Submission

on the

Human Rights Inquiry

to the

Legal Affairs and Community Safety Committee

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1. Introduction

On 3 December 2015, the Legislative Assembly directed the Legal Affairs and Community Safety Committee (the committee) to inquire into whether it is appropriate and desirable to legislate for a Human Rights Act (HR Act) in Queensland, other than through a constitutionally entrenched model.

The Committee is due to report to Parliament by 30 June 2016.

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all mainstream Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

FamilyVoice has had a longstanding interest in upholding fundamental human rights and freedoms.

Submissions are due Monday, 18 April 2016.

2. Terms of Reference

The terms of reference for the inquiry are:

1. *That the Legal Affairs and Community Safety Committee inquire into whether it is appropriate and desirable to legislate for a Human Rights Act (HR Act) in Queensland, other than through a constitutionally entrenched model.*
2. *That, in undertaking the inquiry, the committee consider:*
    a. *the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms;*
    b. *the operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally;*
    c. *the costs and benefits of adopting a HR Act (including financial, legal, social and otherwise); and*
    d. *previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation.*
3. *That, if the committee decides it would be appropriate and desirable to legislate for a HR Act in Queensland, the committee consider:*
    a. *the objectives of the legislation and rights to be protected;*
    b. *how the legislation would apply to: the making of laws, courts and tribunals, public authorities and other entities;*
    c. *the implications of laws and decisions not being consistent with the legislation;*
    d. *the implications of the legislation for existing statutory complaints processes; and*
    e. *the functions and responsibilities under the legislation.*

4. *That the committee invite public submissions, consult with the community and key stakeholders and report to the Legislative Assembly by 30 June 2016.*

3. The effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms

3.1. The effectiveness of current laws and mechanisms for protecting human rights

Human rights are protected in Queensland by a Westminster-style democracy:

- a parliament (without an upper house) which makes laws and is accountable to the people at each election;
- an executive government accountable to the parliament; and
- a judicial system, including the common law and the rights and freedoms it protects.

Several additional elements serve to protect human rights in Queensland, namely a written constitution and a neutral head of state in the Governor who ensures due constitutional process.

This system recognises historical experience that the greatest threat to human rights has arisen from tyrannical governments which have concentrated power in a dictator or small oligarchy.

Human rights are best protected in Queensland, not by a single "rights" document like a charter which needs to be interpreted by the judicial elite, but by deliberation and debate within and between the different arms of this constitutional system of government.

In the Western world in the past, a system of checks and balances has usually been an important part of the protection of human rights. Free nations establish a constitutional division of powers between the legislature, the executive and the judiciary. As the late Sir Harry Gibbs, one of the greatest Chief Justices of the High Court of Australia, pointed out, the most effective way to curb political power is to divide it. He said that a "constitution which brings about a division of power in actual practice, is a more secure protection for basic political freedom than a bill of rights, which means those who have power to interpret it say what it means."[1]

The benefits of this system have been outlined by former News South Wales Labor Premier Hon Bob Carr who said:

> *I and others will take issue with any attempt by a group of zealots to arrogate to themselves the power to define, codify and nail down their definition at this time of what they think ought to be our rights. Talk about elitism.*
>
> *Rights count. So much so they need the give and take of the common law, rowdy parliaments and the ebb and flow of public opinion.*
>
> *It's the commonsensical ethos of a people – temper democratic, bias offensively Australian – not a declaration of abstractions that will keep us free.*[2]

Human rights are best protected in Queensland by a Westminster system with the distinct roles for parliament (including an upper house), the executive government and the judiciary.

Recommendation 1:

The protection of human rights in Queensland should rely on the process of deliberation and debate within and between three arms of government each with its distinct role – parliament (including an upper house), the executive government and the judiciary.

3.2. Possible improvements to current mechanisms

Restoring an upper house to the Queensland Parliament would be the single most important action to improve protection of human rights in Queensland.

The problem of power

Lord Acton recognised the problem of power in his famous letter to Bishop Mandell Creighton in 1887: "All power tends to corrupt and absolute power corrupts absolutely."[3]

British Prime Minister William Pitt the Elder had said much the same thing in a speech to the House of Lords in 1770: "Unlimited power is apt to corrupt the minds of those who possess it."[4]

Earlier still, French philosopher Baron Charles-Louis de Montesquieu noted the problem in his book *The Spirit of the Laws* (1748). He suggested limiting the tendency for governments to become tyrannical, by proposing a "separation of powers".

Montesquieu believed that power in society should be separated among the three French classes: the monarchy, the aristocracy and the commons (ordinary people). He said that such a system would provide "checks and balances" – thus coining a phrase we still use today.

Montesquieu said a government must have certain features if its citizens are to have the greatest possible liberty. He said that since "constant experience shows us that every man invested with power is apt to abuse it ... it is necessary from the very nature of things that power should be a check to power". This can be achieved by separating the executive, legislative, and judicial powers of government. If different persons or bodies exercise these powers, then each can check the others if they try to abuse their powers. If only one person or body holds several or all of these powers, then nothing can stop that person or body from acting tyrannically.[5]

He also said the parliament (or legislature) should be composed of two houses, each of which can prevent acts of the other from becoming law. The judiciary should be independent of both the parliament and the government. Judges should restrict themselves to applying the laws to particular cases in a fixed and consistent manner.[6]

Montesquieu visited Britain from 1729 to 1731. He expressed admiration for its system of government which had evolved over many years to embody, if somewhat imperfectly, many of the ideas he later expressed in *The Spirit of the Laws*.

This book had great influence on political leaders across the Atlantic as they began framing a constitution for the new United States of America. At the US Constitutional Convention of 1787, *The Spirit of the Laws* was frequently cited as delegates attempted to lay down the principles for a government that would maximise political liberty while also maintaining the rule of law. The resulting Constitution reflected many of Montesquieu's ideas, including his advocacy of a separation of powers via such measures as bicameral parliaments.[7]

The Australian Senate – constraining government power

The eminent Australians who framed the Australian Constitution in the late 19th century were well aware of the need for a separation of powers. They drew upon experience in other countries, especially Britain, the US and Switzerland, to devise a system of government in which no single group could gain absolute power. They designed a bicameral parliament with a lower house called the House of Representatives and upper house called the Senate – as in the US.

Harry Evans, Clerk of the Senate from 1988 to 2009, wrote in 2008: "Australia may be regarded as one of those fortunate societies which has managed to deal with the problem of power by constructing a system in which the power of the state is constrained by power controlling power. The Australian Constitution has many of those safeguards which arise from that construction:

- a practically irremovable constitutional monarch, operating through a prestigious representative;
- federalism: an entrenched division of power between the centre and the states;
- the cabinet system, which ensures collective decision-making by a politically responsible group rather than one person;
- responsible government, whereby the holders of the executive power can be removed at any time when the legislature (parliament) loses confidence in them;
- an independent judiciary with a powerful constitutional court."[8]

However, Harry Evans believed that these safeguards had been weakened over time. Various High Court rulings have meant that the Commonwealth Government can and does interfere with the responsibilities of the states. The cabinet is largely controlled by the prime minister and his inner circle, who dictate votes in the lower house where the government always has a majority. Members of the judiciary are appointed by the executive alone – if governments hold power for long enough, the High Court can be stacked with judges of a particular or extreme ideology.

The Senate, with 12 senators elected from each state and two from each territory, stands out as a lone bulwark against the otherwise relatively unfettered power of the prime minister and government of the day. The method of election (by proportional representation since 1949) usually ensures that the government does not have a majority of senators and must negotiate with other parties to achieve its legislative aims.

Governments tend to dislike upper houses for this very reason – they act as a check on government power. Former Australian Prime Minister Paul Keating once described the Senate as "unrepresentative swill",[9] even though its members represent the diversity of Australian viewpoints more effectively than the House of Representatives. Other government leaders have complained that upper houses "obstruct" government legislation.

Harry Evans said that the "obstructionist" charge against the Senate is not supported by the facts.

> *In the first ten years of the Howard government, during which it lacked a majority in the Senate, an average of 154 bills were passed each year. There were only 17 deadlocked bills in the term 2001-2004…*
>
> *… It may be argued that they were important bills. The contrary consideration is that, lacking broader support, they did not deserve to pass. Many more passed that were also important.*

> *Thus there was little obstruction. Many bills passed because the government compromised with other parties and accepted amendments. This can hardly be called obstruction; it is what legislatures are meant to do, according to the textbooks.*[10]

Evans said Senate inquiries may be even more important than the Senate's legislative role:

> *During its history the Senate has adopted measures which have had the effect of compelling governments to provide information and to explain themselves in ways that would otherwise not be required… These measures ranged from insisting in 1901 on details of proposed expenditure in appropriation bills, to requiring in 2001 the publication on the internet of details of government contracts. All of these measures depended, directly or indirectly, on governments not having control of the Senate…*
>
> *Of particular significance was establishment in 1981 of the Scrutiny of Bills Committee, to scrutinise all legislation to detect any violations of civil rights or of legislative propriety. This measure was taken, in a period when the Fraser government had a majority in the Senate, only because several government senators promoted it and then voted against the government on the issue.*[11]

NSW Legislative Council – uncovering corruption

The NSW Legislative Council was originally an undemocratic body – its members were appointed by the governor on advice from the government of the day. However this changed with reform in 1978, when 45 Council members were elected by proportional representation from the whole state, with a third of the seats contested at each election. In 1991 the number of Council members was reduced to 42, with half the seats contested each election.[12] Proportional representation has made possible the election of minor parties who are not normally able to achieve lower house seats – such as the Greens and the Christian Democratic Party.

Harry Evans described some of the ways in which the NSW Legislative Council provides a safeguard against tyranny. One example is the Council's power to require the NSW government to produce documents on matters of public concern, in situations where the government wanted to protect itself by keeping the documents secret.

> *In 1996, when the Treasurer (a member of the NSW Legislative Council) refused to disclose documents in response to an order, the Council ejected him from the chamber and from the building. He was sufficiently ill-advised to take the Council to court, and lost the case comprehensively… The NSW Supreme Court upheld the power of the Council to impose a penalty for refusal of an order for documents… Council orders for documents have now become so unremarkable that they go unreported … the first disclosures of disturbing information about the financial entanglements of the cross-city tunnel were the result of a Council order.*[13]

Queensland's lost upper house

The Queensland Legislative Council chamber, complete with plush red carpet and furnishings, is still in use in Brisbane's Parliament House. It provides a dignified setting for official openings of parliament by the Queensland governor, and the occasional reception or poetry reading. However its original purpose – to serve as an upper house to constrain abuse of power by the Queensland government of the day – ceased in 1922 when the Council was abolished, in defiance of an earlier referendum.

The bicameral parliamentary system of the new colony of Queensland, set up in 1860, was copied from the parent colony of New South Wales. Members of the Queensland Legislative Council were appointed by the governor on advice from the premier of the day, for life.

Since early governments were conservative, so were the unelected upper house MPs. The Australian Labor Party was formed and began to win government in the 1900s. The ALP was unimpressed when the Council blocked part of its reform agenda. In 1915 the Queensland Labor government twice passed a bill in the Legislative Assembly to abolish the upper house – but the Legislative Council, comprising mostly non-Labor MPs, rejected it.

To resolve the deadlock, the government held a referendum to abolish the Council in 1917. But most people – 179,105 – voted a clear no. The yes vote was just 116,196. Queenslanders wanted to keep their parliamentary safeguards.[14]

Labor forces were not deterred. Over the next few years, Labor governments advised the governor to appoint a total of 30 new Labor members of the Legislative Council – enough to defeat the remaining conservative members. A bill to abolish the Council eventually passed in 1921 and came into effect in 1922. Some conservative calls for reform rather than abolition of the upper house had fallen on deaf ears.

Nicholas Aroney and Scott Prasser comment:

> *Queensland's Constitution was thus fundamentally altered through successive acts of executive and legislative power effectively concentrated in the hands of the premier and cabinet. And, indeed, the politics of Queensland have ever since been determined by this same concentration of power – executive and legislative – in the hands of a small coterie of politicians. If there was no separation of powers under the conservative regime of Premier Bjelke-Petersen, its origins are to be traced to the abolition of the Legislative Council by the progressive forces of 1922…*
>
> *As Justice Bruce McPherson has pointed out, 'In fashioning an instrument of unlimited power for their own use, the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of executive authority in Queensland can be in no doubt who were responsible for creating it.'*[15]

While other states have at times been plagued by government corruption, Queensland has arguably experienced more of it. In recent times, Queensland governments have attempted to deal with the lack of government accountability associated with their "winner takes all" power in the single house. They have established a Crime and Misconduct Commission and parliamentary committees.

However these attempts have not succeeded, since members of the CMC are appointed by the government,[16] and every parliamentary committee has a majority of government members. Only an upper house, elected by a different method from the lower house (like the Senate), can provide independent oversight of government operations and adequate review of legislation.

Aroney and Prasser argue that Queenslanders should vote in a referendum to restore their upper house of parliament:

> *Queensland's present unicameral legislature fails to deliver democratic practice, effective citizen participation, regional and minority representation and accountable government. An upper house for Queensland is an idea whose time has come…*[17]

A restored upper house – proportional representation

All lower houses in Australia, except those of Tasmania and the ACT, are composed of members elected from single-member electorates. This favours large political parties and generally results in a party or coalition having a clear majority in the lower house, thereby enabling the formation of a strong government. In the absence of an upper house, however, an unfettered government may become effectively an elected dictatorship.

A government having no effective checks on its power can become crudely "majoritarian" and ignore the views even of substantial minorities in the community. In contrast to majoritarianism, a healthy democracy, according to John Stuart Mill, includes a "willingness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views."[18]

For an upper house to provide an effective check on such majoritarian rule it is desirable that it is not usually controlled by any major party or coalition. Rather, the composition of the upper house should reflect a broader range of community opinion than the lower house. This is best achieved with multi-member electorates and proportional representation as the voting system.

A good example of multi-member electorates is provided by the Australian Senate, for which each state acts a single electorate from which six senators are elected at each election. For state legislative councils, the whole state acts as a single electorate in New South Wales and South Australia. For electing the legislative councils in Victoria and Western Australia, the states are divided into several multi-member regions, each returning several members. In Victoria, five members are elected from each of eight regions. In Western Australia, six members are elected from each of six regions.

Either approach would be feasible in Queensland.

Proportional representation has proved successful as an upper house voting method that achieves a broader composition including independents and representatives of the larger minor parties as well as the major parties. As a result, the government party or coalition seldom controls the upper house and must negotiate contentious legislation with others. Usually, this results in modified legislation that is more acceptable to a larger proportion of the community – a good democratic outcome.

For a candidate to be elected from a multi-member electorate by proportional representation, his or her total number of votes must exceed a quota. The quota is the total number of formal votes divided by one more than the number of candidates to be elected. For example, in a regular Senate election where there are six senators to be elected in each state, the quota is the number of votes divided by 7, that is approximately 14%. This system generally results in the upper house better reflecting the spread of political views in the community rather than being completely dominated by the major political parties.

A restored upper house – rotation and double terms

Another positive contribution that upper houses can make to good government is stability. When the government formed in the lower house changes, a new and inexperienced government may make hasty decisions and introduce ill-conceived legislation. An upper house elected by rotation, with only half of the members facing re-election each time, provides greater continuity of experience and stability.

Governments formed in the lower house are rightly accountable to the people at elections every three or four years. However this can lead to short-term thinking and planning which may not be in the best interests of the state. A longer term for upper house members has the advantage of encouraging a longer-term perspective when government legislation is reviewed. Even members of a major party are encouraged to think more independently when they don't have to face an election so frequently.

A rotation system of re-election works well in states where the upper house is elected from the whole state as a single electorate. In New South Wales, the upper house has 42 members with 21 elected each time from the whole state. The quota of 1/22, or about 4.5%, enables several smaller parties to be represented. In South Australia, the upper house has 22 members with 11 elected each time from the whole state. The quota of 1/12, or about 8.3%, is also within reach of some smaller parties.

The Australian Senate also uses the rotation system of re-election. Each state is represented by 12 senators, with six being elected at alternate normal elections.

Restoring an upper house is a matter of priority

Sir Winston Churchill famously said "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."[19]

Upper houses, as they have developed in Australia, have proved to be an effective means of improving the way democracy works by providing an important check on the growing power of executive governments.

The restoration of an upper house in Queensland should be a matter of priority for all those who value good government and who want to improve integrity and accountability.

Recommendation 2:

The restoration of an upper house to be elected by a method of proportional representation, with six year terms and mid-term rotation of half the members should be made a matter of priority.

4. The operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally

A principal criticism of charters of rights is that they transfer important functions from elected parliaments to unelected courts particularly by bestowing on courts a power to interpret all other statutes and subordinate legislation in the light of the enumerated rights in a charter as understood by the court.

The experiences of Victoria and the Australian Capital Territory within Australia and the United Kingdom internationally illustrate this.

4.1. Victoria's Charter of Human Rights and Responsibilities Act 2006

Effects of the Victorian Charter on litigation and the role of courts and tribunals: the interpretive provision (Section 32 (1))

In the *Charter of Human Rights and Responsibilities Act 2006 (VIC)* the relevant section setting out the interpretive power reads as follows:

> *32. Interpretation*
>
> *(1) 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.*

The meaning of this provision has been hotly contested – in parliament when the bill was debated, by commentators in public discourse and, not least, by tribunals and courts – with widely differing interpretations being offered.

The key point at issue has been to what extent this provision allows a court to "read into" a statutory provision a meaning other than that intended by the parliament which enacted it in order to make it compatible with the human rights enumerated in the Charter as understood by the court.

Judge Harbison, Vice President of the Victorian Civil and Administrative Tribunal, opined in her judgment in the case of *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415 (26 November 2008) that:

> *In deciding this application, I must consider the Charter because s32 clearly tells me that in interpreting all statutory provisions (and I take that to mean whether they are ambiguous or clearly expressed), I must make sure that I do so in a way that is compatible with human rights.*[20]

The learned judge proceeded to find that Section 32 of the Charter did in fact change the interpretation of Section 83 of the *Equal Opportunity Act*, significantly narrowing the grounds on which an exemption from anti-discrimination provisions of the Act could be granted.

Chief Justice Warren of the Supreme Court in the case of *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009) interpreted a provision in that Act which in certain circumstances abrogated the privilege against self-incrimination as extending derivative use immunity to the person, despite the fact that the statute itself clearly provided only a much more limited form of immunity. The extended immunity had to be "read in" by the judge.

The judge essentially used the Charter interpretive provision to second guess the parliament on the balance to be achieved between the privilege against self-incrimination and the difficulty and importance for the well-being of the community of prosecuting cases of organised crime.

On 17 March 2010 the Victorian Court of Appeals issued its judgment in the case *R v Momcilovic*[21] [2010] VSCA 50 (17 March 2010). The court decisively rejected the approach adopted by Chief Justice Warren and distinguished Section 32 (1) of the Charter from the parallel provision in the UK *Human Rights Act 1998*.

At 74 the court said:

> *With great respect to Bell J, we do not agree that the insertion into s 32(1) of the words 'consistently with their purpose' was intended to 'put into s 32(1) the approach to s 3(1) adopted by the House of Lords in Ghaidan'. In our view, the insertion of those words of limitation stamped s 32(1) with a quite different character from that of s 3(1) HRA, which was said in Ghaidan to require the court where necessary to 'depart from the intention of the Parliament which enacted the legislation'. In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament.*

The court rejected submissions that it could use a broad understanding of section 32 (1) to read down a provision in the *Drugs, Poisons and Controlled Substances Act 1981*, which reversed the onus of proof on a person accused of possession of drugs to establish that drugs found in the person's residence were not in the person's possession, to require only an evidential burden of proof (providing some evidence to raise a doubt) rather than a legal burden of proof (providing evidence that was persuasive on a balance of probabilities).

The result of applying a narrower understanding of the interpretive provision of the Charter was that the court found that there was no meaning of the relevant provision in the *Drugs, Poisons and Controlled Substances Act 1981* which was compatible with the Charter right to be presumed innocent.

The court further considered that the limitation on the right to be presumed innocent was not "demonstrably justified" under section 7(2) of the Charter. The court then set a high bar for any government seeking to claim such "demonstrable justification" for a provision incompatible with Charter rights:

> *The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).*

The implication is that to avoid a court issuing a declaration of inconsistent interpretation, as the court did in this case, a government must persuade the court of the validity of its reasons for limiting the Charter right. This seems to improperly involve the court in the exercise of making public policy by weighing the respective arguments for a policy decision.

Ms Momcilovic appealed the case to the High Court. In 2011, the Court handed down its judgment. A summary of it is as follows:

> *In relation to the validity of the Charter, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that s 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts. With respect to the declaration of inconsistent interpretation made by the Court of Appeal, French CJ and Bell J held that s 36 of the Charter was valid but that there could be no appeal to the High Court from a declaration made under that section. Crennan and Kiefel JJ held that s 36 of the Charter was valid but that a declaration of inconsistent interpretation should not have been made by the Court of Appeal in this proceeding. Gummow, Hayne and Heydon JJ held that s 36 was invalid for impermissibly impairing the institutional integrity of the Supreme Court. As a majority of the Court was of the view that the declaration of inconsistent interpretation made pursuant to s 36 either was invalid or ought not to have been made by the Court of Appeal in this proceeding, the Court ordered that the declaration be set aside.*[22]

As long as the interpretive provision remains there will continue to be a lack of clarity as to the meaning of all Victorian statutes which conceivably touch on human rights. Such a lack of clarity is contrary to the desirability of law to be transparent and its meaning reasonably ascertainable.

The rule of law includes the important principle that laws are published and available for consultation so that the citizen can know at any time what laws he must obey and what penalties he may face for violating the law.

Charter-based interpretation of laws by the courts undermines the rule of law and substitutes for it rule by judges. No one can know what the law means until a judge tells him. No one then can act in a way that complies with the law and avoid violating it.

This is a form of tyranny. A person may find himself having violated the law because a judge has just interpreted a statute contrary to its plain meaning but in a way considered necessary by the judge to give the statute have a charter-compatible meaning.

Recommendation 3:

The Victorian Charter has caused the transfer of considerable power from the elected Parliament to unelected judges by empowering the courts to creatively interpret legislation to achieve compatibility with the charter or to declare statutory provisions to be incompatible with the charter. These provisions have increased uncertainty about the meaning of the law and have undermined democratic processes. For these reasons Queensland should not enact a Charter of Rights.

Trivialising human rights

The Institute of Public Affairs has identified several examples of statements of compatibility that trivialise human rights issues.

The list is indicative of the waste of resources and parliamentary time created by the Victorian Charter's requirement for statements of compatibility:

- whether a prohibition on the possession of implements to engage in identity theft infringes the right to freedom of expression (*Crimes Amendment (Identity Crime) Bill 2009*)

- whether requiring persons who serve on town planning committees to disclose their interests on a register of interests infringes their right to privacy and reputation (*Planning Legislation Amendment Bill 2009*)

- whether granting or extending a lease over Crown land to a person to run a kiosk or other facility infringes the right to freedom of movement by preventing other citizens moving freely over that piece of Crown land (*Crown Land Amendment (Leases and Licences) Bill 2009*)

- whether banning graffiti is a justifiable limitation of the freedom of expression of graffiti 'artists' (*Graffiti Prevention Bill 2007*)

- whether the ability of a fire safety inspector to evacuate licensed venues that are a serious fire hazard is a justifiable limitation on freedom of movement (amendments to the *Liquor Control Reform Act 1998* made by the *Justice Legislation Further Amendment Bill 2010*)

- whether police powers to seize ice pipes for sale in retail shops is a justified limitation of property rights of ice pipe retailers (amendments to the *Drugs, Poisons and Controlled Substances Act 1981* made by the *Justice Legislation Further Amendment Bill 2010*. The Statement of Compatibility reassures readers that "*If an ice pipe is seized, it must be returned within three months*".)[23]

These examples show how the requirement to prepare a statement of compatibility with the Charter for every bill introduced to the Victorian Parliament has resulted in squandering of resources analysing pointless issues, wasting parliamentary time and trivialising human rights. Such statements also have the potential to undermine the legitimate responsibility of the Parliament to legislate for the good order and government of the people of Victoria.

Effects of the Victorian Charter on provision of services by public authorities

The Victorian Equal Opportunity & Human Rights Commission's 2010 report on the operation of the Charter claims that the Charter is having a significant effect on the provision of services by public authorities.[24]

Some examples offered include:

- Consumer Affairs Victoria producing information for people with disabilities, Indigenous consumers and consumers from culturally and linguistically diverse backgrounds in accessible formats;

- The Department of Health making a commitment to "*involving people in informed decision making about their treatment*";

- Corrections Victoria working with the Koori community on programs for released prisoners to reduce the risk of reoffending;

- New facilities for accommodation for the homeless; and

- Boorandarra City Council making provision for blind people to know, in the absence of gutters, where the "footpath ends and the road begins".

The obvious question with these examples is whether or not the Charter really contributes in any significant way to public authorities simply doing their mandated job in a sensible manner. It is noteworthy that the moral obligation to care for the blind was enunciated thousands of years ago in our Judaeo-Christian heritage: *"*You shall not curse the deaf or put a stumbling block before the blind, but you shall fear your God: I am the LORD*"* (Leviticus 19:4).

On the other hand, some examples offered by the Commission raise concerns about possible negative effects of the Charter.

The decision by Moreland City Council to ban from using Council facilities all sporting clubs that are unable to show that "they are actively including women, juniors, people with a disability and people from culturally diverse backgrounds in their clubs" seems an unnecessarily draconian policy based on a misapplication of the "right to equality".[25]

The Victorian Law Foundation's decision to "consult with children about proposed reforms to the Children's Court and to ensure that their concerns are reflected in the reforms"[26] is also of dubious value.

Recommendation 4:

Given the lack of substantial evidence that the Victorian Charter is directly responsible for any significant improvements in the provision of services by public authorities, no such claim should be accepted as a reason for enacting a Charter in Queensland.

Effects of the Victorian Charter on litigation and the role of courts and tribunals: importing international law

Section 32 (2) of Victoria's *Charter of Human Rights and Responsibilities Act 2006* provides that:

> *International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.*

United Nations treaty monitoring bodies have expressed the view that, among other things, governments should protect human rights by:

- refusing to foster the observance of Mother's Day;
- prohibiting parents from withdrawing their children from a sex education class;
- ensuring that at least 30 percent of children under age three are in full time day care;
- denying doctors or hospitals the right to conscientiously object to participation in abortion;
- denying economic support to mothers who choose to stay at home;
- allowing children to access medical or legal counselling without parental consent;
- allowing teenagers to access to abortion without parental knowledge; and
- denying religious bodies any exemptions from anti-discrimination laws.[27]

These views all touch on matters that are socially contentious and which should remain the business of elected, accountable parliaments and the executive governments answerable to those parliaments.

As pointed out earlier, a decision of the European Court of Human Rights declared that random search provisions violate the right to a private life in European human rights law.[28] This decision apparently led the Victorian Minister for Police and Emergency Services to declare that such provisions in government bills were incompatible with the Charter right to privacy.[29]

In *Director of Public Transport v XFJ* Ross J of the Supreme Court of Victoria opined that:

> *interpretation of the Charter requires consideration of general human rights standards and jurisprudence, not simply the application of domestic cases concerning different statutory regimes. International human rights law and comparative jurisprudence supports a different, more flexible, approach to disability discrimination than that adopted by the majority in Purvis [a recent judgment of the High Court of Australia].*[30]

While this case was decided on other grounds, it is a matter of some concern that a judge of the Supreme Court of Victoria would consider that the Charter operates so as to direct Victorian courts to *prefer* the approach of international courts to statutory interpretation over that of the High Court

of Australia. This is particularly concerning since section 73 of the *Commonwealth of Australia Constitution Act* provides that "the judgment of the High Court ... shall be final and conclusive."

Effects of the Victorian Charter on litigation and the role of courts and tribunals: the right to freedom of belief

Section 14 of the Charter provides for the right to freedom of thought, conscience, religion and belief as follows:

> *(1) Every person has the right to freedom of thought, conscience, religion and belief, including–*
>
> *(a) the freedom to have or to adopt a religion or belief of his or her choice; and*
>
> *(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
>
> *(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

The interpretation of this right, and the consideration of its relationship with "the right to equal and effective protection against discrimination" provided for by section 8 (3) of the Charter, was considered by Hempel J of the Victorian Civil and Administrative Tribunal in *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination).*[31]

The case involved the refusal by Christian Youth Camps Ltd (CYC), a company conducted by members of the Christian Brethren, to accept an application for a booking for the use of a campsite run by the company from a group called WayOut, which works with groups of young people from rural Victoria "to provide an environment that is welcoming to same sex attracted young people."[32]

Hempel J invoked the Charter in interpreting the relevant provisions of the *Equal Opportunity Act 1995*:

> *The correct approach, in my view, when considering the interpretation of the provisions of the EO Act relevant to the complaint, that is those relating to the definition of discrimination in ss 7 and 8, of the provision of services and accommodation in ss 42 and 49, and whether Cobaw had standing to bring a representative complaint under s 104(1B), is to interpret those provisions in a way that gives effect, as far as possible consistently with the purposes of the EO Act, to the realisation of the right of equality and freedom from discrimination in s 8(2) and (3) of the Charter.*
>
> *In considering the interpretation of the provisions of the EO Act relevant to the exceptions relied on by the respondents, that is s 12 and ss 75(2) and 77, that I must interpret those provisions in a way that gives effect, as far as possible consistently with the purposes of the EO Act, to the realisation of the rights of freedom of religion and expression in ss 14 and 15 of the Charter, and of the right of equality and freedom from discrimination in s 8 of the Charter.*[33]

The case highlights the potential conflict between Charter rights.

Hempel J set out her approach to dealing with this conflict as follows:

> *A construction that advances the purposes or objects of the EO Act would favour a narrow, not broad, large or liberal interpretation of the exceptions. The inclusion of the exceptions in the EO Act evidences Parliament's intention to strike a balance between the right to be free from discrimination, and the right to freedom of religious belief, and the point at which the*

> *balance is struck. In construing the exceptions, the right to freedom from discrimination must not be curtailed unless "clearly manifested by unmistakeable and unambiguous language".*
>
> *These principles referred to in the previous paragraph must be considered in light of s 32 of the Charter. The complainant did not take issue with the Commission's submission that, when construing ss 75(2) and 77 the right to equality and freedom from discrimination under s 8 of the Charter invoked by the complainant was required to co-exist with the rights to freedom of thought, conscience, religion and belief and freedom of expression in ss 14 and 15 of the Charter invoked by the respondents. The complainant and the Commission both submitted that just as the s 8 rights to equality and freedom from discrimination were not absolute and may be limited in accordance with s 7(2) of the Charter, so too were the rights to freedom of religion and expression not absolute. They too were subject to limitation pursuant to s 7(2).*
>
> *The respondents submitted that s 32 of the Charter required ss 75(2) and 77 of the EO Act to be interpreted in a manner consistent with the rights to freedom of religion under s 14 and expression under s 15, but without regard to the right to equality and freedom from discrimination in s 8. The effect of the respondents' submissions was that the freedom of religion and expression rights trumped the equality and freedom from discrimination rights relied on by the complainant. For the reasons I expressed when addressing the respondents' submissions about what Charter rights were engaged in this proceeding, that is not a tenable submission having regard to s 7(2) of the Charter which requires both rights to co-exist.*
>
> *I accept the Commission's submission that when considering the application of the Charter rights to the exceptions, both sets of rights invoked by the parties may be limited for the purpose of protecting the rights of another person. I also accept the Commission's submission that it is necessary to examine the content of the respective rights to determine the relevance of those rights in the task of interpreting the exceptions. This must be done, not in the abstract, but by reference to the words of the provisions setting out the exceptions.*
>
> *I must therefore interpret sections 75(2) and 77, having regard to the purpose of those exceptions, namely to protect religious freedoms, and in a manner consistent with the rights to freedom of thought, conscience, religion and belief in s 14 of the Charter, and freedom of expression in s 15 of the Charter but also, so far as is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the Charter. I must do so in a way which does not privilege one right over another, but recognises their co-existence.*[34]

In the light of this approach Hempel J went on to make the following extraordinary findings:

- notwithstanding very explicit religious purposes in its trust deed CYC was not a religious body for the purposes of the exception in section 75 (2) of the *Equal Opportunity Act 1995*;

- that the *only* "doctrine" of the Christian Brethren was the plenary inspiration of Scripture so that any beliefs they had about homosexual behaviour based on the *interpretation* of Scripture were not doctrine and therefore could not establish a need to discriminate to comply with their doctrine;

- that notwithstanding the strongly expressed views of all the Christian Brethren who gave evidence that "they and other Christian Brethren would be offended, horrified or greatly or very upset, if WayOut conducted its proposed forum at the adventure resort", this was not grounds for concluding that the refusal to take the booking was necessary to avoid injury to the religious sensitivities of people of the religion (section 72 (b) (a)). [35]

  "Injury in this context means more than mere offence. Injury means causing harm. … The harm must be real, and significant. In our secular and pluralistic society, freedom of

religious belief and expression carries with it acceptance of the right of others to hold different beliefs, and for those who hold different beliefs to be able to live in accordance with them. This is the essence of the difference between the freedom to hold one's own beliefs, and the right to impose those beliefs on others."[36]

- "The conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality. They are entitled to their personal and religious beliefs. They are not entitled to impose their beliefs on others in a manner that denies them the enjoyment of their right to equality and freedom from discrimination in respect of a fundamental aspect of their being. Having done so, and in a manner that understandably caused hurt and offence, compensation is appropriate. I order the respondents pay compensation in the amount of $5,000." [37]

In this case the Charter, despite section 14, manifestly failed to protect the freedom of religion and belief. Instead it was used by the judge to support the narrowest possible reading of the religious exceptions in the *Equal Opportunity Act 1995.*

Recommendation 5:

The Victorian Charter has failed to protect the right to freedom of religion. It gives no useful guidance as to how to resolve matters where rights conflict. It is susceptible to being interpreted by judges to suit their own predetermined views. Instead of a Charter being enacted in Queensland, substantive protection of human rights such as freedom of religion should be ensured by broader exemptions from anti-discrimination legislation.

4.2. The ACT Human Rights Act 2004

Empowering courts, whenever possible, to interpret statutes in such a way as to make them compatible with the bill of rights can lead to some very creative judicial reasoning.

For example, the ACT *Human Rights Act 2004* originally provided in Section 30 (1) that: "In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred."

'Becomes' reinterpreted to mean 'allows'

In the 2005 case of *SI by his next friend CC v KS by his next friend IS*,[38] Chief Justice Higgins exercised this power to interpret Section 51A (3) (b) of the *Domestic Violence and Protection Orders Act 2001* in a way contrary to its plain and unambiguous meaning. The provision states that an "interim order ***becomes*** a final order against the respondent if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order." (Emphasis added).

Higgins CJ thought that this provision violated the rights to liberty and freedom of movement guaranteed by the *Human Rights Act 2004* and therefore declared that it should properly be interpreted to "empower but not mandate the making of a final order in the absence of a conforming objection".[39]

‘Before’ reinterpreted to mean ‘after’

In 2008 the ACT’s Legislative Assembly amended Section 30 of the *Human Rights Act 2004* to read “So far as it is possible to do so ***consistently with its purpose***, a Territory law must be interpreted in a way that is compatible with human rights.” (Emphasis added). This amendment came into effect on 18 March 2008.

However, this did not stop Chief Justice Higgins deciding on 31 March 2008 in *R v DA*[40] that the right to a fair trial guaranteed by Section 21 the *Human Rights Act 2004* required him to read down a provision in Section 68B of the *Supreme Court Act 1933* which allows an accused person to elect trial by a judge alone “if the election is made ***before*** the court first allocates a date for the person's trial”. (Emphasis added). According to the chief justice this provision, despite its plain meaning, did not prevent him allowing the accused to elect trial by a judge alone ***after*** the court had allocated a date for the trial.

Chief Justice Higgins tells us that “becomes a final order” means “does not become a final order unless a judge thinks it should” and “before the court first allocates a trial date” means “before the court first allocates a trial date or later if the judge thinks this is necessary for the accused to get a fair trial.”

Under this system parliamentarians would have no idea – and no basis on which even to guess – what meaning may be attributed to the words of the statutes they enact. Nor would they have any effective means of amending a statute when it is interpreted by a judge to mean something contrary to the plain meaning of its wording. What possible form of words could stop a Chief Justice Higgins from making a statute mean just what he chooses it to mean – neither more nor less?

From a citizen’s perspective, one of the most important attributes of law is certainty. A law-abiding citizen needs to know what the law means, with a reasonable degree of certainty, so that he or she can live in a manner that complies with the law. Lack of reasonable certainty replaces freedom with fear.

4.3. The UK Human Rights Act 1998

The United Kingdom’s *Human Rights Act 1998* provision dealing with interpretation reads as follows:

> *3 Interpretation of legislation*
>
> *1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

This UK provision was famously interpreted by the Lords of Appeal in *Ghaidan v Godin-Mendoza.* Lord Nicholls of Birkenhead observed that:

> *the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.* [41]

This case dealt with the meaning of a provision of the *Rent Act 1977* which provided that on the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. The statute explicitly provided at paragraph 2(2) of Schedule 1 that "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant".

Mr Juan Godin-Mendoza lived in a flat with the legal tenant Mr Hugh Wallwyn-James. The two men were in a homosexual relationship up until Mr Wallwyn-James' death. Mr Godin-Mendoza asked the court to rule that he was entitled to succeed as a tenant as the "spouse" of the deceased tenant.

Lord Nicholls noted that:

> *On an ordinary reading of this language paragraph 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot.*[42]

He concluded:

> *Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting heterosexual [sic] couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.* [43]

Lord Nicholls's view prevailed in this 4-1 decision of the House of Lords (Lords of Appeal).

Neither "mere facts" such as the inherent meaning of words, nor "unambiguous" provisions in a statute, nor the "ordinary reading of … language" are to stand in the way of court's power to make the law mean what they think it ought to mean.

5. Conclusion

Human rights are best protected in Queensland by a Westminster-style system with a parliament that makes laws and is accountable to the people at each election; an executive government accountable to the parliament; and a judicial system, including the common law and the rights and freedoms it protects.

To enhance this system and better protect human rights, Queensland should restore Parliament's upper house.

Further, exemptions from anti-discrimination legislation should be broadened.

The experience of Victoria, ACT and UK has shown that charters of rights transfer power from democratically-elected representatives to unelected judges and undermine the rule of law by enabling them to distort the meaning of legislation, thereby creating uncertainty. As such, any move to introduce a charter of rights into Queensland should be rejected.

6. Endnotes

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