THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: HOW BEST TO ACCOMMODATE THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS IN QUEENSLAND?

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This submission addresses the terms of reference for the inquiry into whether it is appropriate and desirable to legislate for a Human Rights Act (HR Act) in Queensland. The submission is, largely, empirically based, informed by official reports and reviews into the operation of HR Acts, institutional reports, and academic commentary on the desirability, operation and effectiveness of statutory bills of rights in the ACT, Victoria and United Kingdom. What is at stake must be appreciated: the underlying issue is whether and how we opt to re-calibrate the relationship between law and politics, and the individual and the state.

More particularly, the submission addresses: the objectives of a HR Act, and the scope of the rights to be protected; key operative provisions – including, compatibility statements and parliamentary (legislative) scrutiny; public authorities human rights-based duties; judicial interpretative obligations and declarations of incompatibility/inconsistency; complaints procedures; and complaint-handling/oversight institutions.

This submission will show that there is considerable capacity for the Queensland system of government to evolve and better accommodate human rights in law-making and public administration, while retaining the foundations of representative government inherited from Westminster: namely, parliamentary (legislative) supremacy[1] *and the concept of responsible government. In short, the submission is concerned with human rights-based reforms organised around the framework provided by established constitutional principles. The introduction of a HR Act entails some adjustment of the respective roles of the legislature, executive and courts but, critically, it does not eliminate the differences*

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[1] The States are regarded as having the legislative powers that the Parliament of the United Kingdom might have exercised, subject to constitutional constraints. Accordingly the competence of the Queensland parliament is constrained by the *Constitution* ss 106 and 107.

between them; differences in terms of composition, expertise, accountability and legitimacy.

This Inquiry, and program of public consultation, is to be welcomed: it is an important precursor to the introduction of (any) enhanced human rights mechanisms for Queenslanders. This is because it can instil a greater sense of public participation in the reform process. Public participation in political deliberations about the desirability of enhanced human rights protection in Queensland lends legitimacy to, and promotes the longevity of, any subsequent reforms.[2]

"Having conducted this review, it is clear to me that the [Victorian] Charter has helped to promote and protect human rights in Victoria."

(Michael Brett Young, *From Commitment to culture: the 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (September, 2015) at iii).

"the HRA has overall succeeded in creating a fledgling human rights culture in the ACT. [...] [The HRA] has brought human rights questions explicitly into the consideration of policy and legislation, thereby improving their quality."

(The ACT Human Rights Act Research Project, *ANU, The Human Rights Act 2004 (ACT): The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (May 2009) at 7).

[2] One of the problems identified with the introduction of the *HR Act 1998* (UK) was the absence of public deliberation about the legal transplantation of the *European Convention on Human Rights* into domestic law (see, M Amos, "Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act" (2013) 35(2) *Human Rights Quarterly* 386, 406).

Introduction

HR statutes are, ostensibly, ordinary (non-entrenched) laws that provide important statements about the values and long-term commitments of a given society. HR statutes can provide for enhanced institutional checks and balances on the executive (Premier and Cabinet), legislature, and public decision-makers.

The presence of political and legal actors and institutions holding executive government to account, under a HR Act, can encourage respect for, and the enforcement of, fundamental rights (rights which may reflect Australia's international human rights treaty obligations). Accordingly, a HR Act can help realise the formal promise of enhanced human rights protection (promised through treaty ratification) into actual reality. A HR Act may also serve an educative function (as per the *Judicial Review Act 1991* (Qld), for example), serving to raise public awareness about human rights, responsible government and separation of powers. A HR Act cannot promote and protect human rights effectively unless it is accompanied by strong political leadership, a systematic education and ongoing training program for public officials and judiciary, and accessible complaint handling institutions.

Traditional political techniques and conventions for promoting accountability over elected governments in Queensland (including, an Upper House and a parliamentary committee system that enables effective scrutiny of draft laws) are absent or inadequate in Queensland and, arguably, need to be buttressed by reform of political and legal accountability devices. Majority governments of different political shades – well intentioned governments – often overlook the human rights and freedoms of minorities, the vulnerable, the voiceless and the unpopular.[3] There is little dispute that strength of party discipline in Westminster models of government, typically, diminishes the capacity of the legislature to check the executive effectively.

Undiluted majoritarian democracy in any system of government, and particularly in a unicameral system, is risky. Some of the main vulnerable societal groups, including,

[3] Academic commentary has sought to highlight the fragility of fundamental civil and political rights and freedoms in Queensland, for a recent example see, H Hobbs and A Trotter, "How far have we really come? Civil and political rights in Queensland" (2013) 25(2) *Bond Law Review* 166.

children, people with mental disabilities and the homeless, and unpopular groups in society (such as prisoners, and perhaps asylum seekers) are excluded from political processes. It is, therefore, unsurprising that some of these groups are the targets of the most repressive legislation and administrative practices. The Legislative Assembly is often an ineffective check on the executive because of large majority governments and party discipline. The current institutional design of government in Queensland means radical legislation, impinging on human rights and fundamental freedoms can be readily passed in haste.[4] The absence of accountability, through a vibrant upper house that can re-evaluate and improve draft legislation,[5] and weak parliamentary committee system ('weak' because it is often sidelined),[6] means institutional reform is urgently required, and a HR Act is one vehicle through which reform to political – law-making – processes can be achieved. As the Hon Peter Wellington MP observed (to paraphrase), the unicameral system in Queensland and current committee system are an ineffective check and balance on state governments, and formalising the protection of fundamental rights in Queensland through a bill of rights is warranted.[7]

Through a Human Rights Act (HR Act) parliament and the courts can work harmoniously: the courts can *support and enhance* the traditional (Westminster- based) 'political constitution' in Queensland, not supplant it. Human rights statutes – the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT) are apposite here – provide the courts with new powers and responsibilities. These statutes adopt what is, sometimes, referred to as a 'dialogue model' for the recognition of human rights norms into domestic law.[8] HR statutes that purport to

[4] The raft of law and order measures passed by the Queensland Parliament in 2013, including 'anti-bikie' and sex offenders' legislation, effectively by-passed political processes of accountability – there was no public consultation, strictly limited parliamentary debate and no parliamentary committee scrutiny. See further, W Isdale and G Orr, "Pathologies in Queensland Law-Making: Repairing Political Constitutionalism" (2014) 2(1) *Griffith Journal of Law and Human Dignity* 126.

[5] See N Aroney et al, *Restraining Elective Dictatorship: The Upper House Solution?* (UWA Press, 2008)

[6] See W Isdale and G Orr, "Pathologies in Queensland Law-Making: Repairing Political Constitutionalism" (2014) 2(1) *Griffith Journal of Law and Human Dignity* 126, 127.

[7] Queensland Parliament, *Hansard*, 29 October 2014, 3753-3754, (Peter Wellington MP).

[8] The dialogue is said to take place between the courts, executive and parliament. The extent of any dialogue between the courts and legislature has been contested: see T Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act" [2008] *Public Law* 306; and J Allan, "The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism" (2006) 30(3) *Melbourne University Law Review* 880. Indeed, French CJ

embrace the 'dialogue model' provide for *political review* of legislation on human rights-based grounds and *judicial review* over human rights.

'Dialogic' HR statutes do not and need not radically alter the basic function and relationship of the courts vis-à-vis the executive and legislature. Importantly, the functions of elected politicians, and judges, can remain distinct – maintaining the separation of powers and the legislative supremacy (subject to *constitutional* constraints) of the legislature.

Alternatively, 'parliamentary models' of human rights incorporation entail human rights-based scrutiny of executive policy and draft legislation through political processes only, but do not invest the courts with new responsibilities and powers in the form of human rights-based judicial review over public administration or legislative enactments.

A 'parliamentary model' was adopted by the Commonwealth of Australia with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This model may be characterised as less ambitious than other models, noted above, which include a juridical element. Some commentators consider the parliamentary model to be deficient because (among other concerns):

(a) it does not provide people with effective legal remedies for human rights violations, and
(b) it does not impose legal duties on public authorities to act in a human rights compliant manner.

Conversely, it has been noted that the Australian (federal) approach "fits well into Australia's deeply rooted history of parliamentary scrutiny committees".[9]

(among other judges) has stated that the metaphor "is inapposite" (in *Momcilovic v The Queen* [2011] 245 CLR 1, 670).

[9] T Campbell and S Morris, "Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011" (2015) 34(1) *University of Queensland LJ* 7, 11.

Both of the models outlined above modernise a traditional Westminster model that vests human rights protection in conventional representative and democratic institutions (the legislature and parliamentary committees), political processes and conventions (responsible government) and *ad hoc* public bodies (e.g. Anti-Discrimination bodies and the Office of Ombudsman).

Both of the HR Act models canvassed above involve important constitutional reforms: they both signal a subtle shift of power from executive government to parliament (parliamentary model), or from government to parliament and the courts (dialogue model). Neither model vests decisive power for the legal protection of human rights and freedoms in the judicial branch of the state, as occurs in some foreign jurisdictions. Both in principle and in practice it is clear that responsibility for human rights ultimately rests with the executive and legislative branches.

When debating human rights protections there can be a tendency among commentators to focus on the role of the courts and judicial powers. This overlooks one of the key objectives of human rights legislation, which is to require the legislature, executive and public authorities to carefully consider, and act compatibly with, human rights when developing policies, drafting legislation, and administering and delivering public services. Indeed, ensuring that human rights concerns are given thorough consideration in the development of policy and law is arguably the *most important* impact that a HR Act can have.

Equally, imposing a duty on public bodies to consider and comply with human rights in the course of taking administrative action, coupled with alternative dispute resolution mechanisms, and a direct cause of action based on breach of human rights, supplements traditional legal norms (enforced through judicial review) that regulate the actions of public authorities.[10]

[10] Broadly, legality, procedural fairness and reasonableness: see further the catalogue of judicial review grounds in the *Judicial Review Act 1991* (Qld).

Under a HR Act the Queensland Legislative Assembly should retain the final word on rights as occurs under other human rights instruments in Victoria and the ACT, for example. Under a HR Act Parliament can choose to depart from fundamental human rights principles (i.e. curtail rights) when drafting legislation, or it can subsequently, effectively, overrule the courts by deliberately electing to maintain legislation that the courts have declared to be inconsistent with human rights. Rights-defying legislation cannot be struck down by the courts under a HR Act model of the kind adopted in Victoria and the ACT. This means that elected politicians can choose to persist with political projects that diminish human rights and encroach on freedoms if they deem it absolutely necessary and proportionate. But they must accept responsibility for such action and justify this to the electorate, wearing any political costs at the ballot box.

Critically, the catalogue of rights to be protected, and the limits of legal (human rights-based) adjudication, is set by Parliament under the terms of a HR Act. A HR Act, in keeping with other human rights statutes (such as, the *Anti-Discrimination Act 1991* (Qld)), can protect people's procedural and substantive rights and freedoms. Under a HR Act rights and freedoms, such as; individual liberty, access to the courts, freedom of speech/expression, freedom of association, right to a fair trial/hearing, and equality before the law, can be better promoted and respected. A more progressive HR Act would also enumerate, promote and protect certain *socio-economic* rights such as, the right to education and housing, and Indigenous *cultural* rights. Tentative steps in this direction have been taken in the ACT with express recognition of the right to education, following reform of the *HR Act 2004* (ACT) in 2010. The Victorian Charter's preamble recognises the special importance of human rights for the Aboriginal people of Victoria.

In summary, the presence of a HR Act on the statute book has the potential to augment existing political checks on public power and enhance legal checks and balances; law and politics need not necessarily be presented or perceived as in tension under statutory human rights mechanisms that are carefully and precisely drafted, informed by relevant comparative experiences (notably, from within Australia).

A. The Objectives of a HR Act, and the Rights to be Protected

> "**In many ways, the Charter has had its greatest impact in the way it influences and shapes everyday interactions between the government and the community**. This is evident by the number of positive examples we heard about human rights and the Charter in practice in government and the community – including initiatives to increase the number of women in leadership, to improve decision-making for older Victorians, and to promote diversity and inclusion."
>
> (Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities*, 1).

Introduction

Australia does not have a Bill of Rights in its *Constitution*.[11] But the *Constitution* took effect in a society operating under particular assumptions about the rule of law and fundamental rights and freedoms (civil liberties) reflected in the common law (judge-made law) inherited from England. The same may be said of Queensland which lacks a Charter or Bill of Rights in its constitutional law. The protection of fundamental rights has been left to the judiciary via the common law, the legislature, the conventional processes of responsible government, and through designated oversight institutions such as, the Anti-Discrimination Commission ('ADCQ') and the Queensland Ombudsman.

As a matter of international law the Commonwealth of Australia is bound to observe those treaties which it has ratified, and is accountable to various supervisory organs of the United Nations for its compliance with human rights treaty obligations. Australia has legislated to give effect to certain human rights treaties, including the 'equality laws' prohibiting discrimination on grounds of race, sex, disability and age (e.g. *International Convention on the Elimination of All Forms of Racial Discrimination 1965* ('ICERD') via the *Racial Discrimination Act 1975* (Cth)). Equally, the *Migration Act 1958* (Cth) purports

[11] There are a small number of provisions in the *Commonwealth Constitution* which meet the description of basic or fundamental human, rights. They are similar to some of the rights set out in major international human rights treaties. (See, Chief Justice Robert French, "Protecting Human Rights Without a Bill of Rights" (26 January 2010) (Speech to the John Marshall Law School, Chicago) at 10-15).

to give effect to Australia's protection obligations owed to refugees under the *Convention (and Protocol) Relating to the Status of Refugees 1951 (1967)*).

However, the Federal Parliament has not legislated to incorporate a broader range of fundamental rights and freedoms, sourced in major international human rights treaties, into domestic law so that the *judiciary* have a role in the enforcement of human rights. In 2011, the Australian government attempted to mainstream human rights issues through political (legislative) review processes, via the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and with the establishment of the Parliamentary Joint Committee on Human Rights ('PJCHR'). This reform offers the possibility for policy-making and law-making to be informed by, and critically assessed against, a broad range of human rights and freedoms drawn from seven international legal instruments (containing over one hundred rights provisions).[12]

The variety and number of treaty rights involved has provided challenges for the PJCHR which is charged with scrutinising bills, legislative instruments and existing Acts. Evidence to date suggests that civil and political rights (*International Covenant on Civil and Political Rights*-related) issues were by far the most frequently raised in the course of the PJCHR's deliberations over legislation.[13] There is no explicit human rights-based parliamentary review of draft legislation by existing parliamentary committees in Queensland.[14]

The Queensland Parliament is able to legislate over a wide range of matters that are within its legislative competence that raise paradigmatic human rights issues, including; policing, penal policy, access to justice, equality/non-discrimination, and children's

[12] *International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child*; and *Convention on the Rights of Persons with Disabilities.*

[13] T Campbell and T Morris, above n 9, at 16.

[14] The *Legislative Standards Act 1992* (Qld) s4(3) contains a relatively nebulous requirement that legislation should have 'sufficient regard' to the rights and liberties of individuals. The enumerated rights and liberties cohere with several, traditional, common law rights (e.g. natural justice) and 'rule of law' concepts (e.g. clear and precise legislative drafting). But the scope of rights to be considered by Queensland's (portfolio) committees when examining bills and subordinate legislation is thin compared to legislative review processes under statutory human rights internationally and in Victoria and the ACT.

rights, as well as education, housing and health. But Queensland's human rights framework is ***ad hoc***. Certain human rights are protected through assorted statutes and are amenable to resolution or adjudication in legal proceedings (before ADCQ, Queensland Civil and Administrative Tribunal ('QCAT'), certain inferior courts and the Supreme Court, notably).

For example, the concept of equality is promoted via the *Anti-Discrimination Act 1991* (Qld) which prohibits discrimination (on various grounds, including; sex, parental status, age, race, political beliefs, gender identity, and sexuality) sexual harassment, victimisation and vilification. Relatedly, discrimination against same-sex couples was addressed via the *Discrimination Law Amendment Act 2002* (Qld) which inserted a non-discriminatory meaning of 'de facto' into the *Acts Interpretation Act 1954* (Qld) and, thereby, addressed the 'human rights of Queensland's citizen's'.[15] The right of peaceful assembly enjoys qualified protection under the *Peaceful Assembly Act 1992* (Qld). Additionally, freedom of information/right to know is recognised and respected through the right to information laws (*Right to Information Act 2009* (Qld)) which enhance government accountability and transparency, and access to the courts and right to procedural fairness (fair hearing) is protected via the *Judicial Review Act 1991* (Qld).

Defining human rights in legislation

A key (and admittedly divisive) question is how to define human rights and freedoms in domestic law. When considering the scope of statutory human rights instruments enacted in Australia, or in other common law jurisdictions overseas, we find that the enumerated human rights that are protected often tend to be either simply *transplanted* from (or derived from*)* the civil and political rights found in certain treaties: notably, the *International Covenant on Civil and Political Rights* ('ICCPR'), or the *European Convention on Human Rights* ('ECHR').

It is worth pausing to recall that some of the civil and political rights/freedoms to be found in these international law instruments are not alien legal artefacts and have,

[15] Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2011 3978 (Anna Bligh).

historically, been delivered and protected by judges through the common law. The role of the common law (judge-made law) as a repository of rights and freedoms has been of considerable significance.[16] For example, common law rights include; the right of access to the courts, privilege against self-incrimination, immunity from interference with equality of religion, no deprivation of liberty except by law, right to procedural fairness (or, natural justice), freedom of speech and movement. Accordingly, there are a number of rights and freedoms recognised and protected through the common law that meet the description of human rights guarantees. It is the, *consolidated*, statutory protection of these sorts of traditional human rights (at the very least) that a bill/charter of rights in Queensland can achieve.

Returning to the issue of which rights to enact in legislation, a key issue around the design of a HR Act is the range of substantive rights to be protected. Careful consideration needs to be given as to whether the most *straightforward* way of giving further effect to human rights obligations (that is, transplanting some or all of the rights from the traditional UN human rights treaties, e.g. *ICCPR*) is the best way for Queensland.

An alternative (albeit more time-consuming and costly) approach would be to draft an indigenous, and potentially more modern, instrument for Queensland that encompasses; certain economic, social and cultural rights, the right to education, housing and health, and the rights of people with a disability, for example.[17] It is worth recalling that the progressive and incremental realisation of human rights (including socio-economic rights), through statutory enactment, is the approach taken in the ACT.[18]

[16] Chief Justice R S French, 'The Common Law and the Protection of Human Rights', 4 September 2009, Anglo-Australia Lawyers Society, at 3.

[17] For example, see the *Charter of Fundamental Rights of the European Union* (2000).

[18] See, *Human Rights Act 2004* (ACT) Part 3 and 3A.

A principal object of disquiet for some critics of existing HR statutes in the UK and local statutes in Australia has been the limited range of rights protected.[19] For example, there are twenty (almost exclusively civil and political) rights enshrined in the Victorian Charter. In my submission it is advisable for Queensland to deliberate carefully and draft its own list of human rights to be protected, which should be informed by international treaties to which Australia is a party. Queenslanders need to be cognisant of, and comfortable with, the range of rights to be enacted. The approach of simply pulling human rights 'off the shelf' – copying the rights in certain international treaties – runs the risk of being rejected, over time, by the public and politicians, as an foreign imposition and illegitimate. There is some evidence of this having occurred in the United Kingdom where popular dissatisfaction with the *HRA 1998* (UK) has seemingly increased of late. In part this appears due to the lack of public consultation and participation by the people in the law making process in 1997-98.[20]

B. **Legislative Processes: Parliamentary (Human Rights) Scrutiny Mechanisms**

"**The HR Act has had its most immediate impact on the development of policy and legislation in the ACT**. […] Although the dialogue generated within the ACT executive by the compatibility certification process is not always obvious to the public, it has played a significant role in shaping policy and legislation."

(H Watchirs and G McKinnon, "Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia" (2010) 33(1) *UNSW Law Journal* 136, 141-142.)

Introduction: a pro-active political approach to human rights

HR statutes supply society (the public, politicians, public agencies/institutions and judiciary) with a set of enumerated rights and freedoms against which to critically

[19] E.g. see M Amos, "Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?" (2009) 72(6) *Modern Law Review* 883, 890-892.

[20] M Amos, "Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act" (2013) 35(2) *Human Rights Quarterly* 386, 406.

examine policies, draft laws and enacted legislation. HR Acts offers an opportunity for significant change in how Cabinet develops policy proposals and Parliament makes laws. Political plans may be enhanced through principled legislation that is drafted with an understanding of the putative law's compatibility with basic human rights. Accordingly, the underlying rationale for legislative (human rights-based) review may be said to be twofold: first, entrenching human rights issues in political deliberations about policy and law and, second, nurturing respect for and observance of human rights norms.

A HR statute can promote human rights through political – parliamentary – processes by establishing and charting the contours of legislative (human rights) review. Formalised human rights-based legislative scrutiny processes within parliament have the capacity to ensure that the human rights of all Queenslanders are more thoroughly considered, contested and debated in in the drafting and passage of legislation. Importantly, they also offer the potential for public deliberation and participation in human rights scrutiny. A critical foundation for the promotion and protection of human rights is:

(a) robust and transparent *executive* consideration and *parliamentary* scrutiny of Bills and draft regulations, and

(b) public engagement (though consultation processes) with parliament for scrutinising proposed laws.

Therefore, there needs to be effective mechanisms to ensure that designated human rights are a mandatory consideration in policy formulation and legislative drafting, and that the Queensland Parliament is fully informed and aware of the human rights implications of its legislative work. It should be noted that the process of examining and benchmarking bills and delegated legislative instruments in a principled and effective way is, frequently, a complex, time consuming and resource intensive exercise.[21] This issue goes to the question of what rights should feature in a HR Act for Queensland. The

[21] This assertion rests on the PJCHR experience under the federal HR Act (see T Campbell and S Morris, above n 9, at 17.

more comprehensive the human rights coverage (i.e. the enumerated rights travel beyond the customary human rights norms reflected in treaties (ICCPR and ICESCR)) the greater the challenge for the executive and parliamentary committees in delivering timely and thorough human rights assessments. But it is not an insurmountable challenge for the executive and parliament to overcome.

The Executive and the Queensland Parliament's foundational role in human rights-based scrutiny of proposed laws (including subordinate legislation) may be realised in two related ways. First, by government ministers (and their department officials) being made *responsible* and *accountable* to Parliament through the timely reporting of carefully reasoned statements of compatibility ('SOC') as Bills proceed through Parliament.[22] This process may be conceived of as initiating robust debates about human rights in respect of given legislative proposals. Secondly, by improved parliamentary scrutiny, by requiring a designated parliamentary committee to critically examine Bills against legislatively designated rights and freedoms, within an adequate time-frame, for their human rights compatibility and reporting to Parliament.

Policy-making, the drafting of legislation and human rights considerations

> "… there is evidence that **departments and ministers were giving increasingly explicit attention to human rights, both in the drafting of bills and construction of SoC**. Especially noteworthy is the frequency and persistence with which the PJCHR follows up its inquiries with a sustained exchange of views which can lead to modifications and undertakings agreed with the minister in question."
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> (T Campbell and S Morris, "Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011" (2015) 34(1) *University of Queensland LJ* 7, 19).

It has been argued that human rights considerations are well integrated in the *policy process* in the United Kingdom, New Zealand and Victoria because proposed Bills are

[22] The reporting responsibility could be placed on the Attorney-General, or the government Minister or MP introducing a Bill to Parliament.

vetted for their human rights impacts, by government legal advisers who have a clear obligation to advise Cabinet before the Bill is formally introduced to Parliament.[23] Moreover, in addition to technical legal guidance, the quality of human rights analysis in SOC is driven by the *culture* fostered by and through the government, Attorney-General and senior officials within the public sector.

Government departments require robust assistance and guidance about the impacts of legislative proposals on human rights at an early stage of policy formulation, when drafting bills and a SOC. This may be realised through the provision of (*inter alia*) Human Rights Guidelines for Legislation and Policy officers,[24] liaising with government legal advisers (including DJAG) and referring to Crown Law.

Statements of compatibility[25] oblige government ministers and their officers to consider the human rights implications of proposed legislation 'in-house' before it is introduced to parliament, and to account for and justify any adverse human rights impacts and any limitations on rights with reference to orthodox human rights-based criteria: necessity and proportionality.

SOC should contain assessments, not merely assertions, about legislative compatibility with human rights, and to provide, as a starting point for political/public deliberations, an informed and reasoned opinion on the human rights issues arising. These statements ought, in my submission, to contain:

a statement of the Bill's/legislative instrument's purpose;
a declaration about the impact on legislatively designated human rights;

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[23] S Evans, 'Improving Human Rights Analysis in the Legislative and Policy Process' (2005) 29 *Melbourne University Law Review* 665, 693, and S Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the *Human Rights Act (Parliamentary Scrutiny) Act*' (2015) 38(3) *UNSW Law Journal* 1046, 1054.

[24] Guidelines should cite foreign sources of law (jurisprudence) with due care, where relevant, mindful of the High Court's warning in *Momcilovic v The Queen* (2011) 245 CLR 1, 37, 87-90, 123, 183, against the indiscriminate uses of international and comparative human rights sources due to the variety of legal systems and constitutional settings in which those sources are located.

[25] A HR Act may provide for an 'override declaration' that permits the government to declare its intention to introduce a law that is inconsistent with human rights and to account for the exceptional circumstances (e.g. national security) that warrant the override in parliament (see s 31 *Charter of Human Rights and Responsibilities Act 2006* (Vic)).

a statement on any rights-limiting aspects of the Bill/legislative instrument and a justification for any limitations on rights; and,

a statement on whether any less restrictive means of achieving the stated purpose were reasonable available.

Compatibility statements that contain, at the very least, a summary of the reasons that substantiate the executive's opinions serve an importance educative function and enable the legislature to enter into a dialogue with the executive.[26] The tabling of a methodical, rational (meaning, reasoned intelligibly) and rights-literate SOC can inform and generate political debate and enable deeper human rights scrutiny of legislation by parliament.[27]

A HR Act could include a *legislative requirement* requiring the government to provide reasons (in the terms outlined above) in their compatibility statements. This has the potential to foster informed human rights-based discussions and debates within the executive, better debates within parliament, and to promote openness and transparency benefitting the wider community and nourishing public participation in deliberative law-making processes. To fully mainstream human rights in political review processes the obligation to table a SOC may be extended to all members of Parliament, thereby encompassing non-government proponents of legislation.

The *2015 Review of the Charter of Human Rights and Responsibilities (Vic)* recommended that the Victorian Government publish draft SOC when exposure drafts of Bills are released for public comment, as a means to enhance the effectiveness of parliamentary and public scrutiny by identifying and potentially resolve human rights issues arising before a Bills formal introduction to Parliament.[28]

[26] Explanatory Statements accompanying bills can supplement SoCs by fully elaborating upon the reasons supplied in the SoC.

[27] A well-reasoned SOC would cite and consider all relevant treaty provisions, relevant case law and pertinent general comments of international bodies (such as the UN Human Rights Committee).

[28] M B Young, *From Commitment to Culture: The 2015 Review of the Charter*, at 188.

Where amendments are tabled to Bills these amendments will not attract public scrutiny and comment (other than perhaps through the media) and will not be subject to review by parliamentary committee. Accordingly, a HR Act could, and arguably should, include a requirement that a SOC should accompany major legislative revisions to Bills that raise human rights issues and have human rights impacts, for the benefit of Parliament.

The two following recommendations address certain weaknesses identified in the Commonwealth's scheme of legislative (human rights) review.

First, a HR Act should, impose a similar obligation upon the government to supply a SOC with respect to *delegated* legislative instruments, made under the authority of Queensland Acts, that effect a change to the content of the law. This is because delegated legislation can have an adverse impact upon human rights in precisely the same way that primary legislation can, albeit different political processes lead to their respective enactment.

Second, to more fully embed human rights considerations in pre-legislative enactment processes, a HR Act could be designed to require well-reasoned and rights literate SOCs (as noted above) and provide stiff legal consequences (invalidity) for non-compliance with such a statutory obligation.[29] A failure to comply with procedural requirements to supply a reasoned and substantiated SOC (or perhaps, a SOC in 'good faith') would be judicially reviewable.[30] Such a procedural fetter (or 'manner and form' provision) would not deprive parliament of its legislative powers. It would prescribe the manner or form of their exercise and send an important signal to parliament, the government and society about the importance of mainstreaming human rights in policy making and law

[29] Some SOC, in the federal sphere, have been highly deficient in terms of identifying relevant human rights impacted by legislative proposals and addressing them rigorously. See the evaluation of SOCs accompanying recent reforms to the *Migration Act 1958* (Cth) establishing regional processing and the NDIS legislation in, S Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the *Human Rights Act (Parliamentary Scrutiny) Act*' (2015) 38 (3) *UNSW Law Journal* 1046, 1061-1070.

[30] The Supreme Court would be the arbiter of whether statutory procedures, requiring a reasoned SOC, had been followed, or adhered to in 'good faith'.

reform, and also function to incentivise governmental compliance with the obligation to prepare and table a carefully reasoned SOC.

Parliamentary accountability and human rights-based scrutiny

> **"Our current assessment is that the PJCHR [Parliamentary Joint Committee on Human Rights],… has promoted a measure of cross-party engagement with human rights** in a way that manifests a degree of impartiality appropriate to resolving human rights issues, **while contributing significantly to informed debate** concerning the difficult moral choices facing a parliament when determining the meaning and weight to be given to specific and often competing human rights considerations."
>
> (T Campbell and S Morris, "Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011" (2015) 34(1) *University of Queensland LJ* 7, 9-10).

Rights review before a parliamentary committee is an important element of human rights protection in Victoria, the ACT, the Commonwealth of Australia and the United Kingdom. A HR Act can enable ongoing deliberation about human rights issues arising in the law-making process by establishing a cross-party parliamentary human rights review committee charged with the responsibility for examining human rights issues arising in respect of draft legislation.

None of the existing human rights review committees have legislative veto powers: their powers of review do not extend to compelling a government (and Parliament) to discard a Bill because it is incompatible (or inconsistent) with certain human rights (or particular interpretations of human rights in foreign courts or human rights institutions). Rather, a legislative (human rights) review committee can alert parliament to any risks of human rights violations with Parliament, and leave it up to the legislature to decide what course to take.

Consideration should be given to enabling a human rights review committee to delay the passage of rights-infringing bills, in order to facilitate further parliamentary deliberation, and perhaps public scrutiny, over thorny human rights issues. Equally, in respect of delegated legislative instruments that pose a threat to human rights the legislative review committee could be given a delaying power.

To work effectively it is critical that adequate periods of time are permitted for committee scrutiny and public consultation (including public hearings where Bills raise significant human rights issues). Realistic timeliness for parliamentary scrutiny and public engagement with stakeholders will enhance the utility of this important aspect of executive accountability. The evidence from Victoria suggests that a period longer than two weeks for human rights scrutiny and reporting, before Bills are debated on, is appropriate.[31]

Parliamentary committees can inform, and help raise the level of, political debates about legislation and human rights protection, and promote a culture of justification in government and among officialdom:

> First, they can provide valuable assistance to parliamentarians who lack the time and expertise to make a nuanced assessment of the human rights issues raised by a given piece of legislation. Secondly, they can ensure that legislation that may be incompatible with human rights is brought to Parliament's attention by seeking further explanation from a legislator where an SOC papers over human rights issues.[32]

Evidence from the ACT identifies that governments have given serious consideration to the views of the Scrutiny of Bills Committee, promoting a dialogue between the two and in some instances amendment of legislative proposals.[33] Additionally, federal MPs have evidenced great support for the PJCHR in the period 2012-14. References to the reports of the PJCHR in federal parliamentary debates have been overwhelmingly supportive

[31] Victorian Equal Opportunity and Human Rights Commission, *2014 report on the operation of the Charter of Human Rights and Responsibilities* (June 2015) at 64-65.

[32] S Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the *Human Rights Act (Parliamentary Scrutiny) Act*' (2015) 38 (3) *UNSW Law Journal* 1046, 1050.

[33] The ACT Human Rights Act Research Project, The ANU, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) at 31.

regarding the importance and value of the committee's work for parliamentary debates on bills and other committee inquiries.[34]

In conclusion, it is recommended that a HR Act for Queensland makes provision for scrutiny of draft legislation by a, bi-partisan, human rights committee that is cognisant of legislatively enumerated human rights, which would report separately from existing portfolio committees. This new committee would fulfil a role functionally related to the (former) Scrutiny of Legislation Committee which examined fundamental legislative principles (FLPs).

This important reform would strengthen accountability over executive government and legislation with particular reference to a clear catalogue of human rights sanctioned by Parliament.[35] The significance of such a reform to the committee system cannot be stressed enough in view of the absence of effective checks and balances under the unicameral system and dilution of electoral democratic accountability via the move to four year parliamentary terms.

C. Executive Responsibilities: a Duty to *Consider* and *Comply* with Human Rights

An effective HR Act will include a provision that clearly provides for human rights standards to apply to the decisions and conduct of public officials and authorities exercising administrative powers. This is an important feature of HR statutes operating in Australia and the UK and the available evidence suggests that placing human rights obligations on public authorities has, to a large extent, embedded human rights in public sector decision-making and policy development. Therefore, placing human rights obligations on public authorities exercising administrative powers (or acting in an administrative capacity) is crucial to making human rights protection more effective without the need for recourse to the courts.

[34] T Campbell and S Morris, above n 9, 19.

[35] The ADCQ has made a similar recommendation to the Committee of the Legislative Assembly, *Review of the Parliamentary Committee System*, Report No.17 (February 2016) at 38-39.

The scope of any duty imposed on public authorities needs to be carefully drafted because it speaks to the issue of promoting administrative compliance with human rights. Under the HR Acts in Victoria and the ACT the duty on public authorities has two distinct aspects, *substantive* and *procedural*:

> first, to *act* in a way that is compatible with a human rights. Compliance with this duty turns on whether the administrative action taken has breached human rights in practice; and
>
> secondly, to give *proper consideration* to human rights in the course of taking administrative action. Compliance with this duty requires decision-makers to consider human rights in the process of deciding.[36]

The operation of the two limbs should be made clear. The first aspect of the duty should establish that it relates to conduct, a failure to act/decide and substantive decisions.[37] The second aspect of the duty, which is framed in traditional judicial review terms, is important because it "has the potential to entrench real cultural change in the way government goes about its business."[38] Straightforwardly, administrative action is more likely to be human rights compliant if the decision maker *considers* human rights before acting or deciding. To promote compliance with this duty significant work/training needs to be first undertaken so that administrative decision-makers appreciate the new norms ('reference points') conditioning the exercise of administrative powers.

In short, the imposition human rights duties on public authorities modernises administrative law: it has the potential to enhance the traditional supervisory function of the superior courts to judicially review the action (or inaction) of public bodies for legal errors (*ultra vires* and breach of natural justice)

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[36] The courts in Victoria have established that this basis for reviewing administrative action imposes a higher standard on decision-makers than traditional 'relevant considerations ground of judicial review (see, M B Young, *From Commitment to Culture: The 2015 Review of the Charter*, at 69-70).

[37] The operation of the duty in Victoria has been subject to different judicial interpretations (see, M B Young, *From Commitment to Culture: The 2015 Review of the Charter*, at 70-71).

[38] The ACT Human Rights Act Research Project, *ANU, The Human Rights Act 2004 (ACT): The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (May 2009) at 20.

A HR Act should set out who or what is a public authority, and provide as much certainty as possible in that regard while ensuring there is sufficient flexibility in the definition of 'public authority' so that the Act can adapt to changes in the way that public functions are carried out and services delivered. A non-exhaustive list of public authorities could be enacted (or prescribed by regulation) and a definition of '*functions* of a public nature' would serve to capture non-government agencies providing public services (for instance, operating a correctional facility).[39] In this respect guidance can usefully be obtained from both the ACT and Victorian legislation, case-law and periodic reviews.

In addition to enabling both the Ombudsman and Anti-Discrimination Commission Queensland to investigate, address and resolve people's human rights-based complaints about public administration and the actions of public authorities (*see, further, below in Part E*) it is recommended that a HR Act establish a direct cause of action for breach of human rights by a public authority. In that way an individual can institute proceedings in either QCAT and/or the Supreme Court in order to enforce their human rights. Careful consideration needs to be paid to how such a cause of action relates to existing causes of action, such as merits review before QCAT and judicial review under the *JRA 1991* (Qld).

D. Interpreting legislation, applying and enforcing human rights

> **"[Legislative] statements of rights do provide organising principles which are democratically conferred and of genuine assistance in better judging".**
>
> (The Rt Hon Chief Justice Dame Sian Elias GNZM, "A Voyage Around Statutory Protections of Human Rights" (2014) 2 *Judicial College of Victoria Online Journal* 4, 29)

Introduction

[39] Courts and tribunals would not be classified as public authorities except when exercising administrative functions/powers.

This part introduces questions about how a HR Act could also operate in respect of: (a) statutory interpretation and (b) declarations of incompatibility/inconsistency. A HR Act may provide for decision-makers to interpret legislation in a human rights compatible manner where it is possible to do so. Additionally, courts in other domestic and foreign jurisdictions have been invested with power to make 'declarations of incompatibility' (or 'declarations of inconsistency'), where it is determined that legislation is 'incompatible' (or, 'inconsistent') with designated human rights. Importantly, this judicial (advisory) power is not to be equated with a power to invalidate legislation; where a declaration is made the validity, operation and enforcement of the law is unaffected.

The crafting of legislative provisions that empower the courts to interpret legislation in a rights-consistent manner raises critical questions about the respective functions of courts (as adjudicators) and the legislature (as law-makers), and of the related separation between law and politics. A cautionary note should be sounded here at the outset: if an interpretive provision is drafted, and is read and applied liberally, in a way that appears to radically depart from traditional approaches to statutory interpretation, there is a risk that the judges will be perceived as encroaching on the law-making role of the legislature, blurring their respective functions. If judges are, or are perceived to be, effectively re-writing legislation this may cause irreparable harm to the democratic credentials of a HR Act.

Interpreting legislation in a way that accords with human rights

If a HR Act is to contain a legislative decree that imposes an interpretive obligation on decision-makers when construing legislation, then the terms of the obligation must be clear in order to avoid some of the difficulties that have affected comparable obligations in other HR statutes in Australia and overseas.

In view of comparative experiences the meaning and application of an interpretive provision must be clearly spelt out to promote certainty and accessibility: stipulating the steps for interpreting Queensland statutes in a way that is *consistent* with designated human rights, and in a manner which does not impermissibly encroach on

Parliament's law-making function, needs articulating. This is because the interpretive obligation falls on all public bodies administering the law, not just the courts and tribunals.

The principle on which such interpretive provisions rest is straightforward enough: laws are to be interpreted in a way that is human rights compliant over an interpretation that is not human rights respecting, *where possible*. The interpretive mandates under the *HR Act 1998* (UK) (s 3), and *Victorian Charter* (S 32(1)) have not proved straightforward to construe (with differences of opinion among the senior judiciary) and have stimulated debate about 'creative legislative interpretation', especially among academics.

In the UK section 3 *HR Act 1998* is treated as the primary remedial measure for people to redress their grievances. The prevailing orthodox approach to s.3 is found in the case of *Ghaidan v Godin-Mendoza*,[40] which licences a fairly extensive interpretive approach (labelled "interpretation plus" or "construction on speed" by the President of the UK Supreme Court).[41]

This approach to statutory construction differs from normal rules of interpretation, and can require the courts to *depart* from the unambiguous and plain *meaning* that legislative text would otherwise bear in order to arrive at a human-rights consistent interpretation; but with the rider that any interpretation must 'go with the grain of the legislation' (i.e. be consistent with statutory purpose).

Words can be implied ('read in') to change the meaning of enacted legislation (and, words can be 'read out' and 'read down' (modified)) so long as they are consistent with the purpose of the particular legislation. The courts in the UK have stated that this unconventional approach to statutory interpretations is directed by s 3 *HR Act 1998*,

[40] [2004] UKHL 7. More recently the approach was adopted in *R v Waya* [2012] UKSC 51.

[41] The Rt Hon Lord David Neuberger of Abbotsbury, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience" (2014) 2 *Judicial College of Victoria Online Journal* 30, 33.

and they are, therefore, acting in accordance with the UK Parliament's intention when enacting the HR Act 1998.

The far reaching character of this interpretive approach is that (a) it does *not* require ambiguity in statutory language before it operates, and (b) invites the courts to identify a legislative purpose, which may not cohere with the ordinary meaning of the text, and to t 'remake' the statute in light of the purpose identified.

Clearly, s 3 HR Act 1998 (UK) is a strong rule of statutory construction that travels beyond the limits established under ordinary principles of statutory interpretation, including the 'principle of legality'. The 'principle of legality' imposes what can be termed a manner and form requirement for clear statutory language before the courts will construe a statute as displacing fundamental rights and freedoms.[42] The principle of legality has no application where statutory language is clear and precise, and it is not a concept that involves the judges in remaking the law.

Among the criticisms directed at s 3 *HR Act 1998* (UK) (and its subsequent application by the courts) is that it has blurred the separation of powers and respective functions of the judiciary and legislature. This is because s 3 requires the judiciary to depart from objectively determined meaning and adopt linguistically strained interpretations of the underlying law (effectively re-construct legislation) so as to ensure it is compatible with human rights. In short, as the High Court of Australia (HCA) stated in *Momcilovic's case* the UK approach has effectively conferred a law-making function on the judiciary, and that adjusts the balance of power between the courts and legislature.

The interpretive obligations contained in the *HR Act* (ACT) (s.30) and *Charter* (Vic) (s. 32) would seem, on their face, consistent with the *Ghaidan* approach. Indeed, it is arguable that they were drafted with *Ghaidan* in mind and so they all reflect the same

[42] *Potter v Minahan* (1908) 7 CLR 277, 304; and *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131. The 'principle of legality' means that unless a statute *expressly* or by *necessary implication* abrogates rights, the courts should presume that no abrogation was intended to be authorised by the legislature. See, further, the list of fundamental rights referred to in *Momcilovic v The Queen* (2011) 245 CLR 1, 177-178. See also, *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8, 21-22 (on the limits of common law rules of statutory construction).

interpretive obligation. However, the HCA has made it clear in *Momcilovic* that s.32 of the *Charter* is *not* as strong an interpretative obligation as s 3 *HR Act 1998* (UK), and that it is, therefore, a constitutionally valid provision because it does not confer a legislative function on the courts.

Relevantly, the majority of the HCA in *Momcilovic* interpreted s 32(1) in a less potent manner than the British counter-part because of *textual* and *contextual* differences: differences in the wording of the Victorian provision (relative to the UK) and different constitutional constraints present in Australia (relative to the UK). [43]

In *Momcilovic's case*, Crennan and Kiefel JJ explained that the references to 'interpretation' and 'statutory purpose' in s. 32(1) were consistent with the *ordinary task of the courts*.[44] Bell J also clearly concluded that s. 32(1) was not a special remedial provision (i.e. 'interpretation plus') the task imposed on the court was one of *orthodox interpretation*.[45] Gummow J (with whom Hayne J agreed) appears to suggest that s 32(1) goes beyond ordinary canons of construction, but is not clear how. But importantly he did not equate s 32(1) with the *Ghaidan* approach.

So it appears that for a majority of the High Court the terms of the *interpretive* obligation under the *Victorian Charter* reflected established construction principles (including the 'principle of legality'). This means that the courts will give words in a statute the meaning the legislature is taken to have intended, and legislative intention is divined by examining closely the text, context and purpose(s) underlying the enactment.

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[43] *Momcilovic v The Queen* [2011] 245 CLR 1, 38, 48-50 (French CJ) 88-90 (Gummow J), for example.

[44] *Momcilovic v The Queen* [2011] 245 CLR 1, 92-93 (Gummow J) and 210 (Crennan and Kiefel JJ) citing *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381. Statutory interpretation is concerned with the search for the meaning of the language used; with the text examined and construed in light of the immediate *context* (the statute as a whole) and broader *context* (including, the pre-existing state of the law, and the mischief being dealt with) and *purpose (or object)* of the statute.

[45] *Momcilovic v The Queen* [2011] 245 CLR 1, 181-182 (Heydon J). Heydon J (dissenting) decided that s 32 of the *Victorian Charter* was a strong interpretive provision It followed that this was unconstitutional because it directed the courts to effectively remake laws – a legislative act.

Following the High Court's decision in *Momcilovic*, the Victorian Court of Appeal stated in *Slaveski v Smith* that the statutory rule of construction applies only where there is *indeterminacy* in the language of statutes:

> If the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the courts should give them whichever of those meanings best accords with the human rights in question.[46]

Later in its reasons the Court of Appeal, following French CJ in *Momcilovic*,[47] approximated s 32(1) with the 'principle of legality'. The Court of Appeal stated:

> s 32 applies in the same way as the principle of legality with a wider field of application. It does not authorise a process of interpretation which departs from established understandings of the process of construction. **[...] it does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision.**[48] [emphasis added].

Conversely, in *Victorian Police Toll Enforcement v Taha*[49] the judge interpreted Gummow J's reasoning in *Momcilovic* as requiring an interpretation of s 32(1) that went beyond conventional approaches (and beyond the principle of legality), even if it did not equate to *Ghaidan*.

The point made here is that, in view of the case-law canvassed above, it is apparent that an interpretative obligation must be carefully drafted to avoid protracted legal uncertainty about a critical operative provision in the legislation. If the Queensland Parliament wishes to invest the courts with a special (remedial) interpretive provision (permitting 'reading in' and 'reading out', as in *Ghaidan*) then that intention must be made abundantly clear. However, if a strong interpretive provision was drafted (or at least open to a liberal interpretation), this would likely attract a constitutional challenge on the basis that it invited the re-writing of statutes by the judiciary. The more work an interpretive obligation does the greater the risk of invalidity on constitutional grounds

[46] (2012) 34 VR 206 [24].

[47] *Momcilovic v The Queen* [2011] 245 CLR 1,

[48] (2012) 34 VR 206 [45].

[49] [2013] VSCA 37 [190].

because a new paradigm of statutory interpretation could well be viewed as altering the established relationship (separation of powers) between legislature and courts and expanding judicial power.

The Queensland Parliament should carefully consider whether it wishes to empower the courts to utilise a *strong* interpretative rule, (per *Ghaidan*). I would caution against it. To do so would invite the charge that the legislation draws the judiciary into the legislative arena and encourages legal adventurism; ammunition for those commentators sceptical about giving judges a serious role in promoting and protecting human rights. It would, I suggest, induce criticisms about the adverse impact of a HR Act on the traditional, political, constitution. This would be regrettable given that empirical data reveals that the courts have actually had a relatively minor role in the administration of the HR statutes in both the ACT and Victoria to date.

Therefore, an(y) interpretive provision should, in my view, *augment* existing and accepted methods of statutory interpretation that are employed to determine parliamentary intent: a provision that facilitates a rights-respecting *interpretation* of legislative provisions *where possible,* that is to say, *consistently with context and statutory purpose*.[50] If that cannot be achieved then the courts *may* resort to a 'declaration of incompatibility' (or, 'inconsistency').

Importantly, the interpretive provision should not be simply read as a codification of the 'principle of legality', it operates differently in two respects; first, the interpretive provision will have a different (potentially greater) sphere of application, travelling beyond the rights recognised as fundamental at common law; and, second, the principle of legality does not embrace a balancing (*proportionality-type*) exercise whereas under as statutory interpretive provision, balancing is (or should be) undertaken as part of the task of deciding whether a human rights compatible/consistent meaning is possible.[51]

[50]See, *Project Blue Sky v Australian Broadcasting Act* (1998) 194 CLR 355, 381-382; and *ICAC v Cuneen* (2015) 318 ALR 391, 400-407.

[51] See, The Hon Justice Pamela Tate, "Statutory Interpretive Techniques under the Charter: Three Stages of the Charter – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic? (2014) 2 *Judicial College of Victoria Online Journal* 43.

Accordingly, in light of the Victorian experience,[52] a HR Act in Queensland should make tolerably clear the stages of the interpretive process. The following steps could be set out in the legislation in the following way:

1. Ascertain the meaning of the legislative provision in accordance with the conventional rules of statutory interpretation (this includes the 'principle of legality'). If words are clear they must be given that meaning.

2. If a statutory provision construed in accordance with the conventional rules does not limit any relevant human right, that meaning can be adopted without further analysis. The meaning arrived at by the ordinary principles of statutory interpretation is *compatible* with human rights and there is no need for any further task of interpretation.

3. If the legislation restricts or limits a relevant right, ascertain whether the limitation is nevertheless justified (*proportionality analysis*).

4. If the limit is justified, there is no incompatibility with a *Charter* right and the meaning ascertained by ordinary principles prevails.

5. If the limit is not justified, once the balancing (proportionality) exercise has been undertaken, the Court should examine the words in question again, to see if it is *possible* for another meaning compatible with the relevant right or freedom, (consistent with context and statutory purpose) to be found in them. If it is possible that meaning must be adopted. On this approach it would be possible to depart form the literal or grammatical meaning of a provision to reach an alternative human rights-respecting meaning if that was congruent with context (structure of the Act) and statutory purpose(s).[53]

[52] See the discussion in M B Young, *From Commitment to Culture: The 2015 Review of the Charter,* 140-148.

[53] These interpretive steps are heavily informed by the essay written by The Hon Justice Pamela Tate, "Statutory Interpretive Techniques under the Charter: Three Stages of the Charter – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic? (2014) 2 *Judicial College of Victoria Online Journal* 43, 55-56.

Limitations on rights and freedoms (a proportionality test)

Many, indeed most, human rights are not absolute,[54] meaning they may be clearly limited,[55] or qualified with reference to other competing rights and public interests (such as public safety).[56] There are very few absolute (or, inalienable) rights but it is important that those rights that are recognised as such in international law should enjoy that same status in a domestic HR Act and *not* be subject to limitation provisions (a proportionality analysis).

Conversely, qualified rights, require a balance to be struck between individual rights and wider community or state interests. "Proportionality as a principle may generally be said to require that any statutory limitation or restriction upon a right or freedom having a particular status be proportionate to the object or purpose which it seeks to achieve."[57] It is important to recognise that a limit on a human right that is 'proportionate' *is* compatible with human rights.

Careful consideration needs to be given to how a HR Act can, relevantly, incorporate proportionality techniques vis-à-vis legislative and administrative decisions affecting designated rights and freedoms. <u>One</u> mechanism is sufficient for that purpose, *either*

(a) *express* limitations within specific enumerated rights,[58]

or

(b) include a *general* limitations clause (applicable to most, if not all enumerated rights).

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[54] The right to protection from slavery and forced labour or freedom from torture, are examples of 'absolute' human rights that cannot be 'balanced' against other human rights or competing public interests.

[55] For example, right to liberty and security is subject to express qualification in art 5 *ECHR*.

[56] Such as, right to religious freedom, freedom of expression and freedom of assembly and association.

[57] *Momcilovic v The Queen* [2011] 245 CLR 1, 212.

[58] I would advocate setting out the specific limits attaching to each enumerated human right that is not recognised as an 'absolute' right (e.g. the prohibition on torture), following the approach taken under the ECHR and ICCPR. In my view it is preferable for parliament to clearly tailor express limitations for particular rights, rather than adopt a general limitations clause. This promotes the (rule of law) value of legal certainty.

Using both limiting devices, as has occurred in Victoria under the *Charter* is unwieldy, complex and generates uncertainty.[59] On either approach (set out above) the limitations test corresponds to 'proportionality' as understood in international jurisprudence (such as the European Court of Human Rights) or other common law jurisdictions such as Canada and the UK, or domestic approaches to the idea of proportionality.[60]

How are questions about the proportionality of restrictions imposed by law on certain human rights to be determined in the course of *interpreting legislation* and *reviewing administrative action*?

Legislative interpretation

How are judges to reach a conclusion about whether a statutory measure that infringes human rights is proportionate or not? If there is to be a 'balancing' of rights, or a 'balancing' of human rights with competing public interests, then there needs to be clear and succinct criteria governing the operation of a proportionality test. This is the lesson learnt from the Victorian experience over the past ten years.

The tests for proportionality are not universal, and are more or less detailed in their terms.[61] It is beyond the scope of this submission to canvass and critique the various proportionality tests employed in Australian public law and in foreign jurisdictions. But the following outline will illustrate how the contours of proportionality could be drawn and applied.

In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[62] Lord Clyde set out the classic, three stage, formulation of proportionality. His

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[59] See, M B Young, *From Commitment to Culture: The 2015 Review of the Charter*, ch.5. The statutory formulations of reasonable limits in the *Victorian Charter* and *HR Act* (ACT) are quite complex and repetitive.

[60] Members of the High Court have referred to *constitutional* doctrines of proportionality in *Momcilovic v The Queen* [2011] 245 CLR 1, 214-215 with reference to cases such as *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 133-142. Note also, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567, for example. Additionally, on 'reasonable proportionality' as a criterion for the validity of *delegated legislation* see *Attorney-General (SA) v Adelaide Corporation* (2013) 249 CLR 1;,and on proportionality as an aspect of 'legal unreasonableness' when reviewing *administrative action* see *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332.

[61] See *Bank Mellat v HM Treasury)(No 2)* [2014] AC, 700, 789-792

[62] [1999] 1 AC 69, 80.

Honour observed that in determining whether a limitation (*by an act, rule or decision*) is arbitrary or excessive the court should ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) (ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

As Lord Steyn explained subsequently in the House of Lords, “these criteria are more precise and more sophisticated than the traditional grounds of [judicial] review.” [63] He added that there was overlap between traditional grounds of review and the approach of proportionality, but that the intensity of review was somewhat greater under a proportionality approach. The criteria outlined above have “affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8—11 [*ECHR*] that an interference with the protected right should be necessary in a democratic society”.[64]

The formulation in *de Freitas* was a milestone in the development of the law in the United Kingdom. It has subsequently been adapted in the human rights case-law under the *HR Act 1998* (UK). In *Huang v Secretary of State for the Home Department*,[65] it was noted that the formulation in *de Freitas* was derived from the well-known judgment of Dickson CJ in *R v Oakes*.[66] In a recent Supreme Court (UKSC) judgement Lord Reed stated that:

> The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality

[63] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [27]-[28].

[64] *Bank Mellat v HM Treasury)(No 2)* [2014] AC, 700, 790.

[65] [2007] 2 AC 167, para 19.

[66] [1986] 1 SCR 103.

> into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit.[67]

Under the approach adopted in *Oakes* it is necessary to determine:

> (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
> (ii) whether the measure is rationally connected to the objective,
> (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective,[68] and
> (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

The first three of these are the criteria listed in *de Freitas*, and the fourth reflects an additional observation made in *Huang*. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

Additionally, it should be highlighted that proportionality is a variable standard of review that can be adapted to suit local conditions and employed carefully, as Lord Reed noted:

> the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture.[69]

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[67] *Bank Mellat v HM Treasury)(No 2)* [2014] AC, 700, 790.

[68] The limitation of the protected right must be one that it was *reasonable* for the legislature to impose (*R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781—782).

[69] *Bank Mellat v HM Treasury)(No 2)* [2014] AC, 700, 790.

In my opinion the Queensland parliament should examine carefully the more structured tests currently employed in Canada and the UK (noted above) which are preferable to the comparatively more indeterminate or abstract formulations that may be read as leaving the courts to their own devices and idiosyncrasies.[70] This is because the approach taken to proportionality in Canada and the UK is more in accordance with the approach to legal reasoning characteristic of the common law.

If the criteria governing proportionality are vague then the plasticity of such a test will likely attract judicial scorn; such criteria may be criticized as inviting the courts to *simply* substitute their own assessment of where to strike the balance between competing rights and interests, for that of the legislature or decision-maker. Understandably, that would be viewed as exceeding the supervisory role of the courts in Australia.

In short, the contours of proportionality should be carefully mapped out in a HR Act. To be clear, proportionality is a more intensive/intrusive form of review than under traditional judicial review grounds where the application of its sibling (legal unreasonableness (or, '*Wednesbury*' unreasonableness)) is a relatively higher threshold to satisfy.

Reviewing administrative action by public authorities

Proportionality techniques are also relevant to public officials and authorities when discharging their obligation to consider and comply with human rights in the course of taking administrative action. The relevance of proportionality to *administrative* decision-making was re-iterated by French CJ in *Minister for Immigration and Citizenship v Li* where it was stated that:

> a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves [citation omitted].[71]

[70] *Momcilovic v The Queen* [2011] 245 CLR 1, 429.

[71] *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332, 352. See also, *Minister for Immigration and Border Protection v Singh* (2014) 139 ALD 50, 65: "it could be said that the exercise of power to refuse a short adjournment in these circumstances was disproportionate to the tribunal's conduct of the review to that point".

It is clear that this proportionality 'test' inheres in the concept of legal unreasonableness and is more broad brush and less rigorously structured than those comparative proportionality tests explained above. But essentially it is also directed at determining whether the right balance between individual rights and interests and competing rights and interests has been struck.

It should be open to public authorities to rely on a limitations (proportionality) provision to justify action that limits one human right in order to promote other human rights or promote competing social objectives. Therefore, in order to best factor in proportionality into administrative decision-making, an HR Act should make tolerably clear what proportionality means so it is readily understood by decision-makers be they front-line government bureaucrats or judges.

In summary, if the courts are invested with a new tool of statutory construction under a HR Act that tool should not enable the courts to depart from the clear and settled intention of Parliament (as indicated by the text, context and purpose of the legislation) and 'read in' or 'read down' legislation so that it can be read consistently with human rights. This is because such a strong power of interpretation might well be perceived as undemocratic, and also generates uncertainty for people about what the law is (thereby undermining the rule of law). Accordingly, where it is impossible to read legislation in a rights-consistent way the courts may resort to another remedial feature of HR Acts: the declaration of incompatibility (inconsistency).

Declarations of incompatibility (inconsistency)

> "The making of the declaration, however, does no more than manifest, in a practical way, the constitutional limitations upon the Court's role and the fact that **it is Parliament's responsibility ultimately to determine whether the laws it enacts will be consistent or inconsistent with human rights**."
>
> *Momcilovic v The Queen* [2011] 245 CLR 1, 68

Declarations of incompatibility constitute another important mechanism for the protection and promotion of human rights. Under a HR Act, the judiciary may be invested with power to make a 'declaration of incompatibility' (or,' inconsistency') in circumstances where a court forms the opinion that legislation is incompatible with designated human rights and cannot be interpreted in a human rights compliant way (pursuant to the terms of an interpretive provision of the type discussed above).

In principle, parliament retains the last word on human rights – a declaration is non-binding. In short, there is no substantive legal limitation on democratic political authority. Under the HR Acts in the UK, ACT and Victoria, a judicial decision to make a declaration clearly does not affect the validity, continuing operation or enforcement of the legislation. Rather, a declaration can have legislatively specified *procedural* consequences: a declaration can enliven obligations on the executive branch of government to fashion a direct response to the declaration.[72] Moreover, a declaration draws the legislature's attention to disconformity between a state law and enumerated human rights, thereby serving to stimulate a debate in parliament about whether and how to respond to such a declaration.

The rhetorical power of a judicial declaration, formally stating a law is incompatible with human rights, is considerable and should be fully appreciated. In the context of the relationship between parliament and judiciary it is a strong message to send. It is not, I suggest, a power that the Queensland judiciary would employ lightly, and it is conceivable that where a case raised highly controversial questions of social policy (such as assisted suicide) the judges would defer to the parliament as the democratically accountable institution and decline to exercise their declaratory power.[73]

[72] For example, sees 37 *Victorian Charter* which requires a written ministerial response to declaration within 6 months to be laid before Parliament and published in the Gazette.

[73] See R*(Nicklinson) v Ministry of Justice* [2015] AC 657,230-234, 267, 293-294, 296-297 where four judges of the Supreme Court determined that whether and to what extent assisted suicide should be lawful was a matter for determination by the elected legislature rather than the court even though they had jurisdiction to to make a declaration of incompatibility under s.4 of the HR Act 1998 (UK).

In practice, in the UK, of the 20 declarations that have been finalised (i.e. not overturned on appeal or still subject to further appeal) all bar one have been remedied by primary or secondary legislation, or remedial order.[74] It is noteworthy that successive UK governments have determined not to respond (by legislative amendment) to adverse rulings in the domestic courts (and before the European Court of Human Rights) in respect of the blanket prohibition on prisoners voting.[75] Equally, in the ACT, the Legislative Assembly has not legislatively responded to the first declaration of incompatibility issued by the Supreme Court in 2010.[76] A provision in the *Bail Act 1992*, reversing the presumption of bail in certain cases, that was deemed inconsistent with the *HR Act 2004* (ACT), remains on the statute book unamended.

The 'effectiveness' of a declaration of incompatibility, as a remedy for a person aggrieved by a human rights violation, has been subject to criticism with some lawyers and commentators labelling it as a 'lose/lose' situation for litigants. For example, Fenwick has stated that s 4 *HRA 1998* (UK) is "an empty remedy as far as the majority of litigants are concerned."[77] Therefore, consideration should be given to enabling the Supreme Court to award damages where a declaration is made, or allowing a person who obtains a declaration of incompatibility from the Supreme Court, to apply to the government for an *ex gratia* payment of compensation.[78]

Interpretation of rights

How are the courts are to determine the meaning of human rights? Under the *HR Act 1998* (UK) the courts have, in practice, taken their lead and, typically, *deferred* to the European Court of Human Rights on the meaning and application of human rights. This has arisen because the court provides final and authoritative rulings on the content of

[74] See, Ministry of Justice, *Responding to human rights judgments – Report to the Joint Committee on Human Rights on the Government Response to human rights judgments 2013-14* (December 2014) at 32.

[75] The issue of prisoners' disenfranchisement (blanket voting bans on convicted prisoners) is outstanding and remains under review by Parliament. Successive UK governments have not responded to either domestic or several Strasbourg court judgments regarding breach of prisoners' rights under the first protocol to the ECHR. The declaration of incompatibility was issued in the Scottish case of *Smith v Scott* [2007] SC 345, and subsequently considered in *R (Chester) v Secretary of State for Justice* [2014] UKSC 25.

[76] *Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

[77] Helen Fenwick, *Civil Liberties and Human Rights* (2007, Routledge) at 203.

[78] As recommended in, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) at 23.

rights contained in the *ECHR* and because the *HR Act 1998* was clearly intended to 'bring [ECHR] rights home'. This meant the statute was to provide for effective domestic remedies for breach of rights drawn from the *ECHR*. In short, there is perhaps limited scope for the British courts to work out what human rights mean, rather ECtHR jurisprudence is drawn upon heavily, if not always decisively.[79]
If the Queensland Parliament produces its own (indigenous) list of basic human rights (albeit informed by international treaties to which Australia is a party) to be promoted and protected, it should fall to the Queensland courts to work out what the human rights mean locally. This would be more akin to a domestic bill or charter of rights rather than an international transplant. The process would require the courts to have *regard*, but not defer, to the opinions and decisions of domestic and foreign courts, where comparative materials have logical or analogical relevance.[80] There is nothing novel in this approach.[81]

In my view it is important that the Queensland courts enjoy the autonomy to forge authoritative, home-grown, human rights jurisprudence; a jurisprudence that is well versed in national, international and foreign jurisprudence relating to relevant human rights, but which may depart from or modify approaches taken in other jurisdictions on a principled basis. For example, where the body of national and international opinion does take a clear and consistent line about the meaning of rights. In this way the Queensland judiciary could then contribute to a national and trans-national dialogue about the meaning and application of human rights.

E. **Handling Human Rights Complaints: Accountability and Oversight**

It is recommended that there are a range of judicial *and* non-judicial remedies for breaches of human rights in Queensland. The promotion of human rights requires a multifaceted political and legal institutional response, involving the executive,

[79] See, The Rt Hon Lord David Neuberger, above fn 41 who notes that the Strasbourg court's decisions have not always been followed.

[80] See s.31(1) of the *HR Act 2004* (ACT) which provides: 'International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.'

[81] *Momcilovic v The Queen* (2011) 245 CLR 1, 36 (French CJ).

parliament, public agencies, oversight ('integrity') bodies, tribunals and courts. It is critical that complaints systems are accessible, easy to navigate and relatively cheap; vindicating human rights through court proceedings should be a measure of last resort.

> "As in previous years my office this year again received complaints that raise issues around human rights. These **complaints often concern the treatment of people in custody or people such as vulnerable children or people with a disability who rely on the state for their continued welfare**."
>
> (Victorian Ombudsman, *Annual Report 2012-13 Part 1*, 48)

The Queensland Ombudsman

The Queensland Ombudsman deals with complaints that are of an overtly human rights nature, concerning agency decision-making in areas such as; access to justice/legal aid, housing, education, child safety and disability services, corrective services and policing, among others. Indeed, the periodic reports of each Australian Ombudsman "confirm that the highest volume of individual complaints concern government departments which are more likely to engage in human rights breaches, such as prisons, social services, child welfare, mental health institutions…".[82]

Consequently human rights are an area of the Ombudsmen's work that has been implicit, and I suggest that it should become a clear focus of responsibility. I advocate for the Queensland Ombudsman to be given new powers under a HR Act in order to make its human rights-related work more explicit. I also support an enhanced role for the Queensland Ombudsman as a human rights institution, enabling the promotion of fairness, reasonableness and legality in public administration <u>and</u> respect for, and compliance with, human rights. Provision for such a human rights-based complaint mechanism is key, this is because it can facilitate the resolution of people's grievances, through non-litigious processes, relatively uninhibited by issues which restrict access to justice (time and costliness) before the courts (and to a lesser extent, tribunals).

[82] A Stuhmcke, "Australian Ombudsmen and Human Rights" (July 2011) *AIAL Forum No 66,* 43, 45.

Specifically, the objects of the *Ombudsman Act 2001* (Qld) could be amended (by a HR Act) to reflect the concept of promoting human rights compatibility in the exercise of administrative powers by public authorities. Relatedly, a HR Act should expressly refer to the Ombudsman's human rights-related functions to help foster greater public awareness about the role of the Office.

Additionally, the functions of the Queensland Ombudsman may be augmented to confer a specific human rights mandate in addition to the traditional principal functions relating to administrative oversight. This would entail amending the legislative mandate of the Queensland Ombudsman to provide the Office with additional powers to promote executive agencies' respect for, and check compliance, with human rights.

I recommend that the Ombudsman be empowered to investigate whether administrative action was taken in a human rights-respecting manner by public authorities (and 'functional' public authorities); either when complaints are formally made, on the Ombudsman's own motion, or upon a referral from the Legislative Assembly. Section 13(2) of the *Ombudsman Act 1973* (Vic) provides a useful prototype:

> The function of the Ombudsman under subsection (1) includes the power to enquire into or investigate whether any administrative action that he or she may enquire into or investigate under subsection (1) is incompatible with a human right set out in the C*harter of Human Rights and Responsibilities Act 2006*.[83]

The nature of investigations into administrative action would be transformed under this approach, allowing the Office to apply legislated human rights principles to promote fair and just public administration for Queenslanders, especially vulnerable community members. As the Victorian Ombudsman noted in a recent *Annual Report*:

> While **the human rights established by the Charter** apply to all people in Victoria, they **are particularly important to consider for vulnerable individuals**: **those in closed environments** (such as prisons and juvenile justice detention centres); **individuals with a disability**; and **children** [emphasis added].[84]

[83] In contrast to the *Victorian Charter*, the *HR Act 2004* (ACT) does not confer a specific complaint handling role on the Ombudsman, but the Ombudsman entertains human rights complaints if they relate to a 'matter of administration' falling within the Ombudsman Act 1989 (ACT).

[84] Victorian Ombudsman, *Annual Report 2012-13 Part 1*, 18. See also Victorian Ombudsman, *Annual Report 2014*, 24, Victorian Ombudsman, Annual Report 2015, 42-46.

The responsibility of an Ombudsman, invested with a human rights mandate, should extend beyond the investigation of individual complaints in order to identify and address wider, systemic, problems with administrative practices. The importance of this broader oversight role is apparent from the Victorian experience:

> Over the past year my officers conducted over 20 visits to Victorian prisons and other secure facilities where individuals are held. These included police cells; juvenile justice centres; closed psychiatric facilities; and secure disability units. These visits allow my officers to observe the conditions in these facilities to identify any issues that are not compatible with the Charter, in particular the right to humane treatment when deprived of liberty.[85]

In summary, augmenting the role of the Queensland Ombudsman by giving that institution responsibility for promoting and protecting human rights may facilitate complaints about the actions of public agencies and, thereby, improve public administration and respect for human rights. This is particularly so where coercive (public agency) powers impact on Queenslanders' liberty and physical integrity. The Ombudsman's function in promoting respect for human rights in public administration, through investigative methods and reporting, should be complemented by extending the function and individual dispute resolution powers of the Anti-Discrimination Commission (Qld).

Anti-discrimination Commission Queensland (ADCQ)

The functions of the ADCQ include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as examining and, where possible, effecting conciliation of complaints of contraventions of the *Anti-Discrimination Act 1991* (Qld), and whistle-blower reprisal under the *Public Interest Disclosure Act 2010*.

The ADCQ's free, independent and impartial conciliation service, directed to resolving individual complaints about alleged direct/indirect discrimination is an important means of ensuring individual human rights are protected. The benefits of conciliation are that parties can save on the time and cost of going through more formal proceedings

[85] Victorian Ombudsman, *Annual Report 2012-13 Part 1*, 48.

in a tribunal or court. Parties can negotiate an outcome that is mutually acceptable and which can provide a remedy for the complainant, such as an apology or damages.

The design of human rights complaint mechanisms is important. Under a HR Act there must be a mechanism by which people can redress their human rights-related grievances in an accessible and timely manner. Accordingly, careful consideration should be given to enhancing the jurisdiction and role of the ADCQ. This would facilitate a clear, quick and non-litigious resolution of individual human rights-related complaints using a similar process to that currently available for discrimination complaints. Giving ADCQ additional statutory functions coheres with both its institutional rationale – "to strengthen the understanding, promotion and protection of human rights in Queensland" and its human rights objectives. Moreover, it would mean that one of the perceived weaknesses of the regulatory scheme under the *Victorian Charter* was avoided in Queensland.

The Victorian Equal Opportunity and Human Rights Commission ('Commission') does not currently have jurisdiction to receive complaints under the Charter. The absence of a human rights resolution role for the Commission under the *Victorian Charter* has been perceived as inimical to effective government accountability for the protection of human rights.[86] Not having a clear and accessible way of raising human rights complaints meant the rights under the Charter were effectively treated as 'second-class' relative to other human rights (e.g. equality/non-discrimination). In the *2015 Review of the Victorian Charter* it was recommended that the Commission be given the statutory function and resources to offer dispute resolution for Charter-based disputes because it was "the best mechanism to enliven independent dispute resolution".[87]

Finally, it is recommended that the ADCQ be given a reporting function, to provide annual reviews on the operation of the HR Act in the work of public authorities, tribunals and courts, in parliament and the community. The ADCQ could function in a

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[86] M Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) at 99-103.

[87] M Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) at 105.

manner comparable to the Victorian Equal Opportunity and Human Rights Commission in this respect.

F. Enforcing Human Rights Through Direct Avenues of Redress

In addition to facilitative and persuasive (reporting and conciliatory) regulatory techniques canvassed above, it is important that there are legal enforcement mechanisms under a HR Act. Otherwise there is a risk that the legislation may be regarded as toothless by the public, and not taken seriously enough by the public sector if there are no consequences for public authorities breaching human rights. The available evidence from Victoria demonstrates that complex remedial provisions, and the absence of a direct cause of action on human rights grounds, has limited the effectiveness of the *Charter* and presented a barrier to people's ability to remedy breaches of their human rights. Conversely, section 40C of the *HR Act 2004* (ACT) provides for a direct cause of action to remedy breaches of human rights by public authorities in the ACT Supreme Court, though the provision has been utilised infrequently to date.

The Queensland Civil and Administrative Tribunal (QCAT)

Inferior courts and tribunal are a more cost-effective pathway to remedying wrongs than superior courts, and also offer jurisdictional expertise in human rights-related matters. In Queensland QCAT is well placed to consider whether individual's rights have been unlawfully infringed by public authorities and to provide an effective remedy.

QCAT aims to provide a fair, just, accessible, quick and inexpensive means of resolving a wide variety of disputes, and discharges a human rights-related function through its Human Rights Division (HuRD). HuRD manages anti-discrimination, guardianship and administration matters, children and young people matters and education matters. Additionally, QCAT exercises jurisdiction over a range of administrative and disciplinary decisions, and civil disputes (e.g. tenancy matters), that impact on people's human rights. Accordingly, QCAT already provides an accessible dispute resolution service to

many of Queensland's most vulnerable and disadvantaged people, including adults with impaired capacity, children, people alleging discrimination and social housing tenants.[88] As a public authority, with administrative powers, QCAT has the potential to be the primary vehicle through which human rights are *enforced* in Queensland. Securing effective accountability through a review mechanism that is accessible, fair, quick and inexpensive is vital because it can obviate the need to go before the Supreme Court and the attendant stress and cost of those legal proceedings.

I suggest that human rights-based complaints about public authorities actions could be referred, by the ADCQ, to the QCAT for hearing and determination, adopting similar processes to those presently used when anti-discrimination disputes are not resolved through ADCQ's conciliatory processes.

Where QCAT finds there has been a breach of human rights it should have the express power to grant any relief or remedy that is 'just and appropriate'; this could include making an *award of damages* where applicable. QCAT already has jurisdiction to award damages to successful complainants under the *Anti-Discrimination Act 1991*.[89] An express remedial power would avoid the difficulty arising in the ACT whereby lower courts and the ACT Administrative and Civil Tribunal ('ACAT') can hear human rights-based arguments in proceedings but, seemingly, cannot grant relief under the HR Act. This is because only the Supreme Court has expressly been given that particular power.[90]

Additionally, a person claiming that a public authority has acted incompatibility with their human rights could be provided with an independent right to apply *directly* to QCAT for a remedy in relation to the alleged breach of human rights (i.e. a free standing cause of action on human rights grounds).[91]

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[88] Applications for review made to QCAT can be transferred to the Ombudsman if they are more appropriate dealt with by that institution and vice-versa.

[89] See, *QCAT remedies* <http://www.adcq.qld.gov.au/resources/legal-information/tribunal/qcat-remedies#2015>

[90] See Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004 by the ACT Human Rights and Discrimination Commissioner* (2014) at 6.

[91] The requirement that human rights based claims can only be brought in addition to ('piggy back') existing legal claims in Victoria under the Charter has been subject to criticism (see M Young, *From Containment to Culture*, Ch.4,

Judicial Review

It is recommended that a HR Act in Queensland enable judicial review over a public authority's decision on the ground of alleged breach of human rights (designated rights enumerated in the Act would be justiciable). The availability of judicial review should not be contingent on a person having another (non-human rights-based) ground of review and would be available in addition to other legal proceedings. There appear to have been only a trickle of cases before the ACT Supreme Court based on the direct cause of action;[92] it appears it is a remedy that is out of reach for the majority of people in the ACT community. This underscores the importance of providing access to justice and an effective remedy via QCAT, and access to other oversight bodies, notably the ADCQ.

Under s 40C *HR Act 2004* (ACT) proceedings may be commenced directly in the ACT Supreme Court against a public authority, in the alternative to relying on human rights in other legal proceedings. With an eye firmly on the ACT model, the *2015 Review of the Victorian Charter* recommended that the Charter be reformed so that a person claiming breach of their human rights by a public authority can either apply to the Victorian Civil and Administrative Tribunal (VCAT) or rely on the *Charter* in any other legal proceedings.

Conclusion

Enacting human rights (drawing on, but not necessarily limited to, the *ICCPR* and *ICESCR*) into domestic law would represent a wide-ranging political reform and signal a departure from more *ad hoc* approaches to human rights promotion, protection and enforcement in Queensland. It would facilitate the integration of human rights into policy-making, legislative drafting, and parliamentary deliberations and decision-making. Human rights-based reforms offer the potential, in my view, to enrich, not

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and the Human Rights Law Centre, *More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter* (June 2015) at 24).

[92] Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004 by the ACT Human Rights and Discrimination Commissioner* (2014) at 5.

diminish, the quality of our democracy in Queensland. This assertion rests on an evidence-base drawn from the official reviews of statutory bills of rights operating in the UK and Australia, academic commentaries and University-based evaluations.