has become an integral part of US life and has been interpreted to reflect community values. The US Supreme Court has overcome the lack of an explicit justified limitation clause by recognising that the nature of rights dictates that such a principle should apply and continues to interpret the US Bill of rights as if such a principle was part of it.
>
> However, the US Bill of Rights has come under criticism for not providing appropriate responses to contemporary issues of community debate such as abortion, euthanasia and gay rights. It has been noted that despite constitutional safeguards, America's law on, for example, gay rights is more restrictive than that of Australia's.[30]
>
> **Canada.** The push for Canadian autonomy in the 1970s and power struggles within the federation brought on the constitutional revision which ultimately resulted in the new

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28 The constitutions of various countries are available on the Internet via the website established by the Australian Broadcasting Corporation for the Constitutional Convention held in Canberra in February 1998 at <http://www.abc.net.au/concon/constitutions/default.html>.

29 M I Urofsky, *A march of liberty: A constitutional history of the United States*, Alfred A Knopf, New York, 1988, pp 108-110.

30 F Brennan, *Legislating liberty: A bill of rights for Australia?*, University of Queensland Press, Brisbane, 1998, p 7.

constitution including a charter of rights for Canada. The *Canadian Charter of Rights and Freedoms* is a legally enforceable statement of 'fundamental freedoms' (such as freedom of conscience and religion, of thought, of peaceful assembly and of association), democratic rights, mobility rights, legal rights, language rights and a general equality right. It has had a great impact on Canadian law and the nature of Canadian society. As a result of its entrenchment in that country's *Constitution Act 1982*, the *Charter* can be, and has been, used as a basis to challenge inconsistent national and provincial legislation. (This is even though the rights are subject to 'justified limitations' and there is a means available to government to invoke in later legislation an 'override' provision.) Predominantly, the *Charter* has been used in criminal law (where its impact has been significant) and in challenging the actions of government officials.

Detractors of the *Charter* perceive it as adding to the complexity and cost of litigation, as reflecting a wholesale transfer of power from the Parliament to the courts, and—because of that—as an instrument of uncertainty and hindrance to government. The *Charter*'s proponents see it as an inspirational document that has enhanced the protection of the rights and freedoms of Canadian citizens. Proponents also prefer to categorise the post-*Charter* relationship between Parliament and the courts as a constructive one.

New Zealand. The New Zealand Bill of Rights was originally proposed as an entrenched constitutional bill of rights to counter what was seen as 'unbridled'[31] executive power in that country. However, much concern was expressed that such a bill would inappropriately displace the Westminster doctrine of parliamentary sovereignty in favour of increased judicial review. The bill was subsequently enacted as ordinary legislation (not supreme law) in the form of the *New Zealand Bill of Rights Act 1990*. While at the time critics of this outcome described the bill as a 'Clayton's bill of rights',[32] it appears that the New Zealand judiciary has nevertheless embraced the content of the bill and has applied it with substantial fervour. Again, the impact of the New Zealand Bill of Rights has been significant in the area of criminal law.

Republic of South Africa. The (final) *Constitution of the Republic of South Africa* came into effect in February 1997 as an attempt to create a democratic and free state following years of apartheid government and civil unrest.[33] Chapter 2 of the Constitution comprises a bill of rights expressed as the '*cornerstone of democracy in South Africa*'. The bill contains an extensive range of civil and political, economic and social and cultural rights. Some rights are expressed in absolute terms, others are more qualified in nature.

The rights are legally enforceable and can be used to both challenge the validity of legislation and the fulfilment of obligations of government imposed by the Constitution. Moreover, Chapter 2 can only be amended by a bill passed by a special majority of the National Assembly, and a threshold vote by the National Council of Provinces. The rights are nevertheless subject to a justified limitations clause and legislation enacted

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31 The term stems from an influential 1979 constitutional paper, *Unbridled power*, penned by Sir Geoffrey Palmer, New Zealand Prime Minister from 1989-90 and professor of constitutional law who led much of the push for a bill of rights in that country.

32 The saying comes from an advertising campaign popular at the time that put the phrase in Australian and New Zealand vernacular. The product, Clayton's, is a non-alcoholic drink resembling an alcoholic spirit: 'the drink you have when you're not having a drink.'

33 The introduction of a bill of rights in South Africa was initially perceived by many as a '*disguised mechanism for the entrenchment of vested [white] privileges'*. However, the need for a justiciable bill of rights subsequently received more general support: A Cockrell, 'The South African Bill of Rights and the 'Duck/Rabbit', *Modern Law Review*, vol 60, no 4, July 1997, pp 513-537.

during a state of emergency need not fully comply with the bill.

The bill of rights applies to all law and binds the legislature, the executive and the judiciary. A provision of the bill of rights also binds a natural or legal person if—and to the extent that—it is applicable taking into account the nature of the right. Individuals (either acting on their own or in a representative capacity) can approach a competent court alleging that a right has been infringed. The court may grant appropriate relief including a declaration of rights. When interpreting the bill of rights, a court, tribunal or forum '*must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*' and there is express provision that the court must consider international law.

The Constitution also establishes a Human Rights Commission to promote respect for and development of human rights and to monitor observance of human rights in the Republic.

United Kingdom. In October 1997, the Blair Government introduced the Human Rights Bill (not yet passed) to incorporate the articles of the *European Convention on Human Rights* (ECHR) into UK domestic law.[34] The bill makes it unlawful for 'public authorities' to act in a way which is incompatible with the Convention rights, enabling people to invoke their rights in civil or criminal proceedings brought against them by a public authority (or in proceedings they might bring before a public authority).

However, the bill seeks to uphold the doctrine of parliamentary sovereignty by making it explicit that the courts can not strike down legislation that contravenes the rights. (Although the courts will be able to set aside secondary legislation which is incompatible with the Convention.) Instead, the bill requires the courts to interpret primary and secondary legislation, as far as possible, in a way that is compatible with the Convention rights.[35]

If a court does determine that a legislative provision is incompatible with a right contained in the Convention, a higher court can make a declaration to that effect. It is then a matter for government or Parliament to rectify.[36] If such a declaration is made, there is a 'fast-track' procedure to allow the offending provision to be amended so as to conform with the Convention. This will usually be done via a remedial order prepared by the appropriate government minister. A draft of the order must be approved by resolution of each House of Parliament before taking effect. However, in particularly urgent cases, the order will take effect immediately but will expire after a short period if not approved by Parliament.

The features of, and rights contained in, the *Canadian Charter* and the *New Zealand Bill of Rights Act*—which the committee found particularly useful given the similarity of their legal

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34 As with the position in Australia when the federal government ratified the ICCPR and the ICESCR, ratification of the ECHR by the UK government did not mean that the ECHR had been incorporated into the UK's domestic law. However, as international law, the Convention has had some effect on the UK's domestic law. The courts have used it to assist in the interpretation of ambiguous statutes or in identifying particular public policy demands. Pursuant to the Convention, persons within the jurisdiction of the United Kingdom could also submit a petition to the European Commission of Human Rights if they were aggrieved by a legislative or executive action perceived to be in breach of the Convention and they had exhausted all available domestic remedies.

35 According to the UK government, this is because of the importance that it attaches to parliamentary sovereignty: United Kingdom Human Rights Unit, Home Office, *Rights brought home: The Human Rights Bill*, White Paper, October 1997, para 2.13.

36 Such a declaration does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.

systems to that of Queensland—are explained in more detail in **Appendices B** and **C** of this report.

In assessing the impact (both positive and negative) that the above bills of rights have had, the committee has considered:

- the form of the bill of rights (in terms of entrenchment, enforceability and the rights they seek to protect);
- the circumstances surrounding the introduction of the bill of rights;
- the extent and effectiveness of other measures of protecting rights in the jurisdiction, both at the time of introduction of the bill of rights and since; and
- the practical impact and utility of the bill of rights in terms of who is benefiting, at what cost, and whether all categories of the rights introduced are being effectively protected.

The former committee had the opportunity to consider first-hand each of these aspects in relation to the *Charter* during its study tour to Canada. This committee has been able to reflect upon the notes of the meetings and much of the material gathered during that tour. It has also benefited from the continuing membership of a member who participated in that tour. The committee makes further reference to Canada's experience with a bill of rights as it addresses the threshold issue of whether Queensland should adopt a bill of rights in the chapter 4.

The committee does, however, make one overall comment as to these other jurisdictions. Whilst a bill of rights response may have been appropriate in one country, state or province with its legal and social idiosyncrasies and in light of prevailing local circumstances, it does not mean that a bill of rights will necessarily be an appropriate response in another jurisdiction.

2.7 SUMMARY

The question of whether Queensland should adopt a bill of rights is a complex one. At the outset, consideration must be given to what rights the bill might be seeking to promote, and to the form or features that the bill of rights might embrace. Decisions must be made as to whether any bill of rights should be enforceable or merely declaratory. If a bill is to be enforceable, against whom, by whom and how should the bill be enforced? Should a bill of rights form part of the constitution (and, if so, should it be entrenched) or, should it be in the form of normal legislation? What are the precise goals of the bill of rights? All of these issues are integral to any consideration of whether Queensland should adopt a bill of rights.

To date, no Australian jurisdiction has adopted a bill of rights despite a number of attempts to introduce one. In the company of other Western parliamentary democracies, Australia is somewhat unique in not having a bill of rights. This in itself, of course, is not sufficient reason for Queensland to adopt a bill of rights. Nevertheless, Queensland can gain considerable guidance from the experiences of other jurisdictions as to what might be achieved by adopting a bill of rights and at what cost. However, the circumstances surrounding the creation of bills of rights in those jurisdictions must equally form part of such consideration.

The need for a Queensland Bill of Rights and what such a bill might contain if introduced also relies on an assessment of how well rights are protected under existing arrangements in Queensland. The committee makes such an assessment in the next chapter of this report, as a preliminary but necessary step in its consideration of the arguments for and against a Queensland Bill of Rights.

3. EXISTING RIGHTS PROTECTION IN QUEENSLAND AND ITS EFFECTIVENESS

As a preliminary step in deciding whether to adopt a bill of rights in Queensland, it is relevant to analyse how individuals' rights are currently protected in the State and whether that protection is adequate. As submissions received by the committee showed, many people's view of the effectiveness of existing rights protection measures heavily influences—though not necessarily determines—their view on whether or not a bill of rights should be adopted to further preserve and enhance rights and freedoms. (Of course, other people see the two issues as quite distinct, being against a bill of rights even though they consider existing protections as inadequate, and vice versa.)

Many of the arguments for and against a bill of rights in a particular jurisdiction are likewise predicated on views about whether that jurisdiction currently provides for the proper preservation and enhancement of rights and freedoms.[37]

Therefore, the adequacy of existing rights protection is an important factor in assessing whether to adopt a bill of rights. But conclusions about the adequacy of existing protections does not itself answer the question of whether it is desirable to adopt a bill of rights.

To favour the introduction of a bill of rights, it must also be demonstrated that a bill of rights would produce tangible benefits without inordinate inappropriate costs. In addition, it should be able to be shown that:

- the bill of rights would actually be capable of fulfilling the objectives intended by the legislature in introducing it: and
- the bill of rights would be appropriate to the circumstances in Queensland.

The committee's attention therefore turns in the next chapter to the overall arguments for and against a bill of rights, before summarising the committee's conclusion on whether a bill of rights would be appropriate for Queensland.

3.1 EXISTING RIGHTS PROTECTION

As the committee discussed in its issues paper, various mechanisms operate in Queensland—such as constitutional rights, legislation, pre-legislative processes, the common law and international human rights law—to protect individuals' rights and freedoms. So too does the overall system of government (that is, a parliamentary democracy) within which these institutions and processes operate. In this section the committee briefly outlines these mechanisms, their sources and influences on them, by way of description only. Subsequently, in section 3.2, the committee assesses the adequacy of the mechanisms, particularly in terms of the combined protection they afford.

However, it is first helpful to describe some of the basic principles relating to our system of government before more specific rights protection mechanisms are discussed. These principles

[37] Accordingly, issues surrounding the adequacy of existing protections are also discussed in the next chapter dealing with the arguments for and against a bill of rights.

are: representative democracy; responsible government; federalism; parliamentary sovereignty and the separation of powers.

Our system of government. We live in a representative democracy. It is a principle that underlies and is reflected in the Commonwealth Constitution. It is also a characteristic of Queensland's constitutional arrangements. Both the State and the Commonwealth electoral systems ensure that the people, at regular and fair periodic elections, directly choose people to exercise legislative and executive power in their interest. Freedom of political discussion is fundamental to this system of representative democracy.

The principle of responsible government is the cornerstone of our constitutional system. Responsible government operates at both Commonwealth and State level. It means that the Crown (the Queen of Australia, represented by the Governor at State level and the Governor-General at Commonwealth level) exercises the executive powers vested in it on the advice of ministers who are selected from, and answerable to, the Parliament. Ministers remain in office only with the confidence of the Parliament and are responsible to the Parliament for the actions of the Crown. This ultimately means that government has, and must have, the confidence of the people.

Ministers are both individually responsible to the Parliament for the government departments that they administer and collectively responsible to the Parliament for what the government does.

As discussed in chapter 2, parliamentary sovereignty is another important constitutional concept. The legislative power of State Parliament is plenary. The words of s 2 the *Constitution Act 1867* (Qld) that Parliament may 'make laws for the peace, welfare and good government of the Colony in all cases whatsoever', grant the Parliament the widest possible powers to it as a sovereign legislative body. However, those powers are subject to restrictions, the most important of which is the Commonwealth Constitution which divides power in the federal system between two spheres of government.

In the federal sphere, the Commonwealth Parliament makes laws for the 'peace, order and good government of the Commonwealth' with respect to specified powers. Due to the division of power in Australia's federal system, mainly provided for in s 51 of the Commonwealth Constitution, the Commonwealth Parliament must make laws within the 'heads of power' listed in s 51.

The principle of parliamentary sovereignty suggests that, within the limits of the powers granted to it, the power of Parliament is supreme; Parliament can make and unmake laws as it sees fit, subject to the control or direction of no other entity. Subject to the federal system of government provided for in the Commonwealth Constitution and some other exceptions, the Queensland Parliament can be thought of in a general sense as operating under the principle of parliamentary sovereignty.

However, in relation to the Commonwealth Parliament, which operates under a written and entrenched Constitution, the principle of parliamentary sovereignty is of less relevance. The entrenched Constitution imposes various limitations on the Commonwealth's legislative power. The laws of the Commonwealth must be able to be characterised as being laws with respect to one of the Commonwealth's heads of power. The Commonwealth's law-making power is also granted 'subject to this Constitution' and is qualified by such restrictions in the Constitution as prohibiting laws that, for example, give preference to one state or part thereof over another (s 99) or establish, impose or prohibit any religion (s 116). The Commonwealth Parliament's legislative power is thereby subject to review in the courts. The High Court of

Australia is the ultimate arbiter of what the Commonwealth Parliament and Executive (and the State Parliaments and State Executives) can do under the Constitution.

Our system of government is also characterised by a separation of powers. The Commonwealth Constitution vests legislative, executive and judicial powers of the Commonwealth in three different branches of government with different personnel:

- legislative power is vested in the Parliament which makes laws;
- executive power is vested in the Executive Government which 'executes' the business of government and administers the law; and
- judicial power is vested in the Judiciary (the courts) which interprets the law and adjudicates on people's rights under the law.

The doctrine of separation of powers requires that no one of these branches exercise the powers or functions of another and that no one person is a member of more than one branch. In Australia, however, the separation of powers is not absolute. At Commonwealth level, the lines between the exercise of executive and legislative power become blurred. Nevertheless, there is a 'strict' separation of judicial power from the other Commonwealth powers, ensuring the independence of the judiciary in its role as a safeguard for liberty. At State level, there are no requirements in the Queensland Constitution for a strict separation of any of the powers, though in some cases, the Commonwealth Constitution might require a strict protection of State courts from executive or legislative power. In practice, government at State level can in principle be characterised as representing a separation of powers, particularly with respect to an independent judiciary.

Understanding these concepts and our system of government is important to appreciate:

- how the mechanisms mentioned in following discussion serve to protect rights, in themselves and in conjunction; and
- the discussion in chapter 4 as to the effect that the adoption of a bill of rights might have on the way in which our government operates.

How then are basic rights specifically protected in Queensland?

Systemic protections: Queensland as a parliamentary democracy. There is a certain systemic degree of rights protection in Queensland arising generally from the operation of the constitutional principles just mentioned in the State. The protection of rights and liberties is an integral role of Parliament, and of parliamentarians as they represent their constituents, as well as in their legislative role. Queensland has a system of representative democracy in which government must be formed from members of Parliament directly chosen by the people. The government's record of respecting individuals and minorities' rights is one of the matters that is—or, at least, should be—considered, by electors every three or so years as they participate in free and fair elections. In between those times, individuals and groups (such as public interest lobby and advocacy groups, community legal centres and welfare bodies) can make representations to members of Parliament or government organisations to respect or promote rights or to refrain from measures that restrict rights. They can make such representations without fear of reprisal.

The institutions and process of government, in particular Parliament, enshrine a tradition of preserving and enhancing individuals' rights and freedoms. In individual cases of government excess (where available appeals to Ministers, statutory tribunals or other review mechanisms prove unsatisfactory), individuals have ultimate recourse to an independent judiciary.

Constitutional guarantees: Commonwealth and State. In Australia, constitutional provisions mostly set out the respective roles, functions and powers of each branch of government. This is unlike the constitutions of some countries which additionally guarantee certain individuals' rights and freedoms in the form of a bill of rights. The Queensland *Constitution Act 1867* does not contain any provisions that are explicitly directed towards guaranteeing individuals' rights and freedoms. And, unlike in the United States or Canada, only a limited number of provisions in the Commonwealth Constitution expressly guarantee individuals' rights and freedoms; for example, s 116—freedom of religion; s 80—trial by jury; s 51(xxxi)—acquisition of property on just terms; and s 24—representatives to be directly chosen by the people.[38]

Traditionally, these 'rights' clauses in the Commonwealth Constitution have been very narrowly construed by the High Court of Australia and their applicability and effectiveness have been limited. However, starting with two cases in 1992,[39] the High Court found in the Commonwealth Constitution an *implied* freedom to communicate on political matters. The freedom arises from the principle of representative government and direct popular election that is implied from the Commonwealth Constitution. This implied freedom would operate to invalidate Commonwealth (and, as decided in a later case,[40] state) legislation that disproportionately limits it. Some members of the High Court have considered whether other rights might be implied in the Commonwealth Constitution, however, current jurisprudence does not conclusively settle the issue.[41]

Nevertheless, as indicated in the above discussion, constitutional requirements operate to protect individuals' rights in a general sense. Not only does the Executive have to exercise its statutory powers within the limits of the Acts of Parliament that grant those powers, but Parliament when enacting legislation must respect any applicable constitutional restrictions that bind it. When legislation made by Parliament does not conform to such binding ('entrenched') constitutional provisions, the courts can be called upon to declare the legislation invalid. At national level, all the provisions of the Commonwealth Constitution are entrenched—made supreme law—by s 128 of the Commonwealth Constitution. At State level, there are not as many entrenched requirements in the Queensland Constitution, though the State Parliament's powers remain subject to the requirements of the Commonwealth Constitution.[42]

Legislation. Parliament can directly provide for the protection of citizens' rights in specific pieces of legislation. Such legislation can be in the form of positive assertions of citizens' rights. Alternatively, it might be expressed as restrictions on government from doing certain things or be more procedural in nature, providing means of redress for aggrieved citizens.

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38 These provisions do not apply to the states. Two 'federal' provisions which do apply to the states and indirectly affect individuals' rights are s 92—free trade, commerce and intercourse among the states and s 117—prohibition against discrimination towards interstate residents.

39 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1*; Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. This implied right was confirmed in two 1994 cases: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. The Court has subsequently qualified the right. See, for example, *Langer v Commonwealth* (1995) 134 ALR 400 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

40 *Stephens v West Australia Newspapers Ltd* (1994) 182 CLR 211.

41 For example, in *Leeth v Commonwealth* (1992) 174 CLR 455 some members of the High Court embraced a constitutional right to legal equality. A number of implied rights were also considered in *Kruger v Commonwealth* (1997) 46 ALR 126.

42 That the courts via judicial review can call into question the validity of legislation made by Parliament is the flip-side of the concept of parliamentary sovereignty discussed at the beginning of this chapter. Also see the previous chapter for an explanation of entrenchment and the related concept of constitutionalism.

Important Commonwealth legislation operating in Queensland that serves to protect individuals' rights includes the: *Racial Discrimination Act 1975; Sex Discrimination Act 1984; Disability Discrimination Act 1992; Human Rights and Equal Opportunity Commission Act 1986;*[43] and the *Privacy Act 1988*.

Important Queensland 'rights' legislation includes the *Anti-Discrimination Act 1991* and the *Peaceful Assembly Act 1992*, and other statutes relating to administrative law that have equivalents at Commonwealth level: the *Parliamentary Commissioner Act 1974*; the *Judicial Review Act 1991*; and the *Freedom of Information Act 1992*.

Reference is sometimes also made to the protection offered by the *Magna Carta* 1215 (Imp) and the *Bill of Rights* 1688-9 (Imp).[44] These two pieces of imperial legislation are part of Queensland law, as recognised in the *Imperial Acts Application Act 1984* (Qld). However, as Solomon noted in a recent paper:

> *But several Justices of the High Court have said there are no rights of any substance arising from the Magna Carta. And the Bill of Rights was an assertion of parliament's rights against the Crown - the real basis of the sovereign British parliament. It had little or nothing to say about the rights of people vis-a-vis parliament.*[45]

Moreover, the *Magna Carta* and the *Bill of Rights* are not an entrenched part of Queensland's constitutional laws and, like ordinary legislation, they can (and have) been impliedly and expressly amended by later inconsistent legislation.

Pre-legislative measures. In addition to specific pieces of legislation that provide for rights, Queensland has introduced a process to help ensure that legislation generally is developed with individuals' rights in mind. The *Legislative Standards Act 1992* (Qld) requires that legislation must have regard to 'fundamental legislative principles' (FLPs). Particularly, these principles include that legislation must have 'sufficient regard to' both the rights and liberties of individuals and the institution of Parliament.[46] (The examples given in the Act in relation to rights and liberties of individuals[47] are replicated in **Appendix E** of this report).

Individuals cannot challenge legislation that has passed through Parliament on the grounds that it does not pay sufficient regard to the FLPs. However, before legislation is passed, compliance with FLPs is enhanced through the Queensland Parliamentary draftsman being required to advise the government and Parliamentarians on the application of the FLPs when legislation is developed,[48] and through the Scrutiny of Legislation Committee of the

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43 The ICCPR is reproduced as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986* although it does not form part of Australia's domestic law.

44 A number of submitters to the committee's inquiry stated that they believed that Queensland did not need a bill of rights because it already has one in the form of these pieces of Imperial legislation which still apply in Australia today: A Simpson, submission dated 8 November 1997; I McLeod, submission dated 8 November 1997; D Stanbridge, submission received 31 October 1997; P Mayhew, submission dated 12 November 1997; I McNiven, submission dated 14 November 1997; and Australian Civil Liberties Union, submission dated 14 November 1997.

45 D Solomon, 'Should Australia and its States have a Bill of Rights?', paper presented to the Boston, Melbourne, Oxford Conversazioni on Culture and Society, October 1996, p 2, as attached to Mr Solomon's submission dated 10 October 1997.

46 *Legislative Standards Act 1992* (Qld), section 4(1).

47 *Legislative Standards Act 1992* (Qld), section 4(3).

48 The parliamentary draftsman (the Office of the Queensland Parliamentary Counsel) is also to advise the government on alternative ways to achieve policy objectives: *Legislative Standards Act 1992* (Qld), section 7(g) & (h).

Queensland Legislative Assembly scrutinising bills and subordinate legislation for FLP compliance when they are introduced into Parliament.[49]

The common law and the judiciary. It is sometimes argued that Australia does not need a bill of rights because its common law (judge-made law) provides the individual with adequate protection. Our system of government is based on the rule of law which means that government and citizens alike are subject to the law and that nobody is above the law, regardless of their position or influence in society. The law is adjudicated and interpreted by an independent judiciary that attempts to ensure in a general sense that the legislative and the executive arms of government do not reach beyond their respective powers.

Moreover, , as judges adjudicate on the law, they also specifically aim to protect individuals' rights and freedoms from the excesses of the state.[50] This is reflected in such things as procedural safeguards guaranteed by the courts for defendants in criminal trials, and in natural justice protections applied by the courts in cases where the decisions and actions of bureaucrats have adversely affected individuals' interests. It is also reflected in common law principles that recognise that an individual may do as he or she wishes unless expressly prohibited from doing so by law, and in the principles of statutory interpretation such as that, in the absence of a clear intention to the contrary, legislation is presumed not to invade common law rights.[51]

International law. International law includes both formal agreements between states (such as the ICCPR and the ICESCR) and the principles of customary international law which is broadly the set of general principles of law that, due to widespread acceptance by a majority of civilised nations, show they are 'accepted as law'.

When the Commonwealth Government ratifies a treaty, the terms of the treaty do not become domestic law in Australia. Parliament must enact the terms of the treaty as legislation to change Australian law. However, international law can affect Queensland citizens in the following circumstances.

1. When the Queensland or Commonwealth Governments pass legislation based on international treaties, for example, the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights and Equal Opportunity Act 1986* (Cth).
2. When the Courts use international human rights law, where justified, to develop the common law. The above-mentioned common law predilection with individuals' rights and freedoms is becoming stronger—or, at least, more explicit—with the increasing 'internationalisation' of common law in Australia. The decisions of the superior courts in other countries are increasingly influencing Australian courts. To the extent that those other countries have bills of rights, that influence is rights-based. In addition,

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49 *Parliamentary Committees Act 1995* (Qld), section 22(1).

50 During his recent swearing in speech as Chief Justice of New South Wales in May 1998, the Hon J J Spigelman QC said: '*Finally, I want to emphasise the role of an independent judiciary as a bulwark of personal freedom, particularly against the hydra-headed executive arm of government, which history suggests is the most likely threat to that freedom*' [Emphasis added]. As reported in 'The new Chief Justice speaks on the profession and the judiciary', *Law Society Journal*, July 1998, pp 40-42.

51 In *FCT v Citibank Ltd* (1989) 85 ALR 588, French J at 614 said: '*The nature of this society, and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms. But where the natural meaning of the words is clear, the will of the Parliament must be respected.*'

international law *per se* is more heavily influencing Australian courts.[52] As His Honour Justice Brennan stated in the landmark *Mabo* decision: '*international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of human rights*'.[53] Other recent High Court decisions have suggested similar notions: that the courts, if existing law is ambiguous, can turn to international rights standards for guidance.[54]

3. When principles in ratified international instruments might need to be taken into account by State and Commonwealth Government decision-makers and policy-makers. In 1995, the High Court held that, subject to an executive or legislative indication to the contrary, people are sometimes entitled to expect that they will at least be heard if government decisions affecting their interests are going to be made without respecting the terms of international instruments ratified by Australia, especially in human rights matters.[55]

In addition, with Australia's accession to the First Optional Protocol to the ICCPR in 1991, Australians who have exhausted all their domestic remedies may complain to the United Nations Human Rights Committee (UNHRC) with alleged breaches of ICCPR rights. The UNHRC has determined that Tasmania's criminalisation of homosexual conduct was a violation of the right to privacy in the Covenant.[56] While such determinations by the UNHRC can stimulate domestic political agitation for change to the law (as indeed it did in the case of Tasmania's criminal law on homosexual conduct), they do not affect Australian law.

Some commentators have pointed to the possibility of an 'imported bill of rights' coming about as a result of the internationalisation of our law. Indeed, some commentators who have recognised this increasing adoption of international human rights standards in Australian courts have argued that the trend itself makes a good argument for actually introducing an Australian Bill of Rights. For example, Philip Alston has argued that, to mitigate against any undesirable consequences that might result from a possible imported bill of rights (eg uncertainty arising from the possible judicial adoption of any of a myriad of disjointed international jurisprudential influences in any particular case), Parliament should 'bite the bullet' and enact a bill of rights in the form that *it* desires.

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52 P Alston, 'An Australian Bill of Rights: By design or default?' in P Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law Human Rights and Equal Opportunity Commission, Canberra, 1994.

53 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

54 For example, Brennan J's statement in *Mabo* has been since supported by Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499, and by Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 147-148. See also comments by Gummow and Hayne JJ, and Kirby J in *Kartinyeri v The Commonwealth* (1998) 152 ALR 540 at 571 and 599 respectively.

55 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Successive federal governments have tried to displace this 'legitimate expectation' (regarding all treaties) by executive action (through issuing ministerial statements) and legislative action. In terms of legislative action, the former Labor federal government introduced the Administrative Decisions (Effect of International Instruments) Bill 1995 to give such an indication. The Bill lapsed in 1996, was re-introduced by the Liberal federal government but lapsed again with the calling of the 1998 federal election. There have been some questions about how effective these moves will prove to be.

56 *Toonen v Australia*, Communication No 488/1992 (UN Doc CCPR/C/50/488/1992). In May 1997, the UNHRC also found the four-year detention of Cambodian boat people by the Australian Government to be in breach of international law.

3.2 AN ASSESSMENT OF ADEQUACY: THE OVERALL 'FABRIC' OF PROTECTION

Criticisms can be levelled at each of the various processes and mechanisms outlined above with regard to their adequacy as rights protections. Many of these criticisms were brought to the committee's attention in submissions. In this section, the committee outlines and considers such criticisms.

The committee recognises that the protection of rights offered by the common law and by statutes are, in themselves, unsystematic and incomplete. Within the common law there is, for example, no right to such things as religious expression or to privacy. One submission to the committee stated that the '*gaps*' in the common law means that it can not be relied upon by the disadvantaged, vulnerable or powerless for comprehensive protection of fundamental human rights and freedoms.[57] Rights protection via legislation is, like the common law, also developed in an ad hoc and reactive manner.[58] A submission addressing the recognition of rights in legislation stated that such Acts '*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.*'[59] In addition, many submissions referred to various specific inadequacies in terms of rights within existing pieces of legislation (dealing with, for example, abortion, the environment, planning, etc).[60]

The committee also recognises that, because they are not comprehensive in themselves in protecting rights, the common law, existing statutory rights and constitutional rights suffer as avenues for public rights education. In particular, common law rights, in the words of one submission, '*remain relatively unknown - and perhaps even unknowable - among ordinary members of the public*'.[61] They also are '*not always the most useful tools in terms of ... having a capacity to provide forward looking assistance to State policy makers.*'[62] The committee values both education of the public in terms of rights, and education of law and policy makers so as to ensure principled, rights-conscious law and policy-making. Ways of supporting such values are discussed in chapter 5.

The committee agrees that existing common law rights have been, and continue to be, provided in a piecemeal manner. Nevertheless, the committee concurs with the observations in one submission that, especially in light of court decisions over the last five years, the common law generally is '*quite apt and able to advance rights*'.[63] (This trend, and the growing impact of international law on the common law, is discussed earlier in this chapter.)

The committee is aware that existing legislative rights have also been provided in a piecemeal manner. Parliaments at Commonwealth and State level should continually strive to enshrine certain citizens' rights in legislation. But it should also be recognised that the fact that certain

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57 Townsville Community Legal Service, submission dated 11 March 1998, p 2. Rights recognition under the common law was characterised by the ADCQ as being the '*luck of the draw*' of the issue coming before a court: submission dated 12 December 1998, p 5.

58 As argued in submissions to the committee from the TCLS, submission dated 11 March 1998; ICJ (Qld Branch), submission dated 21 November 1997; ADCQ submission dated 12 December 1998; QCCL, submission dated 28 November 1997.

59 Anti-Discrimination Commission Queensland , submission dated 12 December 1997, pp 6-7.

60 Submissions on these specific areas of the law are outlined in Appendix D which lists submissions on specific rights proposed in EARC's bill of rights.

61 International Commission of Jurists (Qld Branch), submission dated 21 November 1997, p 3.

62 Ibid.

63 Anti-Discrimination Commission Queensland, submission dated 12 December 1997, p 5. The ADCQ acknowledged this point while arguing generally against traditional notions that the common law does a good job at protecting rights and that the common law is the appropriate forum for rights protection: submission dated 12 December 1997, pp 2-6.

rights are currently not protected in legislation does not mean that such protection is desirable or appropriate. One of the reasons why some rights have not been put in legislation was because those rights—and expressions of their associated limits and exceptions—have been difficult to translate into statutory form. Attempts to do so have also been aborted for various reasons. Interest groups have, at times, been unsatisfied with the draft formulations of the rights. Politicians have, at times, been concerned about potential limitations to their legislative power. Constituents, have, at times, been suspicious about the motives behind such moves. Notably, the 1988 attempt to insert four express rights into the Commonwealth Constitution, including a strengthened freedom of religion, failed at referendum.

The committee also believes that the pre-legislative processes outlined above and the bolstered committee system of Queensland Parliament (both recent developments) have improved, and will continue to improve, the quality of Queensland legislation and help ensure that rights considerations are paramount when legislation is considered by Parliament. But, while the FLPs are considered when legislation is developed and when bills are checked for compliance by the Scrutiny of Legislation Committee,[64] FLPs do not represent a bill of rights, at least according to two submissions that asserted respectively:

> *The failure to entrench those 'fundamental legislative principles' such that they are a guideline but not a ground for challenge, makes them an ineffective method for the protection of individual rights.*
>
> *The 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.* [65]

Nevertheless, the FLP process has been successful. The committee responds to these submissions and takes the point regarding a wider educative role about rights within government further in chapter 5 of this report. In chapter 5 the committee also discusses how the observance of individuals' rights and liberties should be extended beyond the legislative process.

Some submitters also argued that the common law and ordinary legislation are flawed fundamentally as measures of rights protection because they can be overridden by subsequent Parliaments who can simply enact legislation to limit or take away an existing statutory right[66] or to reverse a judicial decision.[67]

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64 The Scrutiny of Legislation Committee also has certain 'monitoring' functions with respect to the requirements to prepare explanatory notes and regulatory impact statements. These functions and processes are discussed in more detail in chapter 5 of this report.

65 Respectively quoted from the QCCL, submission dated 28 November 1997, p 4 and the ICJ International Commission of Jurists (Qld Branch), submission dated 21 November 1997, p 3. Both of these submitters nevertheless saw the introduction of FLPs as a progressive measure.

66 QCCL stated that, while it had supported the introduction of such Acts as the *Freedom of Information Act 1992* and the *Peaceful Assembly Act 1992*, such ordinary Acts of Parliament '*can be overridden at any time'*: submission dated 28 November 1997, p 1. The Tharpuntoo Legal Service Aboriginal Corporation submitted that, for example, freedom from discrimination provided in legislation was an extremely important right to indigenous Queenslanders '*but all that is required to remove that right is a simple act of Parliament'*, submission dated 17 November 1997, p 4.

67 For example, in the *Wik* decision [*Wik Peoples v Queensland*, (1996) 187 CLR 1], the High Court recognised that Aboriginal people had certain native title rights in relation to land that had been subject to pastoral leases if they had had a continuing connection with that land. It is open to the Federal Government—subject to any applicable constitutional barriers—to modify or reverse the thrust of that High Court decision.

The committee acknowledges that the Queensland Parliament is able to reverse the decisions of courts that it finds unpalatable and that Parliament is able to override both the statutes of previous Parliaments and the unentrenched provisions of the Queensland Constitution.

However, any decision on behalf of the government to curtail fundamental rights is made subject to substantial political pressure not to do so,[68] and ultimate censure by the people at election if it does. The committee believes that, in the final analysis, the capacity of Parliament to curtail basic rights is the down-side of parliamentary sovereignty, which otherwise enables governments ultimate responsiveness and flexibility. Parliamentary sovereignty also enables new governments, with the approval of Parliament, to implement their election commitments (approved, it must be remembered, by the electors) in a full and complete manner. If one accepts that Queensland democracy in a general sense works well, it is appropriate for Parliament—as the direct representative of the Queensland people—to have the final say on what the law should be.

These various measures, along with the overall system of governance, add up—in the committee's view—to an effective, albeit complex, fabric of rights protection. This is all the more so in light of significant recent legislative developments in Queensland (much of which came about as a result of the recommendations by the former EARC). The establishment by statute of various institutions and procedures, in both executive and legislative processes also means that rights considerations are becoming more integral in the development of policy and legislation. This, combined with the various institutional and constitutional guarantees outlined above, means that individuals' rights in Queensland are currently protected via a wide range of avenues. To use the words of Williams in describing the rights protection at Commonwealth level, there is a:

> … *loose and sometimes overlapping web of protection* [that] *offers significant support for civil liberties and may act as an important legal and political barrier to a government wishing to breach fundamental rights.*[69]

However, the commentary continues:

> *However, the regime ... is inadequate. The protection offered is ad hoc and of limited scope. Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994 that: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community.'*[70]

The committee did receive submissions from community and 'minority' groups that concurred with former commissioner Burdekin's assessment that the protection of the rights of the disaffected in Australian society was especially inadequate. The Queensland Association for Mental Health (QAMH) submitted that '*the experience of people with mental illness clearly demonstrates the inadequacies of the common law and current statutes in protecting human rights*'.[71] The Women's Legal Service submitted that its law reform work and experience over the past 13 years shows that there is insufficient existing rights protection, and, indeed, that it:

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68 The scrutiny of legislation process can enhance this by making rights curtailment in proposed legislation more public.

69 G Williams, *Human Rights under the Australian Constitution*, forthcoming by Oxford University Press, p 23.

70 Ibid, referring to B Burdekin, 'Foreword', in Alston, op cit, p iv.

71 Queensland Association for Mental Health Inc., submission dated 27 November 1997, p 1.

'*clearly demonstrates that the common law and specific statute law has disadvantaged and discriminated against women*'.[72]

Children by Choice likewise submitted that the law has traditionally been poor in safeguarding women's rights.[73] The Gay and Lesbian Welfare Association (GLWA) listed various statistics on problems particularly faced by gay, lesbian, bisexual and transgender people and that they had limited legislative protection.[74] Tharpuntoo Legal Service Aboriginal Corporation talked of '*Queensland Indigenous people's history of dispossession, dispersal, cultural genocide and disadvantage.*'[75] The Townsville Community Legal Service (TCLS) stated that Aboriginal and Torres Strait Islander people are '*regularly denied such [human] rights in North Queensland.*'[76] TCLS also provided the committee with examples of incidents affecting the rights of children and young people, people of non-English speaking backgrounds and people with a physical disability.[77]

The committee acknowledges these submissions. The committee also notes the words of the 1988 Constitutional Commission after it assessed the nature of common law and legislated rights: '*This means that, for the most part, these rights and freedoms are legally protected only to the extent that the law-makers consider that they should be protected*'.[78]

The committee acknowledges that such a statement is true in a sense. However, the committee believes that both Australia and Queensland are free and fundamentally tolerant places where the respective Parliaments and the courts, in light of the social milieux and mores of the day, have done, and continue to do, a respectable job in assuring that citizens are given a 'fair go' and their rights are not prematurely undermined. There are no systematic denials of human rights. Parliamentary democracy in this State, with all of its various machinations, has served Queensland well and the committee is confident that it will continue to do so.

Thus, the committee considers that each of the various mechanisms or processes outlined above *in their own right* are not adequate in their protection of freedoms and liberties. However, in combination and within the overall operation of Queensland's parliamentary democracy and its associated political and institutional pressures, such mechanisms do operate to differing degrees and with different levels of enforceability to protect rights and freedoms. The committee notes the sentiments of the Senate Standing Committee on Constitutional and Legal Affairs expressed in its 1985 *Exposure Report on a bill of rights for Australia*: '*the current position in Australia in relation to observance of fundamental rights and freedoms is good but it is by no means perfect.*'[79]

The committee appreciates that conceptions about the sufficiency of existing rights mechanisms are necessarily imprecise. There will inevitably be disagreement. The processes and institutions themselves are inherently difficult to quantify, and assessing them in terms of rights protection is a process that is, to a degree, subjective. There is nevertheless in Queensland a certain safety net in terms of rights protection.

This 'web' or fabric of rights protection in Queensland does have deficiencies. In particular, the web of protection is a complex one, and aspersions that it is accordingly difficult for a

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72 Women's Legal Service, submission dated 28 November 1997, p 2.
73 Children by Choice, submission dated 30 November 1997.
74 GLWA, submission dated 25 November 1997.
75 Tharpuntoo Legal Service Aboriginal Corporation, submission dated 17 November 1997, p 2.
76 TCLS, submission dated 11 March 1998, p 6.
77 TCLS, op cit, pp 6-11.
78 Constitutional Commission, op cit, para 9.14.
79 Senate Standing Committee on Constitutional and Legal Affairs, op cit, para 1.11.

person to identify the sources and extent of their rights are justified. Nevertheless, the web does have discrete, real rights protection measures as its basis. The difficulty appears to be that people are not sufficiently aware of what those protections are.

In other words, it is the committee's perception that Queensland citizens do experience a sense of grievance when their 'rights' have been transgressed. And there are, within the legal and institutional frameworks in the State, real means of addressing many of those transgressions. However, many citizens are not aware of the avenues of redress open to them. The committee believes that citizens' knowledge of their rights and avenues of redress is clearly an area that needs to be further addressed. The committee discusses this matter further in chapter 5 of this report.

That there is scope for improving the existing web of rights protection in Queensland means that the option of a bill of rights requires serious consideration. But whether a bill of rights—in the form proposed by EARC or otherwise—is the *most appropriate* option to further preserve and enhance individuals' rights in this State is a separate issue, to which the committee now directs its attention.

4. SHOULD QUEENSLAND ADOPT A BILL OF RIGHTS?

Given the conclusion in the previous chapter that current rights protection in Queensland can be improved upon, the committee's focus now turns to whether a bill of rights is the most effective and desirable mechanism to further preserve and enhance individuals' rights and freedoms in Queensland.

4.1 ARGUMENTS FOR AND AGAINST A BILL OF RIGHTS

The main arguments for and against a bill of rights were set out in the committee's issues paper.[80] In summary, proponents of bills of rights claim that such bills (if enforceable) create a much-needed basis upon which individuals can challenge rights-infringing legislation and government action. In other words, a bill of rights provides individuals with a means to protect their position *vis a vis* the state or 'the tyranny of the majority'. The entrenchment of a bill of rights further ensures that Parliament is held to a paramount commitment to protect basic freedoms.

Even if not enforceable or constitutionally entrenched, a concise statement of citizens' rights can have an important aspirational and/or educative value.

On the other hand, critics of bills of rights argue that the transfer of power from the legislature to the judiciary (which constitutionally entrenched bills, in particular, effect): derogates from parliamentary sovereignty; is undemocratic; provides an avenue for the legislature to leave it to the judiciary to resolve politically-sensitive policy issues; and subsequently over-politicises the judiciary. The potentially enormous impact of a bill of rights—for example, the possibility of legislation being overturned by the courts, and the enormous amount of litigation potentially generated—is further seen as a compelling reason to refrain from introducing a bill of rights.

Detractors also question the utility of a bill of rights given the prohibitive costs involved for those wishing to enforce their rights in the courts (especially where they are constitutional rights), a barrier not present in the case of wealthy and/or corporate citizens who are subsequently seen as the real benefactors of a bill of rights.

Concerns also arise as to: the effective coverage of a bill of rights given a diminishing 'public' sector and an increasingly powerful private sector; which rights should be included in a bill of rights and how they should be expressed; which of those rights should be enforceable; and the effect of 'codifying' and 'freezing' the enunciated rights.

EARC came to the conclusion that the Queensland Parliament should adopt a bill of rights. EARC's reasoning in this regard might be summarised as follows.

- Without a bill of rights, individuals' legislated and common law rights and freedoms can be displaced or removed by Parliament and/or ignored by government authorities.
- A bill of rights will have a strong educative effect by declaring and clarifying the rights and freedoms of individuals in Queensland.

[80] Also see M Kirby, 'The Bill of Rights debate', *Australian Lawyer*, vol 29, no 11, December 1994, pp 16-21 for a concise summary of the arguments.

- Most significantly, a bill of rights is the only truly effective means through which people will have the power to enforce the most fundamental of their rights against whoever tries to remove or overturn them.[81]

Further, EARC saw this as a matter that should be attended to by the Queensland Parliament given that the Commonwealth Parliament does not have power to pass such a law other than by implementing an international treaty, and such treaties are not tailored to the specific needs of Australia.[82]

Submissions to the committee as to the desirability of a State Bill of Rights *vis a vis* a national Bill of Rights were divided. Dr Goodman submitted that common sense suggests that it is the wrong approach for Queensland to 'go it alone' at the State level.[83] The Women's Legal Service, whilst supporting the concept of investigating a bill of rights for Queensland, also thought that human rights and freedoms are so fundamental that they deserve protection at the national level.[84] The ACTU (Queensland Branch) submitted that, ideally, any Queensland Bill of Rights legislation should not be pursued in isolation to federal legislation, but that as the likelihood of such legislation being enacted at federal level remains slight, Queensland should proceed independently.[85] Mr Solomon submitted that Queensland should adopt a bill of rights as an example for the other states, noting that a State Bill of Rights is more likely to be successful than a national one because it would not involve dependence on the Commonwealth's external affairs power and subsequent opposition in terms of 'state's rights' arguments.[86]

However, this issue aside, what is not clear from EARC's report is *precisely* why it wanted to adopt a bill of rights and what it sought to achieve from a bill of rights. What was impressed upon the former committee in its discussions in Canada is that Queensland must be clear about the reasons why it wants to adopt a bill of rights and what exactly it expects to achieve from such a move.

This committee has carefully studied and deliberated upon both the general advantages and disadvantages of introducing a bill of rights (in the various forms) and in light of particular circumstances in Queensland. The committee has done this from both a theoretical and, more importantly, a practical perspective.

From a theoretical perspective the committee has considered the voluminous material on the issue of a bill of rights, including academic work and the various reports which have been written on this subject.[87]

However, what has been particularly important to the committee and what it has actively sought to achieve, is an appreciation as to how a bill of rights—in its various forms and with its various features—might operate on a day-to-day basis in Queensland. This committee, like its predecessor, is concerned that any attempt to further preserve and enhance individuals' rights and freedoms should be both workable and practical. The committee has had the opportunity to consider the bill of rights debate from this 'grass roots' perspective through the

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81 EARC rights report, op cit, p 52.

82 Ibid.

83 Dr Goodman, submission dated 6 November 1997, p 3.

84 Women's Legal Service, submission dated November 1997, pp 2-3.

85 ACTU (Queensland Branch) submission dated 18 November 1997, p 1.

86 David Solomon, submission dated 10 October 1997, and his October 1996 paper (op cit) attached to his submission.

87 Refer to the bibliography at the end of this report.

various discussions undertaken by the former committee in Canada on how the *Charter* affects everyday life in that country.

It is evident from the preceding discussion that one's acceptance of a bill of rights will most likely depend upon which features the bill is to contain. As previously stated, the committee believes that consideration of these various features must form part of, and not be subsequent to, the decision as to whether to adopt a bill of rights.

However, the committee also believes that the proponents of any particular bill of rights model must show that that bill of rights would achieve a *real* difference to the preservation and enhancement of individuals' rights and freedoms in Queensland. In other words, a bill of rights must *actually* provide citizens—particularly those in society whose rights are most at threat—with the ability to challenge legislative and governmental action that infringes their fundamental rights. To be an effective measure, this requires access to the mechanisms pursuant to which rights can be enforced. Rights on paper are vastly different to rights enforceable in practice.

Above all, a bill of rights must achieve this real difference without substantial, inappropriate social and economic costs. A bill of rights should serve to unite rather than divide the community.

The committee has a number of fundamental concerns with respect to the potential consequences that would flow from Queensland adopting a bill of rights. Some of these concerns stem from the committee's observations of Canada's and New Zealand's experience with bills of rights. These concerns are dealt with below under separate headings.

4.2 THE COMMITTEE'S SPECIFIC CONCERNS

4.2.1 Transfer of power to the judiciary

The primary concern that the committee has with respect to a Queensland Bill of Rights is the changes it is likely to make to the relationship between the legislature and the judiciary. The committee has considered the discrete ramifications which might become manifest in this regard.

<u>The erosion of parliamentary sovereignty</u>

There is little doubt that a constitutionally entrenched bill of rights would alter the nature of the relationship between the legislative and judicial arms of government. Whilst entrenchment would serve to ensure that the government and Parliament could not infringe rights for politically expedient motives, the flip side is that the judiciary's role and 'power' would be enhanced. This is because the courts could strike down legislation where it is found to be inconsistent with the bill of rights.[88]

The courts would also have significant 'power' in that they, rather than the legislature, would have the final say on the interpretation of the provisions of the bill. The courts' decision or interpretation would then not be reviewable by Parliament except where Parliament passes amending legislation in compliance with special procedures such as passing a vote by special majority or putting the proposed changes to the bill of rights to a referendum. In the absence

[88] In Queensland, the relevant court would be the Supreme Court of Queensland in the first instance and the High Court of Australia on appeal (by leave).

of such measures being successful, any subsequent modification to a particular court's interpretation of a particular right will depend upon that court or a higher court having an opportunity to reconsider the matter.

The potential consequences of this transfer must be considered in light of the fact that referendums are expensive and historically have been prone to failure. Depending on political realities at the time, it may also be difficult to secure a special majority vote of the Parliament. Thus, rights matters would, in practice, finally rest with the judiciary rather than the legislature in most cases.

The Canadian experience illustrates that there can indeed be a substantial transfer of power from the legislature to the judiciary. There is much disagreement amongst Canadian experts and commentators about the extent and appropriateness of this enhanced role for the judiciary. Some believe that the change has been moderate and that the role of the judiciary has not been fundamentally changed; rather the basis upon which courts can exercise judicial review has broadened. Indeed, Penner suggests that '*a constructive relationship between the judiciary and Parliament*' has developed in Canada.[89]

However, other commentators argue that parliamentary sovereignty should prevail; that is, Parliament is entitled to make or unmake whatever laws it sees fit and that no person or body (including the courts) should have the right to amend or set aside the legislation of Parliament.

Detractors of bills of rights also argue that any such alteration in the relationship between the judiciary and legislature would be 'undemocratic' because it would effectively transfer the power to determine the nature and scope of protection afforded by a law from elected representatives of the people—the legislature—to members of the judiciary who are appointed and not *directly* accountable to the people. (Although, the judiciary is 'accountable' in the sense that decisions by its members must be supported by full reasons, made public and are subject to review by courts of appeal.)

Acceptance of the argument that this shift is undemocratic depends on one's concept of democracy. As Toohey J has noted:

> *Yet democracy need not be defined narrowly to mean no more than majority rule. Rather, it might be regarded as involving recognition of a range of fundamental principles concerning the manner in which people exercise power over each other for common purposes, of which majoritarianism is just one principle, equally fundamental with others, but not necessarily more so.*[90]

Supporters of the *Canadian Charter* argue that any transfer of power to the judiciary which has been effected in Canada is, in fact, democratic because the people (represented by their elected representatives) in an open and democratic process enacted the *Charter*.

New Zealand's experience with a statutory bill of rights also indicates that a bill of rights need not be constitutional in form to effect a significant transfer of power. The New Zealand courts have embraced that country's bill of rights so as to give it almost quasi-constitutional status.

The legislatures in those jurisdictions which have bills of rights have also been accused of engaging in 'buck passing'; that is, leaving harder, politically-sensitive or fundamentally moral

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89 R Penner, 'The Canadian experience with the Charter of Rights: Are there lessons for the United Kingdom?', *Public Law*, Spring 1996, p 123.

90 As cited in B Horrigan, 'Is the High Court crossing the rubicon?- A framework for balanced debate', *Public Law Review*, vol 6, 1995, p 303.

issues for the judiciary to resolve.[91] As one commentator recently noted of the US Bill of Rights:

> *The United States bill of rights has probably given politicians greater licence over time to pass the buck to judges. It has allowed the legislative process to be more loose and inconsistent. Politicians can pass laws for the display of the Ten Commandments knowing they will be struck down. They can promise to ban abortion even in cases of rape knowing that the courts will not permit it. Meanwhile, they satisfy their more fundamentalist constituents.*[92]

A number of submissions to the committee agreed that a bill of rights would bring about an inappropriate change to the current relationship between the legislature and the judiciary, or as one submitter stated, a bill of rights would be contrary to '*our whole democratic system*.'[93] On the other hand, the Anti-Discrimination Commission Queensland did not envisage that a bill of rights would necessarily detract from the supremacy of Parliament. In the Commission's view, Parliament itself would be the initiator by enacting the bill of rights which is consistent with the fundamental rule of parliamentary supremacy. Further, the Commission stressed that the judiciary has always had a substantial law-making role independent from that of the legislature.[94]

The effect of the judiciary resolving politically-sensitive issues

In addition to concerns over the fact of this transfer of power, there is a concern that a bill of rights will mean that the judiciary will, inappropriately, be increasingly asked to make 'policy' decisions.

It is widely recognised that judges have always determined matters of 'policy' in the judicial decision-making process. This is particularly so in constitutional interpretation. However, apart from matters which it is clearly improper for judges to take into account (such as personal biases as opposed to community values), considerable disagreement surrounds the scope of 'acceptable' policy consideration by the judiciary. Some question the ability of judges to consider certain matters of policy (particularly those involving socio-economic judgments) given their limited access to resources on which such policy decisions would usually be made. Others point out the environment it creates for members of the judiciary to import their own personal values into their decisions.

Detractors of the *Canadian Charter* have noted that one of the *Charter's* consequences has been that Canadian judges have found themselves making decisions which belong in that realm of 'policy' which properly belongs with the legislature.[95] In particular, concerns have been raised in Canada about the judiciary's ability and resources to decide questions concerning

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91 K M Weiler, 'Of courts and constitutional review', *Criminal Law Quarterly*, vol 31, 1988-89, p 121, as cited in G Ferguson 'The impact of an entrenched Bill of Rights: The Canadian experience, *Monash University Law Review*, vol 16, no 2, 1990, pp 211-227, p 225.

92 Brennan, op cit, p 8.

93 For example, the submissions of: H R Slaney, dated 24 October 1997, p1; B J Clarke, dated 14 November 1997, p 5; and B Galligan, dated 24 November 1997, p 1.

94 In this regard, the Commission referred to the area of torts law which was initiated and wholly developed by judges: ADCQ, submission dated 12 December 1997, p 3.

95 Y-M Morissette, 'Canada as a post-modern Kritarchy', *Australian Law Journal*, vol 72, April 1998, pp 294-302.

rights.[96] Courts do not have the capacity to conduct fieldwork or other non-legal research, nor do they have the ability to identify and seek representation of unrepresented interests.

In 1992, Sir Gerard Brennan, then Chief Justice of the High Court, observed when discussing whether Australians would want a bill of rights administered by the courts, that it was:

> *… no light thing to strike down a law or an executive act which one of the political branches of government, armed with information and experience much wider than the court can muster, has deemed to be justifiable.* [97]

There have also been allegations that Canadian judges when placed in the position of adjudicating *Charter* matters have not sufficiently divorced their personal values from community values and that their values are not those of society in general. One commentator stated the position as:

> *While judges officially adhere to the theory of judicial neutrality in applying the Charter, they continue to impose their own values and priorities, those of the elite.*[98]

Experience in Canada has also shown that by judges making 'policy' decisions, there is greater potential for more 'controversial decisions', or decisions which have significant repercussions for society. (Examples of far-reaching Canadian court decisions are given in the next section under the heading 'The enormity and uncertainty of a bill of rights'.) Judicial appointments therefore might become a highly political issue, threatening the independence of the judiciary. The perception that judges are political appointees as opposed to impartial adjudicators can, in turn, impair public confidence in the judiciary. Thereby, the high regard in which the community holds the judiciary can be undermined.

The Canadian judiciary has been characterised by some as being politicised. One commentator noted that s 1 (the 'justified limitations' clause in the *Charter*):

> *...is capable of plunging judges into the cauldron of "small p" political controversy, because it necessitates an examination and prioritisation of competing social policy goals in order to determine the reasonableness of particular limits. Judicial discomfort with the prospect of such controversy has undoubtedly influenced the way section 1 has been interpreted and applied.*[99]

The same commentator also suggests that some judges may dispose of *Charter* rights arguments at the definitional stage to avoid entering the political sphere surrounding 'justified limitations' considerations.[100]

Many consider that if the judiciary is to have this enhanced role, then the system of appointing and educating judges must also be reviewed.

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96 Ferguson, op cit, p 226. However, Penner notes that judicial education programs which previously dealt with developments in the more procedural aspects of the law now deal with issues concerning rights: Penner, op cit, p 115.

97 Sir G Brennan, 'The impact of a bill of rights on the role of the judiciary: An Australian response', Human Rights Conference, 16 July 1992, University House, Canberra, p 3, as cited in F Brennan, op cit, p 32.

98 Ferguson, op cit, p 224.

99 D Gibson, 'The deferential Trojan horse: A decade of Charter decisions', *Canadian Bar Review*, vol 72, no 4, December 1993, pp 417-455, p 435.

100 Ibid.

The Queensland Council for Civil Liberties in its submission to the committee's inquiry stated that it did not believe that a bill of rights would result in the politicisation of the judiciary stating that: '*The courts would still face the same policy issues which they confront at present in adjudicating difficult issues which impinge upon individual rights and freedoms*'.[101]

However, EARC noted in its report that the majority of submissions it received anticipated that the judiciary would be politicised by a bill of rights. EARC's consideration of this issue led it to conclude that if a bill of rights was adopted in Queensland as it proposed, then it would be necessary to secure the independence of Queensland's judiciary. EARC recommended that the Queensland Constitution be amended accordingly.[102] However, EARC failed to address this important issue with any specificity; making no comment in its report as to matters such as: the manner in which judicial appointments might subsequently be made; how there might be some guidance provided to judges in their consideration of policy issues; and, critically, what additional resources may need to be provided to the judiciary in this new role.

The committee's conclusion

The committee is concerned as to the potentially significant impact that an enforceable bill of rights—particularly a constitutionally entrenched but also a statutory one—would have in transferring power from the legislature to the judiciary.

In particular, the committee is concerned about the erosion of parliamentary sovereignty. The committee believes that the legislature, consisting of parliamentarians as the elected representatives of the people, has the primary function of making laws for the State on all matters including rights. The legislature is directly accountable to the people for its decision-making on rights matters via periodic elections.

This is not to say that the committee does not recognise the role that the judiciary plays with respect to law-making as a consequence of interpreting and adjudicating upon the laws made by Parliament. The committee has already indicated its support for judicial protection of rights and freedoms through the common law. However, a bill of rights enforceable by the courts proposes a radical change to our tried and proven system of government.

By the same token, the committee believes that, since the legislature has important legislative functions for which it is accountable to the people, it should not be able to excuse or absolve itself from those responsibilities by effectively referring difficult issues to the judiciary. A bill of rights would provide the legislature with an avenue to do this.

The committee also has serious concerns about the ramifications of this transfer in terms of the nature of issues that the judiciary would be asked to adjudicate upon. As the preceding discussion highlights, judges would be considering more controversial policy-type issues, some of which would have wide-ranging implications for large sections of the community. This, the committee feels, is inappropriate as it could leave members of the judiciary open to the criticism of applying personal values in their decision-making, moreso if those personal values are perceived as those of the elite and not in accord with the general community.

More importantly, the committee agrees with the argument that the judiciary is not well equipped to appropriately make far-reaching social and economic policy decisions. The courts simply do not always have all the relevant information before them. The Parliament's role is to

[101] QCCL, submission dated 28 November 1997, p 2.
[102] EARC, rights report, op cit, pp 62-63.

make laws. The government, which introduces laws into the Parliament, has the benefit of a substantial amount of information and expertise in formulating laws. Laws, once introduced in Parliament, are then subject to parliamentary scrutiny.

The Queensland Parliament's capacity to scrutinise proposed laws has been recently enhanced with a bolstered parliamentary committee system. In particular, the Scrutiny of Legislation Committee, which forms part of this system, assists the Parliament by considering the application of FLPs (which include the rights and liberties of individuals) to particular bills and particular subordinate legislation. The committee believes that this is an important mechanism in ensuring the preservation and enhancement of individuals' rights and freedoms by the legislature. The Queensland Council for Civil Liberties submitted to the committee that, while the FLPs should have been entrenched so they acted not just as a guideline but as a ground for challenge, the Scrutiny of Legislation Committee '*is to be commended ... for its endeavours in seeking to bring to the attention of parliamentarians legislation which breaches the fundamental legislative principles.*' This system was not in place at the time when EARC handed down its rights report recommending that Queensland adopt a bill of rights.

Parliamentary committees, amongst other matters, also provide Parliament with a means to undertake further research into particular areas and programs so as to improve upon the quality of legislation. The implementation of an estimates process in which government expenditure on budgetary programs (including those which affect rights) is scrutinised has also been introduced since the date of EARC's report.

Finally, the committee sees a very real threat of the judiciary becoming politicised if it is frequently called upon to make potentially controversial policy decisions. Whether or not this occurs in reality, if the community *perceives* that judicial adjudicators are not impartial but political appointees then the independence and integrity of the judiciary will potentially be undermined.

An alternative approach is to make any Queensland Bill of Rights enforceable by an entity other than the courts. Such a non-judicial entity would not be able to strike down legislation but could have recommendatory, investigative and/or determinative powers. For example, alleged infringements of the Australian Bill of Rights Bill 1985 were to be investigated by a Human Rights Commission.

If Queensland was to adopt this approach, either a new body would have to be established to fulfil this function or additional resources would have to be granted to an existing body. The committee believes that a more effective allocation of resources would be to try and prevent rights infringements occurring in the first place. In particular, such allocations could be directed to programs which aim to financially support or otherwise empower the very individuals and groups which a bill of rights would aim to protect.

4.2.2 The potential enormity and uncertainty of a bill of rights

An issue which follows on from the transfer of power to the judiciary is consideration of the potential impact of a bill of rights on society in general. Again, the experience from other jurisdictions is instructive in this regard.

The *Canadian Charter* has been described as '*the most significant legal development in Canada since confederation*'.[103] This is despite predictions by some that the *Charter*'s impact would be limited for reasons including that many of its values already existed in Canada's law.

[103] Ferguson, op cit, p 212.

The Supreme Court of Canada's initial activist and liberal interpretation of the *Charter* (subsequently followed by the lower courts) is reflected in the following figures:

> *Between 1982 and 1988, the Supreme Court of Canada nullified eight federal and 12 provincial statutes for violating the Charter. It upheld 16 federal and 15 provincial statutes during the same period. Provincial appellate courts, on the other hand, struck down 82 statutes, or statutory provisions for Charter violations between 1982 and 1988. In some cases, the legislation struck down was politically very sensitive.*[104]

Over 4,000 cases involving the *Charter* were reported between 1982 and 1990, 100 of which involved the Supreme Court of Canada.[105] The *Charter*'s greatest impact has probably been in the area of the criminal law where, as a result of the *Charter*, much of the law has been recast. At least 75% of *Charter* cases deal with matters such as substantive criminal law, sentencing, police and prosecutorial procedures, and evidence.[106] The 1992 Supreme Court of Canada decision in *R v Askov*[107] is an instructive example of one court decision having enormous ramifications. In that case, the Court considered what might constitute unreasonable delay with respect to the *Charter* right 'to be tried within a reasonable period' and held that delay caused by inadequate institutional resources would not necessarily be excused. The decision resulted in a total of 51,791 charges in the province of Ontario alone being stayed between October 1990 and November 1991 (9% of all charges) as a result of 'unreasonable delay'.[108]

In other areas the *Charter* has been used to challenge abortion laws,[109] invalidate restrictions on political activity of public servants,[110] and strike down laws regarding matters such as the exclusive use of the French version of company names in Quebec[111] and prohibiting Sunday trading.[112] Further uncertainty for the fiscal management of the State—in the way of potential court challenges to regulatory schemes—is discussed below.

There is debate as to whether the Canadian Parliament actually realised the full implications and scope of this transfer of power in 1982.[113] In addition, some commentators note that the focus at the time was on national unity and patriation of the Constitution, rather than on a new, enhanced role for the judiciary.[114]

The impact of the *Charter* stands in stark contrast to the Canadian *Bill of Rights Act 1960* which had operated as a non-entrenched statutory bill of rights since 1960. This statutory bill of rights received a lukewarm response from the Canadian judiciary. The courts failed to refer to the Act as a matter of course and applied its provisions in only a relatively limited number of cases which dealt with potential infringements of individuals' rights.

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104 Ibid, p 222.

105 Naturally, there was also many unreported cases in the various courts.

106 Some commentators view this as acceptable given that the criminal law is an area for which an entrenched bill of rights is vital and is less likely to involve the courts in political decision making: for example, Ferguson, op cit, pp 223-4.

107 [1990] 2 SCR 1199.

108 The figure of 51,791 is from a letter dated 7 May 1997 to the committee from the President of the Criminal Lawyers' Association of Ontario, Mr Bruce Durno, following the committee's meeting with the Association in April 1997. Mr Durno advised that Ontario Attorney-General's Office had confirmed the figure as being the number of charges stayed between 22 October 1990 and 29 November 1991.

109 *R v Morgentaler* (1988) 37 CCC (3d) 449.

110 *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69.

111 *Ford v Quebec* (AG) [1988] 2 SCR 712.

112 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321.

113 Ferguson, op cit, p 214.

114 Ibid.

However, New Zealand has had a different experience with its statutory bill of rights. The 1990 *New Zealand Bill of Rights Act* has been truly embraced by the New Zealand courts, despite its critics who saw its non-entrenched status (which refrains the courts from holding legislation inconsistent with the bill invalid) as potentially rendering it ineffective.[115]

In the first two years following its enactment, the *New Zealand Bill of Rights Act* had featured in more than 150 superior court decisions and had been cited regularly. As one commentator has noted:

> *But for all its modest beginnings, the Bill of Rights has become an integral and evolving part of our law and jurisprudence. The New Zealand courts have embraced the measure with a "generosity of spirit" fully deserving of a constitutional instrument. They have declared a three-fold commitment: to "make the Act work"; to develop new remedies when necessary for vindicating rights and to consult international human rights standards and for giving content to rights.*[116]

Again, arguably, the greatest impact of the bill of rights has been in the area of criminal law and, more particularly, criminal procedure and rights upon search, arrest and detention.[117] However, cases also disclose that the effect of the bill has extended to matters such as peaceful assembly, freedom of the press, the right to refuse medical treatment and the right to privacy.

The experience of these jurisdictions highlights that, to a large extent, the impact of a statutory bill of rights—and any consequential transfer of power to the judiciary—will depend upon the attitude and approach of the judiciary in its interpretation of the bill of rights. A Canadian Professor of Law informed the former committee that, along with the *Canadian Charter*, the *New Zealand Bill of Rights Act* shows that, if Queensland were to adopt a bill of rights, it 'would take on a life of its own.'

In the committee's opinion, this unknown variable merely adds to the unpredictable outcome of a bill of rights. And, as already discussed, the Parliament's ability to readily reverse or modify this potential outcome is restricted. In the case of an entrenched bill of rights, it would require fulfilment of a special procedure, such as a referendum or special majority vote of the Parliament, to overturn any decision of the courts regarding the bill. In the case of a bill of rights enacted as ordinary legislation, it would require the political 'nerve' to overturn a 'rights' decision of the court. Should the Queensland Parliament enact such a fundamental law when it does not know—and will not, without using special procedures, be able to rein in (if the bill is constitutionally entrenched)—its consequences?

While the Bar Association of Queensland in its submission to the committee did not take a stance on a bill of rights on behalf of its members, the Association nevertheless stressed the extensiveness of what EARC was proposing in its draft Bill of Rights 1993:

> *The draft Bill is intended to over-ride ordinary State legislation (s.6) and (subject to important exceptions) to be enforceable against all persons performing public functions (s.4). It confers jurisdiction on the Supreme Court of Queensland to enforce those rights which the Bill requires to be observed by persons.*
>
> *The draft Bill, being a proposal which expressly and intentionally results in an alteration to the Statute Law of Queensland, should not be regarded as merely a*

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115 W Mapp, 'New Zealand's Bill of Rights: A provisional assessment', *Agenda*, vol 1, no 1, 1994, pp 81-89, p 87.

116 P Joseph, The New Zealand Bill of Rights', *Public Law Review*, vol 7, no 3, 1996, pp 162-176, p 162.

117 *NZ Bill of Rights Act 1990*, ss 21-23.

> *general reaffirmation of existing principles, not intended to have specific consequences. Its practical implications may be far reaching. Upon Parliament conferring a statutory jurisdiction on the Courts to give effect to a substantive application of rules, such as those proposed by the draft Bill, the Courts will (correctly) consider themselves obliged to exercise, and exercise widely, the jurisdiction conferred.*

EARC failed to address these potential consequences of a bill of rights in its rights report (eg adequate court resourcing), although EARC did propose that the bill of rights operate for a trial period of five to seven years before entrenchment. Yet, clearly, the potential enormity of a bill of rights and the uncertainty which may evolve as a result is matter which must be given very serious consideration. A necessary part of this consideration is the correlation of this *impact* with the intended *objectives* of the bill of rights. As mentioned above, a matter which the former committee was consistently advised to consider whilst in Canada was what was sought to be achieved by the introduction of a bill of rights.

For example: Is the bill of rights supposed to be about enhancing the position of minorities and people who are socially disaffected (the purpose of a general equality clause)? Is the bill about securing a clean environment, proper education, social welfare or other social objectives (social, economic and cultural rights)? Or should the bill focus on assuring access by individuals to parliamentary democracy (civil and political rights) or securing the rights of everyone that is detained or arrested (legal rights)? Alternatively, should the bill be really about improving the quality of the administrative actions of government officials (procedural and review provisions)? Or improving the quality of legislation that comes out of Parliament (by providing pre-legislative standards) or, ultimately, enhancing the prospect of good governance of the State in a rights-conscious way (by all these things, and through the ability to challenge the validity of laws that infringe rights)?

Again the committee is unable to discern from EARC's report EARC's priorities in wanting Queensland to adopt a bill of rights.

If Queensland is not clear about the objectives it is seeking to achieve with a bill of rights, it might introduce a bill that is internally self-contradictory and one that is inconsistent, confusing, and ineffective in operation.

4.2.3 The cost of a bill of rights

One of the major concerns that the committee has with respect to a bill of rights enforceable in the courts—whether a statutory or, particularly, a constitutional bill—is the costs involved. These costs, which can be categorised as costs to the individual and costs to the public or society, are significant and arguably inordinate to the benefits achievable through a bill of rights.

Cost to individuals. The committee has stressed throughout this report the importance of the practicality or utility of a bill of rights. One of the major factors the committee sees as detracting from this goal is the cost to an individual in enforcing their rights under the bill. From the individuals' perspective, this cost can be expressed in terms of: the financial cost in enforcing the right in the courts or other fora; costs of delay in having alleged rights infringements addressed; and psychological costs in having to mount a prolonged public court action over what might be a highly private matter.

Of particular concern to the committee is the financial cost involved in mounting a bill of rights action. Prohibitive legal costs will by necessity have a very negative impact on the utility

of a bill of rights. This concern is compounded by the fact that Australia's legal system is already criticised for matters such as being slow, expensive, mystifying, unnecessarily formal and technical. Someone mounting a *Charter* challenge to the validity of legislation in Canada '*must expect legal bills equivalent to at least $50,000, and more if the decision is appealed*'.[118]

One answer to this problem would be to simultaneously establish complementary funding for bill of rights litigation to those persons who most need bill of rights protection. However, there are practical limits to the extent that government is able to subsidise legal fees. In addition, it is arguable that such allocated funding could be more usefully employed in addressing the social inequities which lead to rights infringements in the first place.

In Canada, the federal government established the Court Challenges Program to provide independent funding and advice for important *Charter* challenges to federal legislation. The program assisted community and advocacy organisations (one of the most prominent being the Women's Legal Action and Education Fund) to undertake *Charter* advocacy on behalf of their respective members. However, similar programs were never introduced at provincial level and the federal program was terminated in 1992.[119]

The committee would suggest that any Queensland Bill of Rights, particularly one that contained social or economic rights, would need to be accompanied by allocations of substantial funding for public interest litigation if the bill was to be effective in enhancing social and economic rights. But the committee's point remains that such funding would be better directed at the 'coalface'; that is, programs that directly target the causes of social economic inequity and disadvantage in society.

Public cost/cost to society. The committee is also concerned that other wider, more public costs would arise from the introduction of a bill of rights. These costs would include the price of providing the court machinery to support bill of rights challenges. For example, since the *Charter* has been introduced in Canada, there is a backlog of cases to be heard in the courts. This backlog is at least partly attributable to the complexity of *Charter* challenges and the associated likelihood of the joinder of interested parties given the potentially wide social and economic, let alone legal, ramifications of *Charter* decisions. The length of time to deliver judgements has grown for similar reasons.

There is also the possibility that, depending on the manner in which the judiciary interprets the bill, there will be unforseen, significant fiscal consequences for society in general. The former committee heard that the costs and task of regulating industry, business, insurance and the professions in Canada is now more difficult since it must be done in a way that avoids potential *Charter* challenges. Entire regulatory schemes (designed for general public benefit) might collapse upon the successful challenge to the scheme from one individual whose *Charter* rights are adversely affected by it. One commentator suggests that legislation which might be challenged by a well-financed interest group cannot be introduced until the government allocates funds for subsequent *Charter* litigation.[120]

In its report, EARC did not consider the many costs of a bill of rights and, in particular, the impact that these costs may have upon the utility of the bill. There is a vast difference between having a statement of rights and having the means to be able to enforce the rights granted by

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118 T Ison, 'A constitutional bill of rights: The Canadian experience', *Modern Law Review*, vol 60, no 4, July 1997, pp 499-512, p 503.

119 Gibson, op cit, p 422.

120 Ibid, p 504.

that statement. The impact of the introduction of a bill of rights in terms of exacerbating existing court costs and delays should also form a vital part of determining whether Queensland should adopt a bill of rights.

Foremost, the committee is concerned that the cost to bring actions will selectively, and inappropriately, determine who benefits from a bill of rights. If enforcing rights under a bill of rights is expensive, then access will be largely restricted to the wealthy or corporate citizen or perhaps, at the other end of the scale, the indigent individual who qualifies for legal assistance. Those who fall within the vast 'middle range' will effectively be denied the ability to enforce their rights due to purely financial reasons. Indeed, as is discussed in the next section, the Canadian experience seemingly validates this observation.

4.2.4 The real benefactors of a bill of rights

As noted above, if the costs involved in enforcing rights pursuant to a bill of rights are high, then the real benefactors of the bill of rights are the ones who can afford to access the courts. These are generally corporations and the wealthy.

In Canada, some commentators argue that the *Charter* actually *reinforces* a socially inequitable status quo and *promotes* the values and interests of the socially and economically powerful. For example, whilst the courts have held that the benefits of the *Charter* apply to corporations (many of which have the resources to enforce their *Charter* rights), corporations are not bound by its obligations.[121] Wealthy, advantaged interest groups have also been accused of hindering progressive governments' attempts at legislative reform by mounting *Charter* challenges to such reforms.[122] Thus, a bill of rights can be a double-edged sword. It can be a vehicle for socially progressive reform. But it can also be a weapon against such reform wielded by powerful groups with vested interests.

The *Charter* has also been accused as responsible for the concentrated private corporate interest receiving (particularly via the courts) disproportionate sway to a 'dissipated public interest'. As one commentator noted:

> *About the only groups in society that have clearly benefited from the Charter are constitutional and criminal lawyers, drug traffickers and transnational corporations. The Charter might also meet the needs of any politician or official who needs to explain inertia.*[123]

This potential consequence greatly concerns the committee.

Similarly, the former committee heard from a number of people whilst in Canada that, despite the *Charter*, there has been a significant erosion in Canadian health, tertiary education and welfare programs at both federal and provincial level since 1982. Some suggest that this has resulted from fiscal restraint rather than being any result of the *Charter*.[124] Nevertheless, the committee notes that the *Charter* has not always operated to protect and enhance social and economic rights asserted by minority groups.

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121 Ibid, p 503.
122 Ferguson, op cit, p 225.
123 Ison, op cit, p 511.
124 Penner, op cit, p 111.

To the extent that the *Charter* seeks to ensure any equitable sharing of societal resources, it is through the Charter's constitutional guarantee of equality rights in s 15[125] (and perhaps through the guarantee of security of the person in s 7). The *Charter* does not contain a list of explicit references to social and economic rights.[126] This might be compared with EARC's proposed bill of rights which enunciates a wide array of social and economic rights, albeit as guiding principles rather than enforceable guarantees.

Nevertheless, in 1982 when the *Charter* was introduced, many human rights advocates and community organisations had high expectations for s 15 and its potential to improve the position of women, the disabled, people of different race,[127] and gay men and lesbian women in Canadian society. However, while some of the people that the committee met with in Canada suggested that s 15 had been (or was evolving to be) beneficial to minority groups, most of them expressed disappointment about what s 15 had achieved. At best, it was suggested that s 15 had been a 'mixed success' for minority groups.

While this perception might to a degree be a function of the high level of initial expectation, the level of disappointment expressed to the committee about what s 15 had actually achieved serves as a reminder that a bill of rights in this State will not be a panacea for all social and economic inequities.

There have been unsuccessful moves in Canada to enshrine social and economic rights in the Canadian Constitution. In particular, in 1992 the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada proposed a 'Social Covenant', recommending a new s 36.1 of the *Constitution Act 1982* (that is, not an amendment to the *Charter* itself). The new section '*would commit governments to fostering the following social commitments: (a) comprehensive, universal, portable, publicly administered and accessible health care; (b) adequate social services and social benefits; (c) high quality education; (d) the right of workers to organise and bargain collectively; and (e) the 'integrity of the environment*'.[128]

The Special Joint Committee also recommended a new s 36.2 which would declare an 'Economic Union' in which the governments of Canada would be jointly committed to such things as '*pursuing the goal of full employment*' and '*ensuring all Canadians have a reasonable standard of living'*.[129] The Joint Committee proposed that the commitments—which were not to be justiciable (unlike *Charter* rights and freedoms)—'*be subject to public review, including public hearings and periodic reports by a specialised commission'*.[130]

Professor Martha Jackman of the University of Ottawa, suggested in a 1992 article that no Canadian government '*seems prepared to support the entrenchment of anything stronger than*

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125 Equality rights are protected in the *Charter* through the pivotal equality clause (s 15) and by two sections that provide interpretative assistance relevant to equality issues: s 27 (multicultural heritage) and s 28 (equal guarantee of rights and freedoms to males and females). The Supreme Court of Canada defined equality and also set down the framework within which s 15 claims are to be decided in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 and *R v Turpin* [1989] 1 SCR 1296.

126 Elsewhere in the *Constitution Act 1982* (Can) are some discrete statements of social and cultural rights.

127 With respect to the rights of Indigenous Canadians, the constitutional recognition of Aboriginal rights is mainly effected through a constitutional provision outside of the *Charter*; namely, s 35 of the *Constitution Act 1982* (Can).

128 Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (joint chairs: G-A Beaudoin; D Dobbie), *Report*, February 1992, pp 87-89.

129 Ibid, pp 87-89 & 122-23.

130 The Charlottetown Accord further addressed such recommendations.

a declaration of intentions [in relation to a social charter]'.[131] Professor Jackman argues against the common notion that social rights are essentially non-justiciable in nature, and concludes in that article that '*a social charter that fails to include basic and justiciable social rights may indeed be worse than no social charter at all'*.[132]

4.2.5 The scope of a bill of rights

Traditionally, a bill of rights is characterised as operating to protect individuals and minorities against the misuse of power by the government, that is, the judiciary, executive or legislature. In general, bills of rights are not designed to be a direct source of rights and obligations as between private persons. However, recent trends towards privatisation, corporatisation, commercialisation and the contracting out of services and functions traditionally provided by government means that bills of rights (whether statutory or constitutional) which are only enforceable against the government are becoming increasingly limited in their ambit.

Some also argue that the power wielded by powerful private sector entities is such that they too should be caught by a bill of rights. The International Commission of Jurists (ICJ) noted in its submission to the committee that: '*… 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*'.[133]

The ICJ went on to submit that:

> *As such, the ICJ suggests that it may 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* [referring to Part 3 of EARC's bill which contains civil and political rights] *be enforceable, wherever applicable, against all persons.*[134]

Thus, there is a dilemma in determining exactly against whom a bill of rights should be enforceable if it is going to achieve the objective of providing those in most need with a tool by which they can enforce their rights. The options are that a bill of rights can be enforceable against:

- the government;
- the government and private sector entities performing public functions; or
- the government and (powerful) private sector individuals and entities.

The importance of addressing this issue is highlighted by the experience in other jurisdictions.

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131 M Jackman, 'Constitutional rhetoric and social justice: Reflections on the justiciability debate', in J Bakan and D Schneiderman (eds), *Social justice and the Constitution*, Centre for Constitutional Studies, Carleton University Press, Ottawa, 1992, pp 17-28, pp 17-18.

132 Ibid, p 20.

133 International Commission of Jurists (Qld Branch), submission dated 21 November 1997, p 7.

134 Ibid, pp 7-8.

The impact of privatisation and contracting out government services has become evident from Canada's experience with the *Charter* which has been affirmed to only protect interference by the government (in a fairly narrow sense) and exclude private action.[135] This decision, in light of the increasing privatisation of services formerly provided by government in Canada, has meant that the ambit of the *Charter* is decreasing and there is a growing gap in constitutional protection for individuals' rights.

As one commentator remarked:

> *…the Charter does more to undermine than to promote the values that it purports to embody. The Charter is counter-productive primarily because it rests upon a conception of the state that is out of accord with contemporary reality. It perceives of a people whose liberties may be threatened by the power of elected governments. It does not reflect, or even accommodate, the perception of elected governments and the only hope that most people have of protection from those who really wield power.*[136]

Other jurisdictions, such as New Zealand and the United Kingdom, have sought to overcome this deficiency by extending the application of their respective statutes to apply to persons or bodies performing any 'public' function. The UK government has proposed that the Human Rights Bill 1997 (UK) will apply to companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities, to the extent that they are exercising public functions.[137]

Therefore, it is possible that a bill of rights might address this problem by carefully defining to whom it applies, but issues of precise definition remain.

Further, this solution still does not require the observance of human rights by strictly private bodies whose power is such that they can have a significant impact on individuals' rights. The ICJ's comments in this regard are supported in a paper by the UK Institute of Public Policy and Research:

> *Sometimes, however, it is possible to argue that a private body is in reality so powerful and so governmental in its activities that it is really a 'private government' which should be as amenable to judicial review as government itself. The courts have recently developed criteria for deciding whether 'private' bodies, such as the Stock Exchange, the Advertising Standards Authority, and professional disciplinary committees, are subject to judicial review.*[138]

Certainly, a bill of rights could be formulated so as to be enforceable by individuals against the private sector. However, extending a bill of rights so as to make it enforceable between all individuals, corporations and legal entities would have major implications for the functioning of society, not the least of which would be the creation, or threatened creation, of a vast amount of litigation. The situation would remain that private individuals would, due to

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135 *Retail Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573. The Supreme Court of Canada justified this interpretation on the basis that it considered the very purpose of the constitution was to define the appropriate relationship between the individual and the state. Many however disagree with this approach and consider that the *Charter* should not be limited to government action and that it should be unlimited: EARC, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Issues Paper No 20, Government Printer, Brisbane, June 1992, p 23.

136 Ison, op cit, p 499.

137 Human Rights Unit, op cit, para 2.2.

138 United Kingdom. Institute for Public Policy Research, Constitution Paper No 1, *A British Bill of Rights*, Institute for Public Policy Research, London, 1990, p 19.

financial cost, be unable to enforce (or indeed defend) their rights in court. Further, there would be a vast increase in public cost in terms of operating the court system and the likely imposition of additional cost and delay to transacting day-to-day business.

The more appropriate response may be to limit the bill of rights to be enforceable only against powerful corporate entities (in addition to government). However, again this option would be cumbersome and most likely unworkable given very difficult issues which arise such as what precisely what constitutes 'power'.

Thus, the nature of government or 'the state' out of which the notion of a bill of rights emanated has now substantially altered. The enactment of a bill of rights which is only enforceable against the government will provide a restricted form of rights protection in today's society. The alternative of making a bill of rights enforceable against quasi-public bodies, private sector bodies performing 'governmental' functions, and powerful corporate entities is also fraught with definitional problems. Moreover, none of these alternatives overcome the problem that very few individuals are likely to have the resources to bring an action against such bodies in the courts.

4.2.6 Specific rights legislation

As mentioned in chapter 3, a number of specific pieces of legislation, at both Commonwealth and State level, attempt to ensure that specific individual rights and freedoms are protected.

Specific rights legislation has a number of distinct advantages over a general bill of rights.

Firstly, legislation is a measured, directed and precise response to issues of concern that arise in the community. In other words, specific rights legislation is capable of addressing rights in a more comprehensive and proportional manner than a general, all-embracing bill of rights. Parliament can specifically target what mischief it wants to address and can spell out appropriate limitations and exceptions to enforcement of the right in question.

Secondly, specific rights legislation can clearly set out remedies and avenues of complaint; matters which are not apparent on the face of a bill of rights.

Thirdly, specific legislation has the ability to apply not only to the public sector but is also amenable to private sector application, with all the spelt-out exceptions and qualifications that might entail. As noted above, this consideration is more imperative considering the manner in which contemporary governments operate.

Fourthly, legislation is relatively flexible and adaptable as it can be amended either by subsequent amending legislation or be finetuned by regulations. In contrast, a bill of rights (particularly a constitutionally entrenched one) is rigid in nature, usually requiring a special procedure such as a referendum to amend any of its terms.

The advantages of specific rights legislation are evident in legislation currently operating in Queensland. For example, the *Anti-Discrimination Act 1991* (Qld) provides an affordable and accessible avenue of complaint for people who allege that they had been discriminated against. The Act makes discriminatory action unlawful in both the public and private sectors and also establishes the Anti-Discrimination Commission whose wide functions include investigation and conciliation of complaints and education.

Similarly, the former committee believed that Queensland should enact specific privacy legislation to be administered by a dedicated privacy commissioner. The committee's proposed

privacy legislation sets out information privacy guidelines to be followed and details complaint and investigative procedures and remedies available to those who have had their privacy breached. Indeed, the Queensland Law Society—whilst advocating a bill of rights—submitted to the committee that in the case of the right to privacy, specific, detailed legislation qualifying the rights and spelling out exemptions was preferable to a general statement in an omnibus bill of rights.[139]

The committee thus believes that legislative protection of rights is superior to a bill of rights as a means of protecting and promoting rights. In addition, specific legislation overcomes many of the definitional problems associated with rights. (These problems are outlined in the following section.)

Having said this, the committee is aware that some people argue that specific legislation should be complementary to, and not in substitution of, a bill of rights.[140] For example, Williams notes that:

> *There are many statutes at both the Commonwealth and state level that protect human rights. Significantly, such statutes commonly deal with conduct beyond the scope of constitutional rights. While constitutional rights are generally only concerned with imposing limitations on governmental action, human rights legislation frequently also establishes rights and obligations as between private individuals, such as between employer and employee, or between landlord and tenant. This means that the enactment of the Canadian Charter of Rights and Freedoms, or even the New Zealand Bill of Rights Act 1990, has not diminished the importance of statute law in either Canada or New Zealand. Human rights legislation may thus play a separate complementary role even where a constitution contains significant protection of individual liberty.*[141]

A number of submissions to the committee also stated that a bill of rights should operate in conjunction with specific human rights legislation.[142]

Indeed, the committee would agree that if a bill of rights is introduced in Queensland it should not be to the exclusion of other specific rights legislation. However, the fact that both legislation and a bill of rights may co-exist does not quell the committee's concerns about both the adverse consequences that would flow from the introduction of a bill of rights, and its general utility.

4.2.7 Problems with defining rights

The committee has a number of concerns about what rights a Queensland Bill of Rights should enshrine and about the possible ramifications of the rights once defined.

Which rights should a Queensland Bill of Rights include? As the discussion in chapter 2 indicates, trying to define all 'rights' in one document is an almost impossible task given the nature of rights. At least two problems arise in deciding which rights to include. Firstly, by limiting the rights to one 'type' of rights (for example, civil rights) or by stating that certain

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139 Queensland Law Society, submission dated 17 December 1997, pp 4-5.

140 EARC's report refers to Professor Tahmindjis's argument that Queensland's *Anti-Discrimination Act 1991* does not however deal with the notion of inherent rights and that this legislation alone without a supporting bill of rights legislation is insufficient to guarantee fundamental rights and freedoms. EARC rights report, op cit, p 39.

141 Williams, op cit, pp 10-11.

142 For example, QCCL, submission dated 28 November 1997, p 2.

types of rights are only declaratory in nature, some types of rights might appear less important than others. Secondly, producing an appropriate list of fundamental rights on which there is general societal agreement is important yet difficult. The specific rights to be enshrined should be aspirational to all of Queensland society and should bring the community together, not divide it.[143]

As Brennan notes:

> *A bill of rights, if it is to be justified, has to be tailored so that the rights it enunciates are accepted by the general community, rather than by particular interest groups. The rights must be accepted as so fundamental that they may not be overridden by elected representatives seeking a mandate, because in all conceivable circumstances the discharge of their responsibility to take account of the views of the people on whose behalf they act would require that they forbear from legislating in such a way as to interfere with such rights.*[144]

Brennan goes on to describe EARC's extensive bill of rights as '*a cobbled amalgam of rights espoused by contemporary interest groups, designed to educate an ignorant public about how to live lives and shape a better society*.' EARC's bill is not, in his opinion, '*the expression of shared aspirations of the sovereign community entrusting legislators with power and delimiting that power within agreed parameters for the well-being of all citizens*'.[145]

In addition, what happens to the rights once they are expressed? There is a general concern that expressing rights in a bill of rights might have the consequence of 'fossilising' the rights. While a bill of rights might perhaps be a snapshot of values important to society now, it will not necessarily reflect society's values in the years to come. This concern especially arises in relation to constitutionally entrenched bills of rights because of the onerous special procedures that must be followed to subsequently amend the bill.[146]

In the case of such bills, rights can also be 'frozen' by the interpretation given to them by the judiciary for the same reason. As indicated in the preceding sections, Parliament will be unable to easily amend the expression of the right to avoid an interpretation given to the right by the judiciary which the Parliament does not consider appropriate.

In addition, the committee believes that any attempt to define rights today runs the risk of not representing rights which may become important to Queenslanders in the future. The possibility of new rights or new aspects to rights emerging given rapid advances in technology and increased globalisation is certainly foreseeable.

EARC considered this issue of 'fossilisation' of rights and raised the possibilities of having a provision requiring the bill to be interpreted flexibly to meet unforeseen circumstances, or avoiding the problem by limiting the rights to be included in the bill to 'universal' rights. After analysing submissions and evidence, EARC recognised that the problem did not have a simple solution. The Commission was persuaded to conclude that an objects clause or preamble

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143 For example, the Constitutional Commission decided to leave the right to life out of its proposed Australian Bill of Rights because the right was so controversial.

144 Brennan, op cit, p 36.

145 Ibid, p 37.

146 As will be discussed in more detail in the following chapter, one of the reasons that the fundamental legislative principles are not statutorily defined in an exhaustive manner is that they derive their source from the values they enshrine and that they are not fixed but rather evolving.

clause in the bill referring to international covenants would enable a flexible interpretation of its provisions.[147]

However, EARC's conclusion that the bill could be interpreted flexibly by reference to international covenants does not reduce the uncertainty of what the various rights might mean or entail. There is no universal agreement—and, in fact, widespread disagreement—on what constitutes rights.

The committee also has related concerns about the problem of a bill of rights omitting certain rights. EARC thought that this problem of omitting rights could be alleviated by recommending the inclusion of a savings provision that no existing or future right or freedom shall be diminished merely because it is not included in the bill.[148] A savings clause arguably overcomes one aspect of the problem. However, the fact remains that, by making some categories of rights enforceable and others merely declaratory or guiding, a perception is created as to the precedence of some rights (those included in the bill and particularly those deemed enforceable) over others (those deemed declaratory or those not included in the bill).

Another important issues arises: Once the specific rights to be included are chosen, how are they to be defined? A bill of rights written as broad statement with less specific terms is open to wider interpretation by the judiciary. This gives the judiciary greater flexibility in applying the human rights law to the cases that they adjudicate, but also ultimately enhances the judiciary's power *vis a vis* the Parliament. On the other hand, specifically enunciated rights, including (where appropriate) exceptions and qualifications, would circumscribe the judiciary's 'law-making power' but limits its flexibility in interpreting what rights might mean in certain instances and in changing circumstances.

By sufficiently defining rights, the potential for the judiciary to be criticised for 'going too far' or making 'political' decisions is reduced. By contrast, Brennan comments that EARC's right 'to obtain and disseminate information' in EARC's bill of rights is such an 'impossibly wide right' that it:

> *… would require the cutting of an enormous swathe through the entire law of defamation. It would provide no guideposts for a judge to strike the appropriate balance between competing rights and interests of citizens, those wishing to protect their reputation and those wishing to express their views publicly. It would be left to judges to determine the reasonable limits on the right to disseminate information that 'are demonstrably justified in a free and democratic society'.*[149]

EARC sought to address this dilemma by recommending for its bill of rights a drafting style which strikes a balance between general and specific terminology.[150] The committee is not convinced that the issue can be so easily resolved, and does not believe that it has been resolved by the wording of EARC's bill. Which rights should be expressed in specific terms? Which rights should be expressed in general terms? How much scope should be given to the judiciary through the general terminology? Which rights should be subject to express qualification? Which rights should be subject to common law exceptions? What is the effect of codifying those common law exceptions?

Dr Goodman in a submission to the committee's inquiry also stated that a bill of rights is 'doomed to fail' in that:

147 EARC rights report, op cit, pp 63-66.
148 EARC, rights report, op cit, p 68.
149 Brennan, op cit, p 37.
150 EARC, rights report, op cit, p 58.

> *… such a bill would either be so wide and general in its scope that it would be meaningless and lawyers would have a field day for the next fifty years. Alternatively, it would be so narrow and specific that it could never hope to cover all human rights now and in the future.*[151]

A further matter which the committee believes must form part of this debate is the effect of a bill of rights on existing common law rights. Would the bill of rights stand alongside or supplement the common law, overriding the common law in the case of any inconsistency? This was a matter not adequately addressed by EARC in its report, yet it in reality it is an issue which will have a fundamental impact on Queensland jurisprudence and certainty in the law. It is an issue which the committee believes should not be underestimated in importance.

The committee therefore does not believe that EARC produced an appropriate resolution to the many and varied problems associated with defining rights in a bill of rights. The committee is not convinced that the rights encapsulated in EARC's bill of rights represent the expression of shared fundamental aspirations of the Queensland community. In addition, the committee does not believe that EARC devised appropriate solutions to the problems that arise in choosing which rights to appropriately enshrine in a Queensland Bill of Rights, how the possibility of 'freezing' rights should be best addressed, and how specifically or generally specific rights should be drafted.

The committee believes that these are significant issues which will directly impact upon the effective operation of a bill of rights in practice.

(Comments about the drafting of the rights contained in EARC's Bill of Rights 1993 that were made in submissions to the committee and by the various people the committee met with in Canada are outlined in **Appendix D** of this report.)

4.2.8 The educative and aspirational effect of a bill of rights

Outlined above are the committee's fundamental concerns as to some of the adverse consequences that it believes would flow if Queensland adopted a bill of rights.

However, the committee does acknowledge that a bill of rights—or at least a document similar in format—can have certain advantages. Most notably, a bill of rights could be utilised to operate as a significant tool in educating citizens regarding rights and generally raising rights awareness in society. EARC similarly commented in its rights report that it believed there is much evidence to support the educative role of a bill of rights both as a tool itself and as a focus for further citizenship education.[152]

It has been noted that the *Charter* has inspired Canadians by identifying and enforcing widely shared values and *'has "enhanced the culture of liberty"'* through such things as:

- improving the Canadian courts' record on human rights issues;
- governments '*not hesitating to have statutes amended, either on their own initiative or because of judicial prodding, to make them conform to Charter norms*'; and
- increasing social discourse in terms of rights and freedoms and accompanying schemes such as affirmative action programs and measures to assist the disabled.[153]

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151 Dr Goodman, submission dated 6 November 1997, p 4.

152 EARC rights report, op cit, p 76.

153 Penner, op cit, pp 114-115.

A bill of rights need not be constitutionally entrenched to have this educative and aspirational effect. A similar outcome may also be realised from a statutory bill of rights whether or not enforceable. In 1987, the Victorian Legal and Constitutional Committee considered the desirability of introducing a bill of rights into Victoria's Constitution. That committee concluded that Parliament was the most appropriate guardian of human rights and that an unenforceable declaration of rights would avoid the undesirable consequences which would potentially flow from a bill of rights. Moreover, that committee recognised that such a declaration would have a significant '*moral and educative*' effect at the '*highest levels of law-making and government*' and in turn enhance general community awareness of human rights.[154]

However, the educative value of a bill of rights is, by it nature, necessarily limited to its terms. A bill of rights does not, for example, inform citizens as to what their rights are beyond those in the bill of rights. Moreover, a bill of rights does not answers citizens' queries as to how they might gain further information about their rights, or how they might endeavour to enforce or expand their rights.

There is, the committee believes, much educative and aspirational value in a document which encompasses these features. The need for such a document in Queensland is reinforced by the fact that, as has been highlighted in this chapter, a myriad of systems and mechanisms currently operate in Queensland to protect individuals' rights and citizens are not always aware of the avenues available to redress breaches of rights. A single, easy-to-read, ready-reference document explaining to Queenslanders: (1) what their rights are and where those rights are found; (2) how to find more information about their rights and enforcing their rights; and (3) how they might go about expanding their rights, would greatly assist rights education in Queensland.

The committee makes recommendations in this regard in chapter 5.

4.3 CONCLUSION

The ultimate objective of a bill of rights should be to provide individuals with an effective basis upon which they can challenge legislative or governmental action which infringes their rights. In particular, this is important to those members of society who need it most; namely, the poor, marginalised, those effectively disenfranchised by their social, economic or other circumstances, and those who find themselves in trouble with the law. Whilst the committee naturally endorses the values that a bill of rights such as the one proposed by EARC enshrines—human dignity, life, liberty, security of the person, democratic participation, equality—the committee does not believe that a Queensland Bill of Rights, in any form, would achieve this aim.

Moreover, the committee believes that even if a Queensland Bill of Rights *was* capable of achieving this aim, it would not be able to do so without inordinate legal, social and economic costs.

The committee's reasoning for recommending against the adoption of a bill of rights is based on the following conclusions.

- An enforceable Queensland Bill of Rights would most likely result in a significant and inappropriate transfer of power from the Parliament (the Queensland legislative body elected by the people) to an unelected judiciary. In the case of a constitutionally

[154] Legal and Constitutional Committee of the Victorian Parliament, op cit, pp 94-122.

entrenched bill of rights, it would be the judiciary, not the Parliament, that ultimately decides the validity of legislation and governmental action. Judicial decisions that impose significant costs to society or that do not meet with general community acceptance would be extremely difficult to modify or reverse.

New Zealand's experience with a statutory bill of rights also shows that a bill of rights need not be constitutional in form to effect a significant transfer of power.

- As a result of this shift, the judiciary will potentially find itself in a position where it is making far more controversial decisions of a policy nature; decisions affecting the entire community as to competing social and economic objectives. The judiciary may not be fully equipped to make many of these decisions. There is also a real likelihood that the judiciary will, as a result, become politicised. Another potential effect is that the existing high level of public confidence in the judiciary might be undermined if the public *perceive* that judges are making more 'political' decisions.

  If the judiciary is to have an enhanced role which a bill of rights brings, then a careful review would have to be undertaken of the way in which judges are appointed and educated, and of the resources that are available to assist them in their decision-making.

- The potential consequences of an enforceable bill of rights—the litigation generated, court time utilised, challenges to legislation and administration, the impact on existing areas of the law etc—are impossible to estimate. Although, the Canadian experience provides some instructive and cautionary insight in this regard.

- The experience in other jurisdictions, particularly Canada, also demonstrates that a bill of rights, rather than preserving and enhancing the rights of the people *most* in need of further rights protection, might in fact have the opposite effect and benefit those *least* in need. Prohibitive legal costs associated with enforcing one's rights under a bill of rights (whether constitutional or statutory) might effectively see the utility of a bill of rights being restricted to wealthy and corporate citizens. Yet the *public* costs associated with a bill of rights—such as maintaining court machinery and repairing successfully-challenged regulatory schemes—will be costs borne by *all* members of society.

- A bill of rights is limited in its effective coverage given a diminishing 'public' sector and an increasingly powerful private sector. Yet to try and expand the operation of a bill of rights to appropriately cover newly privatised entities, entities with which the government has contracted, and powerful corporate entities is an extremely difficult task, given the complex definitional issues which arise.

- There are not readily identifiable solutions to other issues that would arise such as: what rights should be included in a bill of rights; which of those rights should be enforceable; how a balance can be struck between specific and general terminology used in defining those rights; how to overcome the effect of 'codifying' and 'freezing' the enunciated rights; and the effect that a bill of rights would have on existing common law provisions.

The current system of rights protection in Queensland, whilst admittedly complex, does provide a safety net of rights protection. As was noted in the 1994 report of the *Civics Expert Group*:

> *As we approach the centenary of the Commonwealth, Australians are able to look back on a remarkably successful record of democratic self-government. The public institutions created in the closing years of the last century have proved flexible and*

> *resilient. The outcomes of the democratic process enjoy popular acceptance—in contrast to the experience of most other countries, we have seldom experienced a challenge to the legitimacy of our civic order or resorted to violence. The political process has operated peacefully. A broad measure of freedoms has been maintained and extended. The rule of law operates. There is a high level of toleration and acceptance.*[155]

It is not a perfect situation. Clearly, there is room for improvement. However, in the committee's opinion, a bill of rights is not the best, or even a viable, means to effect this improvement. The potential adverse consequences of introducing a bill of rights are significant. The potential benefits are by no means guaranteed.

The committee agrees with the conclusion that:

> *A bill of rights may have an educative function but it is no guarantee of a better citizen or a better society. Its only guarantee is restrictive power for elected legislators and increased power for unelected judges for the benefit, if sought, of people whose rights are most likely to collide with the interests of the majority.*[156]

However, the committee would add that even the educative effect of a bill of rights is restricted by its generality. A document which does not explain to citizens the source of their rights beyond those contained in the bill of rights, and how they might go about enforcing or expanding those rights is, in the committee's view, wanting. It provides a limited basis on which productive rights discussion within the community can ensue.

There is, therefore, a need in Queensland for a new mechanism that seeks to reduce the complexity of current rights protection and at the same time provides members of the community with a platform on which they can assess the extent of their current rights protection and, if they feel necessary, seek to expand that protection. In the next chapter, the committee recommends what it believes that mechanism should be.

4.4 RECOMMENDATION

The committee recommends that the Queensland Government *not* adopt a bill of rights as proposed by the former Electoral and Administrative Review Commission in its 1993 *Report on the preservation and enhancement of individuals' rights and freedoms* or in any other form.

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155 Civics Expert Group, *Whereas the People ….: Civics & Citizenship Education*, AGPS, Canberra, 1994, p 13.

156 Brennan, op cit, p 46.

5. FURTHER PRESERVING AND ENHANCING RIGHTS AND FREEDOMS IN QUEENSLAND

The committee observed in chapter 3 of this report that there are a variety of mechanisms which operate in Queensland to protect individuals' rights and freedoms. These mechanisms include the common law, legislation, pre-legislative processes, constitutional protection and international human rights law. The committee concluded that, in combination, and within the overall operation of Queensland's parliamentary democracy and its associated political and institutional pressures, such mechanisms exist to protect (or at least provide a safety net for protecting) individuals' rights and freedoms, albeit to differing degrees and with different levels of enforceability. However, for the substantial reasons canvassed in chapter 4, the committee further concluded that a bill of rights was not a desirable means by which to improve the current situation.

The committee therefore considers in this chapter various mechanisms that could operate in Queensland to further preserve and enhance individuals' rights and freedoms. In particular, the committee believes that there is a need to unravel the current 'web' or fabric of rights protection formed by the various laws, mechanisms and systems, and clearly specify what protection with respect to rights and freedoms currently exist. The complexity of this web makes it difficult for citizens to identify the existence, source, and extent of their rights. Knowing one's rights is, of course, a precondition to being able to assert them.

A number of submissions to the committee suggested alternatives to a bill of rights to further enhance rights and freedoms.[157] These suggestions included:

- enhanced civics education in both schools and the community generally;
- citizen initiated referenda;
- greater parliamentary scrutiny of proposed legislation;
- a constitutional guarantee of equality;
- enhancement of administrative law mechanisms;
- directions that the judiciary is to prefer interpretations which are in line with rights and freedoms;
- re-establishment of an upper house in Queensland;
- a State-based general administrative appeals tribunal to hear reviews of administrative decisions on their merits;
- a more effective parliamentary committee system;
- improved public consultation processes in government;
- measures to enhance fundamental cultural and attitudinal change to rights;
- specific statutory definitions of rights; and
- entrenchment of the FLPs (because they are currently statutory guidelines rather than a

[157] Some of these suggestions were proposed on the basis that a bill of rights not be adopted. Other submissions offered alternatives on the basis that they be introduced in addition to a bill of rights, or in the event that the committee did not advocate the adoption of a bill of rights.

means by which legislation can be challenged).

The committee has considered these options and draws on some of these suggestions in this chapter.

5.1 IMPROVING RIGHTS EDUCATION

5.1.1 Why is rights education important and what rights education strategies are currently in place?

It flows that if the web or fabric of rights protection formed by current laws, mechanisms and systems is complex, then for it to be effective in any meaningful sense, it must be supplemented by appropriate educative and awareness strategies. Having rights on paper is one matter; individuals being aware of those rights and knowing how to enforce them or lobby for their expansion is another. Education as to rights—from the individual's perspective—might be said to be a precondition to accessing justice. From the wider, community perspective, rights education ensures that rights are respected and generally accepted within the wider community and provides a platform on which meaningful, informed rights discussion can take place.

Thus, it has become increasingly evident to the committee throughout the course of its inquiry, that a significant amount of emphasis needs to be placed on rights education and awareness. More particularly, this rights education and awareness must have a number of features.

Firstly, rights education must occur across all facets of Queensland society including schools, communities, businesses, workplaces and government.

Secondly, rights education must promote awareness as to the various sources of rights currently possessed by citizens as well as their enforceability. For example, citizens should be aware of their rights in the common law, statutes and the Commonwealth Constitution.

Thirdly, rights education needs to form part of education about the legal, constitutional and political structure of our society within which the concept of human rights is inextricably interwoven. As the Legal and Constitutional Committee of the Victorian Parliament has noted:

> *The Committee is firmly of the opinion that it is imperative that the community be further educated, both on the subject of human rights, and upon the subject of the wider legal process, an understanding of which is vitally necessary before issues of human rights may be understood within their practical context.*[158]

Fourthly, rights education should incorporate education about responsibilities, that is, responsibilities with respect to observing the rights of others.

The importance of rights education has recently been stressed at the international and national level.

[158] Legal and Constitutional Committee of the Victorian Parliament, op cit, p 174.

The UN High Commissioner for Human Rights stated in February 1998 that:

> *Human rights education is a vaccine against intolerance, animosity and conflicts between members of different groups in our communities… I see human rights education as empowering individuals to stand up for their rights and those of others. I believe in the good sense of our citizens—and that people who are aware of their human rights are less likely to violate the rights of others*.[159]

The Australian Government reports to the international community on action it has taken in promoting human rights information and education, including in school curricula and the workplace. Primarily this reporting has occurred in Australia's National Human Rights Action Plan which was first submitted to the Commission for Human Rights in 1994, and in subsequent updates to that plan for 1995 and 1996-97.[160]

However, in its recent report *Improving but… Australia's regional dialogue on human rights,* the Joint Standing Committee on Foreign Affairs, Defence and Trade (the 'Joint Committee') noted that a recurring issue raised in its inquiry was the '*lack of information and education on human rights in Australia*'. Further, that committee observed that the activities for human rights education outlined in the 1996-97 update to the National Human Rights Action Plan (which included reference to the *Discovering Democracy* program discussed below) are limited, and that the information in the updated plan '*suggests that there is little attention paid directly to human rights information and education in school curricula and the workplace*'.[161]

Further, the Joint Committee in its report echoed the comments of others that little action has been undertaken to mark the United Nations Decade for Human Rights Education (which began in 1995); and the 50th anniversary year of the Universal Declaration of Human Rights (being 1998) despite the fact that both provided an excellent opportunity to review the state of human rights education in Australia, and to establish the means of providing for that education to be improved where necessary.[162] This, the committee noted, '*exemplifies the unhealthy state of human rights education in Australia*'.[163]

Evidence received by the Joint Committee stressed the need for appropriate and effective human rights education strategies. In the words of one submitter: '*Human rights education must be rooted in the lives of learners, especially those most marginalised and vulnerable*'. Another submitter also stressed the need for statements from the UDHR to be taken and made relevant to people in their day-to-day lives.[164]

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159 UN High Commissioner for Human Rights, Mrs Mary Robinson, Opening Address, Sixth Workshop on Regional Human Rights Arrangements in the Asian Pacific Region, February 1998, pp 4-5, as cited in the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Improving but…Australia's regional dialogue on human rights*, CanPrint Communications, Canberra, June 1998, p 118.

160 The concept of states preparing and submitting National Action Plans on human rights results from a recommendation of the Vienna Declaration and Program of Action in 1993 and was a concept initiated by Australia.

161 Op cit, pp 118-119.

162 The Australian Human Rights Commissioner gave evidence to the Joint Committee that no resources had been allocated by government to mark the Decade for Human Rights Education or the 50th anniversary of the UDHR. Similar comments were made to the committee by the Australian Council for Overseas Aid regarding Australia's lack of response to the Decade for Human Rights Education. Op cit, pp 119-121. Amnesty International has also been critical of the Australian Government's failure to announce any new initiatives to implement the UN Decade for Human Rights Education. Amnesty International, *Australian Newsletter*, July/August 1998, Vol 16, No 4.

163 Op cit, p 119.

164 Ibid, p 121.

Thus, the Joint Committee recommended that the Australian Government both initiate its own proposals and give favourable consideration to outside proposals that accord with United Nations guidelines and recommendations to mark the United Nations Decade for Human Rights Education and the 50th anniversary of the Universal Declaration of Human Rights.[165]

There has been some positive action in this regard. On 14 August 1998, the Commonwealth Government announced the establishment of a new website for the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) and a new initiative whereby the government is providing HREOC with $30,000 to develop a comprehensive and easily accessible bibliography on human rights. Both of these steps, the government suggested, were significant in actively encouraging a greater understanding of rights and responsibilities, and emphasising education as a major component in the protection and promotion of human rights in Australia.

The bibliography, which will be located on the Internet, will reportedly contain information on matters such as: the origin and history of human rights; international human rights organisations; rights including civil, political, cultural, economic and social rights; Indigenous rights; children's rights and environmental rights; and a guide to where the source of such rights can be found.[166]

A proposal to establish a National Committee on Human Rights Education has also apparently received support from the Commonwealth Government.[167]

This committee endorses the sentiments of the Joint Committee regarding the importance of human rights education and information in the community. Further, like the Joint Committee, this committee has concerns as to the adequacy of rights and civics education in Australia and, in particular, Queensland.

Civics education, at least since the 1960s, has not been an integral component of the Australian school curriculum, and Australians generally have a lack of knowledge about Australian democracy and citizenship.

EARC commented in its rights report that, during it rights inquiry and its previous inquiries, it had become evident that there was a concerning lack of understanding amongst the community of even the most basic political structures including the structure and systems of parliamentary democracy, representative democracy and the Westminster system.[168]

EARC also noted in its rights report the then development of social and civics education in Queensland schools and reiterated its support for implementation of such programs as soon as possible. EARC recommended that these programs include understanding and promotion of its proposed Queensland Bill of Rights.[169]

EARC's concerns were validated by the results of a national civics survey conducted in 1994 which indicated:

> *…widespread ignorance and misconception of Australia's system of government, about its origins and about the way in which it can serve the needs of citizens. ...*

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165 Ibid, p123.

166 Media release by the federal Attorney-General, The Hon Darryl Williams AM QC MP, dated 14 August 1998.

167 Ibid.

168 EARC rights report, op cit, p 77.

169 Ibid, pp 77-79.

> *Only 19 per cent of people have some understanding of what Federation meant for Australia's system of government. Only 18 per cent know something about the content of the Constitution. Only 40 per cent can name the two federal houses of Parliament ... Only 33 per cent have some knowledge of the rights and responsibilities of citizens; for most, citizenship is an abstract concept that is never given much thought.* [170]

This committee is pleased to note that some moves are being made to address this disturbing finding. The Civics Expert Group, a body established by the Commonwealth in 1994, reported in *Whereas the People ... Civics and Citizenship Education* that there was a demonstrable need for an extensive program of public education and information about: the Australian system of government; the Constitution; Australian citizenship; and other civics issues. The Group recommended that, amongst other things, a comprehensive, non-partisan civics curriculum for schools be developed by the Commonwealth for introduction by the states. The thrust of the report has been subsequently endorsed by the Commonwealth and agreed to in principle by the states and territories.

In May 1997, the Commonwealth Government relaunched, and reconfirmed the funding for, an extensive national program for civics and citizenship education that the previous Labor Government had developed in response to the Civics Expert Group report.[171] The program, *Discovering Democracy*, is currently being produced by the Curriculum Corporation, a national curriculum agency jointly owned by the states, territories and Commonwealth Governments. The program comprises 18 sequential learning units for students in years 4 to 10. Each of its four 'themes' touches on rights and responsibilities in varying degrees: Principles of Democracy; Government in Australia; The Australian Nation; and Citizenship. The aim of the *Discovering Democracy* program is to give students an understanding of the history and operation of Australia's system of government and institutions, and the principles that support Australian democracy. *Discovering Democracy* activities will include teaching of basic democratic values and attitudes, such as tolerance and respect for individuals' human rights.

The states have given their in-principle support to the program.

The Commonwealth has allocated $10.6M over four years for the development and delivery of revamped civics curriculum materials. (The first introductory instalment of this funding was delivered to the states in November 1997. The second, and main, component is expected to be delivered in November 1998.) In addition, $4.6M ($800,000 in Queensland) will be spent on associated teacher professional development and some $2.1M will be spent on related national activities.

It is anticipated that Queensland, once it has decided to implement the *Discovering Democracy* curriculum materials that are produced, will incorporate *Discovering Democracy* as a central part of the Key Learning Area of 'studies of society and environment' (SOSE). SOSE is currently being developed by the Queensland School Curriculum Council for State-wide implementation in State, Independent and Catholic Schools in the year 2000.

Currently in Queensland, civics (or information on the Australian system of government and on citizenship) forms a part of the social studies syllabus for students in years 1 to 7. In years 8

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[170] As summarised by the Civics Expert Group, op cit, pp 18-19.

[171] The former federal Labor Government endorsed the Civics Expert Group report with a $25M funding commitment over four years. The Coalition Government in May 1997, after a 12-month review, decided to continue the program with some modifications, such as more emphasis in the content of the curriculum on the development of Australian democracy.

to 10 civics is part of the social studies, social science, study of society, citizen education and history syllabuses. In years 11 and 12, civics is part of the non-compulsory subjects of senior modern history and study of society syllabuses, a trial political studies syllabus and— to a lesser extent—the legal studies syllabus. From year 2000, the new SOSE syllabus for years 1 to 10 will have civics incorporated as part of its 'Time, Continuity and Change' and 'Systems, Resources and Power' strands.

While civics education mainly occurs in the schools, education about rights and our system of government is also undertaken in Queensland by a number of other bodies. For example:

- the Electoral Commission of Queensland which promotes public awareness of electoral matters through education and information programs;[172]
- the Queensland Law Society which raises awareness in the wider community about the law and legal rights through a schools and community legal education officer;
- community legal centres which foster community legal education as well as provide legal services; and
- public interest advocacy and community service groups such as the Queensland Council for Civil Liberties.

The Queensland Anti-Discrimination Commission (ADCQ) also has, in addition to functions in relation to anti-discrimination, a number of wider functions with respect to human rights. Specifically these wider functions include promoting understanding, acceptance, and the public discussion of human rights in Queensland.[173]

The Community Relations Program of the Commission conducts training and education sessions with a range of stake-holders including business, industry and employer groups, Indigenous and ethnic communities, gay, lesbian, bisexual and transgender communities and the public sector. These forums are, however, primarily directed at education and prevention of discrimination and sexual harassment. Therefore, the Commission's focus is on the right to freedom from discrimination, harassment, vilification and victimisation.

The committee understands that the Commission has undertaken some activities to promote a broader understanding, acceptance and public discussion of human rights in Queensland. The Commission has also indicated its commitment to furthering educative strategies in the wider rights sphere. In the Commission's 1996-97 annual report, the Anti-Discrimination Commissioner, Ms Karen Walters, made the following comment about the goals of her office:

> *…the Commission in the forthcoming year needs to be effective and proactive in discharging its community education responsibilities. Preventative and educative strategies are the key to ensuring that individual rights and freedoms are not just afforded reluctant compliance under the force of legislation, but are respected and accepted as a necessary component in a truly civilised and democratic society. If the Commission can perform as a leader in this process of internalising such a view within the community, it will truly be an effective force.*[174]

The committee also perceives that there has been some improvement in rights awareness since the enactment of the *Legislative Standards Act* and the establishment of the Scrutiny of Legislation Committee. Whilst this increase in awareness is mainly within the public sector, and more specifically those involved in the legislative process, it is feasible that there has also

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172 *Electoral Act 1992* (Qld), section 8(1)(d)-(f).

173 *Anti-Discrimination Act 1991* (Qld), section 235(i) and (j).

174 Anti-Discrimination Commission (Queensland), *1996-97 Annual Report*, Brisbane, 1997, p 8.

been a general improvement in rights awareness through the public airing of rights issues via the parliamentary scrutiny of bills.

Increased avenues for access to the law, such as Internet access to Queensland legislation and case law,[175] also plays an important role in enhancing education about our legal system and the rights it serves to protect.

There are, therefore, some different avenues through which citizens in Queensland are, or can be, educated about their rights and responsibilities. However, as the discussion above reveals, despite the efforts of various organisations, there are clearly gaps in the coverage of civics and rights education programs both in schools and in the community as a whole.

5.1.2 How can rights education in Queensland be improved?

The development of widespread community education about rights is no doubt made more difficult by the complexity of current rights protection. Thus, the committee perceives the need for a strategy or mechanism which seeks to overcome this problem and which provides a basis for wide-spread rights education.

The experience of other jurisdictions studied by the committee indicates that one of the largely agreed-upon benefits of a bill of rights is its educative and aspirational effect. Although, as the committee noted earlier, the educational benefit of a bill of rights is limited because it fails to provide information about fundamental rights not included in the bill, and does not advise citizens as to how they might go about enforcing or expanding their rights, or indeed how they might gain further information about their rights generally. The framework and form of a bill of rights nevertheless provides an attractive starting point for what the committee sees as a two-stage process in promoting and enhancing rights in Queensland through education.

As a **first step**, the committee believes that there needs to be a single, easy-to-read document to which Queensland citizens can readily refer to assist them to identify, clarify, enforce and thereby enhance their rights. In other words, the committee believes that there needs to be an easy-to-read document pitched at the same level of generality as a bill of rights, but which:

- explains the sources and limits of current rights protection in Queensland;
- outlines how these sources operate to protect citizens' fundamental (or basic) rights in Queensland;
- highlights citizens' responsibilities as well as their rights;
- provides people with guidance on how they might obtain further information about their rights and enforcing their rights; and
- by identifying the limits of current rights protection, provides citizens with a basis and suggested means by which they might seek to have laws and/or policies regarding rights amended.[176]

Moreover, the committee believes that such a document needs to be an ongoing fixture to be used in human rights information and education strategies employed by all public and private sector organisations in the State.

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[175] The placement of more information about law on the Internet seeks to improve public access to and demystify the law. For example, in August 1998 the Law Council of Australia launched a new website to enable the public to access relevant information about the family law process.

[176] This last point relates to the committee's view, expressed in chapter 4 of this report, that specific rights legislation is preferable to a list of general statements of rights enunciated in a bill of rights.

As part of this inquiry, the committee has prepared a handbook entitled *Queenslanders' Basic Rights* which will be tabled together with this report.

(A more comprehensive version of this handbook will also be tabled with this report and be publicly available on the Internet via the committee's site at <http://www.parliament.qld.gov.au>.)

The handbook consists of four parts.

Part 1, which is introductory in nature, sets out the boundaries within which the committee has prepared its handbook. It deals briefly with matters such as the purpose of the handbook and the nature of the rights included in the handbook and the general caveats to the committee's exercise.

Part 2 is a brief overview of the sources of current rights protection in Queensland. Understanding the nature of the protection offered by these sources is imperative to appreciating the extent of the application of the specific rights detailed in part 3 of the handbook.

Part 3 explains the extent to which certain basic rights are protected by the various sources discussed in part 2. The rights in this part are those generally recognised as basic rights in international human rights law. For convenience, this list is sub-divided into the common categories of: civil and political rights; economic, social and cultural rights; and group and community rights.

Part 4 explains the processes and avenues available to citizens by which they might obtain further information regarding their rights and how to enforce them. Suggestions are also made as to how citizens can seek to have the law and/or policies regarding rights changed.

The committee is firm in its belief that this handbook should be of enduring value and recognises that this will require the handbook to be regularly updated, preferably on an annual or as required basis. The committee believes that the Legal, Constitutional and Administrative Review Committee is the most appropriate body to fulfil this task given that this committee has initiated the preparation of this handbook, and given Parliament's integral role in ensuring the preservation and enhancement of individuals' rights and freedoms. The preparation of this handbook should be a continuing obligation on the committee in the years to come. In order to so mandate the committee, an amendment will need to be made to the *Parliamentary Committees Act* which establishes and sets out the responsibilities of the committee.

The committee proposes that, as an essential **second step** in this process, this handbook should form the basis of civics and rights education and information programs to be conducted by, and within, bodies such as:

- schools (both primary and secondary) and other training and educational institutions;
- government departments, agencies and other public and quasi-public organisations;
- workplaces; and
- non-government organisations such as community legal centres, and community service and public interest advocacy groups.

The handbook should also be easily accessible via the committee's site and linked to other relevant Internet sites.

The committee recognises that the success of the handbook—in terms of the effective, far-reaching impact that the committee envisages for it—will depend on two factors.

Firstly, the handbook will need to be widely disseminated to bodies such as those listed above. The committee, given its finite resources, will not be able to cover the costs associated with the necessary wide-scale publication and dissemination of the original handbook and subsequent editions. In this regard, the committee will seek the assistance of the Premier as the Minister responsible for the *Parliamentary Committees Act*, should the handbook's usage be widely accepted.

Secondly, the success of the handbook will depend on the attitude of organisations into whose hands it falls. The committee trusts that the handbook will promote organisations, particularly government departments and agencies, to investigate innovative ways in which to:

- disseminate the handbook and other rights material within the community; and
- respond to the information contained in the handbook.

As is evident from the discussion thus far, the committee has a particular interest in the education of school children as to civics within which the more specific area of citizens' rights and responsibilities lies. Civics education develops in our youth an understanding and appreciation of the structure and functioning of government, and the role of the individual as an integral component of society. Moreover, civics education should engender in students a sense community belonging and an awareness of their rights and responsibilities and the rights of others within their immediate and wider community. In sum, civics education is imperative to ensure that the next generation of Queenslanders take an active interest in local, state, national and international affairs and are aware of their potential to participate in government and community life.

Given this, the committee believes that the Minister responsible for Education should:

- report to Parliament on current and planned strategies to ensure that *every* school student in Queensland has exposure to effective civics education which includes components about citizens' rights and responsibilities; and
- ensure that the committee's handbook *Queenslanders' Basic Rights* becomes an integral part of civics education in Queensland schools, by the Minister's department developing, or encouraging teachers to develop, documents ancillary to the committee's handbook for use by teachers when, or in association with, teaching about the handbook's contents.

5.1.3 Recommendation

The committee believes that it is important that:

- **there are education and information programs aimed at educating all Queensland citizens about their rights and responsibilities and the workings of democratic institutions in Queensland; and**
- **as an integral part of these education and information strategies, Queensland citizens have ready access to a single, easy-to-read document explaining the nature and limits of their existing rights and responsibilities.**

Therefore, as part of this inquiry, the committee has prepared a handbook, entitled *Queenslanders' Basic Rights*, which the committee will table as part of this report. This handbook sets out in a succinct, easy-to-read document the basic rights and freedoms

currently enjoyed by Queenslanders, the source of those rights and the avenues pursuant to which individuals can seek to clarify, enforce and enhance their rights.

Accordingly, the committee recommends that this handbook form an integral part of rights and civics education and information programs in schools, communities, workplaces, government and non-government organisations throughout the State.

To ensure that this handbook becomes an ongoing fixture in human rights education and information programs in Queensland, the committee further recommends that:

- **the Legal, Constitutional and Administrative Review Committee have an on-going responsibility to table in Parliament an updated edition of the handbook as and when necessary, and be provided with adequate funding to fulfil this responsibility; and**
- **the Minister responsible for the *Parliamentary Committees Act 1995* (Qld) introduce a Bill into the Parliament to amend that Act to obligate the Legal, Constitutional and Administrative Review Committee to prepare and table updates of this handbook as and when necessary.**

Further, to ensure the wide dissemination of the handbook, the committee recommends that the Minister responsible for the *Parliamentary Committees Act 1995* arrange, coordinate and fund the wider printing and dissemination of the first and subsequent editions of the handbook, should its usage be widely accepted.

Finally, given the importance of all young Queenslanders receiving civics/rights education, the committee recommends that the Minister responsible for Education:

- **reports to Parliament on current and planned strategies to ensure that *every* school student in Queensland has exposure to effective civics education which includes components about citizens' rights and responsibilities;**
- **ensures that the committee's handbook becomes an integral part of civics education in Queensland schools; and**
- **ensures the development of documents ancillary to the committee's handbook for use by teachers when, or in association with, teaching about the handbook's contents.**

5.2 RIGHTS AWARENESS AT STATE GOVERNMENT LEVEL

In chapter 3, the committee referred to the pre-legislative process recently introduced in Queensland which, in part, assists in ensuring that legislation has sufficient regard to individuals' rights and liberties. This process, which is set out in the *Legislative Standards Act 1992* (Qld), is based on fundamental legislative principles (FLPs). FLPs are defined in s 4(1) of the Act as '*principles relating to legislation that underlie a parliamentary democracy based on the rule of law*'. The principles include requiring that legislation has sufficient regard to individuals' rights and liberties and the institution of Parliament. Section 4(3) of the Act also contains a list of examples to assist persons in determining whether legislation has sufficient regard to individuals' rights and liberties. (This list is reproduced in **Appendix E.**)

Clearly, compliance with the FLPs is not absolute. Non-compliance with the principles does not allow an individual to challenge executive action or legislation. Further, it is clear from the examples in s 4(3) and EARC's relevant reports, that the principles are not fixed but evolving;

their source including basic democratic values, common law presumptions and, increasingly, international law.[177]

In some cases the principles may conflict with each other. In other cases the principles may be displaced for valid reasons. As the Office of Queensland Parliamentary Counsel (OQPC) noted in its annual report for 1996-97, having 'sufficient regard to' FLPs essentially requires clearly identifying the purposes of proposed legislation, and considering whether the proposed mechanisms in the legislation:

- can be modified to enhance FLPs;
- are carefully directed to only achieving the purposes of the legislation; and
- offend against FLPs.

If the measures do offend against FLPs:

- the purpose should be of sufficient importance to justify impairing FLPs; and
- the measures should offend against FLPs as little as possible.[178]

The Scrutiny of Legislation Committee of the Queensland Parliament (the 'Scrutiny Committee') plays an important role in relation to FLPs. The committee is responsible for considering the application of FLPs to particular bills and particular subordinate legislation. In addition, the committee's responsibility extends to monitoring generally the operation of (among other matters):

- section 4 of the *Legislative Standards Act* (Meaning of 'fundamental legislative principles');
- Part 4 of the *Legislative Standards Act* which requires any Minister who presents a bill to the Legislative Assembly to table an explanatory note for the bill. 'Significant subordinate legislation' must also be accompanied by an explanatory note.[179] Amongst other matters, these explanatory notes are required to address consistency, or inconsistency, with FLPs; and
- Part 5 of the *Statutory Instruments Act 1992* (Qld) which sets out guidelines for regulatory impact statements. A regulatory impact statement (RIS) must be prepared about proposed subordinate legislation which is likely to '*impose appreciable costs on the community or a part of the community*' before that subordinate legislation is made. The information required to be set out in regulatory impact statements must include a brief assessment as to the consistency of the proposed subordinate legislation with FLPs.[180]

Whilst the validity of legislation is also not affected by a failure to comply with Part 4 of the *Legislative Standards Act* or Part 5 of the *Statutory Instruments Act*, both statutes make it clear that it is Parliament's intention that these provisions be complied with.

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177 For further information on what is meant by 'legislative principles' and their nature refer to the report of the former EARC, *Report on Review of the Office of the Parliamentary Counsel*, Government Printer, Brisbane, May 1991, especially pp 9-26.

178 Office of Queensland Parliamentary Counsel, *Annual Report 1996-97*, Government Printer, Brisbane, 1997, p 20.

179 'Significant subordinate legislation' is defined in s 2 of the Act to mean subordinate legislation for which a regulatory impact statement must be prepared under the *Statutory Instruments Act 1992* (Qld).

180 *Statutory Instruments Act 1992* (Qld), sections 43 and 44.

The Scrutiny Committee regularly tables in Parliament *Alert Digests* which highlight concerns that that committee has with respect to bills complying with FLPs. The committee also invites the relevant Minister to respond to its concerns and publishes any such responses in subsequent editions of its *Alert Digest*. Thus, the Scrutiny Committee cannot strike out a provision because it does not have 'sufficient regard to' the rights and liberties of individuals. This is ultimately a question for Parliament. However, the committee does appeal to Ministers to change their position on certain rights issues, and seeks to enhance debate in Parliament on issues regarding the rights and liberties of individuals.

The committee also reports in its *Alert Digests* as to compliance with the requirement to prepare explanatory notes for bills.

In relation to subordinate legislation, the Scrutiny Committee can ask the Parliament to support a motion of disallowance if it believes that there has been insufficient regard to FLPs. Part 6 of the *Statutory Instruments Act* requires that subordinate legislation must be published in the Government Gazette, tabled in the Legislative Assembly within fourteen days after notification in the Gazette, and is subject to disallowance by the Legislative Assembly. Notice of a disallowance motion must be given by a member within 14 sitting days after subordinate legislation is tabled in the Legislative Assembly. If a disallowance motion is passed by the Legislative Assembly, the subordinate legislation ceases to have effect.

This committee believes that ensuring sufficient regard to FLPs is a positive, proactive way to encourage the preservation and enhancement of individuals' rights and freedoms, which is especially important given the unicameral nature of the Queensland Parliament. The Scrutiny Committee's annual reports record the appreciable influence that its work has had on amendments to bills during their passage through the Legislative Assembly.[181]

In its submission to the committee's inquiry the QCCL, whilst congratulating the Scrutiny Committee on its work, stated its belief that FLPs were an ineffective method for the protection of individuals' rights because the failure to 'entrench' FLPs meant they were only a guideline and not a ground for challenging legislation.[182]

To so 'entrench' FLPs would, in effect, make them a statutory bill of rights enforceable against the legislature, although it would be a bill of rights much more uncertain in nature than the bill of rights proposed by EARC. FLPs are not fully enumerated in the *Legislative Standards Act* because they are, in fact, not finite but evolving principles. For this and the reasons outlined in chapter 4 against the adoption of a bill of rights, the committee does not believe that legislation, once enacted, should be open to challenge because of non-compliance with FLPs stated in the *Legislative Standards Act*.

However, the committee believes that, whilst FLPs are directed at the *legislative* process, they should additionally provide important guidance for departmental officers in their policy development and administrative decision-making. In other words, the promotion of FLPs has the potential, which may well have already been realised in some departments and agencies, to be used as a catalyst for a cultural change within organisations to be *generally* more rights aware.

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181 See, for example, Scrutiny of Legislation Committee, *Annual Report 1 July 1997 to 30 June 1998*, Government Printer, Brisbane, 1998, pp 7-8.

182 QCCL, submission dated 28 November 1997, p 4. However, the Scrutiny Committee's *Alert Digests* would be 'extrinsic material' to which the courts could refer in interpreting certain provisions of legislation (such as ambiguous or obscure provisions). See the *Acts Interpretation Act 1954* (Qld), section 14B.

The International Commission of Jurists (Queensland Branch) in its submission to the committee's inquiry noted the need for a fundamental cultural and attitudinal change by the Queensland Government in respecting rights. The ICJ commented:

> *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.*[183]

The committee concurs that FLPs should be promoted within government as a basis for principled policy and decision-making.

The ICJ went on to submit that the Queensland Parliament should '*enact legislation to further advance the principles espoused by the High Court in Teoh's case, so that at the 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*.'

As discussed in chapter 2, the High Court's 1995 decision in *Minister for Immigration and Ethnic Affairs v Teoh* stands for the broad principle that people have a right to expect that relevant international agreements affecting their rights will at least be considered in government administration, especially where human rights are at stake.

The Court in that case also held that such a 'legitimate expectation' could be set aside by executive or legislative indication to the contrary. Recent federal governments have, amongst other measures, introduced and re-introduced (but not passed) the Administrative Decisions (Effect of International Instruments) Bill in response to the High Court's decision in *Teoh.* That bill purports to deem that no such 'legitimate expectation' arises from the Commonwealth's ratification of an international agreement.

The ICJ's suggestion to the committee would appear to be the opposite of the Commonwealth Government's approach; namely, the ICJ would make it explicit that bureaucrats have a duty to at least consider the terms of any treaty that Australia had entered into, especially when they make decisions in relation to rights matters.

The committee is not in a position to make any detailed comment or assessment about the level of Queensland Government departments' current compliance with FLPs, or about their commitment to rights in international agreements to which Australia is obligated. Because of this—and in light of the recent federal government contra-attempts just mentioned—the committee is not at this stage prepared to recommend the introduction of the type of legislation that the ICJ advocates. However, the committee does agree that, for individuals' rights and liberties to be observed in both legislative processes and decision-making/policy development, departmental officers must have access to advice, current information and resources regarding rights.

The main advisory role with respect to the application of FLPs currently rests with the OQPC. Section 7(g) and (h) of the *Legislative Standards Act* provides that the functions of the OQPC include providing advice to Ministers, Members of the Legislative Assembly and units of the public sector on alternative ways of achieving policy objectives and the application of FLPs.

In its annual report for 1996-97, the OQPC makes it clear that its role is to provide advice on the application of FLPs in performing its drafting functions, but that it is '*only one player in*

[183] International Commission of Jurists (Qld Branch), submission dated 21 November 1997, p 3.

the legislative processes of government and its role is limited'. Nevertheless, the report goes on to state that the office has sought to build awareness of, and respect for, FLPs which has involved providing advice about the application of FLPs on a day-to-day basis in its drafting work. It has also involved the Office expounding on the value of the principles directly to its drafting clients.[184]

The committee believes that the OQPC plays an important role in relation to advising on FLPs and in encouraging observance of the rights and liberties of individuals in the legislative process. The fact that advice on the application of FLPs may be received at the early stage of drafting legislation increases the likelihood of removing any potential rights intrusions which could otherwise develop as an integral part of legislation.

However, as the OQPC's above observations indicate, there are some limitations on its advisory role. Notably, the OQPC's role relates solely to the legislative process. Therefore, the office does not have an advisory role in relation to the development of non-legislative policies and the making of decisions of an administrative character which adversely affect individuals' rights and freedoms but which do not involve legislation.

This is not to say that there are not other reference sources to which departmental officers can refer to regarding rights, particularly in relation to the legislative process. The *Queensland Cabinet Handbook*, which is currently being reviewed, contains a section on compliance with the FLPs.[185] No doubt many individual organisations also employ other strategies, such as FLP manuals and seminars, to ensure that their officers are well-informed about FLPs in general and the rights and liberties of individuals in particular.

The committee sees such supportive strategies as imperative if a rights culture/awareness is to raised and maintained in public sector organisations both in relation to the legislative process, and in relation to non-legislative policy development and administrative decision-making. In this regard, the committee reiterates the importance of the Chief Executive Officer (CEO) of each department and agency ensuring that there is a person/s within their organisation charged with functions such as:

- maintaining and updating a FLP manual for the organisation's use;
- organising regular seminars regarding FLPs (to be conducted annually or bi-annually depending on staff turnover) which are to be attended by both legal and policy officers;
- providing advice on compliance with FLPs and alternative ways of achieving policy objectives;
- educating and alerting persons in the organisation about issues regarding rights protection, that is, promoting measures to foster a culture within the organisation so that it is sensitive and responsive to rights issues;
- keeping abreast of rights issues;
- ensuring that, if a FLP is to be departed from in legislation, Cabinet's approval is sought in accordance with the *Queensland Cabinet Handbook* (this would ensure that departures are justified); and
- liaising with like officers in other departments and agencies to ensure rights coordination from a 'whole of government' perspective.

184 Op cit, pp 19-20.

185 Queensland Government, *Queensland Cabinet Handbook*, Government Printer, Brisbane, 1997, p 62.

The committee believes that it is only through such measures that the observance of individuals' rights and liberties will become truly entrenched in public sector practices, including legislative processes, non-legislative policy development and administrative decision-making.

Whilst the committee is not advocating a detailed review of FLPs or the Scrutiny Committee's role in relation to ensuring compliance with them, the committee believes that there is a strong argument for ensuring a high level of departmental compliance with, and commitment to, FLP objectives. The committee also believes that there is a strong argument for generally enhancing departmental consciousness in relation to observing individuals' rights and liberties.

5.2.1 Conclusion

The committee reiterates that it is important that the Chief Executive Officer of each State Government department and agency, ensures that there is within their organisation, appropriate strategies, measures and procedures in place to ensure:

- **awareness of, and compliance with, fundamental legislative principles by public officers so that the rights and liberties of individuals are given due regard by officers in the development of legislation; and**
- **awareness of, and commitment to, the rights and liberties of individuals by public officers in their non-legislative policy development and administrative decision-making.**

The committee believes that it is only through such measures that the observance of individuals' rights and liberties will become truly entrenched in public sector practices including legislative processes, non-legislative policy development and administrative decision-making.

Whilst the committee is not advocating a detailed review of fundamental legislative principles or the Scrutiny of Legislation Committee's role in relation to ensuring compliance with them, the committee believes that there is a strong argument for ensuring a high level of departmental compliance with, and commitment to, fundamental legislative principle objectives. This commitment should not only be in relation to the development of legislation, but in relation to policy-making generally and in administrative decision-making. The committee also believes that there is a strong argument for generally enhancing departmental consciousness in relation to observing individuals' rights and liberties.

5.3 RIGHTS AWARENESS AT LOCAL GOVERNMENT LEVEL

The preceding discussion concerned the application of FLPs to bills and subordinate legislation and raising rights awareness in the State public sector. However, there is also potential for individuals' rights and liberties to be infringed by laws made by local governments. In fact, in many cases it is the laws made by local government that impact most on people's day-to-day lives.

The current power and process for law-making by local governments is set out in the *Local Government Act 1993* (Qld) [the 'LG Act']. The LG Act introduced a new local law-making regime which came into effect in March 1994. The Act gives local governments greater flexibility in law-making than the previous local government legislation by containing a broader, less prescriptive law-making power.

Section 25 of the LG Act states that each local government has jurisdiction to 'make local laws for, and otherwise ensure, the good rule and government of its territorial unit'.[186] This power is generally limited to the extent that a local government cannot make a local law:

- that the State Parliament could not validity make; or
- purporting to exclude or limit the future repeal or amendment of the law.[187]

Further, in the event that there is an inconsistency between a State law and a local law, the State law prevails over the local law to the extent of the inconsistency.[188]

There are a number of types of local laws. These include model local laws, interim local laws, local laws and local law policies. The nature and process for making these laws is set out in chapter 12 of the LG Act.

In summary:

- a model local law is a local law proposed by the Minister as suitable for adoption by local governments. Model local laws may be adopted by local governments using a simplified process, or they can be amended by local governments (using the full law-making process) to suit particular circumstances;
- an interim local law is a local law that the local government and Minister may agree be made without public consultation provided that the process to make it a permanent local law is commenced during the interim period of six months (essentially a means of providing 'gap coverage');
- a local law is a local law developed by a local government in preference to adopting a model local law; and
- a local law policy is a policy made about a particular matter within a local law.[189]

The former Department of Local Government and Planning [now the Department of Communication and Information, Local Government and Planning] ('the Department') has issued a *Local law manual* to assist in the development and adoption of local laws and local law policies.

In summary, in making local laws a local government must:

- by resolution propose to make a law;
- advise the Minister of the proposed local law and give the Minister required information about the proposed local law. The Minister, upon being satisfied that State interests will be satisfactorily dealt with by the proposed law, advises the local government that it may proceed further in making the law;
- consult with the public about the proposed law;
- give public access to the proposed law;
- accept and consider all submissions made to it about the proposed local law;

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186 The *Constitution Act 1867* (Qld) requires there to be a system of local government and provides that the constitution, powers, authorities, duties and functions of local government bodies are determined by the Parliament (see ss 54-56). The Parliament's determination with respect to these matters is largely set out in the *Local Government Act 1993*.

187 *Local Government Act 1993*, section 30(1).

188 *Local Government Act 1993*, section 31.

189 These definitions are drawn from both chapter 12 of the LG Act and the Department of Local Government and Planning, *Local Law making: An evaluation*, Discussion Paper, March 1998, pp 6-7.

- decide whether to proceed with making the proposed law;
- in certain circumstances, again ensure that the proposed law satisfactorily deals with any State interest;
- by resolution make the proposed law; and
- give public notice of the making of the local law.

The requirement with respect to observing FLPs does not apply to local laws. Section 4(1) of the *Legislative Standards Act* requires that 'legislation' has sufficient regard to rights and liberties of individuals and the institution of Parliament. 'Legislation' is not defined in the Act. Therefore, on a wide interpretation, legislation could arguably include a reference to laws made by local governments. However, the exemplification of what, for example, may amount to 'sufficient regard to' FLPs in s 4(3)-(5) only refers to bills and subordinate legislation and therefore, the term 'legislation' would appear to be restricted to only those types of legislation. The definition of 'subordinate legislation' in s 9 of the *Statutory Instruments Act* expressly excludes local laws and other statutory instruments made by local governments.

The Department agrees with this view. In its March 1998 discussion paper *Local law-making: An evaluation*, the Department notes:

> *There are no legislative standards for drafting local laws or local law policies. The standards that apply to the drafting of State Acts and regulations do not apply to local laws and local law policies.*[190]

At most, it would seem that the second step in the process outlined above (the requirement that the Minister must be satisfied that State interests have been satisfactorily dealt with) may involve some consideration of FLPs given that they are enshrined in State legislation.

Three consequences flow from the fact that locals laws do not fall within the *Statutory Instruments Act* definition of 'subordinate legislation'.

Firstly, the Scrutiny Committee does not have jurisdiction in relation to monitoring local government laws as the committee's mandate is restricted to considering the application of FLPs to particular bills and particular 'subordinate legislation'.

Secondly, local laws are not subject to Part 6 of the *Statutory Instruments Act*. Part 6 requires that subordinate legislation must be published in the Government Gazette, tabled in the Legislative Assembly within fourteen days after notification in the Gazette, and is subject to disallowance by the Legislative Assembly.

Thirdly, the Office of Queensland Parliamentary Counsel (OQPC) does not draft local laws as its functions include drafting all proposed 'subordinate legislation' (other than exempt subordinate legislation). Instead, local governments themselves or their independent legal advisers draft local laws. This means that the OQPC's professional expertise in drafting, and its advisory role with respect to the application of FLPs, is not utilised in the local law-making process.

The drafting of legislation is a professional skill developed over years of experience. Independent legal advisers, no matter how competent in advising on the law, are rarely trained in the drafting of legislation. Moreover, they are unlikely to be well-versed in the application of FLPs which should, as a matter of best practice, be used in the drafting of any statutory

[190] Department of Local Government and Planning, op cit, p 12.

instrument. It is unrealistic to expect lawyers who are, on the odd occasion, briefed to draft local laws to be able to perform all functions of the OQPC.

The Department's March 1998 discussion paper supports these concerns:

> *A number of local governments do not have ready access to (or resources for) obtaining competent and current legal services for drafting of local laws. In the 1996 evaluation of the Department's local government program, consultation with some local governments indicated there was a need to improve the standard of advice and expertise being provided by legal firms hired to draft local laws. Local governments concerned indicated they paid for the preparation of local laws only to have them returned from the Department with considerable conditions and changes. This is supported by the fact that many proposed local laws submitted to the Department with intra-vires certificates have contained invalid provisions.*[191]

The Department went on to note that it spends a considerable amount of time rewriting poorly drafted local laws. In particular it stated:

> *A consistent problem with proposed local laws is conflict with and duplication of State legislation.* ***This includes the following types of errors: non-conformance with fundamental legislative principles, such as reversal of onus of proof, inclusion of general and ongoing penalty provisions and exemption from liability regardless of action taken;*** *and duplication of matters regulated by the State such as building standards.*[192] [Emphasis added.]

The committee is aware of a number of instances where local laws could have significant rights ramifications.

Ordinance 11 of the Brisbane City Council's Queen Street Mall Ordinances provides that a person shall not do certain things within the Queen Street Mall without a permit or licence or outside the conditions stipulated in such a permit or licence including:

- '*distribute any matter whatsoever*';
- '*preach, declaim, harangue or deliver any address of any kind*'; and
- '*convene or hold any public meeting*'.

The Council may permit the activities otherwise prohibited by ordinance 11 '*upon such terms and conditions as it thinks fit*' (ordinance 13). The Council may refuse such a permit '*in its discretion*' (ordinance 15). In light of the possible ramifications for individuals' rights and freedoms such as the freedom of (political) communication, the discretion given to the Council in the ordinances to ban various activities in the Mall appears rather wide and ill-defined.

Clause 8(2) of by-law 39 of the Townsville City Council likewise prohibits various activities '*in or upon a pedestrian mall without a permit in writing from the Council*'. The clause prohibits people '*taking part in any public demonstration or any public address*' or having anything that is '*capable of being used for or in connection with*' the prohibited activities in or upon the mall without a permit.[193] In addition, cl 12 of by-law 39 provides that '*a person when in or upon a pedestrian mall shall obey every direction or instruction given to him by an Authorised Person (Pedestrian Mall) [of the Council] or by a member of the Police Force*.'

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191 Ibid.

192 Ibid, p 13.

193 But the by-law does not apply to 'the setting up and use of booth (sic) for religious, charitable, educational or political purposes ...' [cl 8(1)].

Clause 12 does not stipulate that any direction given by the authorised Council officer needs to be reasonable.

In relation to the Townsville City Council mall by-law, the Townsville Community Legal Service submission to the committee stated:

> *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 speech, to disseminate information, to freedom of association, to freedom of peaceful assembly, to freedom of movement, and to freedom from discrimination.*[194]

The TCLS stated that it did not question the right of a local government to regulate activity in public places because such regulation enables peaceful and safe public places. But the TCLS suggested that the law had been used discriminately 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. ..We have also had complaints that the policy is applied selectively in that groups such as the Salvation Army have been granted permits.*[195]

The TCLS also directed the committee's attention to the Townsville City Council Local Law No 51 (Control of Intoxicating Liquor). Clauses 4 and 5 of Local Law 51 provide that a person must not consume or be in possession of intoxicating liquor in a park, unless the local government has authorised the park as a place where intoxicating liquor can be consumed, or the person is transporting the liquor through the park. '*Park*' is defined in cl 3 as '*any public park, open space, garden, recreation ground, reserve, common or any land in the area dedicated to or vested in or under the control or management of the local government or of which the local government is trustee*'.

An '*authorised person*' [which is an authorised Council officer or police officer] may require a person to stop the offending conduct or to take specific action to remedy the contravention. If the offender does not comply with an order:

- the offender becomes subject to a maximum fine of $750; and
- the authorised Council officer or police officer may:
  - '*take action reasonably necessary to have the order carried out and may use reasonable force for the purpose*'; and
  - confiscate the liquor, upon which the liquor becomes the property of the local government. [See cls 6(1)-(2), 7(1)-(2) and 8(1).]

One of the objects of the law is to '*regulate certain activities in parks ... to ensure appropriate standards of conduct*' (cl 2).

In relation to this local law, the TCLS submitted:

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194 Townsville Community Legal Service, submission dated 11 March 1998, pp 9-10.

195 Ibid, p 10.

> *The Local Council has been particularly vigilant in the application of stringent 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.*[196]

If the above by-laws were subject to the same legislative standards and scrutiny process as bills and subordinate legislation, then they would have been scrutinised to check that they had 'sufficient regard to…rights and liberties of individuals', for example, whether they:

- made rights and liberties, or obligations dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- allowed the delegation of administrative power only in appropriate cases and to appropriate persons.[197]

As the March 1998 discussion paper indicates, the Department is currently reviewing the local law-making process.[198] Issues under discussion include the drafting standard of local laws. The Department's assessment of the current local law-making process is as follows:

> *The extensive rework currently required to prepare local laws is an inefficient application of State and local resources used in local law-making. To date, information about local law-making has targeted local governments. It may be more effective to target those involved in preparing local laws or assist in developing alternative local law service providers.*[199]

Possible action that the Department identifies to improve the standard of drafting include:

- a Statewide/regionally-based local laws service which provides competent and current advice and drafting services;
- identification and dissemination of information about good practice in preparing local laws; and
- training and accreditation for those involved in preparing local laws.[200]

The Department has also asked for submissions on whether there are any other mechanisms which may assist in improving drafting standards.

Additional options which the committee would add to those identified by the Department in its paper include the following.

- The OQPC could assume the responsibility of drafting local laws and other statutory instruments on behalf of local bodies. This would ensure that these laws are drafted by professional drafters who, importantly in the rights context, have an operational understanding of FLPs and, in particular, whether such laws are likely to infringe the rights and liberties of individuals. Adopting this approach would of course have significant resource implications for the OQPC, although it could involve a transfer of resources from that portion of a local government's budget allocated to the drafting of local laws to the OQPC.

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196 Ibid, pp 9-10.

197 *Legislative Standards Act 1992*, sections 4(2)(a) and 4(3)(a) & (c).

198 The review is part of the Department's systematic evaluation of the *Local Government Act 1993*.

199 Department of Local Government and Planning, 1998, op cit, p 13.

200 Ibid.

- Local governments or their legal advisers could draft local laws but, as a stage in the local law-making process, there could be a requirement that the laws be reviewed by the OQPC and certified as meeting the legislative standards in the *Legislative Standards Act*. The adoption of this option should be accompanied by the dissemination of further information about good practice in drafting local laws and training and accreditation for those involved in preparing local laws. It would also require further resources for the OQPC, although possibly less than under the above option if little amendment to the local laws is required by the OQPC.
- Another option which would be additional rather than alternative to the above options, is to establish a parliamentary committee which has an equivalent role to the Scrutiny Committee in relation to local laws.
- Local government laws could also be subject to disallowance by Parliament. In this regard it is noted that in most other Australian jurisdictions a parliamentary committee has the power to review *and* the power to ask Parliament to move a motion of disallowance with respect to local government legislation.

At the time of writing, the Department had not released a report on its evaluation of local law-making. It may well be that some of the issues noted above are addressed in any such report or as a result of the evaluation. However, depending on the outcome of this evaluation, there might be a need for the Parliament or government to undertake further inquiry and action regarding the local government law-making process.

Any future review might also incorporate an examination of the law-making by:

- Aboriginal and Torres Strait Island councils; and
- public university councils.

Similar issues to those noted above in relation to local governments generally also arise in relation law-making by Aboriginal and Torres Strait Island Councils. Whilst these councils are also local governments,[201] different provisions apply in relation to their law-making powers[202] and the law-making processes.[203]

Despite these differences, the result is that Aboriginal and Torres Strait Island Council by-laws are also:

- not required to comply with FLPs;
- not subject to scrutiny by the Scrutiny of Legislation Committee;
- not subject to disallowance by Parliament under Part 6 of the *Statutory Instruments Act 1992* (Qld); and
- not drafted by the OQPC.[204]

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201 The LG Act refers to an Aboriginal local government as a body that has the functions of local government under the *Community Services (Aborigines) Act 1984* (Qld) and a Torres Strait Islander local government is a body that has the function of local government under the *Community Services (Torres Strait) Act 1984* (Qld).

202 See the *Community Services (Aborigines) Act 1984*, section 25 and the *Community Services (Torres Strait) Act 1984*, section 23.

203 *Community Services (Aborigines) Act 1984*, section 26 and the *Community Services (Torres Strait) Act 1984*, section 24.

204 These consequences arise because the by-laws are not 'subordinate legislation' for the purposes of the *Statutory Instruments Act 1992*. Section 9(2) of that Act specifically exempts from the definition of 'subordinate legislation' statutory instruments made by a local government.

The committee makes the suggestion that any future review of local government law-making might extend to Aboriginal and Torres Strait Island Councils law-making. However, any review of law-making by Aboriginal and Torres Strait Island Councils would need to consider:

- issues surrounding Aboriginal and Torres Strait Islander self-determination; and
- the nature of FLPs themselves in an Indigenous law-making context, given that FLPs focus more on the rights and liberties of individuals than on community or 'group' rights.

The Scrutiny Committee has also recently expressed concerns regarding law-making by public university councils.

The Acts under which Queensland public universities operate were overhauled in 1997 to, amongst other things, ensure that they conformed with the provisions of the *Legislative Standards Act.* The process in relation to law-making by university councils subsequently changed. The various university Acts specify the matters that university laws (called 'statutes') may deal with. Whilst university councils may no longer make statutes with regard to such things as the conduct of persons or control of traffic on university land, university councils can still make statutes with regard to matters such as disciplining students, and can thereby restrict the rights and liberties of individuals.[205]

University statutes are not principal legislation, but subordinate instruments. Further, the various university Acts provide that a university statute is 'exempt subordinate legislation' under the *Legislative Standards Act.* FLPs apply to university statutes and Part 6 of the *Statutory Instruments Act* also applies. Therefore, university statutes are subject to disallowance (or scrutiny) by the Legislative Assembly.[206]

However, unlike the position before the introduction of the 1997 Acts, the OQPC does not draft university statutes.[207] The Scrutiny Committee made adverse comment on this fact when it scrutinised the 1997 bills.[208] That committee was concerned that the persons who would draft the now exempt instruments would not be able to match the experience of the OQPC in drafting legislation or in applying FLPs to that legislation. Drafting by OQPC was viewed by the Scrutiny Committee as especially desirable since the 1997 Acts also removed the requirement that university statutes be approved by the Minister or the Governor in Council.[209]

EARC, in its *Report on Review of the Office of Parliamentary Counsel*, also expressed concern about subordinate legislation generally not being drafted by the OQPC.[210] As a result, and in accordance with EARC's recommendation, s 9 of the *Legislative Standards Act* provides that Parliamentary Counsel may issue guidelines to persons drafting exempt instruments. Amongst other matters, these guidelines may deal with the application of FLPs to exempt instruments. The Scrutiny Committee noted in October 1997 that s 9 guidelines had still not been issued.[211] (To this committee's knowledge, s 9 guidelines have not been issued to date.)

As a result of its concerns with the application of FLPs in drafting university statutes, the Scrutiny Committee asked the responsible Minister (the Education Minister) to consider

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205 See the Scrutiny Committee's *Alert Digest No 8 of 1997*, pp 2-3 and *Alert Digest No 11 of 1997*, pp 2-3.
206 This is due to the operation of sections 47(3), 49 and 50 of the *Statutory Instruments Act 1992*.
207 See the *Legislative Standards Act 1992*, section 7(e).
208 *Alert Digest No 8 of 1997*, op cit, p 5; *Alert Digest No 11 of 1997*, op cit, p 6.
209 *Alert Digest No 8 of 1997*, op cit, p 6; *Alert Digest No 11 of 1997*, op cit, pp 6-7.
210 EARC, May 1991, op cit, p 30.
211 *Alert Digest No 10 of 1997*, op cit, p 28.

requiring draft statutes to be reviewed by the OQPC and certified as meeting legislative standards set out in the *Legislative Standards Act*.[212] In subsequent correspondence between the then Education Minister and the Scrutiny Committee, the then Minister proposed a protocol for the review of university statutes to ensure that they do not, among other matters, infringe FLPs.[213]

Finally, this committee's comments above about ensuring a high level of awareness of FLPs/rights by officers who draft legislation, develop non-legislative policies and make administrative decisions equally applies to law-making by local governments, Aboriginal and Torres Strait Island councils and public university councils.

5.3.1 Conclusion

The committee notes that local government laws are currently:

- **not required to comply with fundamental legislative principles as set out in s 4 of the *Legislative Standards Act 1992* (Qld);**
- **not subject to scrutiny by the Scrutiny of Legislation Committee of the Queensland Parliament;**
- **not subject to disallowance by Parliament under Part 6 of the *Statutory Instruments Act 1992* (Qld); and**
- **not drafted by the Office of the Queensland Parliamentary Counsel.**

The committee is therefore concerned that the rights and liberties of individuals are not required to be given specific consideration in the local government law-making process.

The committee further notes that the Department of Communication and Information, Local Government and Planning is currently conducting an evaluation of the local law-making process but has not published any final report in this regard. Depending on the outcome of this evaluation, there might be a need for the Parliament or Queensland Government to undertake further inquiry into, and review of, the local government legislative process and its effect on individuals' rights and freedoms.

Such further inquiry might also incorporate a review of law-making by Aboriginal and Torres Strait Island councils and public university councils.

Finally, this committee's comments above about ensuring a high level of awareness of FLPs/rights by officers who draft legislation, develop non-legislative policies and make administrative decisions equally applies to law-making by local governments, Aboriginal and Torres Strait Island councils and public university councils.

5.4 OTHER AREAS OF RIGHTS REFORM

The committee is aware that, in addition to the matters discussed above, individuals' rights in Queensland are affected by other aspects of Queensland law. Given the committee's general jurisdiction in relation to law reform—which specifically includes administrative review, electoral and constitutional reform—the committee monitors many areas of law which affect individuals' rights and freedoms and which may need review.

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212 *Alert Digest No 8 of 1997*, op cit, p 6; *Alert Digest No 11 of 1997*, op cit, pp 6-7.

213 Scrutiny of Legislation Committee, *Alert Digest No 12 of 1997*, p 112.

With respect to administrative law, the committee is conscious of outstanding recommendations of the former Electoral and Administrative Review Commission (EARC) and Parliamentary Committee for Electoral and Administrative Review (PCEAR) regarding the need for reform of Queensland's arrangements for appeals from administrative decisions.[214] The former LCARC referred to these recommendations in its report *Privacy in Queensland* and recommended that, in determining which merits tribunal should hear matters brought under its proposed Privacy Act (Qld), the Queensland Government should give further consideration to acting upon the recommendations of the former EARC and the former PCEAR.[215]

More recently, Professor Wiltshire in his *Report of the Strategic Review of the Queensland Ombudsman,*[216] also identified the need to conduct an overall review of the administrative appeal mechanisms in Queensland with a view to reducing the complexity and cost of the administrative appeals machinery, without diminishing the rights of citizens to complain about administrative discretion.[217] The committee is currently conducting a review of Professor Wiltshire's report.

The committee is also aware of concerns expressed about the decreasing application of administrative law to those services which government departments and agencies have corporatised, privatised and/or contracted out. Again, this was a matter referred to by the former committee in its privacy report. The committee is monitoring the many issues which arise as a result of this increasingly blurred demarcation between the public and private sectors, the manner in which these issues are being addressed in other jurisdictions, and how they might need to be addressed in Queensland.

Thus, in accordance with its wide statutory responsibility, the committee will continue to monitor whether individuals' administrative review rights should be further protected and enhanced.

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214 Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, Government Printer, Brisbane, August 1993; Parliamentary Committee for Electoral and Administrative Review, *Report on Review of Appeals from Administrative Decisions*, Queensland Printer, Brisbane, May 1995.

215 LCARC, op cit, recommendation 14, pp 115-116.

216 K Wiltshire, *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations)*, Government Printer, Brisbane, 1998.

217 Ibid, recommendation 29, p 72.

6. CONCLUSION

It has now been five years since EARC handed down its report on its inquiry into the preservation and enhancement of individuals' rights and freedoms. It was a report prepared in the post-Fitzgerald era when, among other matters, Queensland's electoral and administrative laws were undergoing much-needed reform. In this environment, EARC recommended that Queensland adopt an enforceable bill of rights.

The committee naturally endorses the values that a bill of rights such as the one proposed by EARC enshrines—human dignity, life, liberty, security of person, democratic participation, equality—but does not believe that an enforceable bill of rights is an apt or practical mechanism to realise these values.

Implementation of EARC's recommendation would potentially have a significant—and the committee believes—inappropriate impact on the fundamental nature of the Queensland polity. Moreover, the committee is not convinced, for the reasons noted in this report, that the adoption of a bill of rights would achieve a *real* difference in the protection of the rights and liberties of Queenslanders. Substantial economic and social costs are also likely to result from any such move.

In the intervening period between the handing down of EARC's report and this parliamentary committee review of that report, there have been significant improvements in the area of rights protection in Queensland. Important administrative and 'rights-type' laws—such as those relating to freedom of information, judicial review of administrative decisions and a right to peacefully assemble—which also emanated from EARC's work have now operated successfully for a number of years. A new pre-legislative process which ensures, among other matters, that Queensland legislation has sufficient regard to individuals' rights and liberties is now an integral part of Queensland's legislative process. Additionally, Parliament's ability to scrutinise aspects of government policy and decision-making has been bolstered with a more developed and comprehensive parliamentary committee system.

These new measures are supplemented by other sources of rights protection in Queensland such as the common law and constitutional law, both of which in recent years have also proven to be evolving means of protecting individuals' rights.

However, despite these improvements and the overall safety net of rights protection that they in combination with other sources provide, rights are protected in Queensland to differing degrees and with differing levels of enforceability.

Given that the committee recommends against the adoption of a bill of rights, it has aimed to identify the primary ways in which rights protection in Queensland could be otherwise enhanced. The committee's recommendations in this regard are centred around two primary concepts: ensuring wide-spread education of members of our community about their rights; and enhancing a rights culture or consciousness in State and local government policy, law and decision-makers.

Stemming from this first concept is the committee's major initiative of this inquiry, namely the handbook, *Queenslanders' Basic Rights*. The committee intends that this handbook, which will be tabled together with this report, will serve to inform persons about their existing rights and the sources of those rights. This will, in turn, assist them to enforce their rights. As such,

the handbook is anticipated to be a fundamental resource for rights education throughout Queensland Government departments and agencies, schools, businesses, workplaces and the community in general. The handbook will also assist citizens identify areas in which their current rights protection is deficient so as they may approach appropriate persons and bodies with proposals for change. People they might contact and avenues at their disposal in this regard are also included in this single, ready-reference document. From this perspective, the committee hopes that its handbook will stimulate informed and focused law reform.

The committee believes that its inquiry has led it to make sound conclusions and recommendations about the further preservation and enhancement of individuals' rights and freedoms in Queensland, during which it has identified the need to produce what it believes to be an unique and landmark document.

BIBLIOGRAPHY

MONOGRAPHS

Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law Human Rights and Equal Opportunity Commission, Canberra, 1994.

Australia. Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, National Capital Printing, Canberra, 1994.

Australia. Civics Expert Group, *Whereas the People…:Civics and Citizenship Education*, AGPS, Canberra, 1994.

Australia. Constitutional Commission (Chairman: M Byers), *Final Report*, volumes 1 and 2, AGPS, Canberra, 1988.

Australia. Human Rights and Equal Opportunity Commission, *Free to Believe? The Right to Freedom of Religion and Belief in Australia*, Discussion Paper No 1, Human Rights and Equal Opportunity Commission, Sydney, 1997.

Australia. Parliament. Joint Standing Committee on Foreign Affairs, Defence and Trade, *Improving But…Australia's Regional Dialogue on Human Rights*, CanPrint Communications, Canberra, June 1998.

Australia. Parliament. Joint Standing Committee on the National Capital and External Territories, *A Right to Protest*, AGPS, Canberra, May 1997.

Australia. Parliament. Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia? Exposure Report*, AGPS, Canberra, November 1985.

Australia. Senate. Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Human Rights Legislation Amendment Bill 1996*, Senate Printing Unit, Canberra, June 1997.

Australian Capital Territory. Attorney-General's Department, *A Bill of Rights for the ACT*? Discussion Paper, Government Printer, Canberra, 1993.

Bailey, P H, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990.

Brennan, F, *Legislating Liberty: A Bill of Rights for Australia?*, University of Queensland Press, Brisbane, 1998.

Bryden, P, Davis, S and Russell, J (Eds), *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life*, University of Toronto Press, Toronto, 1994.

Cameron, J (Ed), *The Charter's Impact on the Criminal Justice System*, Carswell, Toronto, 1996.

Canada. Centre for Constitutional Studies, *Social Justice and the Constitution*, Carleton University Press, Ottawa, 1992.

Canada. Department of Justice. *Canadian Charter of Rights Decisions*, <http://canada.justice.gc.ca/Publications/CCDL/index_en.html>, written by G Garton QC.

Canada. Ontario. Attorney General's Advisory Committee (Chairman: Hon G Arthur Martin), *Charge Screening, Disclosure and Resolution: Discussions*, Queen's Printer for Ontario, Toronto, 1993.

Canada. Parliament. Special Joint Committee of the Senate and of the House of Commons on a Renewed Canada (Joint Chairs: G-A Beaudoin; D Dobbie), *Report*, February 1992.

Canada. Quebec. Human Rights Commission (Commission des droits de la personne du Québec), *Québec: Charter of Human Rights and Freedoms*, Quebec Human Rights Commissioner, December 1990.

Gaze, B and Jones, M, *Law, Liberty and Australian Democracy*, Law Book Company, Sydney, 1990.

Hanks, P, *Constitutional Law in Australia*, (second ed), Butterworths, Sydney, 1996.

Mackaay, E, 'The emergence of constitutional rights', *Constitutional Political Economy*, vol 8, Kluwer Academic Publishers, Boston, 1997.

McKenna, M, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights*, Research Paper No 12 of 1996-97, Department of the Parliamentary Library, Information and Research Services, 18 March 1997.

McMillan, J, Evans, G and Haddon, S, *Australia's Constitution: Time for Change?*, Law Foundation of New South Wales and George Allen & Unwin, Sydney, 1983.

New Zealand. *A Bill of Rights for New Zealand: A White Paper*, Government Printer, Wellington, 1985.

New Zealand. House of Representatives. Justice and Law Reform Select Committee (Chairman: Mr Bill Dillon), *Interim Report*, Inquiry into the White Paper: 'A Bill of Rights for New Zealand', Government Printer, Wellington, 1986.

Newman, P (Ed), *Local Government Queensland* (loose-leaf service), Law Book Company, Sydney, 1994.

Northern Territory. Legislative Assembly. Sessional Committee on Constitutional Development, *Addendum to the Final Draft Constitution for the Northern Territory*, Government Printer, December 1996.

Northern Territory. Legislative Assembly. Sessional Committee on Constitutional Development, *Final Draft Constitution for the Northern Territory*, Government Printer, December 1996.

Northern Territory. Legislative Assembly. Sessional Committee on Constitutional Development, *Discussion Paper No. 8: A Northern Territory Bill of Rights?* Government Printer, March 1995.

O'Neill, N and Handley, R, *Retreat from Injustice: Human Rights in Australian Law*, Federation Press, Sydney, 1994.

Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia*, (fourth ed), Butterworths, Sydney, 1996.

Queensland. Anti-Discrimination Commission Queensland, *1996-97 Annual Report*, Government Printer, Brisbane, 1997.

Queensland. Department of Local Government and Planning, *Local Law Making: An Evaluation*, Discussion Paper, March 1998.

Queensland. Electoral and Administrative Review Commission, *Public Seminar on a Bill of Rights for Queensland*, Seminar Papers, Government Printer, Brisbane, 20-21 July 1992.

Queensland. Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, Government Printer, Brisbane, August 1993.

Queensland. Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel*, Government Printer, Brisbane, May 1991.

Queensland. Electoral and Administrative Review Commission, *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Government Printer, Brisbane, August 1993.

Queensland. Electoral and Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Issues Paper No. 20, Government Printer, Brisbane, June 1992.

Queensland. Electoral and Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Public Hearing Transcript, Auscript, Brisbane, 18 February 1993.

Queensland. Electoral and Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Public Submissions, vols 1-4, Government Printer, Brisbane, September 1992.

Queensland. Office of the Queensland Parliamentary Counsel, *Annual Report 1996-97*, Government Printer, Brisbane, 1997.

Queensland. *Queensland Cabinet Handbook*, Government Printer, Brisbane, 1997.

Queensland. Legislative Assembly. Legal, Constitutional and Administrative Review Committee, *Privacy in Queensland*, Report No 9, Government Printer, Brisbane, April 1997.

Queensland. Legislative Assembly. Legal, Constitutional and Administrative Review Committee, *The Preservation and Enhancement of Individuals' Rights and Freedoms: Should Queensland Adopt a Bill of Rights*?, Issues Paper No 3, Government Printer, Brisbane, October 1997.

Queensland. Parliamentary Committee for Electoral and Administrative Review, *Report on Review of Appeals form Administrative Decisions*, Government Printer, Brisbane, May 1995.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 8 of 1997, Brisbane, 19 August 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 9 of 1997, Brisbane, 26 August 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 10 of 1997, Brisbane, 7 October 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 11 of 1997, Brisbane, 28 October 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 12 of 1997, Brisbane, 18 November 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 1 of 1998, Brisbane, 3 March 1998.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 2 of 1998, Brisbane, 17 March 1998.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Alert Digest*, Issue No 3 of 1998, Brisbane, 21 April 1998.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Annual Report: 1 July 1997 to 30 June 1998*, Report No 10, Government Printer, Brisbane, October 1998.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Annual Report: 1 July 1996 to 30 June 1997*, Report No 4, Government Printer, Brisbane, October 1997.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *Annual Report 1995-1996*, Report No 1, Government Printer, Brisbane, October 1996.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *The Operation of the RIS Process Under Part 5 of the Statutory Instruments Act 1992*, Government Printer, Brisbane, April 1998.

Queensland. Legislative Assembly. Scrutiny of Legislation Committee, *The Scrutiny of Bills Within a Restrictive Timeframe*, Report No 6, Government Printer, Brisbane, March 1998.

Solomon, D, *Coming of Age: Charter for a New Australia*, University of Queensland Press, Brisbane, 1998.

United Kingdom. Institute for Public Policy Research, *Constitution Paper No 1*: *A British Bill of Rights*, Institute for Public Policy Research, London, 1990.

United Kingdom. Institute for Public Policy Research, *The Constitution of the United Kingdom*, Institute for Public Policy Research, London, 1991.

United Kingdom. White Paper. *Rights Brought Home: The Human Rights Bill*, London, October, 1997.

Urofsky, M, *A March of Liberty: A Constitutional History of the United States*, Alfred A Knopf, New York, 1988.

Victoria. Parliament. Federal-State Relations Committee, *Report on International Treaty Making and the Role of the States*, No 57 - Session 1996-97, Government Printer, Melbourne, October 1997.

Victoria. Parliament. Legal and Constitutional Committee, *Human Rights Reference: A Bill of Rights for Victoria? Some issues*, Discussion Paper No 1, Government Printer, Melbourne, February 1986.

Victoria. Parliament. Legal and Constitutional Committee, *Human Rights Reference: Are Human Rights Adequately Protected in Victoria? Some Preliminary Examples*, Discussion Paper No 2, Government Printer, Melbourne, March 1986.

Victoria. Parliament. Legal and Constitutional Committee, *Human Rights Reference: Freedom of Expression in Victoria*, Discussion Paper No 3, Government Printer, Melbourne, May 1986.

Victoria. Parliament. Legal and Constitutional Committee, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Government Printer, Melbourne, April 1987.

Wilcox, M R, *An Australian Charter of Rights?*, Law Book Company, Melbourne, 1993.

Williams, G, *Human Rights Under the Australian Constitution*, book forthcoming by Oxford University Press.

Williams, G, *The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia*, Research Paper No 10 of 1996-97, Department of the Parliamentary Library, Information and Research Services, February 1997.

Wiltshire, K, *Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations*), Government Printer, Brisbane, 1998.

Zines, L, *The High Court and the Constitution*, Fourth Edition, Butterworths, Sydney, 1997.

ARTICLES

Alston, P, 'An Australian Bill of Rights: By design or default', in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 1-17.

Amnesty International, *Australian Newsletter*, vol 16, no 4, July/August 1998.

Arden, Hon Dame M, 'Modernising legislation', *Public Law*, 1998, pp 65-76.

Bailey, P '"Righting" the Constitution without a bill of rights', *Federal Law Review*, vol 23, no 1, 1995, pp 1-36.

Beatty, D, 'The Canadian Charter of Rights: Lessons and laments', *Modern Law Review*, vol 60, no 4, July 1997, pp 481-498.

Bouwhuis, S, 'International law by the back door?', *The Australian Law Journal*, vol 72, October 1998, pp 794-798.

Bowen, Hon L, 'Rights Bill is moderate and "a shield, not a sword" says Attorney', *Australian Law News*, vol 21, no 2, March 1986, pp 16-19.

Bowen, J K, 'Victoria's proposed Declaration of Rights and Freedoms: A defective beacon to the future', *Law Institute Journal*, vol 63, no 3, March 1989, pp 181-183.

Brennan, F, 'Comments', *Public Law Review*, vol 7, September 1997, pp 132-134.

Brennan, F, 'The Mitchell Oration: Thirty years on, do we need a bill of rights?', *Adelaide Law Review*, vol 18, no 2, July 1996, pp 123-157.

Brennan, G, 'The impact of a bill of rights on the role of the judiciary: An Australian response' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 177-186.

Brougham, G, 'A bill of wrongs: The argument against the proposed bill of rights', *New Zealand Law Journal*, July 1985, pp 226-231.

Burdekin, B, 'The impact of a Bill of Rights on those who need it most' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 147-164.

Caleo, C, 'Implications of Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', *Public Law Review*, vol 4, 1993, pp 175-192.

Carter, S, 'A national bill of rights? The debate continues', *Proctor*, vol 15, no 3, April 1995, p 23.

Charlesworth, H, 'The Australian reluctance about rights' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 21-53.

Cockrell, A, 'The South African Bill of Rights and the "duck/rabbit"', *Modern Law Review*, vol 60, no 4, July 1997, pp 513-537.

Cooke, Sir R, 'Practicalities of a bill of rights', *Australian Bar Review*, vol 2, 1986, pp 189-202.

Craig, J, 'The "bill of rights" debates in Australia and New Zealand: A comparative analysis', *Legislative Studies*, vol 8, no 2, Autumn 1994, pp 67-77.

Dent, M, 'Congress calls for a "benchmark" bill of rights', *Australian Lawyer*, vol 30, no 2, March 1995, pp 18-21.

Doyle, J and Wells, B, 'How far can the common law go towards protecting human rights?' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 107-122.

Draft charter of rights released: Law Council seeks to foster public debate', *Australian Lawyer*, vol 30, no 4, May 1995, pp 29-32.

Duffy, Hon M, 'The internationalisation of human rights' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 299-309.

Durack, Hon P , 'Do we need an imported bill of rights?', *IPA Review*, vol 47, no 3, 1995, pp 29-32.

Dwyer, P, 'A roving judicial eye: Broader use of foreign judgments by the High Court of Australia', *Reform*, no 70, Summer 1997, pp 11-15.

Elkind, J, 'New Zealand's experience with a non-entrenched bill of rights' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 235-253.

Epp, C R, 'Do bills of rights matter? The Canadian Charter of Rights and Freedoms', *American Political Science Review*, vol 90, no 4, December 1996, pp 765-779.

Evans, G, 'An Australian Bill of Rights?', *Australian Quarterly*, vol 45, no 1, March 1973, pp 4-34.

Ferguson, G, 'The impact of an entrenched bill of rights: The Canadian experience', *Monash University Law Review*, vol 16, no 2, 1990, pp 211-227.

Foley, Hon M, MLA, 'Bill of rights for Queensland seminar', *Constitutional Centenary*, vol 2, no 2, August 1996, p 2.

Galligan, B, 'Australia's political culture and institutional design' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 55-72.

Gaze, B, 'Rights: A Bill of Rights for Victoria?', *Legal Service Bulletin*, vol 12, no 5, October 1987, pp 224-225.

Ghai, Y, 'Sentinels of liberty or sheep in Woolf's clothing?: Judicial politics and the Hong Kong Bill of Rights', *Modern Law Review*, vol 60, no 4, July 1997, pp 459-480.

Gibb, S and Eastman, K, 'Why are we talking about a bill of rights?', *Law Society Journal*, vol 33, no 7, August 1995, pp 49-52.

Gibbs, H, 'Eleventh Wilfred Fullagar Memorial Lecture: The constitutional protection of human rights, *Monash University Law Review*, vol 9, September 1982, pp 1-13.

Gibbs, H, 'The legislative or constitutional protection of human rights', *Constitutional Centenary*, vol 4, no 4, December 1995, pp 26-28.

Gibson, D, 'The deferential Trojan horse: A decade of charter decisions', *Canadian Bar Review*, vol 72, no 4, December 1993, pp 417-455.

Grief, N, 'The domestic impact of the European Convention on Human Rights as mediated through community law', *Public Law*, Winter 1991, pp 555-567.

Hanks, P, 'Implications of the Australian Bill of Rights: Keeping "rights" in perspective', *Legal Service Bulletin*, vol 11, no 1, February 1986, pp 2-4.

Horrigan, B, 'Is the High Court crossing the rubicon? A framework for balanced debate', *Public Law Review*, vol 6, no 4, December 1995, pp 284-306.

Hughes, C A, 'An Australian Bill of Rights: Some key issues' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 165-176.

Hunt, A, 'Fundamental rights and the New Zealand Bill of Rights Act', *Law Quarterly Review*, vol 111, October 1995, pp 565-569.

Ison, T G, 'A constitutional bill of rights: The Canadian experience', *Modern Law Review*, vol 60, no 4, July 1997, pp 499-512.

Jackman, M, 'Constitutional contact with the disparities in the World: Poverty as a prohibited ground of discrimination under the Canadian Charter and Human Rights Law', *Review of Constitutional Studies*, vol 2, no 1, 1994, pp 76-122.

Jackman, M, 'Constitutional rhetoric and social justice: Reflections on the justiciability debate', in Bakan, J and Schneiderman, D (Eds), *Social Justice and the Constitution*, Centre for Constitutional Studies, Carleton University Press, Ottawa, 1992, pp 17-28.

Jackman, M, 'Rights and participation: The use of the Charter to supervise the regulatory process', *Canadian Journal of Administrative Law and Practice*, vol 4, 1990, pp 23-56.

Jackman, M, 'The right to participate in health care and health resources allocation decisions under section 7 of the Canadian Charter', *Health Law Review*, vol 4, no 2, 1995/96, pp 3-11.

Jackman, M, 'Women and the Canada health and social transfer: Ensuring gender equality in federal welfare reform', *Canadian Journal of Women and the Law*, vol 4, 1995, pp 372-411.

Jones, T H, 'Legal protection for fundamental rights and freedoms: European lessons for Australia?', *Federal Law Review*, vol 22, no 1, January 1994, pp 57-91.

Joseph, P A, 'The New Zealand Bill of Rights', *Public Law Review*, vol 7, no 3, September 1996, pp 162-176.

Keith, K, 'The Bill of Rights: Reply to criticism', *New Zealand Law Journal*, November 1985, pp 270-275.

Kennett, G, 'Individual rights, the High Court and the Constitution', *Melbourne University Law Review*, vol 19, no 3, 1994, pp 581-614.

Kentridge, S, 'Parliamentary supremacy and the judiciary under a bill of rights: Some lessons from the Commonwealth', *Public Law*, Spring 1997, pp 96-112.

Kirby, M, 'A bill of rights for Australia: But do we need it?', *Commonwealth Law Bulletin*, vol 21, no 1, January 1995, pp 276-283.

Kirby, M, 'Implications of the internationalisation of human rights law' in Alston, P (Ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994, pp 267-298.

Kirby, M, 'Sir Anthony Mason Lecture 1996: A F Mason—from Trigwell to Teoh', *Melbourne University Law Review*, vol 20, no 4, December 1996, pp 1087-1107.

Kirby, M, 'The bill of rights debate', *Australian Lawyer*, vol 29, no 11, December 1994, pp 16-21.

Lajoie, A and Quillinan, H, 'Emerging constitutional norms. Continuous judicial amendments of the Constitution: The proportionality test as a moving target, *Law and Contemporary Problems*, vol 55, no 1, Winter 1992, pp 285-302.

Le Sueur, A P, 'The judges and the intention of parliament: Is judicial review undemocratic?', *Parliamentary Affairs*, vol 44, no 3, July 1991, pp 283-297.

Lombard, G, 'Human rights: Is the kiwi flying higher than the kangaroo?', *Pacific Research*, vol 9, no 4, November 1996, pp 16-18.

Mahoney, K, 'A charter of rights: The Canadian experience', *Papers on Parliament No. 23*, September 1994, pp 47-79.

Mapp, W, 'New Zealand's Bill of Rights: A provisional assessment', *Agenda*, vol 1, no 1, 1994, pp 81-89.

Mason, A, 'A bill of rights for Australia?' *Australian Bar Review*, vol 5, pp 79-90.

Mason, A, 'Future directions in Australian law', *Monash University Law Review*, vol 13, 1987, pp 149-163.

McLachlin, B, 'Southey Memorial Lecture: The Canadian Charter and the democratic process', *Melbourne University Law Review*, vol 18, December 1991, pp 350-367.

Mescher, I, 'The bill of rights: Do we need uniform laws to protect human rights in Australia?, *Reform*, no 68, Summer 1995/96, pp 14-15.

Moran, A, 'The Constitution (Declaration of Rights and Freedoms) Bill 1998 (Vic): A doomed legislative proposal', *Melbourne University of Law Review*, vol 17, June 1990, pp 418-436.

Morissette, Y-M, 'Canada as a post-modern Kritarchy', *Australian Law Journal*, vol 72, April 1998, pp 294-302.

Morris, A, 'Bill of rights for Queensland seminar', *Constitutional Centenary*, vol 2, no 2, August 1996, p 1.

'The new Chief Justice speaks on the profession and the judiciary', *Law Society Journal*, July 1998, pp 40-42.

O'Neill, N K F, 'Constitutional human rights in Australia', *Federal Law Review*, vol 17, 1987, pp 85-131.

O'Neill, N K F, 'The Australian Bill of Rights Bill 1985 and the supremacy of Parliament', *Australian Law Journal*, vol 60, no 3, March 1986, pp 139-147.

Patmore, G and Rubenstein, K, 'A DIY Constitution. Individuals and government: A charter of rights for Australia?', *Constitutional Centenary*, vol 3, no 4, December 1994, pp 7-9.

Penner, R, 'The Canadian experience with the Charter of Rights: Are there lessons for the United Kingdom?', *Public Law*, Spring 1996, pp 104-125.

Piotrowicz, R, 'Unincorporated treaties in Australian Law: The official response to the Teoh decision', *Australian Law Journal*, vol 71, no 6, July 1997, pp 503-506.

Puddephatt, A, 'Legislating liberty: The case for a bill of rights', *Journal of Legislative Studies*, vol 1, no 1, Spring 1995, pp 26-31.

Rishworth, P T, 'The potential of the New Zealand Bill of Rights', *New Zealand Law Journal*, February 1990, pp 68-72.

Sackville, R, 'An Australian bill of rights: The debate', *Constitutional Centenary*, vol 4, no 4, December 1995, pp 23-28.

Sampford, C, 'Fundamental legislative principles: Their meaning and rationale', *Queensland Law Society Journal*, vol 24, no 6, December 1994, pp 531-542.

Saunders, C, 'Rights and freedoms in the Australian Constitution', *Constitutional Centenary*, vol 3, no 4, December 1994, pp 10-11.

Wadham, J, 'Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into U.K. law', *Public Law*, Spring 1997, pp 75-79.

Webber, J, 'Tales of the unexpected: Intended and unintended consequences of the Canadian Charter of Rights and Freedoms', *Canterbury Law Review*, vol 5, 1993, pp 207-234.

Weeramantry, C G, 'Human Rights', in Wallace, J and Pagone T (Eds), *Rights and Freedoms in Australia*, Federation Press, Sydney, 1990, pp 240-255.

Weir, S, 'The democratic audit of the United Kingdom: A progress report', *Public Law*, Spring 1997, pp 80-83.

Winterton, G, 'A new constitutional preamble', *Public Law Review*, vol 8, September 1997, pp 186-194.

PAPERS

Kirby, M, 'A bill of rights for Australia: But do we need it?', adapted from a paper presented to the Queensland Chapter of the Young Presidents' Association, Queensland Parliament, 4 October 1994.

Kirby, M, 'The constitutional centenary and the counting of blessings', the Fourth Sir Ninian Stephen Lecture presented at the University of Newcastle, 20 March 1997.

Kirby, M, 'The present position as to the mechanisms for the recognition and protection of rights in Australia', paper presented to the Australian Rights Congress, Sydney, 16-18 February 1995.

Solomon, D, 'Should Australia and its states have a Bill of Rights?', paper presented to the Boston, Melbourne, Oxford Conversazioni on Culture and Society, October 1996.

NEWSPAPER AND MAGAZINE ARTICLES

Collins, C, 'Republic wins vote at centenary convention', *The Australian*, 24 April 1997, p 3.

Collins, C, 'Talks test constitution's mettle', *The Australian*, 21 April 1997, p 5.

Craven, P, 'Parliament as it should be', *The Australian*, 11 February 1998, p 42.

Curtins, D, 'Wanted: A wide-angle view', *The Australian*, 29 January 1998, p 11.

Dodson, M, 'Judgment exposes need for bill of rights', *The Australian*, 1 August 1997, p 11.

Dore, C, 'Wrong turn for bill of rights, but preamble gets a rewrite', *The Australian*, 3 February 1998, p7.

Fife-Yeomans, J, 'De facto couple claims child-support injustice', *The Australian*, 15 May 1997, p 3.

Fraser, M, 'The responsible course of action', *The Australian*, 12 September 1997, p 13.

Grace, D, 'Bidding farewell to the ideal of justice for all', *The Age*, 4 December 1996, p 15.

Higgins, E and Zaracostas, J, 'Colonial biases hurt blacks, UN charges', *The Australian*, 31 July 1997, pp 1-2.

Lane, B, 'Professor questions freedom of speech', *The Australian*, 10 March 1997, p 4.

McGregor, M, 'Rights versus duties', *Australian Financial Review*, 2 September 1997, pp 1-2.

Meade, A, 'Lawyers urge human rights protection bill', *The Australian*, 28 May 1997, p 4.

Parsons, B, 'Plea for reform of "unfair" legal system', *The Age*, 11 July 1997, p 4.

Retschlag, C, 'UN blasts "moves against equality"', *The Courier-Mail*, 28 July 1997, p 6.

Ryland, M, 'Legal system out of control', *Australian Financial Review*, 6 May 1997, p 17.

Taylor, L, 'High Court ruling sparks bill of rights call', *Australian Financial Review*, 1 August 1997, p 5.

'Fudging British rights', *The Economist*, October 1997, p 15.

'Religious freedom is not threatened, *The Australian*, 20 February 1997, p 12.

'Stolen claims find NT law no help', *The Australian*, 1 August 1997, p 10.

MEDIA TRANSCRIPTS

'Constituting constitutions: Part 1', *The Law Report*, Radio National Transcript, 29 April 1997.

'Constituting constitutions: Part 2', *The Law Report*, Radio National Transcript, 6 May 1997.

'The High Court and Parliament', *The Law Report*, Radio National Transcript, 12 September 1995.

2RN News, a.m., 28 February 1997.

APPENDIX A: SUBMISSIONS RECEIVED

	SUBMISSION RECEIVED FROM
1.	Mr D Solomon
2.	Not Tabled
3.	Mr K Harris
4.	Mr J Hatton
5.	Ms S McPherson
6.	Not Tabled
7.	Ms S Adams
8.	Mr H Slaney
9.	Mr I Andersen
10.	A Hartwig
11.	C Andersen
12.	D Wallace
13.	Mr A McDonald
14.	S Wilson
15.	Mr A Simpson
16.	Mr I McLeod
17.	Mr K Eagers
18.	Mr D Stanbridge
19.	C E Clark
20.	Ms F Barnes
21.	Ingham Information Group
22.	Ms B Mason
23.	The Queensland Retired Police Association
24.	R Knight
25.	Mr C Erles
26.	Ms S Andersen
27.	Mr & Mrs G & L Andersen
28.	Mr & Mrs D & N Bradshaw
29.	Arms Collectors Guild of Queensland Inc.
30.	Mr S Goan
31.	Mrs E Daniels
32.	M Culverhouse
33.	Sporting Shooters Association of Australia (Qld) Inc.
34.	Mr P Mayhew
35.	Queensland Right To Life

	SUBMISSION RECEIVED FROM
36.	Dr R Goodman
37.	Mr & Mrs A & E Tuck
38.	Mr I McNiven
39.	Mr L Partridge
40.	Mr P Carew
41.	Australian Civil Liberties Union
42.	Confidential
43.	L Culverhouse
44.	Mr B J Clarke
45.	Whistleblowers Action Group (Qld) Inc.
46.	Queensland Corrective Services Commission
47.	Ms B Hocking
48.	Tharpuntoo Legal Service Aboriginal Corporation
49.	Not Tabled
50.	Mr A Bowman
51.	Australian Council of Trade Unions - Qld Branch
52.	Youth Advocacy Centre Inc.
53.	Bar Association of Queensland
54.	Mr D Galligan QC
55.	Right to Life Australia
56.	Gay and Lesbian Welfare Association Inc.
57.	Queensland Association for Mental Health Inc.
58.	Mrs T Toomey
59.	Women's Legal Service Inc.
60.	Queensland Council for Civil Liberties
61.	International Commission of Jurists Australian Section - Qld Branch
62.	Children By Choice Association Incorporated
63.	Anti-Discrimination Commission Queensland
64.	Queensland Law Society Inc.
65.	The Australian Family Association
66.	Townsville Community Legal Service Inc.
67.	Australian Plaintiff Lawyers Association

APPENDIX B: FEATURES OF EARC'S BILL OF RIGHTS COMPARED WITH OTHER EXISTING OR SUGGESTED BILL OF RIGHTS MODELS[218]

Features of EARC's bill of rights	*Canadian Charter of Rights and Freedoms*	New Zealand's *Bill of Rights Act 1990*	Australian Bill of Rights Bill 1985	Constitution Commission Final Report 1988
Entrenchment **EARC's bill of rights is to be submitted to a referendum for entrenchment in the Qld Constitution after 5 to 7 years of operation as an ordinary Act. In the meantime, the Bill - as an ordinary Act - will be subject to amendment in the usual way (by simple majority of Parliament).**	The Charter is entrenched within the Canadian Constitution. It is deemed to be Supreme Law and cannot be amended like ordinary Acts. (The Charter's equality rights provision did not come into force until three years after the Charter was introduced.)	The NZ Bill is (and is intended to remain) a normal Act of Parliament. Initially, the bill was to be entrenched, but this aspect failed to pass Parliament.	The 1985 Bill was intended to be (and remain) an ordinary Commonwealth Act. It was proposed that the Bill would not be entrenched in the Constitution. The 1985 Bill would have operated as a bill of rights for the Cth and Territories but not *vis a vis* State legislation.	The Commission recommended the insertion of a new Chapter, Chapter VIA - Rights and Freedoms, into the entrenched Commonwealth Constitution to operate as a bill of rights for the Commonwealth, States and Territories. The bill of rights would have come into operation 3 years after the Act received Royal Assent.
If the bill is entrenched later, it could only be altered if special procedures were used, that is, a referendum.	The Canadian Constitution, is subject to onerous alteration requirements (7 provinces with 50% of the population to agree).	As an ordinary Act, the bill can be amended through normal procedures.	As an ordinary Act, the bill would have been able to be amended through normal procedures.	The bill of rights, entrenched within the Commonwealth Constitution would have been subject to the onerous alteration requirements of s.128 of the Constitution.
Inconsistent legislation **Pending entrenchment, the Bill - an ordinary Act - is nevertheless intended to prevail over subsequent inconsistent Acts [cl.6(1)(b)], unless the later Act expressly provides otherwise [cl.6(3)].[219]** **If the Bill is entrenched later, the rights contained would prevail over and invalidate subsequent inconsistent Acts (regardless of what the later Act stated).**	As it is entrenched in the Canadian Constitution, the Charter prevails over subsequent inconsistent Acts (subject to the justified limitations clause - like EARC's Bill).	As an ordinary Act, the NZ Bill cannot *automatically* prevail over subsequent inconsistent Acts and s.4 confirms this. However, s.6 provides a directive for judicial interpretation. It states *wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that, meaning shall be preferred.*	The 1985 Bill - an ordinary Act - was nevertheless intended (after 5 years) to prevail over and invalidate subsequent inconsistent Acts [cl.12(4)].[220] However, later Acts that expressly declared that they prevailed over the bill of rights would have done so [cl.12(2)(b)]. The Bill also stated that an interpretation that would *result in the enactment not being in conflict with the bill of rights ... shall be preferred* [cl.10(1)].	Entrenched in the Commonwealth Constitution, the new Chapter VIA would have prevailed over and invalidated subsequent inconsistent Acts (subject to the justified limitations clause - like EARC's Bill).
No override provision **If the Bill is entrenched later, EARC rejected inclusion of a provision enabling Parliament to expressly state in subsequent Acts that the later Act overrides the bill of rights. (See above for the Bill's operation before entrenchment.)**	The Charter seeks to preserve parliamentary sovereignty to some extent via s.33 which enables subsequent Acts to expressly declare that that Act operates notwithstanding (some of the) rights contained in the Charter.	Not entrenched, so not applicable as such. (See directly above.)	Not entrenched, so not applicable as such. (See directly above.)	The majority of the Commission recommended as EARC did, namely, that there should ***not*** be an override provision.

[218] These features are general descriptions only.

[219] To facilitate this effect, EARC envisioned amendment to other Queensland law eg. the *Acts Interpretation Act 1954*, which does not permit Acts of Parliament to deem that they 'prevail' over subsequent legislation. Even after such amendment, it is by no means clear that the courts would uphold the validity of EARC's cl 6 (prior to entrenchment).

[220] Regardless, cl 14 provided that a Court could declare that a subsequent Act inconsistent with the bill of rights could continue to be in force if the operation of cl 12(4) (which would have invalidated the Act) caused *'grave public inconvenience or hardship'*.

Features of EARC's bill of rights	***Canadian Charter of Rights and Freedoms***	**New Zealand's *Bill of Rights Act 1990***	**Australian Bill of Rights Bill 1985**	**Constitution Commission Final Report 1988**
Reporting **Legislation inconsistent with the Bill is to be reported by the Attorney-General to Parl (cl.7).**	No express provision. As a matter of course, Bills are scrutinised for Charter compliance.	Provision similar to EARC's cl.7(s.7).	The 1985 Bill was silent on the matter.	The proposed Chapter VIA was silent on the matter.
Justified Limitations **The rights are not absolute. The rights contained *apply generally and are subject only to any reasonable limits prescribed by law that are demonstrably justifiable in a free an democratic society* cl.10].** **The rights should not be subject to suspension during war or emergency (rec 7.119).**	The rights are not absolute. The rights and freedoms contained are guaranteed *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society* (s.1).	The rights are not absolute. The bill contained a "justified limitations" clause in the same wording as s.1 of the Canadian Charter (s.5). However, the clause is *subject to* s.4 which confirms that the NZ bill of rights is an ordinary Act which no court can use to strike down a provision of another Act.[221]	The rights are not absolute. The bill contained a "justified limitations" clause in the same wording as s.1 of the Canadian Charter [cl.8, Art.3.1]. In addition, the Bill stated the rights and freedoms contained shall not be limited by a law to any greater extend than is permitted by the ICCPR.	The rights are not absolute. The Chapter contained a "justified limitations" clause in the same wording as s.1 of the Canadian Charter (proposed s.124C).
ENFORCEMENT: **Contains legally enforceable civil and political rights (cl.4).** **Contains non-enforceable economic and social, and cultural and community rights which are declaratory in nature and intended as guidelines for government policy and the community generally (cl.5).**	The rights in the Charter (civil and political rights) are legally enforceable. Another part of the Canadian Constitution contains declarations regarding some social and economic rights. The Charter does not contain any cultural and community rights.	The rights contained in the bill (civil and political rights) are legally enforceable. The bill does not contain groups of 'social and economic rights' nor 'cultural and community rights'.	The rights contained (civil and political rights) provided the foundation for investigation by the Human Rights and Equal Opportunity Commission (HREOC). The bill does not contain groups of 'social and economic rights' nor 'cultural and community rights'	The rights contained (civil and political rights) are legally enforceable. The Chapter does not contain groups of 'social and economic rights' nor 'cultural and community rights'.
Enforcement mechanism **The Supreme Court or *'in any proceeding in which the right is relevant to an issue in the proceeding'* [cl. 4(2).**	A Court of competent jurisdiction [s.24(1)].	The Courts (though not specifically stated in the Bill).	HREOC, which could have inquired into activities that may have infringed the bill of rights.	A Court of competent jurisdiction (proposed s.124B)
Who can enforce the rights **Individuals, corporations and other legal entities**	Same as EARC's bill.	Same as EARC's bill.	Only for the benefit of natural persons [cl.9(3)].	Same as EARC's bill.
Against whom can the rights be enforced **Government - the Legislature, Executive and Judiciary - and its agencies. (Only the civil and political rights are enforceable); not the private sector [cl.4(1)].**	The federal and provincial governments (s.32).	Government - the Legislature, Executive or Judiciary - and its agencies (s.3). Provision similar to EARC's cl.4(1).	With respect to investigation by HREOC, acts done or practices engaged in, by or on behalf of, the Commonwealth, States or Territories or their authorities [cl.9(2)].	Governments - the Legislature, Executive or Judiciary- of the Commonwealth States and Territories and their agencies (proposed s.124A). Provision similar to EARC's cl.4(1).

[221] Some commentators believe it inappropriate for a bill of rights that is an ordinary Act of Parliament to contain a justified limitations clause. This is because, on the face of it, *any* limitation contained in a subsequent Act would be permissible.

Features of EARC's bill of rights	***Canadian Charter of Rights and Freedoms***	**New Zealand's *Bill of Rights Act 1990***	**Australian Bill of Rights Bill 1985**	**Constitution Commission Final Report 1988**
Remedies Available **The Bill does not specify what remedies would be available if the Bill was breached. However EARC stated that remedies would be *as court sees fit.***	*Such remedies as the Court considers appropriate and just in the circumstances* [s.24(1)].	The NZ Bill is silent on the matter. However, the NZ Court of Appeal has held that it would grant a wide variety of remedies for breaches.	Breach of the Bill's rights or freedoms was expressly declared *not* to confer any rights of action nor criminal liability on any person (cl.17).	*Such remedy as the Court considers appropriate and just in the circumstances* (proposed s.124B).
Exclusion of Evidence **Evidence obtained in breach of the bill of rights appear to be automatically excluded [cl.19(1)(h)].**	Evidence obtained in breach of the Charter is to be excluded if its admission *would bring the Administration of Justice into disrepute* [s.24(2)].	The NZ Bill is silent. However, the NZ Court of Appeal has established a *prima facie* exclusion rule for evidence obtained in breach of the NZ Bill.	Evidence obtained in breach of rights in the Bill was to be excluded *unless* a detailed public interest test was satisfied [cl.16 (1)].	The Chapter is purposefully silent on the exclusion of evidence *per se*. The Commission expected the general remedy in s.124B to enable the exclusion of evidence obtained by unconstitutional means.

This table is reproduced from the Legal, Constitutional and Administrative Review Committee's Issues Paper No 3: The Preservation and Enhancement of Individuals' Rights and Freedoms: Should Queensland Adopt a Bill of Rights? (September 1997).

APPENDIX C: THE RIGHTS CONTAINED IN EARC'S BILL OF RIGHTS COMPARED WITH THE PROVISION OF RIGHTS IN OTHER BILL OF RIGHTS MODELS

KEY: ✓ ***the right is included***
✗ ***the right is not expressly included***
S ***a similar right is provided but expressed quite differently***
I ***the right might be implied from the provision of other rights***

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models*				
	Can	**NZ**	**Au**	**CC**	**Vic**
"CIVIL AND POLITICAL RIGHTS"					
A person has the following rights:					
• to **life, liberty, and security of the person** [cl.11(a)] and not to be deprived thereof except on a ground established by law and consistent with the principles of fundamental justice [cl.11(b)]	✓	**S**	✓	✗	✓
• to take reasonable steps **to defend** the person's life, liberty or security [cl.11(c)]	✗	✗	✗	✗	✗
• to **recognition as a person** under the law [cl.12(1)]	✗	✗	✗	✗	✗
• to the **equal protection** and benefit of the law (all persons are equal under the law) [cl.12(2)]	✓	✗	✓	✗	✓
• not to be detrimentally affected or have a liability imposed **retrospectively by legislation** [cl.13]	✗	✗	✗	✗	✗
• *if an adult Australian citizen resident in Queensland*, **to vote** by secret ballot in periodic elections and to **stand for election** as a MLA [cl.14]	✓	✓	✓	✗	✓
• to protection against arbitrary interference with the person's **privacy** whether as an individual or as a member of a family [cl.15(1)]. The right to privacy includes the right not to be arbitrarily subjected to:	✗	✗	✓	✗	✓
• **search** of the person	✓	✓	✓	✓	✓
• **entry** to, and search of, property, place of residence or employment	**I**	**I**	**I**	**I**	**I**
• **seizure** of the person's property	✓	✓	✓	✓	✓
• interference or **interception** of the person's correspondence or other forms of communication [cl.15(2)]	✗	✓	✓	✗	✗
• not to be **investigated for an offence** in a way prejudicial to the fairness of the person's trial or contrary to the public interest [cl.16]	✗	✗	✗	✗	✗
• not to be **arbitrarily taken into or held in custody** [cl.17(1)]	✓	✓	✓	✓	✓
• *on being taken into custody* **to be informed** in a language the person understands of the **reasons** for being there [cl.17(2)]	✓	✓	✓	✓	✗
• *if in custody* to be treated humanely and with respect for the inherent dignity of all persons including, eg., to be given: **adequate food and medical treatment** and reasonable access to family and any person necessary to exercise the person's rights [cl.17(3)]	✗	**S**	**S**	✗	**S**
• only subject to limitations reasonably required by the custody and limitations mentioned in s.10 ('justified limitations' - see Table 1 above) [cl.17(4)]	✗	**S**	✗	✗	✗
• not to be taken into custody for an alleged offence unless arrested and **properly charged without delay** [cl.18(1)]	✗	**S**	✗	**S**	✗
• *on being arrested on a charge of an offence* to be informed of the:					
• right to **remain silent** without a negative inference being drawn at trial from the exercise of the right [cl.18(2)(b)]	✗	✓	✓	✓	✗
• to have a reasonable opportunity to **obtain legal assistance** and to consult a lawyer without delay [cl.18(2)(c)]	✓	✓	**S**	✓	✓
• to be **promptly taken before a court** to be dealt with according to law [cl.18(2)(d)]	✗	✓	✓	✓	✗
• **to be informed of the rights above**	**I**	**S**	**S**	**S**	**S**
• and to be informed of the full particulars of the offence and any organisation that may provide legal assistance [cl.18(2)(a)]	**S**	**S**	**S**	**S**	✗

***** "**Can**" - the *Canadian Charter of Rights and Freedoms*; "**NZ**" - the *NZ Bill of Rights Act 1990*;
"**Au**" - the (lapsed) Australian Bill of Rights Bill 1985 (Cth) introduced by former Attorney-General Lionel Bowen;
"**CC**" - The Australian Bill of Rights recommended by the Constitutional Commission 1988, *Final Report*, Vol. 2 Draft Bill No.17;
"**Vic**" - the (lapsed) Constitution (Declaration of Rights and Freedoms) Bill 1988 (Vic).

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models				
	Can	**NZ**	**Au**	**CC**	**Vic**
• not to be arbitrarily denied **bail**. If granted bail, not to be granted bail on unreasonable conditions [cl.18(2)(e)]	✓	S	S	S	✗
• at any time, to have the lawfulness of the custody decided by a legal proceeding [cl.18(2)(f)]	✓	✓	✓	✓	✗
• *if charged with an offence*:					
• to be **presumed innocent until proven guilty** according to law [cl.19(1)(a)]	✓	✓	✓	✓	✗
• to be **tried within a reasonable time** [cl.19(1)(b)]	✓	✓	✓	✓	✗
• to be given a **fair and public hearing by an impartial court** [cl.19(1)(c)]	✓	✓	✓	✓	✓
• to **trial by jury** if the person may be imprisoned for 2 + years for the offence [cl.19(1)(d)]	S	S	✗	✗	✗
• to **free legal assistance** if the interests of justice require it and the person does not have sufficient means to obtain legal assistance [cl.19(1)(e)]	✗	✓	✓	✓	✗
• the free **assistance of an interpreter** at the hearing [cl.19(1)(f)]	✓	✓	✓	✓	✗
• **not to be compelled to be a witness** in proceedings against the person for the offence [cl.19(1)(g)]	✓	✓	✓	✓	✗
• **(not to be found guilty or sentenced on evidence obtained or used in** breach of a right stated in this Act [cl.19(1)(h)])	S	-	-	-	-
• not to be found guilty of an offence unless the act or omission concerned constituted an offence at the time of the act or omission [cl.19(1)(i)]	✓	✓	✓	✓	✗
• not to be tried again for an offence if proceedings for the offence have been heard and decided on the merits [cl.19(1)(j)]	✓	✓	✓	✓	✓
• to have the principles of **due process** applied [cl.19(1)(k)]	I	S	S	S	✗
• *if found guilty of an offence*: [cl.19(2)]					
• to be sentenced within a reasonable time [cl.19(2)(a)]	✗	✗	✗	✗	✗
• the right to benefit of a lesser penalty, if the penalty for the offence has changed since the offence was committed [cl.19(2)(b)]	✓	✓	✓	✗	✓
• to have the finding and sentence reviewed by another court [cl.19(2)(c)]	✗	✓	✓	✓	✗
• not to be punished again for the same offence [cl.19(2)(d)]	✓	✓	✓	✓	✓
• *if a **victim of crime** or of abuse of power* the right of reasonable access to information and the judicial and administrative mechanisms of government to remedy the material, medical, psychological and social effects of the crime or abuse of power [cl.20]	✗	✗	✗	✗	✗
• to freely **express religious beliefs**, whether individually or in community with others [cl.21]	✓	✓	S	✓	✓
• to **freedom of; thought,**	✓	✓	✓	✓	✓
• **conscience**	✓	✓	✓	✓	✓
• **and belief** [cl.22]	✓	✓	✓	✓	S
• to **freedom of speech** and other forms of expression [cl.23(1)]	✓	✓	✓	✓	✓
• to **obtain and disseminate information** [cl.23(2)]	✗	✗	✓	✗	✗
• to **freedom of association** [cl.24]	✓	✓	✓	✓	✓
• to **freedom of peaceful assembly** [cl.25]	✓	✓	✓	✓	✓
• to **freedom of movement** and residence within the State (if the person is lawfully in Queensland) [cl.26]	✓	✓	✓	✓	✗
• to **freedom from discrimination**, in particular, on the grounds of:	✓	✓	✓	✓	✓
• race (including ancestry, ethnicity or national origin)	✓	✓	✓	✓	✓
• sex	✓	✓	✓	✓	✓
• sexuality	✗	✗	✗	✗	✗
• marital	✗	✓	✗	✓	✗
• or parental status	✗	✗	✓	✗	✗
• socio-economic status	✗	✗	✓	✗	✗
• political, religious or ethical belief or activity	S	S	✓	✓	✓
• age	✓	✗	✗	✗	✗
• mental or physical disability	✓	✗	✗	✗	✓
• medical condition	✗	✗	✗	✗	S
• other natural characteristics	✗	✗	S	✗	✗
but steps taken to advance a person on a ground stated are not discrimination [cl.27]	✓	✓	✓	✓	✗
• to freedom **from slavery** [cl.28(1)]	✗	✗	✓	✗	✗

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models				
	Can	**NZ**	**Au**	**CC**	**Vic**
• to freedom from **forced or compulsory labour** [cl.28(2)]	✗	✗	✓	✗	✗
• to freedom **from torture**	✗	✓	✓	✗	✗
and **cruel, inhumane or degrading** treatment or **punishment** [cl.29(1)]	S	✓	✓	✓	✓
• not to be subjected to medical or scientific **experimentation** without consent [cl.29(2)]	✗	✓	✓	✓	✓
• **to refuse any medical treatment** [cl.29(3)]	✗	✓	✗	✗	✗
• to own **property** [cl.30]	✗	✗	✗	✗	✓
• not to be **arbitrarily deprived of property** by the State (but this does not prevent a properly approved scheme for the orderly marketing of a product) [cl.30(3)]	✗	✗	✗	✗	✓
• if deprived of property by the State, to **fair compensation** [cl.30(4)]	✗	✗	✗	✗	✗
• to have a **decision by a tribunal or public authority** made in observance with the rules of **procedural fairness**, including: [cl.31(1)]	✗	✓	✗	✗	✗
• a reasonable opportunity to present a case [cl.31(2)(a)]	✗	S	✗	✗	✗
• the tribunal or authority must be impartial [cl.31(2)(b)]	✗	S	✗	✗	✗
• the decision must be based on logically probative evidence [cl.31(2)(c)]	✗	S	✗	✗	✗
• of **reasonable access to the State education system** [cl.32]	✗	✗	✗	✗	✗
• *if a **child***:					
• to live with the child's parents (or either of them) and to be cared for by them unless the child's interests require some other arrangement [cl.33(1)]	✗	✗	✗	✗	✗
• to be cared for by government if there is no relative or other appropriate person who is willing and able to care for the child [cl.33(2)]	✗	✗	✗	✗	✗
• to express views on all matters affecting the child's wellbeing and to have the views given appropriate weight having regard to the child's age and maturity [cl.33(3)]	✗	S	I	✗	✗
• not to be forced to perform labour or render services harmful to the child's mental or physical wellbeing or amounting to economic exploitation [cl.33(4)]	✗	✗	I	✗	✗
ECONOMIC AND SOCIAL RIGHTS (NOT INTENDED TO BE ENFORCEABLE):					
A person has the following rights:					
• to a **standard of living adequate** for the person's physical and psychological wellbeing [cl.34(1)]. This includes the right:	✗	✗	✗	✗	✗
• of **reasonable access to social welfare** [cl.34(2)(a)]					
• to **reasonable medical and hospital care**, including reasonable access to traditional medicines and health practices [cl.34(2)(b)]					
• to **reasonable housing** [cl.34(2)(c)]					
• to **gainful work [**cl.35(1)(a)]	✗	✗	✗	✗	✗
• to **work under safe and hygienic conditions** [cl.35(1)(b)]	✗	✗	✗	✗	✗
• to receive **reasonable remuneration** for the person's work [cl.35(1)(c)]	✗	✗	✗	✗	✗
• to **withdraw the person's labour** because of a dispute with the person's employer if the person is reasonably satisfied that no danger to human life will result [cl.35(1)(d)]	✗	✗	✗	✗	✗
• to **equal remuneration** for the same work [cl.35(2)(a)]	✗	✗	✗	✗	✗
• to **equal employment opportunity** [cl.35(2)(b)]	✗	✗	S	✗	✗
• of **reasonable access to legal assistance** [cl.36]	✗	✗	✗	✗	✗
• to live in a safe society protected by a **government that promotes non-violence** [cl.37]	✗	✗	✗	✗	✗
• to **freedom of family structure** [cl.38(1)]. This includes the right:	✗	✗	S	✗	✗
• to **marry** [cl.38(2)(a)].	✗	✗	✓	✗	✓
• to **live in a de facto relationship** [cl.38(2)(b)]	✗	✗	✗	✗	✗
• to **establish a family regardless of marital status** [cl.38(2)(c)]	✗	✗	S	✗	S
• the right to personal **autonomy over reproductive matters** [cl.38(2)(d)]. This includes:	✗	✗	✗	✗	✗
• the right of a female to **control her own fertility** [cl.38(3)(a)]	✗	✗	✗	✗	✗
• the right to decide freely and responsible on the **number** and spacing **of** the **children** and to have reasonable access to information, education and means to enable the exercise of this right [cl.38(3)(b)]	✗	✗	✗	✗	✗
• *if a parent or other person responsible for the care and control of a child* to **reasonable access to adequate child care** facilities [cl.39]	✗	✗	✗	✗	✗

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models				
	Can	**NZ**	**Au**	**CC**	**Vic**
COMMUNITY AND CULTURAL RIGHTS (NOT INTENDED TO BE ENFORCEABLE):					
A person has the following rights:					
• The collective and individual right to **political, economic, social and cultural development** [cl.40]	✗	✗	S	✗	✗
• Various rights **particular to Aboriginal People and Torres Strait Islanders** [cl.41]	I	I	I	✗	✗
• Various rights to access and express the person's **culture** [cl.42]	I	S	S	✗	✗
• Rights **particular to an author**, including to be known as the author of an original work and to have the integrity of the work respected [cl.43]	✗	✗	✗	✗	✗
• Right **to environmental protection and conservation** including the right to have the environment of Queensland protected by government from excessive, undue or unreasonable human interference and reasonably conserved by government for its own intrinsic value [cl.44(1)]	✗	✗	✗	✗	✗
• Right to promote **ecologically sustainable development** and the right to object to development that is not ecologically sustainable and to expect that government will accept and act on a reasonable objection [cl.45]	✗	✗	✗	✗	✗
• to freedom **from slavery** [cl.28(1)]	✗	✗	✓	✗	✗
• to freedom from **forced or compulsory labour** [cl.28(2)]	✗	✗	✓	✗	✗
• to freedom **from torture**	✗	✓	✓	✗	✗
and **cruel, inhumane or degrading** treatment or **punishment** [cl.29(1)]	S	✓	✓	✓	✓
• not to be subjected to medical or scientific **experimentation** without consent [cl.29(2)]	✗	✓	✓	✓	✓
• **to refuse any medical treatment** [cl.29(3)]	✗	✓	✗	✗	✗
• to own **property** [cl.30]	✗	✗	✗	✗	✓
• not to be **arbitrarily deprived of property** by the State (but this does not prevent a properly approved scheme for the orderly marketing of a product) [cl.30(3)]	✗	✗	✗	✗	✓
• to **trial by jury** if the person may be imprisoned for 2 + years for the offence [cl.19(1)(d)]	S	S	✗	✗	✗
• to **free legal assistance** if the interests of justice require it and the person does not have sufficient means to obtain legal assistance [cl.19(1)(e)]	✗	✓	✓	✓	✗
• the free **assistance of an interpreter** at the hearing [cl.19(1)(f)]	✓	✓	✓	✓	✗
• **not to be compelled to be a witness** in proceedings against the person for the offence [cl.19(1)(g)]	✓	✓	✓	✓	✗
• **(not to be found guilty or sentenced on evidence obtained or used in** breach of a right stated in this Act [cl.19(1)(h)])	S	-	-	-	-
• not to be found guilty of an offence unless the act or omission concerned constituted an offence at the time of the act or omission [cl.19(1)(i)]	✓	✓	✓	✓	✗
• not to be tried again for an offence if proceedings for the offence have been heard and decided on the merits [cl.19(1)(j)]	✓	✓	✓	✓	✓
• to have the principles of **due process** applied [cl.19(1)(k)]	I	S	S	S	✗
• *if found guilty of an offence*: [cl.19(2)]					
• to be sentenced within a reasonable time [cl.19(2)(a)]	✗	✗	✗	✗	✗
• the right to benefit of a lesser penalty, if the penalty for the offence has changed since the offence was committed [cl.19(2)(b)]	✓	✓	✓	✗	✓
• to have the finding and sentence reviewed by another court [cl.19(2)(c)]	✗	✓	✓	✓	✗
• not to be punished again for the same offence [cl.19(2)(d)]	✓	✓	✓	✓	✓
• *if a **victim of crime** or of abuse of power* the right of reasonable access to information and the judicial and administrative mechanisms of government to remedy the material, medical, psychological and social effects of the crime or abuse of power [cl.20]	✗	✗	✗	✗	✗
• to freely **express religious beliefs**, whether individually or in community with others [cl.21]	✓	✓	S	✓	✓
• to **freedom of; thought,**	✓	✓	✓	✓	✓
• **conscience**	✓	✓	✓	✓	✓
• **and belief** [cl.22]	✓	✓	✓	✓	S
• to **freedom of speech** and other forms of expression [cl.23(1)]	✓	✓	✓	✓	✓
• to **obtain and disseminate information** [cl.23(2)]	✗	✗	✓	✗	✗
• to **freedom of association** [cl.24]	✓	✓	✓	✓	✓
• to **freedom of peaceful assembly** [cl.25]	✓	✓	✓	✓	✓
• to **freedom of movement** and residence within the State (if the person is lawfully in Queensland) [cl.26]	✓	✓	✓	✓	✗

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models				
	Can	**NZ**	**Au**	**CC**	**Vic**
• to **freedom from discrimination**, in particular, on the grounds of:	✓	✓	✓	✓	✓
• race (including ancestry, ethnicity or national origin)	✓	✓	✓	✓	✓
• sex	✓	✓	✓	✓	✓
• sexuality	✗	✗	✗	✗	✗
• marital	✗	✓	✗	✓	✗
• or parental status	✗	✗	✓	✗	✗
• socio-economic status	✗	✗	✓	✗	✗
• political, religious or ethical belief or activity	**S**	**S**	✓	✓	✓
• age	✓	✗	✗	✗	✗
• mental or physical disability	✓	✗	✗	✗	✓
• medical condition	✗	✗	✗	✗	**S**
• other natural characteristics	✗	✗	**S**	✗	✗
but steps taken to advance a person on a ground stated are not discrimination [cl.27]	✓	✓	✓	✓	✗
• of **reasonable access to the State education system** [cl.32]	✗	✗	✗	✗	✗
• *if a **child***:					
• to live with the child's parents (or either of them) and to be cared for by them unless the child's interests require some other arrangement [cl.33(1)]	✗	✗	✗	✗	✗
• to be cared for by government if there is no relative or other appropriate person who is willing and able to care for the child [cl.33(2)]	✗	✗	✗	✗	✗
• to express views on all matters affecting the child's wellbeing and to have the views given appropriate weight having regard to the child's age and maturity [cl.33(3)]	✗	**S**	**I**	✗	✗
• not to be forced to perform labour or render services harmful to the child's mental or physical wellbeing or amounting to economic exploitation [cl.33(4)]	✗	✗	**I**	✗	✗
ECONOMIC AND SOCIAL RIGHTS (NOT INTENDED TO BE ENFORCEABLE):					
A person has the following rights:					
• to a **standard of living adequate** for the person's physical and psychological wellbeing [cl.34(1)]. This includes the right:	✗	✗	✗	✗	✗
• of **reasonable access to social welfare** [cl.34(2)(a)]					
• to **reasonable medical and hospital care**, including reasonable access to traditional medicines and health practices [cl.34(2)(b)]					
• to **reasonable housing** [cl.34(2)(c)]					
• to **gainful work [**cl.35(1)(a)]	✗	✗	✗	✗	✗
• to **work under safe and hygienic conditions** [cl.35(1)(b)]	✗	✗	✗	✗	✗
• to receive **reasonable remuneration** for the person's work [cl.35(1)(c)]	✗	✗	✗	✗	✗
• to **withdraw the person's labour** because of a dispute with the person's employer if the person is reasonably satisfied that no danger to human life will result [cl.35(1)(d)]	✗	✗	✗	✗	✗
• to **equal remuneration** for the same work [cl.35(2)(a)]	✗	✗	✗	✗	✗
• to **equal employment opportunity** [cl.35(2)(b)]	✗	✗	**S**	✗	✗
• of **reasonable access to legal assistance** [cl.36]	✗	✗	✗	✗	✗
• to live in a safe society protected by a **government that promotes non-violence** [cl.37]	✗	✗	✗	✗	✗
• to **freedom of family structure** [cl.38(1)]. This includes the right:	✗	✗	**S**	✗	✗
• to **marry** [cl.38(2)(a)].	✗	✗	✓	✗	✓
• to **live in a de facto relationship** [cl.38(2)(b)]	✗	✗	✗	✗	✗
• to **establish a family regardless of marital status** [cl.38(2)(c)]	✗	✗	**S**	✗	**S**
• the right to personal **autonomy over reproductive matters** [cl.38(2)(d)]. This includes:	✗	✗	✗	✗	✗
• the right of a female to **control her own fertility** [cl.38(3)(a)]	✗	✗	✗	✗	✗
• the right to decide freely and responsible on the **number** and spacing **of** the **children** and to have reasonable access to information, education and means to enable the exercise of this right [cl.38(3)(b)]	✗	✗	✗	✗	✗
• *if a parent or other person responsible for the care and control of a child* to **reasonable access to adequate child care** facilities [cl.39]	✗	✗	✗	✗	✗

Right contained in EARC's bill of rights	How the right is expressed in other bill of rights models				
	Can	**NZ**	**Au**	**CC**	**Vic**
COMMUNITY AND CULTURAL RIGHTS (NOT INTENDED TO BE ENFORCEABLE): A person has the following rights:					
• The collective and individual right to **political, economic, social and cultural development** [cl.40]	✗	✗	**S**	✗	✗
• Various rights **particular to Aboriginal People and Torres Strait Islanders** [cl.41]	**I**	**I**	**I**	✗	✗
• Various rights to access and express the person's **culture** [cl.42]	**I**	**S**	**S**	✗	✗
• Rights **particular to an author**, including to be known as the author of an original work and to have the integrity of the work respected [cl.43]	✗	✗	✗	✗	✗
• Right **to environmental protection and conservation** including the right to have the environment of Queensland protected by government from excessive, undue or unreasonable human interference and reasonably conserved by government for its own intrinsic value [cl.44(1)]	✗	✗	✗	✗	✗
• Right to promote **ecologically sustainable development** and the right to object to development that is not ecologically sustainable and to expect that government will accept and act on a reasonable objection [cl.45]	✗	✗	✗	✗	✗

This table is reproduced from the Legal, Constitutional and Administrative Review Committee's Issues Paper No 3: The Preservation and Enhancement of Individuals' Rights and Freedoms: Should Queensland Adopt a Bill of Rights? (September 1997).

APPENDIX D: THE RIGHTS CONTAINED IN EARC'S BILL OF RIGHTS: SUBMISSIONS AND COMMENT RECEIVED

This appendix records submissions and comments made to the committee relating to the rights specified in EARC's proposed bill of rights.

The committee makes no comment on the views recorded in this appendix.

Nevertheless, the committee feels that such information would be valuable to any future Queensland (or other) government that, despite the recommendations in this report, decided to adopt a bill of rights.

INTRODUCTION TO APPENDIX D

In Chapter 4 of the attached report, the committee recommends that Queensland should *not* adopt a bill of rights. Because the committee has answered the threshold question 'Should Queensland adopt a bill of rights?' in the negative, the committee has not gone on to consider and make recommendations about what *form* a Queensland Bill of Rights should take or what rights it should contain (that is, apart from considering such matters as part of answering the threshold question).

Regardless of the committee's primary recommendation, it is the case that:

- EARC recommended that Queensland should adopt a bill of rights and provided a draft Bill of Rights Act 1993 (reproduced as Appendix F of this report: 'EARC's Bill'); and
- this committee received various submissions (in response to its issues paper and during its Canadian discussions) that either specifically addressed the desirable form/content of any Queensland Bill of Rights or that expressly addressed EARC's Bill.

The purpose of this appendix is to outline (but not evaluate) those submissions on the content of a desirable bill of rights and on EARC's Bill. Such submissions are valuable in their own right, particularly if the Queensland Government (current or future) decides to implement a bill of rights despite this committee's recommendation to the contrary.

Specifically, this appendix outlines:

- submissions and comment regarding actual *rights* contained (or not contained) in EARC's Bill; and
- submissions and comment addressing the actual (and possible) *features* of EARC's Bill (a justified limitations clause, remedies, the lack of an override clause etc).[222]

Submissions that did not address the rights contained in EARC's Bill

Many submissions that the committee received in response to its issues paper were restricted to the issue of whether Queensland should adopt a bill of rights. Most of those submissions generally made statements supporting or rejecting a bill of rights while making no comment as to the specific content of any such document.

Some submitters specifically asserted that, having either given their support or otherwise to a bill of rights at this stage, they were willing to provide further submissions about the content of such a bill '*once the decision to go ahead with a bill of rights had been made*'. Indeed, some organisations indicated that it would only be proper that more public consultation occur before a bill of rights is adopted in the State.[223] For example, the Women's Legal Service submitted that, while it welcomed the opportunity to make a submission in response to the committee's issues paper:

> *(W)e are concerned at the lack of public debate about the critical social, legal and political issues raised. In such an environment, we fear submissions to the review may be entering a virtual vacuum, devoid of acceptable levels of community involvement*

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222 The desirability of a constitutionally entrenched bill of rights *vis a vis* a normal statute is addressed in chapters 2 & 3 of the body of the attached report.

223 For example, International Commission of Jurists, submission dated 21 November 1997, p 6; Townsville Community Legal Service, submission dated 11 March 1998, p 4; Bar Association of Queensland, submission dated 18 November 1997, p 1.

> *and understanding.*[224]

The committee concurs with sentiments that there would need to be much greater public consultation and debate should Queensland wish to go ahead and adopt a bill of rights. The committee recognises that the potential ramifications of introducing a bill of rights are enormous, especially if the bill is to be entrenched and contain an extensive list of rights. If the committee had decided to recommend to the Parliament that a bill of rights be adopted in this State, then no doubt the committee would have consequently recommended that the government see to it that, before a bill was enacted, further extensive public consultation be undertaken regarding its content.

A number of submissions received by the committee nevertheless did address specific rights that might be contained in a Queensland Bill of Rights. These submissions—along with comment made to the committee during the committee's Canadian study tour and specifically addressing EARC's Bill—are outlined below.

GENERAL COMMENTS ABOUT EARC'S BILL

Various submissions reminded the committee that the ramifications of any bill of rights very much depends on what it includes and how it is written. The Sporting Shooters Association of Queensland (Qld) Inc submitted that the provisions of any intended bill of rights should be closely examined: '*beware the integrity of the legislators*'.

B J Clarke submitted that, while he was not making a stand 'for' or 'against' bill of rights in general, '*the EARC proposal, when looked at on its merits as a specific proposal, turns out to be (to put it bluntly) a radically bad attempt at a bill of rights*'. B J Clarke continued:

> *The bill looks innocuous enough. Depending on how they are counted, there is something like ONE HUNDRED AND TWENTY SIX (126) rights enumerated … [that] are expressly (and significantly) said not to be exhaustively stated (s.8).*
>
> *Thus merely by its size, the bill bears little outward resemblance to the short and pithy declarations of the Bill of Rights of 1688, the Declaration of Independence of 1776, or the bill of rights forming part of the US Constitution, or even the Declaration of the Rights of Man of 1791.*
>
> *It does, however, have a marked similarity to the Weimar Constitution of August 1919, adopted in Germany after its defeat in World War I. The inclusion of rights "communal life" and "economic life" was a new departure in that constitution. EARC's proposal perhaps contains a further new departure in respect of "cultural rights".*

B J Clarke postulated that many of the rights included in EARC's Bill have been attempted to be enshrined before but were rejected:

> *When members of the committee examine the "rights" some will be more familiar than others. But on the whole, they will be able to say that they have "heard it all before", because proposals for ordinary statutory reform, justified on the basis of one or other of the general propositions in the EARC bill have been repeatedly made over the years. The committee should use that past experience. Some of those proposals, usually the sensible ones, have been adopted. Some have not.*

[224] Women's Legal Service, submission dated 28 November 1997, p 2.

> *Experience shows that not all the proponents of the ones that have failed have accepted the result. In many cases they explain their failure, not on the basis of the want of merits in their proposals, but on the basis of some alleged defect in the (so-called) "proves" of parliamentary reform.*
>
> *The EARC proposal is a change of tactics for legislative reform for the dissatisfied, even disaffected, reformers. The new tactic falls into two parts:-*
>
> 1. *To push for general legislative acceptance of broad propositions, formulated widely enough to incorporate the desired changes, but without descending to the particulars. (Many of the failed proposals failed because they proved too controversial or even obnoxious, when it come down to looking at the application of the general rule to practical cases.)*
>
> 2. *Leave the testing out of the consequences to a judicial, rather than a legislative process.*

B J Clarke suggested that the specific formulation of probably all the rights in EARC's Bill are open for serious criticism.

While various people that the committee met with in Canada embraced the concept of a bill of rights (if not all of the actual aspects of the *Canadian Charter*) and were keen to see Queensland adopt its own bill of rights, few openly embraced the full content of EARC's Bill. EARC's Bill was generally recognised as considerably broader than the *Canadian Charter*. A number of individuals expressed reservations about the bill's general format. Some questioned the overall workability of the bill, pointing to apparently disparate and possibly conflicting or incompatible features and rights. Others queried the bill's terminology.

One official from the Ontario Attorney-General's Department described EARC's Bill as '*very much a draft'* and stated that the bill's drafting needed a great deal of tightening. A representative of the British Columbia Law Society stated that many of EARC's rights appeared very open ended.

A representative of the Barreau du Quebec characterised EARC's Bill as a combination of the approaches taken in the provincial Quebec Charter and the *Canadian Charter* in terms of how it defined rights. It followed the Quebec Charter in that it addressed very specific issues and specific articulated rights. At the same time, it followed the *Canadian Charter* by including some very general notions of rights.

Many individuals that the committee met with in Canada predicted that the broad drafting of EARC's Bill would leave it very much open to the courts to determine the content and ancillaries of the rights it contained. Many made the comment that Queensland should, where possible and appropriate, follow the wording of the Canadian *Charter* or the wording of other bills of rights that have been in place for some time and have consequently been subject to considerable judicial interpretation. Queensland would then have a body of jurisprudence to draw from for guidance in ascertaining what specific rights meant or, at least, what they might be held by the courts to mean.

Specific reservations that were conveyed to the committee in Canada [about the rights and clauses of EARC's Bill] are listed later in this appendix.

SUBMISSIONS CALLING FOR RIGHTS NOT TO BE INCLUDED IN EARC'S BILL

A number of submissions responding to the issues paper endorsed all of the rights enunciated by EARC for inclusion in a Queensland Bill of Rights. Several submitters, however, specifically suggested rights that they would like to see in a Queensland Bill of Rights that EARC had not included in its bill.

B Mason submitted that the Queensland Bill of Rights should contain all the rights contained in EARC's Bill plus the following:

- a right to have legal access to any drug whatsoever;
- a right to commit suicide in a way which harms no other person; and
- '*animal rights';* namely, that '*all animals (domestic, agricultural, native and wild) have the right to be treated with respect and compassion at all times.*'

P Carew submitted that a Queensland Bill of Rights should include a right not to be arrested or charged purely on the unsubstantiated word of a law enforcement officer; that is, not to be 'verballed'. R Knight informed the committee that both the law and practice relating to land planning discriminated against rural land owners *vis a vis* urban land owners, especially on issues of land resumption. A bill of rights should therefore address the issue of '*protection from discrimination for owners of private freehold land in rural areas'*. The Queensland Retired Police Association submitted that, while they were not in a position to respond on whether Queensland should adopt a bill of rights, they believed that more attention should be directed to enhancing the rights of police officers, whose rights are increasingly being eroded.

Right to possess firearms

Several submissions (many in the form of slight deviations to a pro forma letter) addressed only one right: the right to bear arms. C Andersen, G & L Andersen, A MacDonald, S A Wilson, C Erles, L Partridge, D & N Bradshaw and I Andersen submitted, in similar terms, that '*any sound and law abiding adult should have the right to own or possess any type of firearm which is not capable of fully automatic function, without undue interference from the government … for the purpose of defence of self and family'.*

J Hatton, S Goan and S Andersen submitted that the right to own a firearm is a fundamental right of the individual. D A Wallace suggested that, without the right to own firearms suitable for self defence, every other right and freedom that individuals have is worthless. The Sporting Shooters' Association submitted that the right to liberty is based on the right to own and use firearms. The Arms Collectors Guild of Queensland submitted '*the Governments shall make no laws to diminish the rights of the people to own, collect and use firearms*'.

However, the Queensland Association for Mental Health indicated that it would strongly oppose any inclusion of the right to bear arms. In the QAMH's view, the right to bear arms equates with a right to access the most lethal means of suicide.

Parliamentary privilege

Officials from the British Columbia Legislative Assembly raised an important issue with the committee: whether the introduction of any Queensland Bill of Rights would mean that parliamentary privilege would become subject to the rights contained in the Bill. The committee was referred to the judgment of the Canadian Supreme Court in relation to the *Donahoe* case (*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*. That case involved the issue of whether a broadcasting corporation had a

fundamental *Charter* freedom of expression in the form of a right to televise the proceedings of the chamber of the Nova Scotia Legislative Assembly against the Speaker's wish.[225]

On appeal to the Supreme Court of Canada, the Court reversed the decision of the lower court and found for the House of Assembly. The Court held that, even though parliamentary privilege was not enshrined as an explicit right or freedom in the *Charter*, the reference in the preamble of the *Canadian Constitution Act 1982* to the fact that Canada would have a system of government similar to that of the United Kingdom meant that any inherent parliamentary privileges enjoyed constitutional status and could not be undermined by *Charter* rights. The Court added, however, that it was difficult to conclude that a Legislative Assembly could *never* be subject to the *Charter*.

In light of that case, the Law Clerk and Clerk-Assistant of the British Columbia Legislative Assembly strongly suggested to the committee that, should Queensland adopt a bill of rights, it should explicitly enshrine the privileges of Parliament to avoid any doubt that parliamentary privilege continued undiminished.

SUBMISSIONS AND COMMENTS ADDRESSING THE SPECIFIC RIGHTS CLAUSES OF EARC'S BILL

This section outlines comment made in public submissions to the committee and during Canadian discussions in relation to specific rights clauses contained in EARC's Bill. The committee did not receive submissions or comments in relation to every provision of EARC's Bill. Therefore, not every clause of EARC's Bill is canvassed in the following discussion.

PART 3–CIVIL AND POLITICAL RIGHTS

Clause 11 (Right to life, liberty and security of the person)

The right to life in EARC's clause 11 has the potential to conflict with the rights of a female to control her own fertility in EARC's clause 38(3)(a). Children By Choice submitted that '*a person*' in EARC's right to life provision should be defined in a way that prevented the right from being used to restrict the rights of a woman to control her own fertility. However, Right to Life Australia submitted that they would '*strenuously oppose any bill of rights which precludes a recognition of a right to life for pre-born beings*'. The organisation stated that EARC '*dismissed preborn human beings, presumably right up to the point of birth, as beings worthy of the right to life. In doing so, they set aside all the scientific evidence which establishes the conclusion that a new, unique human life begins at fertilisation*'. [Further comments received by the committee relating to abortion are listed below under cls 15 and 38(3).]

Clauses 11(a) and (b) are based on s 7 of the Canadian *Charter* which states that '*everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*'. The British Columbia Ombudsman told the committee that section 7 of the *Charter*—in referring to '*the principles of fundamental justice*'—has been interpreted in a manner that strengthens the status of administrative law in Canada. For example, the Ombudsman suggested that review bodies like herself could use section 7 as a 'sword' against agencies that are reluctant to implement their recommendations.

[225] The issue of the impact of the *New Zealand Bill of Rights Act* on the powers and privileges of its legislature has also been the subject of jurisprudence in that country.

The British Columbia Ombudsman also suggested that the *Charter* has gone beyond a formal statement of people's rights and has actually translated—via such provisions as section 7—into better administrative practices in various institutions and agencies.

EARC's right to self defence in cl 11(c) (a right not commonly found in bill of rights instruments) was perceived by K Eagers as no right to self defence at all in that it implies that only someone *in authority* has the right to defend a person. K Eagers suggested that cl 11(c) be amended to make it clear that it refers to a person defending their *own* life.

Clause 12 (Right to legal recognition and equality)

The Women's Legal Service (WLS) submitted to the committee that a strong equality clause should be the cornerstone of any effective bill of rights. The Women's Legal Service referred to the 1994 report of the Australian Law Reform Commission *Equality Before the Law: Women's Equality*, where the ALRC observed that '*Most submissions support the entrenchment of an equality guarantee in the constitution, either on its own or as a bill of rights*'.

WLS supported the provision of an equality clause similar to that which appears in s 9 of the Constitution of the Republic of South Africa. That provision reads:

> ***Equality***
>
> ***9(1)*** *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> ***(2)*** *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.*
>
> ***(3)*** *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

WLS endorsed the discrimination grounds included in s 9(3)—particularly gender, sex, pregnancy, sexual orientation and conscience—and also the grounds of discrimination that are recognised in the *Anti-Discrimination Act 1991* (Qld).

WLS further specified that, to be effective, a bill of rights should recognise the effect of violence on women in both public and private spheres. This is because violence undermines equality. The ALRC report on women's equality stated that '*The law's failure to deal effectively with men's violence against women denies women the equal protection of the law and the equal enjoyment of human rights and fundamental freedoms*'.

WLS therefore endorsed the inclusion in a Queensland Bill of Rights of an equivalent of section 12(1)(e) of the South African Constitution which provides for a right '*to be free from all forms of violence from either public* ***or private*** *sources*'. [Emphasis added.]

Overall, the WLS submitted that an equality guarantee would:

- *confirm that women have a right to equality in law*;
- *express government commitment to achieving women's equality*;
- *recognise and affirm commitment to implementing international standards*;

- *recognise and acknowledge diversity;*
- *recognise the importance and promote the use of special measures as a means of assisting women to secure equality; and*
- *promote recognition and acceptance within the community of the principle of the equality of women and men.*

During the committee's discussions in Canada, it was suggested that:

- there were real doubts in Canada as to whether the general equality provision in the *Charter* (s 15) had really made a difference to the position of minority groups in Canada; and
- should a Queensland Bill of Rights include an equality provision, then that particular purpose of the bill of rights should be clearly identified and distinguished from other possible purposes (eg protecting fundamental political and civil rights such as free speech, making legal rights available to accused persons, etc).

Readers should also refer to comments below in relation to cl 27 (Right to freedom from discrimination).

Clause 15 (Right to privacy)

EARC included as clause 15(1) a right to '*protection of the law against arbitrary interference with the person's privacy, whether as an individual or as a member of a family*'. This general right to privacy was greeted warily by the Queensland Law Society. While the Society said it supported protections against specific incursions into a person's privacy such as arbitrary search and seizure [cl 15(2)], it submitted that '*there are considerable definitional and workability problems with a creation of* [an enforceable] *general right of privacy*'.

The Law Society stressed that it was not necessarily opposed to the development of a right to privacy in common law nor was it necessarily opposed to moves specifically directed to extending legislative protection of privacy in a specified and detailed manner. But a general right to privacy would create considerable controversy.

The Law Society added that the 'amorphous nature' of a general right to privacy was particularly conducive to uncertainty in the law:[226]

> *Usually the prospect of conflict between later and earlier statutes is minimised because statutes are usually drafted with a large degree of precision. The more general and wide ranging the latter statutory provision, the greater the prospect of inconsistency with pre-existing statutes.*
>
> *Some level of uncertainty as to the validity of pre-existing statue law is unavoidable and is one reason why the Society has stressed that the rights contained in the Bill be confined to the core civil and political rights. However, the very broad scope of a general right to privacy makes it particularly problematic.*

In Canada there is no *general Charter* right to privacy. However, the Supreme Court has drawn certain broad privacy implications from rights that *are* contained in the *Charter* such as the right to be secure against unreasonable search or seizure (s 8).[227] The Canadian Privacy

[226] The Society's logic can be extended to broadly stated constitutional rights generally.

[227] Members of the Canadian Bar Association stated that s 8 of the Canadian *Charter* would always be subject to litigation. The section does have the effect of extending the length of prosecutions and making them more expensive to run (with extended legal argument on whether evidence was obtained in breach of the *Charter*) 'but only when the police make mistakes.'

Commissioner informed the committee that the original draft of the *Charter* did contain a general right to privacy but it was foregone during negotiations surrounding the *Charter*'s introduction. There have, however, been subsequent calls for a *Charter* right to privacy.[228]

Some submissions received by the committee addressing a bill of right's effect on the issue of abortion pointed out that in the United States the right to privacy is used to justify abortion.[229] Thus, EARC's cl 15 (Right to privacy)—as well as rights in cls 11 (to life) and 38(3)(a) (of a female to control her own fertility)—will potentially impact on the abortion debate in this State. These clauses highlight the fact that provisions within an extensive bill of rights can conflict.

Clause 17 (Rights relating to custody generally)

The Queensland Association for Mental Health (QAMH) submitted that EARC's selection of rights to be included in its 'comprehensive scheme' was appropriate. The QAMH nevertheless added that, in relation to clause 17, it believed that:

> *The procedural rights in relation to involuntary detention, which are framed to primarily address the criminal law process and the correction system, should be extended to people who are placed in involuntary detention under the Mental Health Act. While the actual process used in the Criminal Law system and the Mental Health system should be appropriate to the circumstances, the basic procedural rights to fairness and natural justice should be no different.*

Clause 18 (Rights particular to an alleged offender)

Sub-clause 18(2)(b) (Right to remain silent without a negative inference being drawn at trial)

Members of the Quebecois judiciary with whom the committee met were concerned about EARC's cl 18(2)(b). The judges cautioned that, while this was indeed a principle of the common law, when stated in such a bill of rights, it was not necessarily subject to the exceptions which exist in common law.[230] The judges therefore suggested to the committee that subject matter of cl 18(2)(b) be left to the common law.

Sub-clause 18(2)(c) (Right to have a reasonable opportunity to obtain legal assistance and consult with a lawyer without delay)

In relation to EARC's right to obtain legal assistance on being arrested in cl 18(2)(c), members of the Canadian Bar Association told the committee that EARC's drafting was an improvement on the Canadian equivalent, s 10(b) of the Canadian *Charter*. Members of the Association stated that the wording of *Charter* s 10(b)—the right to '*retain and instruct counsel* ***without delay***'—was 'too absolute' and should be avoided. EARC's cl 18(2)(c)—the right to '*have a*

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228 In 1991, the Special Joint Committee on a Renewed Canada received submissions, including one from the Privacy Commissioner, to enshrine a right to privacy in the Canadian *Charter*. See Bruce Phillips, Privacy Commissioner of Canada, 'Entrenching a constitutional privacy protection for Canadians', submission to the Special Joint Committee on a Renewed Canada, December 1991 and the accompanying speech to that submission presented to the committee on December 9, 1991; and Professor David Flaherty's background paper entitled *Entrenching a constitutional right to privacy for Canadians* presented to the same committee. Also see another argument for the constitutional entrenchment of the right to privacy presented by the Hon Mr Justice G V Laforest of the Supreme Court of Canada, 'Privacy, notes for a speech to the Canadian Human Rights Foundation Summer School', University of Prince Edward Island, 17 July 1990.

229 Queensland right to life submitted: '*the examples listed in [cl 15] were straight forward but the "right to life" has been one of the cornerstone arguments in the abortion debate in [the US], derived from their constitution*'.

230 As discussed in the Canadian Supreme Court case of *R v Chambers* (1986) 26 CCC (3d) 353 (SCC).

reasonable opportunity *to obtain legal assistance and to consult a lawyer without delay'*—was more desirable.

Clause 19 (Right to reasonable standard of criminal procedure)

Sub-clause 19(1)(b) (Right to be tried within a reasonable time)

Clause 19 provides that a person who is charged with an offence has '*the right to be tried within a* ***reasonable*** *time.*' Clause 19 copies verbatim s 11(b) of the Canadian *Charter*. That provision was proffered by a number of organisations that the committee met with in Canada as an example of the uncertainty that a (constitutional) bill of rights can bring. In a landmark decision in 1990, the Supreme Court of Canada laid down factors in determining whether trial delay is unreasonable (such as length of, and reasons for, the delay, prejudice to the defendant). The court held that delay caused by inadequate institutional resources would not necessarily be excused and that the jurisdiction in question would be compared with 'better' comparable districts in the country.[231] As the attached report points out in section 4.2.2, the Supreme Court decision in that case—the *Askov* case—resulted in a total of 51,791 charges in the province of Ontario alone being stayed between October 1990 and November 1991 (9% of all charges) as a result of 'unreasonable delay'.

In light of the consequences of the *Askov* decision,[232] some members of the British Columbia Law Society suggested to the committee that Queensland should not include an explicit right to a speedy trial in the form of EARC's cl 19(1)(b). The Society pointed to the maxim that 'justice delayed is nevertheless justice done.'[233] However, some members of the Canadian Bar Association who met with the committee in Ottawa had a different perspective on *Askov*. They suggested that the decision represented a positive scenario, where a constitutional right (as adjudicated on by the Supreme Court) *forced* the government to direct its attention and money to the criminal justice system.[234]

The Quebecois judges that met with the committee also had reservations about EARC's speedy trial provision. The judges nevertheless endorsed EARC's **cl 19 (2)(a)** which states that a person who is found guilty of an offence has the '*right to be* ***sentenced*** *within a reasonable time ...*'

Sub-clause 19(1)(c) (Right to be given a fair and public hearing by an impartial court)

EARC's cl 19(1)(c) provides that a person who is charged with an offence has '*the right to be given a fair and public hearing by an impartial court*'. One of the Quebecois judges whom the committee met strongly urged the committee to recommend that the word '*impartial*' be replaced by the word '*independent*'. The phrase '*independent tribunal'* is wider and has specific legal meaning (eg it extends to how, and by whom, the tribunal is chosen).

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231 One representative of the Ontario Attorney-General's Department suggested that the *Askov* decision amounted to saying that a 'reasonable' period within which to bring an accused to trial was about 8 months.

232 However, the harsh consequences of the *Askov* decision were subsequently ameliorated by a later Supreme Court of Canada decision where the Court 'clarified' that it did not mean to be taken so literally: Ontario Attorney-General's Department's discussion with the committee.

233 The Society, along with the Ontario Attorney-General's Department, said that the cases thrown out of Canadian courts as a result of *Askov* would have had a very high conviction rate.

234 The Criminal Lawyer's Association of Ontario suggested to the committee that, in Ontario before *Askov*, there was a 'shocking' lack of resources directed to justice and that 3-year delays in criminal proceedings were not uncommon. The Association suggested that the average delay is now 6 months.

Sub-clause 19(1)(d) (Right to trial by jury for certain criminal offences)

EARC's cl 19(1)(d) states that a person who is charged with an offence '*has the right to trial by jury if the person may be imprisoned for 2 or more years for the offence*'. The Quebecois judges suggested that EARC's cl 19(1)(d) should be rephrased, and that two years imprisonment was too low a limit.

Sub-clause 19(1)(e) (Right to free legal assistance in certain cases)

EARC's section 19(1)(e) states that a person who is charged with an offence '*has the right to free legal assistance if the interests of justice require it and the person does not have sufficient means to obtain legal assistance*'. The Quebecois judges strongly urged the Committee to delete EARC's section 19(1)(e).[235] The provision was described as a potential legal minefield, especially given the 'massive' cuts in legal aid in Canada.[236] The Canadian Department of Justice suggested that clause 19(1)(e) would likely require a Public Defender's-type office.

Sub-clause 19(1)(f) (Right to the free assistance of an interpreter in certain cases)

EARC's clause 19(1)(f) states that a person who is charged with an offence has the '*right to the free assistance of an interpreter if the person cannot adequately hear, understand or speak the language used at the hearing*'. The Quebecois judges suggested that EARC's cl 19(1)(f) be replaced with a more general right for persons who are charged '*to understand the proceedings and charges brought against the person*.' A specific right to an interpreter could then be more appropriately placed in the rules of the courts.

Sub-clause 19(2)(a) (Right to be sentenced within a reasonable time)

See comment above in relation to cl 19(1)(b) (Right to be *tried* within a reasonable time).

Clause 20 (Rights particular to a victim)

A member of the Quebecois judiciary vehemently urged the committee not to insert a 'victim's rights' provision in any Queensland bill, stating that to give victims constitutional rights in criminal proceedings is to misunderstand the common law. Another Quebecois judge explained that there were good reasons why the common law has traditionally refused to acknowledge the existence of an actual 'victim'. By having a victim as an ordinary witness (and not as a formal party to the criminal proceeding) means that the state is (properly) conceptualised as the party that has been perpetrated against (due to breach of the public order). Many aspects of criminal proceedings, such as the accused's right to silence, depend on this premise.

The Canadian Police Association stated that it believed that the Canadian *Charter* (which does not contain an express protection of victim's rights) had not so far operated to assist victims of crime but that perhaps that aspect is still to evolve.

Clauses 23 (Right to freedom of speech and other expression)

The Quebecois judges informed the committee that under the Canadian *Charter* political speech was 'virtually unrestricted' but that commercial speech, while recognised, was not as

[235] Even though the decision by the High Court of Australia in the *Dietrich* case recognised a similar principle in common law [*Dietrich v the Queen* (1992) 177 CLR 292].

[236] Although the committee heard many differing opinions about the extent of legal aids cuts in Canada.

extensive a right.[237] During its Canadian study tour, the committee's attention was also directed to a high-profile challenge by the Canadian tobacco industry's lobby group to a Canadian bill that aimed to stop tobacco advertising. The challenge was lodged in terms of the bill breaching tobacco companies' *Charter* right to freedom of expression.

Clause 27 (Right to freedom from discrimination)

Regarding the drafting of cl 27, the Tharpuntoo Legal Service Aboriginal Corporation commended the replication of freedom from discrimination on the basis of race in EARC's Bill. It was a good measure which, if EARC's Bill became entrenched in the Constitution, would protect that important right[238] from being removed '*by a simple Act of Parliament*'. The Queensland Council for Civil Liberties submitted to the committee that cl 27 should include transgender status as a further prohibited ground of discrimination. Ms F Barnes suggested that EARC's 'positive discrimination' exception in cl 27(2) should be analysed more closely, and reminded the committee that there were sometimes good social reasons behind discrimination. (Such exemptions are extensively provided for in the *Anti-Discrimination Act 1991* but obviously not listed in EARC's Bill.)

Representatives from the British Columbia Law Society suggested to the committee that the right to equality in cl 12(2) was not, in fact, a separate right to the right to be free from discrimination in cl 27. The committee was advised that the two provisions were confusing and possibly conflicting as they stood. Any Queensland Bill of Rights should not separate them. The British Columbia Ombudsman pointed out that in many Canadian jurisdictions human rights legislation preceded the *Charter* and that there was no fundamental difficulties in having the two laws. Human rights legislation was penal (being phrased in terms of 'you shall not ...') whereas the *Charter* is phrased in terms of 'you have a right to ...'. A staff member from the University of Ottawa further suggested that EARC's cl 27 would conflict, or at least overlap, with the social and economic rights contained in Part 4 of the bill.

Clause 29 (Right to freedom from torture, experimentation and treatment)

EARC's cl 29(1) states that '*a person has the right to freedom from torture and cruel, inhumane or degrading treatment or punishment*'. A Quebecois judge suggested that the adjective '[*and*] *unusual*' be added before '*treatment*' in the clause. This is the wording used in an equivalent provision in the Canadian *Charter* (s 12) and the judge said that the Canadian provision works appropriately.[239] Queensland would also then be able directly use Canadian jurisprudence surrounding s 12 in interpreting EARC's cl 29(1). The British Columbia Ombudsman informed the committee that s 12 of the *Charter* regarding cruel or unusual treatment had been used effectively for setting standards for Canadian psychiatric institutions and prisons.

Queensland Right to Life submitted that EARC's cl 29(3) (the right to refuse any medical treatment) raised two concerns. The first related to how cl 29(3) would relate to the common law which already provides a right to refuse medical treatment. The second concern was that the phrase could potentially be interpreted to embrace 'passive euthanasia.'

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237 See, for example, *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927.

238 Now provided in Queensland law under by the *Anti-Discrimination Act 1991* (Qld).

239 The judge told the committee that legislation containing compulsory sentences has been subject to the *Charter* right regarding unusual and cruel punishment. An example (showing the extra-territorial ramifications of the *Charter*) that was given by the judge was where a Canadian court did not allow the extradition of person suspected of drug offences to Michigan where there was a compulsory sentence of 25 years for possession of less than one pound of marijuana.

Clause 32 (Right to education)

Clause 32 provides that '*a person has the right to reasonable access to the State education system*'. B Mason submitted to the committee that '*reasonable access*' should be changed to '*reasonable and free access*' to the State education system. A member of the University of Montreal law faculty stated that Queensland should be very wary of an explicit right to education. Firstly, such a right might mean that the government could not deny students access to certain schools. Secondly, such a right could end up dictating to government where it has to build schools. The committee was told that in Germany, where there is an enunciated right to education, the government cannot place quotas on the number of children attending a particular school.

[The committee notes that the right to education (cl 32) was placed by EARC in Part 3 (*Civil and political* rights) and that rights included in Part 3 are enforceable because of cl 4 (Way civil and political rights may be used).]

Clause 33 (Rights particular to a child)

The Youth Advocacy Centre Inc submitted that any bill of rights should ensure that children are beneficiaries of the rights included in it. It should also ensure that children have the opportunity to participate in society and decisions which affect them. It should only be subject to the proviso that '*in the particular circumstances the child is capable of so doing, taking into account their age and maturity*'. However, a staff member of the University of Montreal law faculty warned the committee that enshrining the rights of children might translate to 'an open invitation' for people to challenge the rights of particular parents to keep their children.

PART 4–ECONOMIC AND SOCIAL RIGHTS

Clause 38 (Right to freedom of family structure)

EARC's Bill provides that a person has a right to freedom of family structure [cl 38(1)]. This includes a '*right to personal autonomy over reproductive matters*' [cl 38(2)(d)], which itself includes:

- the right of a female to control her own fertility [cl 38(3)(a)]; and
- the right to decide freely and responsibly on the number and spacing of children [cl 38(3)(b)].

WLS submitted that reproductive freedoms were fundamental to women's rights and that EARC's cl 38(3) reflected article 16 of the UN *Convention on the Elimination on all Forms of Discrimination Against Women*. However, Queensland Right to Life simultaneously directed the committee's attention to the UN Convention on the Rights of the Child, the preamble of which recognises the importance of appropriate legal protection for the child '*before and after birth*'.

Both Queensland Right to Life and Right to Life Australia submitted (in different terms) that a Queensland Bill of Rights should not give recognition to a right to abortion, either directly or indirectly and suggested that EARC's cl 38(3) does exactly that. The right of a woman to control her own fertility and the right to choose the number and spacing of children were, in the words of Right to Life Australia, '*clearly meant to provide a back-door entrance to a right to abortion.*' T Toomey submitted that cl 38(3) '*almost certainly*' would be interpreted as right to abortion. Queensland Right to Life, Right to Life Australia and T Toomey also stated that cl 38(3) contradicted the right to life in EARC's cl 11.

Children By Choice saw cl 38(3) quite differently, submitting that '*We are disappointed that the "right to personal autonomy over reproductive matter" does not include the right to abortion.*' Children by Choice also expressed disappointment that cl 38(3) is included under 'Social and Economic Rights' and is thereby not intended to be enforceable.

PART 5–COMMUNITY AND CULTURAL RIGHTS

Clause 41 (Rights particular to Aboriginal People and Torres Strait Islanders)

The Tharpuntoo Legal Service Aboriginal Corporation submitted to the committee that rights particular to Aboriginal people and Torres Strait Islanders ('ATSI') should in fact be enforceable. [As they now stand (in Part 5 of the Bill) ATSI rights are expressly not enforceable because of the provisions of EARC's cl 5 (Way other rights may be used)]. WLS submitted that, if Queensland should adopt a bill of rights, it should include ATSI rights (in even stronger terms than those drafted by EARC). An individual submitter to the committee, however, stated that Aboriginal people and Torres Strait Islanders '*should have the same rights as all other Australians*'.

In Canada, one judge warned the committee to be very careful with a provision such as cl 41 because, if the rights expressed are extremely broad, the whole provision tends to reflect a paternalistic approach to 'managing' Aboriginal peoples. The judge said that the clause also obviously begs the question of who is an Aboriginal person or Torres Strait Islander that can access the guaranteed rights. An individual from the Canadian Department of Justice also expressed concern at the breadth of EARC's cl 41(c) and its granting of the right to obtain reasonable financial and technical assistance from government for Aboriginal people to pursue their political, economic, social and cultural development.[240]

Clauses 44 (Right to environmental protection) and 45 (Right to sustainable development)

WLS submitted that it '*supports the inclusion of environment rights in any Bill of Rights mechanism as proposed by [EARC's] cls 44 and 45*'. B Mason submitted that a Queensland Bill of Rights should include both a '*right to visit, at no charge, all National Parks in Queensland*' and a '*right for all National Parks in Queensland to be protected by the Queensland and/or Federal Governments*'.'

SUBMISSIONS AND COMMENT ADDRESSING *FEATURES* OF EARC'S BILL

The previous section related to the actual rights contained in EARC's Bill. This section outlines public submissions received by the committee and comments made to the committee in Canada that relate to the more general features of EARC's Bill. For further discussion on the purpose and effect of these features, readers should refer to chapter 2 of the main report.

EARC's preamble

The Queensland Council for Civil Liberties submitted that any Queensland Bill of Rights should commence with a statement of the philosophical basis for the recognition of the rights set out in the bill. Such a statement should identify the fact that, while the rights contained in the bill are derived from sources including international instruments, they are formulated with a view to ensuring their enjoyment *in Queensland*. A preamble should also include a statement of principle denouncing any discriminatory application of the rights and freedoms contained in the bill, in accordance with the wording of the UDHR.

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[240] It is worth noting that it is s 35 of the *Canadian Constitution Act 1982* and not the *Canadian Charter* itself that expressly constitutionalised Indigenous rights in Canada.

The International Commission of Jurists (Queensland Branch) likewise suggested that both the 'preamble' and the 'objects' section of the bill of rights should direct those who are required to interpret the bill of rights to the sources of those rights, thereby pointing them to the growing body of international human rights jurisprudence.

On the other hand, B J Clarke interpreted EARC's preamble to read '*as an implicit assertion that there has been a failure hitherto of "the government" (whatever that is intended to mean in this context) to "support and promote" rights*'. B J Clarke questions why Parliament needs to tell the people, and future Parliaments, what the rights of the people are.

Clause 10 (Subject to justified limitations)

EARC's clause 10 provides that '*The rights stated in this Act apply generally and are subject only to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society'*. The clause indicates that the rights contained in the Bill are not absolute in nature but rather relative to each other and wider social interests. In EARC's words, the provision '*will operate to prevent injustices and anomalies where the Bill might strike down otherwise sensible legislation.*'[241] The provision has equivalents in the *Canadian Charter* (s 1) and the *New Zealand Bill of Rights Act* (s 5; though, as was pointed out to the committee by a member of the University of Ottawa Law Faculty, the equivalent clause is somewhat illogical or superfluous in the *New Zealand Bill of Rights Act* since it is a normal Act of Parliament, not constitutionally entrenched like the *Canadian Charter*.) The New Zealand jurisprudence nevertheless shows that the justified limitation clause plans an important role in the courts' consideration of the bill of rights.

There was clearly consensus in the statements made to the committee in Canada in relation to s 1 of the *Canadian Charter* that the inclusion of an equivalent provision would be highly desirable in any Queensland Bill of Rights.

No equivalent in EARC's Bill to the override clause in s 33 of the Canadian Charter

As discussed in chapter 2 of this report, EARC considered but rejected the proposal that its bill of rights—should the bill be constitutionally entrenched—contain a parliamentary override provision equivalent to s 33 of the *Canadian Charter*.

The public submission received by the committee from B J Clarke argued that '*over-ride provisions are illusory safeguards for parliamentary flexibility*'.

The committee heard a range of views [on the appropriateness of having included the s 33 override clause in the *Canadian Charter*] during its Canadian discussions. Section 33 was alternately characterised by different people the committee met with as:

- on the one hand, abhorrent to the spirit of a charter of rights (as an instrument guaranteeing fundamental human rights); and as
- on the other hand, an appropriate acknowledgment of parliamentary sovereignty, and an essential safety valve to be invoked in times of emergency or social upheaval, or when a superior court makes an important decision that the Parliament considers fundamentally wrong from a policy perspective.

[241] EARC rights report, p 11 of Appendix B (Explanatory memorandum to the bill).

Remedies:

Sub-clause 19(1)(h) (Right not to be found guilty or sentenced on evidence obtained or used in breach of a right stated in this Act)

EARC's cl 19(1)(h) states that a person who is charged with an offence has the '*right* ***not to be*** *found guilty or sentenced on evidence obtained or used in breach of a right stated in this Act*'. This exclusion of evidence clause attracted much criticism in Canada—essentially because if the courts did not read the clause in light of EARC's cl 10 (subject to justified limitations) it would operate to automatically exclude evidence that was gathered in breach of the Bill. The Canadian Police Association warned the committee to be very wary regarding the extent of cl 19(1)(h) and that the clause was '*very much a mistake*'. A prominent expert on the *Charter* urged the committee to revisit the provision; exclusion of evidence should be relative not absolute.

The Quebecois judges believed that the clause was far too directive and absolute in its phraseology. The clause suggested that even technical or borderline breaches of the Bill would lead to the automatic exclusion of evidence. The rules regarding exclusion of evidence instead should contain safety valves and should be qualified by a public interest test. Officers of the Canadian Department of Justice likewise stated that the absolute exclusion of evidence afforded by cl 19(1)(h) was akin to the former US Bill of Rights approach—an 'all-or-nothing approach'—now being shied away from within the US.

A number of persons including representatives from the Canadian Bar Association, Quebecois judges and the Canadian Department of Justice all urged the committee to instead recommend the introduction of a provision equivalent to s 24(2) of the Canadian *Charter*. Section 24(2) gives judges discretion to exclude evidence which, if admitted, would bring the '*administration of justice into disrepute*'. The section was described as far more adapted and flexible (even though some suggested that its particular wording could be improved upon).

A general remedy provision

With regard to the issue of remedies under EARC's Bill generally, several people that the committee met with in Canada highlighted s 24(1) of the Canadian *Charter* as a desirable addition to EARC's Bill. Section 24(1) of the *Canadian Charter* empowers the court to grant '*such remedy as the court considers appropriate and just in the circumstances*'. Section 24(1) provides for remedies to breaches of *Charter* rights generally, though it is also important to the admissibility of evidence in criminal proceedings. Section 24(1) offers judges alternatives in dealing with breaches of the *Charter* by police collecting evidence. Instead of excluding evidence, a judge armed with s 24(1) might admonish inappropriate police information-gathering in other ways. For example, the judge might delay the relevant proceedings or might reduce the sentence of a person found guilty in partial reliance on borderline evidence.

EARC's Bill does not contain an explicit general remedy provision. A representative of the Canadian Bar Association suggested that a bill of rights without an enforcement mechanism is meaningless. A faculty member of the University of Ottawa told the committee not to make the same mistake in Queensland as was made in New Zealand by not including an explicit enforcement mechanism. (It should be noted that the Court of Appeal in New Zealand has nevertheless developed a range of what it considers appropriate remedies for enforcing the *New Zealand Bill of Rights Act*.)

It was also suggested to the committee in Canada that a provision in EARC's Bill similar to s 24(1) of the *Canadian Charter* might also impact on what remedies a judge might consider should there be a 'right to be tried within a reasonable period' in the form of EARC's cl 19(1)(b) above.

APPENDIX E: MEANING OF 'FUNDAMENTAL LEGISLATIVE PRINCIPLES': *LEGISLATIVE STANDARDS ACT 1992* (QLD), SECTION 4

4.(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.[242]

(2) The principles include requiring that legislation has sufficient regard to–

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation–

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill–

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation–

[242] Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only–

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

APPENDIX F: EARC'S DRAFT BILL OF RIGHTS

EARC's Draft Queensland Bill of Rights 1993 is reproduced from Appendix A of EARC's *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*', Government Printer, Brisbane, August 1993.

THE FOLLOWING IS A BILL OF RIGHTS RECOMMENDED FOR QUEENSLAND BY THE ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION IN ITS *REPORT ON REVIEW OF THE PRESERVATION AND ENHANCEMENT OF INDIVIDUALS' RIGHTS AND FREEDOMS*, AUGUST 1993, GOVERNMENT PRINTER, BRISBANE.

THE FOLLOWING IS NOT THE CURRENT LAW OF QUEENSLAND

Draft Queensland Bill of Rights Act 1993

PART 1–PRELIMINARY

Short title

1. This Act may be cited as the *Queensland Bill of Rights 1993*.

Act binds all persons

2. This Act binds all persons.[1]

PART 2–GENERAL EFFECT OF RIGHTS

Rights affirmed

3. The rights stated in this Act are affirmed.

Way civil and political rights may be used

4.(1) The rights stated in Part 3 (Civil and political rights) must be observed by–
(a) the Legislature, Executive and Courts of Queensland; and
(b) a person or body in performing a public function or exercising a public power under legislation (whether an Act or otherwise),

(2) A right required to be observed by a person under subsection (1) is enforceable against the person–
(a) by the Supreme Court; or
(b) in any proceeding in which the right is relevant to an issue in the proceeding.

(3) Unless the right is enforceable under subsection (2), a right stated in Part 3 is not otherwise enforceable merely because of this Act.

(4) However, the Parliament–
(a) urges the Queensland community generally to observe the rights stated in Part 3; and
(b) encourages persons to assert the rights in ways that do not involve the legal process or proceedings.

[1] Under section 36 of the *Acts Interpretation Act 1954*, "person" includes a body politic.

Way other rights may be used

5.(1) A right stated in Part 4 (Economic and social rights) or Part 5 (Community and cultural rights) is not enforceable merely because of this Act.

(2) Despite subsection (1), the Parliament–
(a) urges the Queensland community generally to observe the rights stated in Parts 4 and 5; and
(b) encourages persons to assert the rights in ways that do not involve the legal process or proceedings.

Rights prevail over inconsistent legislation

6.(1) If a provision of legislation (whether an Act or otherwise) is inconsistent with a right stated in this Act–
(a) the right prevails; and
(b) the provision is invalid to the extent of the inconsistency; and
(c) the remainder of the legislation is not affected.

(2) For the purposes of subsection (1)(b), if a provision's application to a person, matter or circumstance is inconsistent with a right stated in this Act–
(a) the provision is invalid to the extent of the application; and
(b) the provision's application to other persons, matters or circumstances is not affected.

(3) Subsections (1) and (2) apply to a law unless a later Act expressly provides otherwise.

Inconsistent legislation to be reported by Attorney-General to Legislative Assembly

7.(1) This section applies to–
(a) a Bill for an Act that is presented to the Legislative Assembly after the commencement of this Act; and
(b) subordinate legislation that is notified in the Gazette after the commencement of this Act.

(2) The Attorney-General must–
(a) review, or arrange for the review of, each Bill or subordinate legislation to consider whether it may be inconsistent with a right stated in this Act; and
(b) if the Attorney-General considers that the Bill or subordinate legislation is inconsistent with a right stated in this Act–make a report.

(3) The report must include the Attorney-General's recommendation.

(4) The report must be laid before the Legislative Assembly–
(a) in the case of a Bill–before or at the resumption of the second reading debate on the Bill; or
(b) in the case of subordinate legislation–within 14 sitting days after its notification in the Gazette.

Rights non-exhaustive

8. The rights stated in this Act are not intended to be exhaustive and rights (whether existing or future) are not detrimentally affected merely because they are not stated in this Act.

Other Aboriginal and Torres Strait Islander rights not affected

9.(1) A right particular to Aboriginal People or Torres Strait Islanders is not detrimentally affected by the statement of rights in this Act.

(2) Subsection (1) applies whether the right is particular to Aboriginal People or Torres Strait Islanders generally or to a particular community or group of Aboriginal People or Torres Strait Islanders.

Subject to justified limitations

10. The rights stated in this Act apply generally and are subject only to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society.

PART 3–CIVIL AND POLITICAL RIGHTS

Right to life, liberty and security of the person

11. A person has the following rights–
(a) the right to life, liberty and security of the person;
(b) the right not to be deprived of life, liberty or security except on a ground established by law and consistent with the principles of fundamental justice;
(c) the right to take reasonable steps to defend the person's life, liberty or security.

Right to legal recognition and equality

12.(1) A person has the right to recognition as a person under the law.

(2) All persons are equal under the law and have the right to the equal protection and benefit of the law.

Right not to be detrimentally affected retrospectively by legislation

13. A person has the right not to have–
(a) a right of the person detrimentally affected; or
(b) a liability imposed on the person;
by the retrospective application of legislation (whether an Act or otherwise).

Right to vote and stand for election

14.(1) An adult who is an Australian citizen resident in Queensland has the right to vote by secret ballot in periodic elections of members of the Legislative Assembly.

(2) A person who has the right to vote also has the right to stand for election as a member of the Legislative Assembly.

Right to privacy

15.(1) A person has the right to the protection of the law against arbitrary interference with the person's privacy, whether as an individual or as a member of a family.

(2) The right to privacy includes the right not to be arbitrarily subjected to the following–
(a) interference with the person's bodily integrity, including search of the person;
(b) entry to, and search of, the person's property, place of residence or employment;
(c) seizure of the person's property;
(d) interference or interception of the person's correspondence or other forms of communication.

Right relating to investigation for offence

16. A person has the right not to be investigated for an offence in a way that is prejudicial to the fairness of the person's trial for the offence or that is otherwise contrary to the public interest.

Rights relating to custody generally

17.(1) A person has the right to be arbitrarily taken into or held in custody.

(2) On being taken into custody, a person has the right to be informed in a language the person understands of the reasons for being taken into custody.

(3) A person who is in custody has the right to be treated humanely and with respect for the inherent dignity of all persons, including, for example, the right to be given–
(a) adequate food and medical treatment; and
(b) reasonable access to, and opportunities of communication with, family and any person with whom access or communication is necessary for the purpose of exercising the person's rights stated in this Act.

(4) The rights of a person who is in custody are only subject to–
(a) limitations reasonably required by the custody; and
(b) limitations mentioned in section 10 (Subject to justified limitations).

Rights particular to an alleged offender

18.(1) A person has the right not to be taken into custody for an alleged offence unless the person is arrested and all proper charging procedures are carried out without delay.

(2) On being arrested on a charge of an offence, a person has the following rights–
(a) the right to be informed in a language the person understands of the following–
(i) full particulars of the offence;
(ii) the rights stated in paragraphs (b), (c) and (d);
(iii) any organisation that may provide legal assistance;

(b) the right to remain silent without a negative inference being drawn at trial from the exercise of the right;
(c) the right to have a reasonable opportunity to obtain legal assistance and to consult a lawyer without delay;
(d) the right to be promptly taken before a court to be dealt with according to law;
(e) the right not to be arbitrarily denied bail and, if granted bail, the right not to be granted bail on unreasonable conditions;
(f) the right, at any time while in custody on the charge, to have the lawfulness of the custody decided by a legal proceeding and to be released if the custody is not lawful.

Right to reasonable standard of criminal procedure

19.(1) A person who is charged with an offence has the following rights–
(a) the right to be presumed innocent until proven guilty according to law;
(b) the right to be tried within a reasonable time;
(c) the right to be given a fair and public hearing by an impartial court;
(d) the right to trial by jury if the person may be imprisoned for 2 or more years for the offence;
(e) the right to free legal assistance if the interests of justice require it and the person does not have sufficient means to obtain legal assistance;
(f) the right to the free assistance of an interpreter if the person cannot adequately hear, understand or speak the language used at the hearing;
(g) the right not be compelled to be a witness in proceedings against the person for the offence;
(h) the right not to be found guilty or sentenced on evidence obtained or used in breach of a right stated in this Act;
(i) the right not to be found guilty of an offence unless the act or omission concerned constituted an offence at the time of the act or omission;
(j) the right not to be tried again for an offence if proceedings for the offence have been heard and decided on the merits;
(k) the right to have the principles of due process applied to matters arising from the charge.

(2) A person who is found guilty of an offence has the following rights–
(a) the rights to be sentenced within a reasonable time and to be informed in a language that the person understands of the reasons for the sentence;
(b) if the penalty for the offence has changed between the time of commission of the offence and sentencing–the right to the benefit of the lesser penalty;
(c) the right to have the finding and sentence reviewed by another court;
(d) the right not to be punished again for the same offence.

Rights particular to a victim

20. A person who is the victim of crime or abuse of power has the right of reasonable access to–
(a) information; and
(b) the judicial and administrative mechanisms of government;
to remedy the material, medical, psychological and social effects of the crime or abuse of power.

Right to freedom of religion

21. A person has the right to freely express religious beliefs, whether individually or in community with others.

Right to freedom of thought, conscience and belief

22. A person has the right to freedom of thought, conscience and belief.

Right to freedom of speech and other expression

23.(1) A person has the right to freedom of speech and other forms of expression.

(2) A person has the right to obtain and disseminate information.

Right to freedom of association

24. A person has the right to freedom of association.

Right to freedom of peaceful assembly

25. A person has the right to freedom of peaceful assembly.

Right to freedom of movement and residence

26. A person lawfully in Queensland has the right to freedom of movement and residence within the State.

Right to freedom from discrimination

27. A person has the right to freedom from discrimination, in particular, on the grounds of–
(a) race (including colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin);
(b) sex;
(c) sexuality;
(d) marital or parental status;
(e) socio-economic status;
(f) political, religious or ethical belief or activity;
(g) age;
(h) mental or physical disability;
(i) medical condition;
(j) other natural characteristics.

(2) Steps taken genuinely to assist or advance a person or types of person disadvantaged on a ground stated in this section are not discrimination.

Right to freedom from slavery

28.(1) A person has the right to freedom from slavery.

(2) A person has the right to freedom from forced or compulsory labour.

Right to freedom from torture, experimentation and treatment

29.(1) A person has the right to freedom from torture and cruel, inhumane or degrading treatment or punishment.

(2) A person has the right not to be subjected to medical or scientific experimentation without the person's consent.

(3) A person has the right to refuse any medical treatment.

Right to property

30.(1) A person has the right to own property.
(2) A person has the right not to be arbitrarily deprived of property by the State.
(3) The right of a person not to be arbitrarily deprived of property by the State does not prevent the implementation of a properly approved scheme for the orderly marketing of a product.
(4) A person deprived of property by the State has the right to fair compensation.

Right to procedural fairness

31.(1) A person has the right to have a decision by a tribunal or other public authority that may affect the person's rights made in a way that observes the rules of procedural fairness.

(2) The rules of procedural fairness include–
(a) the rule that a person whose interests may be adversely affected by a decision must be given a reasonable opportunity to present a case; and
(b) the rule that the tribunal or authority must be impartial in the matter to be decided; and
(c) the rule that the decision must be based on logically probative evidence.

Right to education

32. A person has the right of reasonable access to the State education system.

Rights particular to a child

33.(1) A child has the right to live with the child's parents (or either of them if the parents live separately) and to be cared for by them unless the child's interests require some other arrangement.

(2) A child has the right to be cared for by government if there is no relative or other appropriate person who is willing and able to care for the child.

(3) A child has the right to express views on all matters affecting the child's wellbeing and to have the views given appropriate weight having regard to the child's age and maturity.

(4) A child has the right not to be forced to perform labour or render services harmful to the child's mental or physical wellbeing or amounting to economic exploitation.

PART 4–ECONOMIC AND SOCIAL RIGHTS

Right to adequate stand of living

34.(1) A person has the right to a standard of living adequate for the person's physical and psychological wellbeing.

(2) The right to an adequate standard of living includes the following–
(a) the right of reasonable access to social welfare;
(b) the right to reasonable medical and hospital care, including reasonable access to traditional medicines and health practices;
(c) the right to reasonable housing.

Right to work

35.(1) A person has the following rights–
(a) the right to gainful work;
(b) the right to work under safe and hygienic conditions;
(c) the right to receive reasonable remuneration for the person's work;
(d) the right to withdraw the person's labour because of a dispute with the person's employer if the person is reasonably satisfied that no danger to human life will result.

(2) All persons have the following rights–
(a) the right to equal remuneration for the same work;
(b) the right to equal employment opportunity.

Right to legal assistance

36. A person has the right of reasonable access to legal assistance.

Right to safe society

37. A person has the right to live in a safe society protected by a government that promotes non-violence.

Right to freedom of family structure

38.(1) A person has the right to freedom of family structure.

(2) Freedom of family structure includes the following–
(a) the right to marry;
(b) the right to live in a de facto relationship;
(c) the right to establish a family regardless of marital status;

(d) the right to personal autonomy over reproductive matters.

(3) The right to personal autonomy over reproductive matters includes the following–
(a) the right of a female to control her own fertility;
(b) the right to decide freely and responsibly on the number and spacing of the children and to have reasonable access to information, education and means to enable the exercise of this right.

Right to adequate child care

39. A parent or other person responsible for the care and control of a child has the right of reasonable access to adequate child care facilities.

PART 5–COMMUNITY AND CULTURAL RIGHTS

Right to collective and individual development

40. All persons have the collective and individual right to participate in, contribute to and enjoy political, economic, social and cultural development in which the fundamental rights of the person can be fully realised.

Rights particular to Aboriginal People and Torres Strait Islanders

41. Aboriginal People and Torres Strait Islanders have the following collective and individual rights–
(a) the right to revive, maintain and develop their ethnic and cultural characteristics and identities, including–
(i) their religion and spiritual development;
(ii) their language and educational institutions;
(iii) their relationship with indigenous lands and natural resources;
(b) the right to manage their own affairs to the greatest possible extent while enjoying all the rights that other Australian citizens have in the political, economic, social and cultural life of Queensland;
(c) the right to obtain reasonable financial and technical assistance from government to pursue their political, economic, social and cultural development in a spirit of co-existence with other Australian citizens and in conditions of freedom and dignity.

Right to culture

42.(1) All persons have the collective and individual right of reasonable access to all culture, arts, sciences and languages.

(2) All persons have the collective and individual right, without fear of prejudice, to freely do the following–
(a) express their culture and arts;
(b) enjoy the benefits of the sciences;
(c) use their language.

Rights particular to an author

43. An author of an original work has the following rights–
(a) the right to be known as the author of the work;
(b) the right to have the integrity of work respected.

Right to environmental protection and conservation

44.(1) A person has the right to have the environment of Queensland–
(a) protected by government from excessive, undue or unreasonable human interference; and
(b) reasonably conserved by government for its own intrinsic value.

(2) A person has the right to object if the right in this section is not observed and to expect that government will accept and act on a reasonable objection.

Right to ecologically sustainable development

45.(1) A person has the right to promote ecologically sustainable development in the interests of current and future generations.

(2) A person has the right to object to development that is not ecologically sustainable and to expect that government will accept and act on a reasonable objection.