



HUMAN RIGHTS LEGISLATION AND QUEENSLAND¹

Frank Brennan

I join with Senator Murray Watt, Senator for Queensland and former human rights lawyer, in celebrating this morning's announcement by your premier Anastacia Palaszczuk that the minority Labor Government will be introducing a Human Rights Bill to the Parliament. I acknowledge the presence of Matt Foley and Wayne Swan, my fellow students from the University of Queensland in the early 70s. Gough Whitlam once asked me why there were so many social reformers who emerged from Queensland back in those days. I responded, 'That's easy Gough. We had someone and something to react to'. So on this historic day in Queensland I think we should spare a thought for the late Sir Joh Bjelke Petersen.

I was privileged to chair the National Human Rights Consultation Committee for the Rudd Government in 2009. Two of the strongest opponents of a federal Human Rights Act were Bob Carr who had served a record term as New South Wales Labor Premier and John Hatzistergos, a retired federal prosecutor who had come into the New South Wales Parliament when Carr was premier. He then became Attorney-General under Carr's successor, Morris Iemma.

In April 2008, long before the federal Labor Government had asked me to chair their inquiry, I attended a spirited address by John Hatzistergos who was feeling the heat from some of his Labor colleagues who were urging him to consider a Human Rights Act along the lines of the Victorian Charter of Human Rights and Responsibilities Act. Hatzistergos was having none of it. He thought the Victorian charter was an expensive, trendy piece of academic window dressing. He told his Sydney Institute audience that if the proponents of the Victorian Charter were correct, you would expect to see a strong flow of traffic down the Hume Highway with people migrating from Sydney to Melbourne in pursuit of the Australian human rights paradise. I was so bold as to suggest that if his doom and gloom about a Human Rights Act were correct, you would expect to find a crushing flow of traffic in the opposite direction. Given that there was no such flow in either direction, I remained an agnostic fence-sitter about the benefits of a Human Rights Act. I think that's why Robert McClelland asked me to chair the National Human Rights Consultation. During the consultation, a sizeable majority of those who put in submissions and those who attended community consultations were strongly in favour of a Human Rights Act. There was also moderate support within the focus groups and in the anonymous telephone polling we commissioned. In the end, my committee came out in support of a Human Rights Act.

The Rudd government decided not to pursue a Human Rights Act. But it did proceed with our lesser recommendations which had enjoyed even stronger support from the public generally. These reforms won bipartisan support in the Parliament and are still in place. As Shadow Attorney-General, George Brandis QC, went so far as to call the reforms 'the most important piece of human rights legislation in a quarter of a century'. The Government claimed: 'The measures in this bill will deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues.'

¹ These are the remarks made by Professor Frank Brennan on 29 October 2016 at the Fringe Conference of the 2016 Queensland ALP Convention. Fr Frank Brennan SJ is Professor of Law at the Australian Catholic University .

Seven warnings for Queensland

Given your commitment to a state Human Rights Act, I would like to share seven warnings from the federal experience.

At the federal level, there is a Parliamentary Joint Committee on Human Rights which is charged with scrutinising legislation for compliance with the major international human rights instruments to which Australia is a signatory. Also when a minister introduces a bill to parliament, there is a requirement for the tabling of a statement of compatibility with international human rights instruments. Without the court oversight which would come with a Human Rights Act, these executive and parliamentary reforms have been piecemeal. Often the parliamentary committee does not report on controversial legislation until it has been passed, and the statement of compatibility will often be rather perfunctory.

First warning: if you're going to be serious about a Human Rights Act, make sure that your government departments are sufficiently resourced and encouraged to produce meaningful statements of compatibility.

Second warning, especially in a unicameral legislature: make sure that your parliamentary committee on human rights has sufficient muscle and status to arrest the progress of any bill until it has been thoroughly scrutinised for human rights compliance.

Third warning: the executive and parliament will not take these tasks seriously unless the Supreme Court of Queensland has the jurisdiction to rule that a statute is incompatible with human rights. I would urge you to go one step further and provide the Supreme Court with the power to strike down future specific laws inconsistent with the Human Rights Act provided only that the parliament has not specified its intention to override the Human Rights Act.

Fourth warning: you need to provide the resources to educate your public service and public instrumentalities into the reality of a human rights culture. Otherwise the human rights rhetoric will be used to disguise ongoing human rights abuses.

Fifth warning: a Human Rights Act works mainly for the benefit of despised minorities like prisoners and asylum seekers. If you are not committed to universal human rights, spare us all the hypocrisy of a Human Rights Act designed only for people like us, a Human Rights Act which continues to alienate the discriminate against those who are 'other'. Just this last week, Tanya Plibersek, one of our finest federal politicians committed to human rights, said that proven refugees including children who have been held on Nauru for over three years could not be brought to Australia because there is a firm rule against it. There is no such rule. No such rule has ever been debated in the House of Representatives. Any such rule would be contrary to the MOU which Prime Minister Rudd signed with Nauru. With a human rights culture backed by a Human Rights Act, no politician, and especially not one of our finest, would be able to claim that such a rule existed.

Sixth warning: a Human Rights Act is no substitute for consulting with and negotiating with those who are adversely impacted by our laws. Just think of the situation on Thursday when the Hon Senator George Brandis QC announced to the Australian legal profession that he was commissioning the Australian Law Reform Commission to investigate the horrendous Aboriginal imprisonment rates. There was a justifiable outcry from Warren Mundine who heads the federal government's Indigenous advisory council. Why? Because Mundine and his councillors were never consulted. They weren't asked. They were not even told. Furthermore, if the Attorney were to look just across the aisle in the Senate he would see Senator Patrick Dodson an esteemed indigenous leader who 25 years ago was a royal commissioner into Aboriginal deaths in custody. Dodson had available to him resources which the law reform commission will never have. He has learning on the topic which would take any law reform commissioner years to obtain. It's the old saying: nothing about us, without us. In April Dodson told the National Press Club: 'For the vast bulk of our people the legal system is not a trusted instrument of justice; it is a feared and despised processing plant that propels the most vulnerable and disabled of our people towards a broken bleak future.' He pleaded, 'Surely as a nation we are better than this.' The answers won't come

from the lofty academic researches of the law reform commission. And they won't come from a Human Rights Act unless indigenous leaders have a place at the table.

Seventh warning: the Tories will always warn that the sky will fall in if a Human Rights Act is enacted. But the experience from Victoria and the United Kingdom shows that once a Human Rights Act is enacted, it will be left in place, though perhaps with modifications. So just get it on the books and work out refinements later. Even prior to BREXIT, the Conservatives in British politics were wanting to replace the UK Human Rights Act with weaker legislation. They have been worried about what they perceive to be a loss of sovereignty because UK courts are required to interpret a statute which is modelled on the European Convention on Human Rights and because the UK courts are required to take into account the jurisprudence on human rights being developed by the European Court of Human Rights in Strasbourg. But even the British Conservatives remain committed to some form of UK Human Rights Act. They say they will put the text of the European Convention into primary legislation, thereby clarifying the Convention rights and reflecting a proper balance between rights and responsibilities. The Tories say:

'There is nothing wrong with that original document, which contains a sensible mix of checks and balances alongside the rights it sets out, and is a laudable statement of the principles for a modern democratic nation. We will not introduce new basic rights through this reform; our aim is to restore common sense, and to tackle the misuse of the rights contained in the Convention.'

So, I commend the Queensland government for today's announcement, and I sound a cautious note of optimism about the very modest gains which might be made by the enactment of a Human Rights Act. If enacted, I don't think it will change Queensland all that much, and I doubt that the Pacific Highway will be clogged with traffic in either direction whatever is decided. Equally, I have no doubt that, in another generation, every Australian jurisdiction will have a Human Rights Act of some sort because human rights is the modern international currency of personal liberty and personal dignity in the face of encroaching state power. Australia is an island but we're not that isolated; and there are limits to Australian exceptionalism. Nineteen years ago, Matt Foley lost a motion on the floor of the ALP conference for a constitutionally entrenched Human Rights Act. Today he has been granted life membership of the party and he has lived to see a Queensland Labor government commit to a Human Rights Act. Let that be a lesson for all the younger human rights advocates gathered here today on the Gold Coast. Thank you.