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11 March 2016

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

Dear Research Director

Human Rights Inquiry

Thank you for the opportunity to make a submission to this inquiry. Our view is that Queensland should enact a human rights act.

Introduction

As has been well identified, there are many recent examples of where human rights have been inadequately protected under existing the legal mechanisms and processes in Queensland. The most appropriate way to remedy this is to enact a human rights act. The main question is what form such an act should take. Queensland is in a better position than any Australian jurisdiction before it to resolve that question, as there is now a total of 22 years' experience available for it to consider from the two jurisdictions that already have such acts: the ACT and Victoria.

The ACT and Victorian experience

The *Human Rights Act 2004* (ACT) ('*HRA*') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') approach the question of how human rights should be protected and promoted in similar ways. The shared conviction is that there should be a dialogue between the three arms of government, with parliament retaining its legislative supremacy, the courts playing a subsidiary but important interpretive and declaratory role, and the executive facilitating the creation of a human rights culture across government.

This is achieved as follows. First, within parliament, proponents of legislation are required to prepare a statement of compatibility detailing how their proposed measure impacts on human rights. The legislation and accompanying statement is then assessed by a standing committee, which provides a report on the rights compatibility of the proposed law to parliament. However,

it remains the prerogative of parliament to enact whatever laws it sees fit. Second, the Executive is brought into the mix by means of duties placed on public authorities in state and local government to act compatibly with, and to give proper consideration to, human rights.

Finally, the judiciary can determine whether the executive has breached those duties. It is also required to interpret all legislation compatibly with human rights, where it is possible to do so consistently with the purpose of the enactment. This falls short of empowering the courts to strike down legislation that cannot be so interpreted. Instead, judges can make a declaration that legislation cannot be interpreted compatibly with human rights, to which parliament is then expected to respond. To date, only one such declaration has been made in each jurisdiction.[1] The amount of litigation generated by these Acts generally has also not been substantial. On average, only 49 cases per year in Victoria and 24 in the ACT have contained some mention of their respective Acts, with many such mentions being cursory.[2]

Recent reviews of each of the Acts reveal that they have each enjoyed a good measure of success. For example, the submission of the Law Institute of Victoria to the 2015 recent review of the Charter highlighted seven major benefits of the Act to date:

> [T]he Charter has had a positive impact on human rights in Victoria. The Charter has:
> - Shaped the law and policy development process…
> - Ensured that Parliament takes human rights into account when passing laws…
> - Generated a greater awareness of human rights within public bodies…
> - Improved decision-making in public authorities…
> - Been an important advocacy tool for people whose rights are at risk…
> - Directed courts to interpret legislation compatibly with human rights…
> - Provided remedies for individuals when their human rights have been breached.[3]

An earlier report published by the Human Rights Law Centre collected 101 case studies of where the Charter had had a positive effect.[4] These included, for example, its role in the systematic removal of rights-infringing provisions from earlier legislation,[5] and in the successful campaign led by the Homeless Persons Legal Clinic to prevent the criminalisation of sleeping in cars.[6] The HRA has also led to positive outcomes, with one of its 'clearest effects' being 'to improve the quality of law-making in the Territory'.[7] Importantly, the benefits of these Acts have not come at a significant cost to the public purse: an analysis of the Victorian Charter in 2011 found that it had only cost 50 cents per Victorian per year.[8]

[1] These occurred in *R v Momcilovic* [2010] VSCA 50 and *In the matter of an application for bail by Islam* [2010] ACTSC 147.
[2] Original research by authors using data from AustLII: <http://www.austlii.edu.au/>.
[3] Law Institute of Victoria, Submission No 79 to the Independent Reviewer, *Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)*, 2–3.
[4] Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities: Case Studies from the First Five Years of Operation* (March 2012).
[5] Ibid 15–16.
[6] Ibid 41.
[7] Australian National University, ACT Human Rights Act Research Project, *A Report to the ACT Department of Justice and Community Safety* (2009) 6.
[8] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) x. The calculation of the annual cost per citizen comes from Ben Schokman, '50 Cents is a Wise Investment to Protect Fundamental Rights' (Human Rights Law Centre, 2 September 2011) <http://hrlc.org.au/50-cents-is-a-wise-investment-to-protect-fundamental-rights/>.

Such reviews also make clear that there is still much that can be improved in each instrument. Indeed, the 2015 independent review of the Charter and the 2014 review of the HRA by the ACT Human Rights Commission collectively make over 60 recommendations for reform.[9] In highlighting areas for improvement, a few problems have become pronounced. In Victoria, there is no effective remedy for those whose rights have been infringed, which has weakened the enforceability of the duties placed on the executive. Also in that state, there is often not enough time set aside for parliamentary scrutiny, while in the ACT the committee's remit does not extent to all forms of legislation. In addition, in both jurisdictions, uncertainty about the courts' interpretive duty has led to an unclear test and to the wasting of time and resources on procedural debate. The following sections explore these problems and show what can be learned from each.

1. An Effective Remedy

When first enacted, neither the HRA nor the Charter gave individuals whose human rights had been breached by public authorities a direct remedy. Rather, people seeking to allege that a public authority had violated their rights were required to rely on some other, separate, ground of relief at which point they could raise unlawfulness under the Acts as an additional argument. In Victoria for instance, Charter issues can only be raised before a court where:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.[10]

In other words, as explained by Michael Young – the independent reviewer of the Charter in 2015 – 'a Charter claim can "piggy back" an existing legal claim'.[11]

While the rationale was to reduce recourse to the courts, this has made litigation lengthier and more complex. As the Law Institute of Victoria has explained:

> [S]ignificant resources (including legal costs, court time and scarce pro bono resources) are spent on: resolving preliminary jurisdictional questions, rather than focusing on the real issue in dispute (that is, whether a public authority has breached a person's human rights); bringing judicial review proceedings in the Supreme Court, rather than in a more accessible forum such as VCAT; [and] arguing potentially 'weaker' claims, when the 'stronger' claim arises from a breach of the Charter.[12]

This is counter-productive because it typically requires the government to expend public money running lengthy intervener cases, thereby cancelling out the one benefit that such a limitation had aimed to secure: to reduce the government's exposure to litigation. The ACT fixed this problem in its own legislation in 2008 by introducing s 40C(2) into the HRA, which provides that a person claiming to be affected by a public authority's contravention of the Act may:

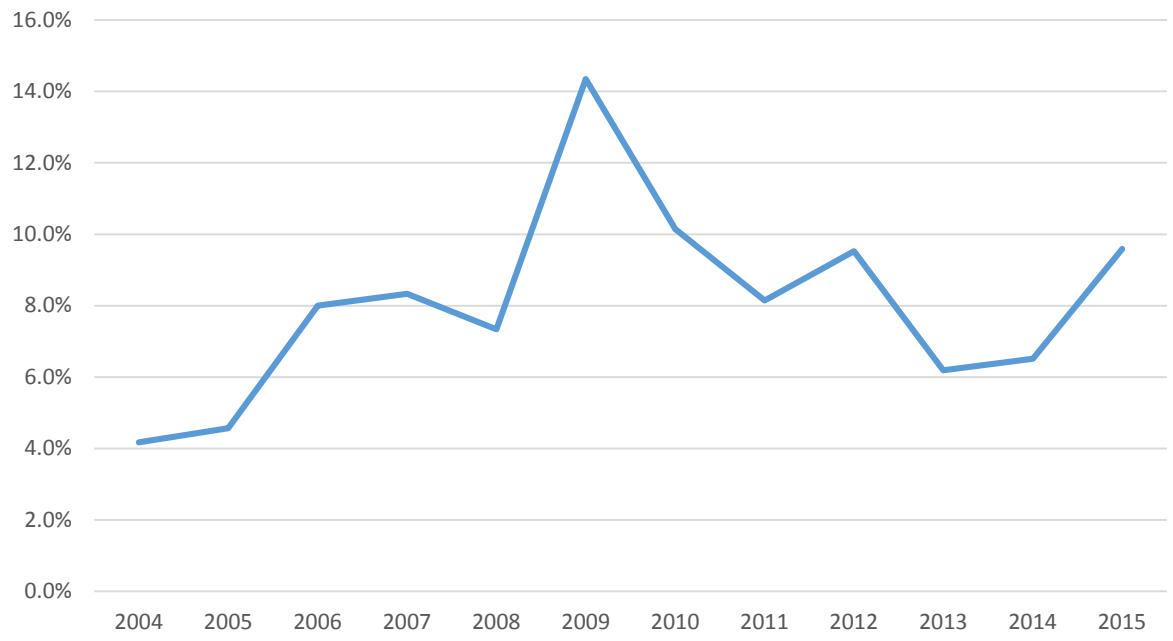
> (a) start a proceeding in the Supreme Court against the public authority; or

[9] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015); ACT Human Rights Commission, *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).
[10] Charter, s 39(1).
[11] Young, above n 9, 119.
[12] Law Institute of Victoria, above n 3, 19.

(b) rely on the person's rights under this Act in other legal proceedings.[13]

As the following Figure shows,[14] while there was a rise in the percentage of cases in the ACT mentioning the HRA in the year that amendment was introduced, that increase has not been sustained:

Figure 1. Percentage of total ACT cases containing mention of HRA



As Young observed in recommending the same reform for Victoria, 'there has not been a flood of applications to the [ACT] Supreme Court in reliance on the freestanding cause of action created by section 40C(2)(a)'.[15] Further, community consultations have repeatedly shown that members of the public want there to be consequences for public authorities that breach human rights. As one individual submitted to the consultation that led to the Victorian Charter, 'if it is nothing more than a statement of what ought to be, without the means to ensure that those statements have legal force, then it is likely to engender cynicism rather than engagement'.[16] More simply still, 'the charter must have teeth'.[17]

If Victoria chooses not to accept independent reviewer's recommendation, it will remain the only jurisdiction in the world to have a human rights act that lacks a direct right of action.[18] In Queensland's case, it should avoid this problem by ensuring that any human rights act enacted in that state contains a stand-alone cause of action from its inception.

2. Legislative Scrutiny

[13] HRA, s 40C(2).
[14] Original research by authors, using data on the ACT Supreme Court, the ACT Court of Appeal, and the ACT Civil and Administrative Tribunal from AustLII: <http://www.austlii.edu.au/>.
[15] Young, above n 9, 126.
[16] Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005) 117.
[17] Ibid.
[18] Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) 23.

Another central feature of the ACT and Victorian regimes is that they require proposed legislation to be subjected to human rights scrutiny by a parliamentary committee. The rationale behind this is to expose impacts upon human rights for parliamentary debate, and to provide an incentive for the drafters of legislation to ensure that such impacts are minimised or eliminated at the drafting stage.

The ACT and the Victorian parliamentary scrutiny systems suffer from problems. In the ACT, the issue is that not all kinds of legislation are subject to scrutiny. For example, the ACT's Standing Committee on Justice and Community Safety (SCJCS), while required to scrutinise all bills for rights compatibility, has no power to do so for delegated legislation.[19] This means a government can evade scrutiny by enacting its more contentious policies in the form of regulations rather than acts. A related issue in the ACT is that both delegated legislation and private members' bills are exempt from the requirement of statements of compatibility, meaning that the Committee is left to divine for itself how any limitations on rights contained in such legislation might be justified.[20] The solution is simple: all forms of legislation should be accompanied by a statement of compatibility and subject to parliamentary scrutiny.

In Victoria, the issue is that its scrutiny committee is not given enough time to carry out its function. The parliamentary sitting calendar means that the Scrutiny of Acts and Regulations Committee (SARC) often has as few as nine working days to scrutinise and report on a bill before it proceeds to debate.[21] In that time the Committee is expected to read and analyse the bill along with its accompanying statement of compatibility; invite submissions from the public and, if it chooses to do so, hold hearings; if the bill raises issues of incompatibility, write to the relevant Minister; wait for and consider any response from the relevant Minister; produce a draft Charter report; circulate that to all Committee members for discussion and approval; and then, publish the report, along with the Minister's response, in the Alert Digest. Finally, before the bill proceeds to a debate, it is expected that parliamentarians will have the opportunity to read and consider the report.[22] This problem of insufficient time has been further exacerbated by a tendency for government to rush bills through parliament.[23]

In light of this, it is unsurprising that the track record of Victoria's SARC in securing amendments to rights-infringing legislation has been poor. As the Chair of that Committee has noted, '[i]n our experience SARC has had little influence over the content of legislation once the bill has been presented to Parliament'.[24] This same issue of delay has also hamstrung the federal Parliamentary Joint Committee on Human Rights from having an impact: in its four-year history, that Committee has made 95 findings that proposed legislation may be incompatible with human rights. 66 of those findings were not published until after the legislation had been enacted into law.[25]

[19] HRA s 38.
[20] ACT Human Rights Commission, above n 9, 14.
[21] Young, above n 9, 179.
[22] Victorian Equal Opportunity & Human Rights Commission, Submission No 90 to the Independent Reviewer, *Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)*, 44–5.
[23] Human Rights Law Centre, Submission to the Scrutiny of Acts and Regulations Committee, *Inquiry and Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, 12.
[24] Young, above n 9, 177.
[25] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* (forthcoming).

Again, there is a fix, which in this case has already been adopted by the ACT: a requirement that no bill proceed to debate until the Committee has reported.[26] Perhaps unsurprisingly, the ACT's Committee has also had the greatest impact, with government members moving almost 100 amendments to bills in response to Committee comments in 2014 alone.[27] The lesson for Queensland is that, if it does choose to require a parliamentary committee to scrutinise new legislation for human rights compatibility, it needs to ensure that the committee is empowered to scrutinise all kinds of legislation, and that it is given sufficient time to do so.

3. Judicial Interpretation

A further feature of the ACT and Victorian regimes is that they require courts to interpret legislation in a rights-compatible way. The text of the relevant provisions in the two Acts is nearly identical, and reads (in Victoria):

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.[28]

Both Acts also provide that in carrying out this interpretive function, '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered'.[29]

Despite the apparent simplicity of these provisions, they have resulted in confusion. In both the ACT and Victoria, courts have divided on how this interpretive function ought to be carried out. A key question is whether the provision amounts to no more than a statutory endorsement of the principle of legality (that is, that legislation is presumed not to infringe fundamental rights unless it is clearly expressed to do so), or whether it amounts to something more flexible and robust like the approach to statutory interpretation set out in *Project Blue Sky Inc v Australian Broadcasting Authority*[30] (where several factors such as text, context and purpose are considered and balanced against each other).

The high point of this confusion was reached in 2011 when the High Court handed down its decision in *Momcilovic v The Queen*,[31] an appeal from the only decision to date in which a Victorian court has made a declaration that 'a statutory provision cannot be interpreted consistently with a human right'. In that decision, the High Court divided evenly on the first question of whether the interpretive process is more akin to the principle of legality or to the *Project Blue Sky* approach. This has been detrimental to the Victorian and ACT instruments, as, their effectiveness is greatly reduced when uncertainty attaches to the important judicial function of interpreting legislation in light of the protected rights. To borrow the words of Justice Gageler in a different context, '[t]here is a net cost to society which arises from uncertainty as to the principle to be applied'.[32]

The consequence of *Momcilovic* for Queensland is that, if it simply copies the interpretive provisions contained in the ACT and Victorian Acts, it will inherit the uncertainty afflicting those jurisdictions. Rather, it should sidestep this by enacting a new form of interpretive

[26] Legislative Assembly (ACT), *Standing Orders and Continuing Resolutions of the Assembly*, June 2015, Standing Order 175.
[27] ACT Human Rights Commission, above n 9, 13.
[28] Charter s 32(1); see also HRA s 30.
[29] Charter s 32(2); see also HRA s 31(1).
[30] (1998) 194 CLR 355.
[31] (2011) 245 CLR 1.
[32] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 242.

provision that sets out, step by step, how courts are expected to perform their duty. There are multiple ways it can do this, but one way might be a provision that states:

> **Interpretation**
>
> (1) So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.
>
> (2) For the purpose of this section, international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered.

This proposal bears some similarity to the recommendation for a new interpretive provision made by Young in the 2015 Charter Review.[33] Both Young's proposal and the above seek to make clear that the interpretive process should operate similarly to the *Project Blue Sky* approach to statutory interpretation, rather than as a statutory codification of the principle of legality. In both proposals this is achieved by requiring legislation to be 'interpreted in *the* way that is *most* compatible with human rights', rather than simply 'in *a* way that *is* compatible'.

We go one step further than Young by updating the requirement that provisions be interpreted 'consistently with their *purpose*' to read 'consistently with their *language, context and purpose*', as this makes it clear that each of these factors should be considered and weighed against each other. We have also dispensed with Young's recommendation for a subsequent provision requiring that apparently incompatible legislation be interpreted in the way that is 'least incompatible' with rights, as we believe this to be superfluous given the 'most compatible' requirement.

The above proposal resolves the uncertainty at the heart of how the interpretive provision operates. It clarifies that judges are expected to reach an interpretation that is as compatible with rights as possible. What the proposal does not deal with is the later question of when judges should make a declaration that a statute is incompatible with human rights. This has also proven to be a vexed issue in the ACT and Victoria, although not one that we will canvass in detail here. As above, the effectiveness of the solution will depend upon its clarity. One way to bring clarity to this aspect of the interpretive process would be to have a provision that sets out how judges are to arrive at the conclusion that a provision cannot be interpreted compatibly with human rights. That provision should spell out the criteria by which courts are to determine whether any limitations upon rights are reasonably justified. That would have the benefit not only of ensuring a consistent approach across courts, but also of giving legislators a clearer idea of how much leeway they have in drafting legislation that may have a limiting effect on rights.

Our proposal represents one of several ways to resolve the issues that have beset the ACT and Victoria. Whichever way it proceeds, the main objective for Queensland will be to ensure that any interpretive provision it adopts is clear and relatively comprehensive.

Conclusion

Australia is on a long journey when it comes to the protection of human rights. Since 2004, states and territories, rather than the Commonwealth, have led the way. Queensland is the latest

[33] See Young, above n 9, 148.

jurisdiction to do so. It has the advantage that it can learn from the many years of experience of the models that have operated in the ACT and Victoria. These regimes have enjoyed significant successes, but have also exposed problems about how such laws should be drafted.

This provides a significant opportunity for Queensland, which can enact its own human rights act in a way that overcomes these concerns. In particular, any Queensland law should:

- Provide a stand-alone cause of action;
- Ensure that a parliamentary committee charged with a scrutiny function is empowered to scrutinise all kinds of legislation, and is given enough time to do so; and
- Contain a clear judicial interpretive provision.

If Queensland can apply these lessons, it stands to gain the best-drafted human rights act in the country.

Yours sincerely

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