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Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland

18 April 2016

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1. Introduction

Caxton Legal Centre **(Caxton)** is an independent, non-profit community organisation providing free legal advice, social work services, information and referrals. Our objects are to provide legal and social welfare services to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness and to educate such people in legal, social welfare and related matters.

The Queensland Parliament, through the Legal Affairs and Community Safety Committee **(Committee)** Human Rights Inquiry (**Inquiry**), is considering the introduction of a legislative regime for human rights in Queensland.

Caxton is of the view that it is appropriate and desirable to implement a Human Rights Act (**HR Act**) in Queensland.

In 1998, the Legal, Constitutional and Administrative Review Committee recommended against the adoption of a constitutionally entrenched bill of rights and the Queensland Government, in accepting the recommendation, relied upon the following reasons:

(a) *a significant and inappropriate transfer of power from the Parliament to an unelected judiciary;*

(b) *increased public costs;*

(c) *the prospect of increased litigation and challenges to legislation; and*

(d) *the existing system of rights protection in Queensland, including constitutional rights, legislation, the common law, and the system of parliamentary democracy, provides effective protection for individuals' rights and freedoms.*[1]

In the succeeding 18 years, legislative human rights protection schemes have been enacted in the United Kingdom (effective from 2000), the Australian Capital Territory (2004) and Victoria (2006). Caxton has researched and considered these frameworks in accordance with Term of Reference 2 of the Inquiry[2]. The experience of these comparable socio-political jurisdictions provides a reliable evidence base upon which the Committee should find:

(a) there would be no loss of parliamentary sovereignty under a legislative scheme;

(b) the costs of implementing a legislative scheme are not prohibitive; and

(c) the prospect of unacceptable levels of litigation and challenges to legislation is negligible.

Further, as illustrated in Schedule 2, the existing system of protections has not proven to be effective, or accessible to many Queenslanders, particularly vulnerable people comprising Caxton's client base, whose human rights have been transgressed by Queensland public authorities.

The justifications for rejecting a Bill of Rights in 1998 can therefore no longer be relied upon to resist the arguments in favour of introducing a comprehensive and coherent legislative rights protection scheme in Queensland. Moreover, the introduction of a HR Act would represent a strong investment in Queensland's social infrastructure and enhance Queensland's credentials as a vibrant modern democracy.

[1] Government's Final Response to the Legal, Constitutional and Administrative Review Committee's Report No. 12 – *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*

[2] A summary of Caxton's research on these frameworks appears in the schedules to this submission.

2. Summary

Term of Reference 3 requires the Inquiry to consider how a HR Act would operate in Queensland at a practical level. As Caxton's view is that it is appropriate and desirable to legislate for a HR Act in Queensland, these submissions to the Inquiry focus on the considerations under Term of Reference 3.

Caxton's view on each Term of Reference 3 are as follows:

(a) **Objectives of the legislation and the rights to be protected**

The objectives of the legislation should be to:[3]

(i) improve, promote, respect and protect the fundamental rights of individuals, regardless of their nationality and citizenship;

(ii) provide individuals with an opportunity to have their personal duties, obligations and needs accommodated without being hindered or prevented by discriminatory practices,

through:

(iii) the establishment of a framework for the development of new law in Queensland;

(iv) the interpretation of the legislation by the Courts and Tribunals when interpreting laws;

(v) requiring public authorities to act in ways that are compatible with human rights; and

(vi) a free standing cause of action giving rise to remedies including damages.

The rights protected by the HR Act should at a minimum mirror those protected in Victoria and the Australian Capital Territory (**ACT**).

The rights protected under the HR Act should be subject to reasonable limits in a similar fashion to the Victorian and ACT models.

(b) **How the legislation would apply to the making of laws, courts and tribunals, public authorities and other entities**

The HR Act should apply to both government and to public authorities, including private entities performing functions of a public nature (for example care facilities and private schools). The HR Act should provide that decisions of public authorities must be substantively compatible with human rights. Regulations should prescribe which entities are public authorities with commencement dates determined after consultations with representatives of the private entities.

Courts and tribunals should only be caught by the HR Act when they are acting in an administrative capacity.

The HR Act should include an opt-in clause to allow private sector entities to request a declaration that the entity become bound by the provisions of the HR Act.

(c) **Implications of laws and decisions not being consistent with the legislation**

[3] See for example the objectives of the *Human Rights Act 2004* (ACT) (**ACT Act**) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (**Victorian Charter**).

In relation to legislative power:

(i) Under the HR Act, Bills introduced to Queensland Parliament and sub-ordinate legislation should be accompanied by a statement of compatibility with the HR Act;

(ii) Bills and sub-ordinate legislation should also be referred to a Standing Committee of the Parliament to be scrutinised for compliance with the HR Act;

(iii) Bills should not proceed to debate, or sub-ordinate legislation receive assent, until the Standing Committee's report has been tabled.[4]

Caxton has not yet formed a view on whether a Standing Committee should also be required to scrutinise amendments to non-Queensland laws that apply in Queensland. In any case, the Queensland Standing Committee should maintain a watching brief on the Commonwealth Senate Standing Committee for the Scrutiny of Bills' findings.

In relation to judicial power:

(i) Queensland should adopt a model which provides for the interpretation of laws that is *most* consistent with the HR Act[5];

(ii) The HR Act should empower lower courts to refer questions of law regarding the HR Act to the Supreme Court;

(iii) The Attorney-General should be empowered to intervene in proceedings involving the application of the HR Act. The HR Act should require a party to such a proceeding to give notice to the Attorney-General;

(iv) The Supreme Court should be empowered to declare Acts to be inconsistent with human rights. A declaration of incompatibility should not affect the validity, operation or enforcement of law. The Attorney-General should be empowered to intervene in proceedings involving a potential declaration of incompatibility; and

(v) The responsible Minister should be required to provide a report on a regular basis (e.g. every 2 years) on any legislation that is passed and is declared to be incompatible with human rights.

In relation to accessible remedies:

(i) It is of paramount importance, and critical to the success of any human rights protection scheme introduced in Queensland, that there be a freestanding cause of action allowing an aggrieved person to access remedies, including damages, for any contravention of their statutory human rights.

(ii) The HR Act should provide for proceedings to be commenced in the Queensland Civil and Administrative Tribunal (**QCAT**) via a complaint.

(iii) An alternative dispute resolution process should be mandated through the Anti-Discrimination Commission (**ADCQ**) before a complainant can proceed with a claim for damages before QCAT. Appeals from QCAT should be heard by the Supreme Court.

[4] Williams and Reynolds Submission No 006.
[5] See Human Rights Law Centre (HRLC) Submission 24 March 2016, p14, and Williams and Reynolds Submission No 006.

(d) **Implications of the legislation for existing statutory complaints processes**

Caxton is of the view that the adoption of a HR Act should be seen as an additional measure for protecting human rights in Queensland, not a replacement for other existing measures. Accordingly, the adoption of a HR Act will not remove the need for existing statutory complaints processes.

Nonetheless it is anticipated that the availability of an efficient HR Act complaints based mechanism would in many cases result in fewer complaints being lodged within existing schemes.

(e) **Functions and responsibilities under the legislation**

A range of other jurisdictions with human rights legislation have established a separate Human Rights Commission. Caxton is generally supportive of the idea of assigning a particular body with the task of administering and overseeing human rights protection. Caxton considers that either a new body, such a Queensland Human Rights Commission, or an existing body, such as the Queensland Anti-Discrimination Commission could be assigned this role.

As referred to in Section 2(c) above, one option would be for ADCQ to receive complaints under the HR Act. ADCQ would provide for alternative dispute resolution (**ADR**) of complaints under the HR Act, similar to current processes under the *Anti-Discrimination Act 1991* (Qld).

If ADR processes are unsuccessful in relation to a complaint, QCAT would have jurisdiction to hear and determine the complaint, including the awarding of damages.

On points of law, the Supreme Court would have the primary judicial authority in relation to the HR Act. The Supreme Court would be empowered to declare Acts to be inconsistent with the HR Act. The Supreme Court would also hear appeals from QCAT dealing with complaints under the HR Act.

(f) **Other issues**

The HR Act should be subject to review every 5 years.

A detailed discussion of these considerations appears at Sections 3 to 7 of this submission.

3. Objectives of the legislation and the rights to be protected

The objectives of the legislation should be to:[6]

(a) improve, promote, respect and protect the fundamental rights of individuals, regardless of their nationality and citizenship; and

(b) provide individuals with an opportunity to have their personal duties, obligations and needs accommodated without being hindered or prevented by discriminatory practices.

Caxton recognises there are broadly two schools of thought on the inclusion of rights that should be protected under a HR Act.

On one hand many credible advocates argue for the inclusion of all rights contained within international covenants to which Australia is a signatory, including all of the rights protected

[6] See for example the objectives of the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

under the International Covenant on Civil and Political Rights, together with all rights from other relevant international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is argued that the various rights are interdependent and indivisible and that piecemeal recognition of rights undermines their implementation.[7]

On the other hand, it is argued that many economic, social and cultural **(ESC)** rights are not readily justiciable and as such, the judiciary is loath to make decisions that may require significant public funds to secure the protection and fulfilment of the rights.[8] On this view, although the international legal position is that the standard of achievement for ESC rights is relative to the State's capacity, and to be progressively achieved according to the availability of resources, the successful implementation of the scheme may be jeopardised if there is no real basis for the fulfilment of these rights.

Caxton suggests that the rights protected by the HR Act should, at a minimum, mirror those protected in Victoria and the ACT, including a right to education.

4. How the legislation would apply to the making of laws, courts and tribunals, public authorities and other entities

Caxton is of the view that the HR Act should protect human rights in three main ways:

(a) human rights ought to be taken into account when developing new laws;

(b) Courts and Tribunals should interpret and apply laws in way that is the most compatible with human rights, as far as possible; and

(c) public authorities and other entities in State and Local Government must act in ways that are compatible with human rights.

This is consistent with the position in the ACT Act and in the Victorian Charter.[9]

The HR Act should require new Bills that are introduced to the Queensland Parliament to be accompanied by a statement of compatibility with human rights. In Victoria, the legislature is required to receive a statement of compatibility with human rights from the member of parliament introducing the new Bill. However, a failure to provide a statement of compatibility does not affect the validity, operation or enforcement of the relevant legislation. Further, in Victoria a Committee is tasked with considering any proposed Bill and must report on the extent to which it is compatible with human rights.

Similarly, in the ACT a dialogue framework applies. This means that after the general rights protected under the Act are enumerated it provides obligations for each arm of government in relation to these rights. This creates an obligation for the Attorney-General to state whether a Bill is consistent with human rights and requires the Standing Committee to report to the Legislative Assembly about human rights issues raised by the Bill.

Caxton is of the view that the HR Act should require new Bills introduced into the Queensland Parliament to be accompanied by a statement of compatibility with human rights and for new Bills to be scrutinised by a parliamentary standing committee.

The ACT Act and the Victorian Charter also requires all Courts and Tribunals to interpret laws in a manner consistent with human rights to the extent that it is possible to remain consistent with the purpose of the law. Where the Supreme Court cannot interpret a legislative provision consistently with the relevantly protected human rights, it may make a declaration of

[7] HRLC Submission, p10.
[8] See for example *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (27 November 1997), Constitutional Court (South Africa).
[9] Sections 30 and 37 *Human Rights Act 2004* (ACT) and sections 28 and 32 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

inconsistent interpretation, and give notice of this declaration to the Attorney-General. A declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in question, nor does it create any legal right or give rise to any civil cause of action.

Caxton is of the view that the HR Act in Queensland should adopt the approach taken in Victoria, which enables Courts to consider international law and decisions of domestic, foreign and international Courts and Tribunals relevant to human rights.

The HR Act should apply to both government and public authorities, including private entities performing functions of a public nature. A public authority may include a Minister, police officer, public servant or another entity performing a public function. For example, the ACT Act and the Victorian Charter requires "public authorities" to take people's human rights into account when they provide services. Private entities are also bound to act compatibly with human rights and consider human rights in decision making when they perform public functions on behalf of government.

In Victoria, special exceptions exist for religious bodies.[10] It is recommended that the Queensland HR Act not include an exception for religious bodies.

Caxton is of the view that decisions of public authorities must be substantively compatible with human rights. Regulations could be provided to prescribe whether an entity is to be considered a public authority for the purposes of the HR Act. The responsible Minister could consult with representatives of private entities performing public functions about the timing of the commencement of regulations to ensure that appropriate training and structural frameworks can be put in place.

Finally, it is recommended that an opt-in clause is included in the HR Act to allow private sector entities to request a declaration that the entity become bound by the provisions of the HR Act. The ACT has legislated for an opt-in clause which allows for private companies, partnerships and associations to request such a declaration from the Attorney-General.

5. Implications of laws and decisions not being consistent with the legislation

At the outset, it is important to recognise that under a HR Act the Queensland Parliament would not be prevented from passing legislation that is incompatible with human rights. Nor would the Courts be given a power to strike down legislation that is incompatible with human rights.

Rather the introduction of a HR Act would ensure that when legislation is proposed that impacts on human rights, that the legislation is then assessed and debated in a transparent and accountable way.

Caxton considers that this should be achieved by way of two separate, but equally vital, structural mechanisms in the HR Act.

Firstly, in relation legislative power:

(a) Under the HR Act, Bills introduced to Queensland Parliament should be required to be accompanied by a statement of compatibility with the HR Act; and

(b) Bills should also be referred to a Standing Committee to be scrutinised for compliance with the HR Act.

Caxton does not have a settled view as to whether a Standing Committee should also be required to scrutinise amendments to non-Queensland laws that apply in Queensland. In any

[10] Section 38 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

case, the Queensland Standing Committee should maintain a watching brief on the Commonwealth Senate Standing Committee for the Scrutiny of Bills' findings.

Secondly, in relation to the judicial power of Courts in Queensland:

(a) Queensland Courts should be required to interpret laws as far as possible in a manner that is consistent with the HR Act;

(b) The HR Act should empower lower courts to refer questions of law regarding the HR Act to the Supreme Court;

(c) The Attorney-General should be empowered to intervene in proceedings involving the application of the HR Act. The HR Act should require a party to such a proceeding to give notice to the Attorney-General;

(d) The Supreme Court should be empowered to declare Acts to be inconsistent with human rights. A declaration of incompatibility should not affect the validity, operation or enforcement of law. The Attorney-General should be empowered to intervene in proceedings involving a potential declaration of incompatibility; and

(e) The responsible Minister should be required to provide a report on a regular basis (e.g. every 2 years) on legislation that is passed and is declared to be incompatible with human rights.

Caxton considers that the model of scrutiny provided in Victoria would be appropriate to adopt in Queensland.

The Victorian Charter does not prevent Parliament from passing legislation that is incompatible with human rights and it does not override other legislation or allow the Courts to strike down legislation that is incompatible with human rights. The Courts must try to interpret laws in a way that is compatible with human rights, but they cannot counter the clear purpose of a legislative provision in order to make it compatible with human rights. Instead, the Victorian Charter promotes human rights compatible laws by making sure that human rights are taken into account in the legislative process. It sets up a mechanism for the Supreme Court to notify the Government and Parliament if it considers a law cannot be interpreted compatibly with human rights.

6. Implications of the legislation for existing statutory complaints processes

Caxton is of the view that the adoption of a HR Act should be seen as an additional measure for protecting human rights in Queensland, not as a replacement for other existing measures. Accordingly, the adoption of a HR Act does not remove the need for existing statutory complaints processes.

A similar approach has been taken in Victoria. As discussed below, the Victorian Charter establishes the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) as an independent statutory agency with an extensive range of advisory and educative functions under the Victorian Charter.

However, the establishment of the VEOHRC has not taken away from the continued role of other independent Offices or Officers in Victoria that deal with human rights issues. For example, the Victorian Ombudsman is an independent officer of the Victorian Parliament who performs an oversight function and investigates complaints about administrative actions taken by a wide range of Victorian public authorities. The Ombudsman has power to enquire into and investigate complaints about alleged breaches of the Victorian Charter. Police and protective services officers are excluded from the Ombudsman's jurisdiction.

Further, the Independent Broad-based Anti-corruption Commission (**IBAC**) has a function to ensure that police and protective services officers have regard to the human rights in the

Victorian Charter and it can investigate police misconduct, including allegations of a breach of human rights. The Ombudsman and the IBAC have power to compel the production of information to support their investigations.

In a similar way, Caxton considers the human rights roles undertaken by entities such as the Queensland Ombudsman and the Crime and Corruption Commission should continue, despite the introduction of a HR Act.

7. Functions and responsibilities under the legislation

A range of other jurisdictions with human rights legislation have established a separate Human Rights Commission or similar entity.

Caxton is generally supportive of the idea of assigning a particular body with the task of administering and overseeing human rights protection in Queensland. Caxton considers that either a new body, such as a Queensland Human Rights Commission, or an existing body, such as the Queensland Anti-Discrimination Commissioner, could be assigned this role.

For example, in the ACT, the Human Rights Commissioner (a role that is established by the *Human Rights Commissioner Act 2005* (ACT)) has been provided with additional functions under the Human Rights Act since the inception of the Commissioner role. The Commissioner may intervene in an action regarding the Human Rights Act with the leave of the Court.

Caxton would support the establishment of a separate commission with responsibilities in relation to the HR Act, and any other legislation in Queensland dealing with human rights.

As for the specific roles that would be given to such a body, the Victorian Charter provides a model which Caxton considers would be appropriate in Queensland.

The Victorian Charter establishes the VEOHRC as an independent statutory agency that has a range of advisory and educative functions under the Victorian Charter, including:

(a) reporting to the Attorney-General annually on the operation of the Victorian Charter;

(b) advising the Attorney-General on anything relevant to the operation of the Victorian Charter by request, reviewing public authorities' programs and practices to determine whether they are compatible with human rights;

(c) providing human rights education;

(d) intervening in legal proceedings when a legal question arises about the Victorian Charter's application or the human rights compatible interpretation of a law; and

(e) assisting with the statutory reviews of the Victorian Charter.

The Commission can also receive complaints under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic) and offer dispute resolution, but it cannot take human rights complaints under the Victorian Charter.

As referred to above, one option would be for ADCQ to receive complaints under the HR Act. ADCQ would provide for alternative dispute resolution of complaints under the HR Act, similar to the current processes under the *Anti-Discrimination Act 1991* (Qld). In our view, it would important that the ADCQ be empowered to report on complaints under the HR Act that are resolved outside of the open court process. It need not be full accounting of the relevant matter but a format for brief and public notation of matters proceeding though ADR processes is necessary. In our view, transparency and ability to build on previous outcomes (even if in a non-binding way) is critical to the success of a complaint handling forum.

If ADR processes are unsuccessful in relation to a complaint, QCAT would have jurisdiction to hear and determine the complaint, including the award of damages.

On points of law, the Supreme Court would have the primary judicial authority in relation to the HR Act. The Supreme Court would be empowered to declare Acts to be inconsistent with the HR Act. The Supreme Court would also hear appeals from QCAT for complaints under the HR Act.

It is submitted that there are compelling reasons why costs should be available to successful parties where 'in the interests of justice' it is appropriate to do. At a practical level, it has been Caxton's experience over several decades of conducting public interest litigation, that the availability of costs orders significantly enhances the prospects of retaining high quality legal representation. The involvement of senior practitioners would in turn aid the development of a coherent human rights jurisprudence. Further, costs awards act as a deterrent against frivolous complaints or zealous litigants seeking to unfairly exploit interrogatory processes.

8. Conclusion

The nature of these submissions, having regard to the Committee's guidelines is necessarily constrained.

Caxton would welcome the opportunity to appear before the Committee to discuss further and in more depth the relevant issues and appropriate modelling for any HR Act to be implemented in Queensland.

Caxton also strongly supports the Committee consulting widely across Queensland and recommends that hearings be held in regional centres and to hear witnesses from Indigenous communities.

Caxton Legal Centre Inc.

18 April 2016

Schedule 1 - Overview of research

The purpose of the schedules to this submission is to summarise Caxton's research on matters that are relevant to the issues before the Inquiry.

Caxton has undertaken research in the following areas:

(a) Effectiveness of current laws and mechanisms for protecting human rights - see Schedule 2 below;

(b) Operation and effectiveness of the human rights legislation in Victoria - see Schedule 3 below:

(c) Operation and effectiveness of the human rights legislation in the ACT - see Schedule 4 below;

(d) Operation and effectiveness of the human rights legislation in the UK - see Schedule 5 below; and

(e) Operation and effectiveness of the human rights legislation in Canada - see Schedule 6 below.

It is recognised that the majority of this research is relevant to paragraphs 2(a), 2(b) and 2(d) of the Committee's Terms of Reference. However, it is noted that where possible, Caxton has provided research that is also applicable to paragraph 3 of the Terms of Reference.

Caxton notes that an analysis of the costs and benefits in relation to the Victorian Act and the ACT Act appears at 1.7 of Schedule 3 and 1.4 of Schedule 4 respectively, and these may be of some relevance to paragraph 2(c) of the Terms of Reference.

Schedule 2 - Effectiveness of current laws and mechanisms for protecting human rights

The Terms of Reference for the Inquiry require the Committee to consider the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms.

There are various legal mechanisms by which rights are currently protected in Queensland.

These include constitutional rights (both express and implied), Commonwealth and State legislation, legislative scrutiny processes, the common law and international human rights instruments.

This schedule considers the current laws and mechanisms for protecting human rights in Queensland, and examines both the strengths and weaknesses in those laws and mechanisms. It builds on the analysis which has been provided in various reviews into the appropriateness of specific laws designed at protecting human rights in other jurisdictions, reviews undertaken at both the State and Commonwealth level.

Where relevant we have provided an analysis, based on Caxton's experience at a practical day-to-day level, regarding whether current laws and mechanisms adequately protect the rights of Caxton's clients and other vulnerable persons in Queensland. In summary we do not consider that the existing legal protections are either adequate or accessible. Accordingly, we consider the introduction of a coherent rights protection scheme would provide a significant improvement to access to justice in Queensland.

1.1 Queensland's system of government

Firstly, it is arguable that human rights are protected and promoted by the framework of Queensland's system of government.

The key features of this system of government and the means by which that system arguably promotes the protection of human rights, are set out below.

Queensland has a system of representative democracy

Queenslanders elect their Government by popular vote. This is a principle that underlies and is reflected in the Australian Constitution[11]. It is also provided for in Queensland's Constitution[12]. Both the Commonwealth and State systems ensure that the people, at regular and fair periodic elections, directly choose people to exercise legislative and executive power in their interests.

Queensland has a system of responsible government

Queensland has a system of responsible government whereby the executive is drawn from, and accountable to, Parliament. This means that the Crown (the Queen of Australia, represented by the Governor at State level and the Governor-General at Commonwealth level) exercise the executive powers vested in it on the advice of ministers who are selected from, and answerable to, the Parliament. Ministers remain in office only with the confidence of the Parliament. This ultimately means that Government has, and must have, the confidence of the people.

Queensland's system of government is characterised by a separation of powers

The Australian Constitution vests legislative, executive and judicial powers of the Commonwealth in three different branches of government with different personnel:

[11] Section 41 of the Australian Constitution.
[12] Section 10 of the Constitution of Queensland 2001.

(a) legislative power is vested in the Parliament which makes laws;

(b) executive power is vested in the Executive Government which "executes" the business of government and administers the law; and

(c) judicial power is vested in the Judiciary (the Courts) which interprets the law and adjudicates on people's rights under the law.

A strict separation of powers ensures that not one of these branches of government is to exercise the powers or functions of another and that no one person is to be a member of more than one branch of government.

However, both at a Commonwealth level and a State level, the separation of powers is not absolute.

At Commonwealth level, the lines between the exercise of executive and legislative power become blurred. Nevertheless, there is a "strict" separation of judicial power from the other Commonwealth powers, ensuring the independence of the judiciary.

At the State level, there are no requirements in the Queensland Constitution for a strict separation of any of the powers. However, in practice, government at the State level can in principle be characterised as representing a separation of powers, particularly with respect to there being an independent judiciary.[13]

1.2 Rights protection in Queensland

The system of government outlined above provides for the protection of rights in Queensland via a range of laws and mechanisms. The key laws and mechanisms are discussed below.

Systemic protections: Queensland as a parliamentary democracy

The operation of the constitutional principles in Queensland set out above provide a degree of rights protection. In particular, the protection of rights and liberties is an integral role of Parliament, and of parliamentarians as they represent their constituents, as well as in their legislative role. As discussed, Queensland has a system of representative democracy in which government is formed from members of Parliament as elected by the public.

The government's record of respecting individuals and minorities' rights is one of the matters that is or, at least, should be considered, by electors every three or so years (or as now, every four years) as they participate in free and fair elections. In between those times, individuals and groups (such as public interest lobby and advocacy groups, community legal centres and welfare bodies) can make representations to members of Parliament or government organisations to respect or promote rights or to refrain from measures that restrict rights.

However, in our experience the system of parliamentary democracy in Queensland does not, of itself, operate to recognise, protect or fulfil the rights of individuals. The unicameral system of Parliament and the relatively immature Parliamentary committee system has demonstrated that there are few impediments to the introduction of legislation capable of infringing fundamental rights and freedoms.

Constitutional guarantees: Commonwealth and State

In Australia, unlike some other countries, there is no bill of rights. Rather, constitutional provisions mostly set out the respective roles, functions and powers of each branch of government.

[13] The requirement of the Supreme Court to function as a Ch III Court with respect to the Australian Constitution effectively imposes a separation of the judiciary to the same extent that applies to Courts in the Federal jurisdiction.

Nevertheless, the Australian Constitution does expressly protect a handful of rights. It has also been found to contain an implied right to political communication. These express and implied rights are discussed below.

The rights expressly protected by the Constitution include:

(a) the right to just terms if the Commonwealth compulsorily acquires property[14];

(b) the right to trial by jury on indictment for an offence against any law of the Commonwealth[15];

(c) freedom of trade, commerce and intercourse within the Commonwealth[16];

(d) freedom of religion, albeit in a narrow sense[17]; and

(e) the right not to be subject to discrimination on the basis of the State in which a person lives[18].

In addition to the express rights described above, the High Court has also inferred a freedom of political communication from ss. 7 and 24 of the Constitution[19]. These provisions require that members of the Senate and the House of Representatives be "directly chosen by the people". The High Court found that for this to be an informed choice, there must be free access to relevant political information. However, whilst this limits the legislative power of the Commonwealth[20] and the States and Territories[21] to make laws that interfere with political communication, it does not protect freedom of speech more broadly.

It can be seen from the above that only certain rights are protected by the Australian Constitution. The Australian Constitution does not protect many of the rights and freedoms contained in, for example, international human rights instruments. The rights protected by the Australian Constitution have been described as "limited and ad hoc rather than forming a coherent collection of specific rights".[22]

Constitutional requirements also operate to protect individuals' rights in a general sense. Not only does the Executive have to exercise its statutory powers within the limits of the Acts of Parliament that grant those powers, Parliament when enacting legislation must respect any applicable constitutional restrictions that bind it.

A further protection may also be provided by s.109 of the Constitution which provides that State laws are invalid to the extent of any inconsistency with a Commonwealth law. For example, State and Territory laws will be invalid to the extent that they are inconsistent with Commonwealth anti-discrimination statutes.[23] However, it is noted that s.109 of the Constitution can also be used by the Commonwealth to override State legislation which protects rights.

Generally speaking, the Constitution of Queensland, does not contain any provisions that are explicitly directed towards guaranteeing individuals' rights and freedoms . However, as set out above, the Constitution of Queensland 2001 provides the framework for the democratic institutions in Queensland and contains a right to vote in s.10.

[14] Section 51(xxxi) of the Australian Constitution.
[15] Section 80 of the Australian Constitution.
[16] Section 92 of the Australian Constitution.
[17] Section 116 of the Australian Constitution.
[18] Section 117 of the Australian Constitution.
[19] *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106.
[20] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[21] *Unions NSW v State of New South Wales* (2013) 252 CLR 530 .
[22] Standing Committee on Law and Justice, "A NSW Bill of Rights", Report 17 – October 2001, at 2.21.
[23] Standing Committee on Law and Justice, "A NSW Bill of Rights", Report 17 – October 2001, at 2.22.

Caxton has acted for at least one client who has successfully relied upon an implied freedom of political communication in an appeal against conviction for public nuisance offences.[24] As noted above this implied right does not extend as a general protection of free speech and is usually invoked 'after the event' as a defence to criminal proceedings. This can present practical difficulties for police with responsibility for exercising discretionary powers of arrest, and in certain situations can also create a risk to peace and order.

For example, in the lead up to the Brisbane G20 Summit in November 2014, former Solicitor General Walter Sofronoff QC expressed the view in a public forum, that protesters wearing face masks (a prohibited item under the *G20 Safety and Security Act 2013*) would be able to invoke the protection of the implied freedom of political communication provided they otherwise stayed within the bounds of the law. In the days following Mr Sofronoff QC's public comments, there was some apprehension amongst those persons organising protests that the group of "Anonymous" protesters would be defying the face mask ban and face arrest. The nature of the laws were such that the potential for the entire assembly of G20 protesters to be declared unlawful, as a result of anticipated actions of Anonymous, was quite real,[25] and there were concerns about the security implications of mass arrests.[26]

The administration of justice would therefore be served by the introduction of HR Act that clarified the protection of the rights to freedom of political communication, the limits upon the exercise of the rights[27], and a process for dealing with alleged infringements.

Legislation

Some rights are given to particular groups of people in Queensland under either Commonwealth or State legislation.

At the Commonwealth level, legislation has been passed protecting different categories of persons from discrimination based on various international instruments and covenants. Commonwealth legislation operating in Queensland that serves to protect individuals' rights include:

(a) The *Racial Discrimination Act 1975* (Cth), which implements many of the provisions in the Convention on the Elimination of All Forms of Racial Discrimination;

(b) The *Sex Discrimination Act 1984* (Cth), which implements some of the provisions in the Convention on the Elimination of All Forms of Discrimination Against Women;

(c) The *Disability Discrimination Act 1992* (Cth), which implements, for example, parts of the ILO Convention Concerning Discrimination in Respect of Employment and Occupation; and

(d) The Human Rights and Equal Opportunity Commission Act 1986, which establishes the Australian Human Rights Commission;

There are other Commonwealth Acts which provide direct or indirect protection of human rights. These include:

(a) The *Privacy Act 1988* (Cth) and the *Human Rights (Sexual Conduct) Act 1994* (Cth) which provide specified privacy rights;

(b) The *Freedom of Information Act 1982* (Cth) which gives individuals specified rights to obtain personal information held by Commonwealth agencies;

[24] *Courteney v R* (unreported Brisbane District Court Appeal No: BD1007/08).
[25] Section 18(1)(c) of the *G20 Safety and Security Act 2013* rendered an entire assembly unlawful if 2 persons acting in concert committed an offence under the Act (such as possessing a prohibited item).
[26] Joshua Robertson, 'G20 blanket ban on masks is not supported by security laws, expert says', *the guardian* (online), 11 November 2014 < http://www.theguardian.com/world/2014/nov/11/g20-blanket-ban-on-masks-is-not-supported-by-security-laws-expert-says>.
[27] As enunciated by the High Court in *Coleman v Power* (2004) 220 CLR and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

(c) The *Evidence Act 1995* (Cth) which gives judges a discretion to exclude improperly or illegally obtained evidence; and

(d) The *Family Law Act 1975* (Cth) which legislates various protections provided for in the Convention on the Rights of the Child.

Important Queensland "rights" legislation includes the *Anti-Discrimination Act 1991* (Qld) and the *Peaceful Assembly Act 1992* (Qld), and other statutes relating to administrative law that have equivalents at Commonwealth level. This includes the *Judicial Review Act 1991* (Qld), the *Information Privacy Act 2009* (Qld), the *Right to Information Act 2009* (Qld) and the *Ombudsman Act 2001* (Qld).

Furthermore, provisions affecting human rights in the criminal justice sphere are contained in the *Criminal Code Act 1899* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld) as the provisions relating to murder and assault, for example, give some protection for such rights as the right to life, liberty and security of the person. These Acts also contain protections relating to fair trials and to arrest, as does the *Justices Act 1886* (Qld).

Reference is sometimes also made to the protection offered by the Magna Carta 1215 (Imp) and the Bill of Rights 1688-9 (Imp). These two pieces of imperial legislation are part of Queensland law, as recognised in the *Imperial Acts Application Act 1984* (Qld). However the Magna Carta and the Bill of Rights are not an entrenched part of Queensland's constitutional laws and, like ordinary legislation, they can (and have) been impliedly and expressly amended by later inconsistent legislation. They have therefore been described as serving only a symbolic function in the law-making context.[28]

In Caxton's experience, the fact the human rights protections in Queensland exist under a number of different statutes make it difficult to determine what protections are available to an individual in a given matter. The administration of justice would benefit from those rights affirmed in one Act of parliament.

Further, the following sample of client experiences demonstrate the limitations of Queensland's existing laws in protecting the rights and interests of Caxton's clients across a number of areas and how the availability of remedies under a HR Act would have potentially provided a practical avenue to address and resolve our clients' issues. There are of course other areas of law and client groups where the inadequate protection of human rights can be demonstrated, for example Indigenous people, young people and people experiencing mental health issues.

Pre-legislative measures

In addition to specific pieces of legislation that provide for rights, Queensland has a process to help ensure that legislation generally is developed with individuals' rights in mind.

The *Legislative Standards Act 1992* (Qld) requires that legislation (both Bills and subordinate legislation) must have regard to "fundamental legislative principles" (FLPs). The FLPs are defined in s.4 of the Legislative Standards Act as being the "principles relating to legislation that underlie a parliamentary democracy based on the rule of law".

The *Parliamentary Committees Act 1995* established a new Scrutiny of Legislation Committee to examine all Bills and subordinate legislation to consider the application of FLPs to particular Bills and subordinate legislation, and the lawfulness of particular subordinate legislation.

However, in 2010, a review of the functions and role of Queensland's Parliamentary committees led to the instigation of a new system of portfolio-based committees in mid-2011.

One of the key roles of the Parliament's new portfolio committees is set out in Section 93 of the amended *Parliament of Queensland Act 2001* (Qld) which now makes each portfolio committee responsible for examining all Bills and subordinate legislation within its portfolio

[28] Tasmania Law Reform Institute, "A Charter of Rights for Tasmania", Report No.10, 2007 at 2.3.27.

area, rather than this being done by a distinct Scrutiny of Legislation Committee (which was abolished under the reforms).

The expanded roles of the portfolio committees mean they must also consider the policy to be given effect by the legislation (a function not previously undertaken by the former scrutiny committees), the application of FLPs to the legislation, and, in respect of subordinate legislation, the lawfulness of the subordinate legislation as made. Those committees also monitor whether Explanatory Notes or Regulatory Impact Statements provided with legislation contain the information required by the Legislative Standards Act.

Compliance with FLPs is not mandatory and it is for the Parliament to determine whether legislation has "sufficient regard" to one or more of the FLPs and whether sufficient justification is given in the Bill's explanatory notes for any departure from them.

In practice, it has been our experience that very few recommendations of Committees concerning fundamental principles have been acted upon. On two occasions during the term of the 54th parliament, recommendations resulted in Bills not being passed[29] however there have been numerous other occasions, including in the terms of other Queensland parliaments, where submissions made to parliamentary committees about fundamental principles have not resulted in recommendations or indeed in any amendments to legislation.

Furthermore, individuals cannot challenge legislation that has passed through Parliament on the grounds that it does not pay sufficient regard to the FLPs.

The common law

The common law is the body of legal principles and rules developed over time by judges in cases that have come before them. One major limitation of the common law is that it can be overridden at any time by legislation.

The common law has developed some important protections for human rights particularly in the area of criminal justice.[30] These include the right of an accused to a fair trial[31], the right against self-incrimination[32], immunity from search without warrant[33], and the onus of proof in criminal proceedings (and the requirement for proof beyond reasonable doubt).[34]

Other common law rights are the rules of natural justice or procedural fairness, which require that a person be given a fair hearing before government make decisions adversely affecting their interests. The common law has also developed rules in relation to the interpretation of legislation that also function to protect human rights. As the High Court said in *Coco v The Queen* [35], "*the courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language*".[36]

This "principle of legality" is a rule of statutory interpretation that gives some protection to certain human rights and freedoms in Queensland. It has been relied upon in a range of cases. For example, in Re Bolton; Ex parte Beane,[37] Brennan J set out the principle in these terms:

[29] Identification Laws Amendment Bill 2013 and Child Protection (Offender Reporting – Publication of Information) Amendment Bill 2013
[30] Tasmania Law Reform Institute, "A Charter of Rights for Tasmania", Report No.10, 2007 at 2.3.19.
[31] In *Dietrich v The Queen* (1992) 177 CLR 292, the High Court recognised the right to a fair trial and held that, where a person is charged with a serious criminal offence but cannot afford legal representation, the absence of any legal representation will be relevant to the fairness of the trial.
[32] See *Sorby v Commonwealth* (1983) 152 CLR 281.
[33] See *George v Rockett* (1990) 170 CLR 104.
[34] See *Woolmington v DPP* [1935] AC 462.
[35] (1994) 179 CLR 427.
[36] *Coco v The Queen* (1994) 179 CLR 427 at 437.
[37] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523.

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the Courts will not construe a statute as having that operation.

In Attorney-General (SA) v Corporation of the City of Adelaide,[38] Heydon J said:

> *"The 'principle of legality' holds that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. For that principle there are many authorities, ancient and modern, Australian and non-Australian."*[39]

There is also the common law principle that an individual may do as he or she wishes unless expressly prohibited from doing so by law. In this regard the High Court said in *Lange v ABC*:[40]

Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it".

However, the protection of rights under the common law is limited. In particular, only some "rights" are justiciable legal rights in the sense of giving rise to legal obligations that may be enforced in Courts of law. In a 2010 speech Protecting Human Rights Without a Bill of Rights, Chief Justice French said:

> *"It is also important to recognise, as Professor Bailey pointed out in his recent book on human rights in Australia, that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort."*[41]

Furthermore, common law rights provide only limited protection from statutory encroachment. If the Parliament intends to encroach on a right and the encroachment is clear and unambiguous, then the statute will be given full force and effect.

In Caxton's experience, common law rights may be actionable in theory however they lie outside the reach of the overwhelming majority of citizens. The recent Court of Appeal decision in *Bulsey*[42] provides a good example of this. In that case the justice system took more than 10 years to provide a remedy for an infringement of "the most elementary and important of all common law rights" – the right to liberty.

Of all of the jurisdictions available in Queensland, the Supreme Court is arguably the most inaccessible; yet it is the avenue for the majority of the existing rights protections, be they actions in tort, equity or judicial review. A HR Act is required to provide a more efficient and accessible means of addressing human rights transgressions.

International law

International law includes both formal agreements between states (such as the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and the principles of customary international law which is broadly the set of general principles of law that, due to widespread acceptance by a majority of civilised nations, show they are "accepted as law".

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[38] (2013) 249 CLR 1.
[39] *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148].
[40] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.
[41] Robert French, Protecting Human Rights Without a Bill of Rights, John Marshall Law School, Chicago (26 January 2010).
[42] *Bulsey & Anor v State of Queensland* [2015] QCA 187.

When the Commonwealth Government ratifies a treaty, the terms of the treaty do not become domestic law in Australia. Parliament must enact the terms of the treaty as legislation to change Australian law. In *Dietrich v The Queen*[43], Mason CJ and McHugh J said:

> *"Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions".*[44]

A set out above a range of international instruments have been incorporated into Australian law. That said, it remains the case that many international treaty obligations remain unincorporated into Australian law, including, the rights set out in the ICESCR and a number of the rights in the ICCPR.[45]

Moreover, international law does not abrogate the power of the Queensland or Commonwealth Parliaments to make laws that are inconsistent with the rights and freedoms set out in these instruments. In *Minister for Immigration v B*[46], Kirby J said that the High Court "cannot invoke international law to override clear and valid provisions of Australian national law".

Where international human rights law has not been incorporated through legislation, it can still influence domestic law in several ways. It can be used in statutory interpretation. Usually, legislation must be interpreted and applied, so far as its language permits, so that it is consistent with, not in conflict with, established rules of international law.[47] There is, however, some debate about whether this rule is to be applied only when legislation is ambiguous[48] or where legislation is designed to implement Australia's obligations under international law.[49] In practice, this means that Courts can take international human rights law into account when interpreting legislation.

International human rights law can also influence the development of the common law. For example, in *Mabo v Queensland (No 2)* Brennan J stated:

> *"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".*[50]

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

1.3 Caxton client experiences

(a) Older people

A HR Act would provide broad reaching assistance to people with disabilities, particularly those disabilities acquired through age. Caxton's Family and Elder Law

[43] (1992) 177 CLR 292.
[44] *Dietrich v The Queen* (1992) 177 CLR 292 at 305.
[45] Tasmania Law Reform Institute, "A Charter of Rights for Tasmania", Report No.10, 2007 at 2.3.2.
[46] *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171].
[47] See *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).
[48] For example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).
[49] For example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 27–8 (Gleeson CJ).
[50] (1992) 175 CLR 1, 42. See also *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

Team assist older clients including people affected by impaired capacity or disability in their interactions with government agencies and service providers.

We have made numerous submissions to various Inquiries to advocate for and promote the rights of these vulnerable clients. Relevant recent examples include submissions to the Australian Law Reform Commission Inquiry into Equality, Capacity and Disability in Commonwealth Laws in 2014 and 2015, the Office of the Public Advocate regarding Decision Making in Queensland's Guardianship System (not published) in late 2015.

In these submissions and more broadly, Caxton supports the move towards supported rather than substituted decision making for people with impaired capacity, consistent with their human rights. In our view, a HR Act would affirm the direction of changes in this area of practice and provide a solid foundation for future conversations about decision making for people with impaired capacity. It is important to note in this regard that there are existing rights for people subject to intervention under the *Guardianship and Administration Act* 2000 (in section 11 and Schedule 1 of that Act) but that those rights are difficult to assert in practice. While such statements of rights are useful in articulating community expectations, unless they are supported by rights of action in instances of breach, their role will be limited.

There are a large number of case studies contained in our submissions, particularly in the submission to the ALRC Inquiry into Equality, Capacity and Disability in Commonwealth Laws[51] which demonstrate the difficulties our clients have experienced under the existing regime.

Case example

Caxton successfully assisted a healthy woman in her mid-70s obtain release from a locked dementia ward where she had been improperly placed following an incorrect diagnosis. Although the outcome was successfully resolved in QCAT with the client obtaining a declaration of capacity and then discharging herself, she had spent 10 months locked up in a facility deprived of the amenities of independent life.

This client would have been substantially aided by a hospital intake and assessment process which gave consideration to her human rights. Additionally, the language to articulate her need as a right to liberty and security and/or a right to protection from inhumane or degrading treatment would have helped her to talk to the hospital and seek an early resolution to the problem once it had arisen.

How could the HR Act have helped?

Importantly, a stand-alone cause of action would not only have assisted this client to seek an earlier release, it could also have given her an opportunity to seek redress for the loss of liberty and amenity over those 10 months. Within the current framework, her only viable options of seeking such redress would arise only if an injury had been sustained or if the decision to detain her was tainted by unlawful conduct such as discrimination.

Even if a HR ACT only gave this client the opportunity of an 'add-on' cause of action and no right to claim damages, she could have used the Act to ask for a broader reaching range of remedies in her successful case. For example, she could have secured human rights training for the institution which detained her.

(b) Social housing

Over the past two years a combination of legislative and policy change has resulted in decreased security of accommodation for social housing tenants. On a number

[51] Submission 67 on https://www.alrc.gov.au/inquiries/disability/submissions

of occasions Caxton has unsuccessfully assisted clients facing eviction to attempt to stay in their homes.

Case example

We were unable to prevent the eviction of one of our Indigenous clients after she became unable to control the behaviour of persistent unwanted 'visitors' to her housing complex. Although there was a protection order in place to protect our client from the behaviour of the 'visitor' and our client telephoned police to assist when the problems arose, our client was still subjected to 'strikes' against her as a result of his behaviour and ultimately evicted.

How could have the HR Act helped?

If, in the drafting of legislation, parliament was compelled to consider human rights implications these laws may have been differently drafted.

In development of policy and exercise of their legislative rights, the housing providers (the state and agencies engaged by the state) would have had to consider and adopt human rights principles which may have tempered their attitude and helped them to see the context of the misbehaviour at their properties. It may have assisted our client to articulate her needs at an early stage.

Our client would have been able to bring a complaint directly to the ADCQ or another complaint agency when the problems originally arose, facilitating discussion around competing rights and needs before eviction proceedings were considered or brought. As it is, the only option for our client was an internal complaint after she received a 'strike' against her as a tenant.

If eviction proceedings were commenced our client could have argued human rights principles and the decision maker would have had to interpret the legislation in line with human rights principles which may have led to a wholly different outcome.

There are a number of Victorian Charter cases where people have successfully stopped evictions because they have raised charter arguments. [52]

(c) Child protection

There is an existing *charter of rights for a child in care* located in section 74 and Schedule 1 to the *Child Protection Act* 1999. The operation of the *charter of rights for a child in care* provides both a useful example of the value of a Charter of Rights for vulnerable people but also offers us an example of the limitations of a Charter of Rights which is not supported by effective enforcement.

At Caxton we notice that the *charter of rights for a child in care* clearly affects the child's right to be informed and, often, to participate in decision making. In our experience there are some procedural problems with the way this is implemented, particularly in situations when a child's participation in decision making may not be in their best interests due to family abuse or child immaturity, but nonetheless it is broadly positive that these particular rights (of information and participation) are facilitated and promoted via the *charter of rights for a child in care*.

In our experience some of the other rights under the *charter of rights for a child in care*, including the right to maintain relationships with the child's family and community, are not well delivered. In these instances, the *charter of rights for a child in care* offers little for the child, as an individual, to take action to seek access

[52] http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit/Charter-Case-Audit-Search?AreaOfLaw=Residential+Tenancies

to those denied rights. It is important that any charter of rights provides for options for enforcement when rights are not delivered and that standing to bring a complaint resides **both** with the individuals affected and with an appropriate body with investigatory functions.

The drafting of the *charter of rights for a child in care* also presents some difficulties in that it merely requires offering a child 'access' to certain civil rights, such as education and transition support, but does not warrant the quality or appropriateness of those services, and does nothing to assist a child who has their own difficulties making use of that 'access'.

(d) Education

Caxton has successfully assisted several children who have experienced problems accessing education. Our most significant case *Hurst v State of Queensland* [2006] FCAFC 100 was the culmination of several years of litigation on behalf of two deaf children who needed provision for education in Auslan.

The litigation involved complex arguments regarding the ability of the children to manage without Auslan, several layers of litigation and ultimately a Federal Court appeal action carrying a risk of costs if not successful. A year or two (or more) of education is a lot to miss out on while bringing an action against the state to ensure your right to education is ultimately realised.

For these clients and so many like them a HR Act which includes a positive right to education may:

(i) Facilitate better education policy that is consistently drafted with human rights principles at the forefront;

(ii) Give families and older children language to help them ask for their rights and teachers and schools clarity in responding to those requests;

(iii) Facilitate earlier resolution of education matters in some situations;

(iv) Ensure that decision makers interpreting law would need to have regard to human rights principles meaning that better judicial decisions might be made earlier.

We note that although our example was a Commonwealth law matter, there is similar state law to which a HR Act could have been applied. The ability to mount a HR Act argument may be a relevant consideration in choosing jurisdiction in matters such as these when both State and Commonwealth laws apply.

(e) Police

Case examples

Caxton has assisted a number of clients with disabilities who have struggled to obtain appropriate and dignified treatment from the police during relatively routine interactions. In particular we have given help to a number of deaf clients including a woman who struggled to report an offence in which she was the victim, and a man who was called on to identify the body of family member. In these cases the clients were given little assistance to facilitate their interactions including no access to interpreters and were left unnecessarily bewildered and distressed.

How would a HR Act help?

A charter of rights would assist these clients in a number of ways.

Good policing policy drafted with human rights principles in the front of mind would almost certainly have provision for interpreters in all relevant situations. Affected people would have a framework to talk about their needs that is less convoluted than the existing anti-discrimination legislation. Individual officers making front line policing decisions would also have clarity regarding their responsibilities.

It is of note that cases such as those we mention briefly above are struggling as anti-discrimination cases in the Court system in Queensland at the moment. The main difficulty for clients is that the comparison exercise required under anti-discrimination legislation and the way in which the legislation is interpreted. In particular the relevant legislation is, in our view, being 'read down' rather than being interpreted beneficially. It would be of considerable assistance to be able to argue that legislation ought to be interpreted as much as possible in line with human rights principles.

Clarification of the proper construction of legislation (in line with human rights principles) would also reduce costly litigation by facilitating early resolution. In most of these cases the monetary outcome is very small but they are subject to months and often years of expensive litigation in part due to the range of possible interpretations of the law and the different approaches taken at different levels of the Court and Tribunal system.

It is perhaps trite to also point out that in each case the cost of good treatment during the interaction at the police station is trivial in comparison to the cost of seeking resolution; treatment we believe could be delivered by a charter of rights.

Further, a stand-alone cause of action which offered an alternative to an action under the *Anti-Discrimination Act 1991* would be transformative to this area of law.

(f) Domestic Violence

A HR Act would provide an overarching framework, covering (or at least drawing together) some of the existing gaps in the protection provided by domestic violence laws. For example, notwithstanding recent improvements in service provision for women experiencing domestic violence, they remain surprisingly unprotected in many areas of life.

Although it may be contrary to current community expectations, female victims of violence have no particular legal rights to accommodation of their special needs, no protection against discrimination, and no reliable right to be treated by police or other services in a consistent and supportive way that affirms their fundamental rights to family, safety and security. Their children have no particular legal right to require their school to take into account their family circumstances in provision of their education in the way they would if they were, for example, children with disabilities.

A HR Act would help women and children in situations of violence in many ways, not least of which is the fostering of a human rights culture which clearly articulates community expectations regarding individual and family rights and safety, and demands that public services are ready and capable of respecting those rights.

1.4 Summary of the adequacy of rights protection in Queensland

As can be seen from the various examples and case studies above, criticisms can be levelled at each of the various processes and mechanisms with regard to their adequacy as rights protections.

(a) **International human rights law**: Australia has committed itself to a variety of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented by domestic legislation. Although

various mechanisms exist to hold Australia accountable at the international level, they are not legally binding in a practical sense under our domestic laws;

(b) **The democratic system:** Australia has strong democratic institutions, but they do not always ensure that human rights, in particular, minority rights, receive sufficient consideration. Queensland's unicameral system and recent move to four year terms significantly weakens the protection of individual human rights rights.

(c) **The Australian Constitution**: Australia's Constitution was not designed to protect individual rights. It contains protection for a few stated rights, but they are limited in scope and have been interpreted narrowly by the Courts;

(d) **Legislative protections**: Federal, State and Territory legislation protects some human rights, but the Acts can always be amended or suspended to limit or remove that protection. The legislative framework is inconsistent across jurisdictions and difficult to understand and apply;

(e) **Administrative law**: Administrative law enables individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions;

(f) **The common law**: The common law protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language;

(g) **Independent oversight mechanisms**: There are a number of oversight mechanisms for example, the Australian Human Rights Commission that can review government action. The powers of these bodies are, however, limited when it comes to human rights, and their recommendations are usually not enforceable; and

(h) **Access to justice**: Access to justice is an overarching problem in connection with the adequacy of existing protections. Individuals who lack the knowledge or means to make use of Australia's framework of human rights protections will ultimately be unable to enforce their rights. Many of the existing legislative, administrative and common law protections reside within the jurisdiction of superior courts which are beyond the reach of the majority of Queenslanders, let alone Caxton's vulnerable clients.

The protection of rights offered by the common law and by statutes are, in themselves, unsystematic and incomplete. They do not provide comprehensive protection of fundamental human rights and freedoms. Furthermore, it is often said that citizens are not aware of the avenues of redress open to them. Citizens' knowledge of their rights and avenues of redress is clearly an area that needs to be further addressed.

That there is scope for improving the protection of rights in Queensland means that the option of a HR Act requires serious consideration.

Schedule 3 - Operation and effectiveness of the human rights legislation in Victoria

1.1 The objectives of the legislation and the rights to be protected

The Victorian Charter was introduced as a commitment between the Parliament and the people of Victoria. It aims to improve the lives of individuals and the community as a whole. The Victorian Charter performs an integral role in our democratic society by protecting fundamental rights and freedoms.[53]

The human rights protected by the Victorian Charter are based largely on (but are not identical to) those contained in the *International Covenant on Civil and Political Rights* (**ICCPR**), including:[54]

(a) the right to life (s9);

(b) the right to protection from torture and cruel, inhuman or degrading treatment (s10);

(c) the freedoms of movement (s12), expression (s15) and thought, conscience, religion and belief (s14);

(d) cultural and property rights (ss19-20);

(e) the right to liberty and security of person (s21); and

(f) rights concerning criminal proceedings and in respect of retrospective criminal laws (ss25-27).

In total the Victorian Charter contains 20 human rights. Those additional to the ones listed above are:

(a) the right to recognition and equality before the law (s8);

(b) the right to freedom from forced work (s11), privacy and reputation (s13);

(c) the right to peaceful assembly and freedom of association (s16);

(d) the right to protection of families and children (s17);

(e) the right to take part in public life (s18);

(f) the right to humane treatment when deprived of liberty (s22);

(g) the rights of children in the criminal process (s23) and the right to fair hearing (s24).

The rights in the Victorian Charter are not absolute but they can only be subject to reasonable limitations that can be justified. Section 7(2) sets out factors for determining whether a limitation on a right is justified.

1.2 How the legislation applies to the making of laws, courts and tribunals, public authorities and other entities

The Victorian Charter works to protect human rights in three main ways:[55]

[53] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at iii.
[54] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.

(a) human rights must be taken into account when developing new laws;

(b) people and public institutions, including the Courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible; and

(c) public authorities in state and local government must act in ways that are compatible with human rights.

The legislature is required to receive a statement of compatibility with human rights from the member of parliament introducing a new Bill. However, failure to provide a statement of compatibility does not affect the validity, operation or enforcement of the subject legislation. Further, the Victorian Charter requires a committee consider any proposed bill and report on whether it is compatible with human rights.[56]

The Victorian Charter requires the Courts and Tribunals to, as far as it is possible, interpret all statutory provisions in a way that is compatible with human rights. Where the Supreme Court cannot interpret a legislative provision consistently human rights, it may make a declaration of inconsistent interpretation (s36), and give notice of this declaration to the Attorney-General. The Minister responsible for administering the affected statutory provision must then prepare a written response for parliament within six months (s37). Again, a declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in question, nor does it create any legal right or give rise to any civil cause of action (s36).

The Victorian Charter requires public authorities to take people's human rights into account when they provide services. The definition of 'public authorities' is broad enough to capture government Ministers, public servants, local councils and the Victoria Police (s 4). Private entities are also bound to act compatibly with human rights and consider human rights in decision making when they perform public functions on behalf of government.[57]

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) also receives an expanded role under the Victorian Charter (ss 40-43), including monitoring and reporting on the implementation and operation of the Victorian Charter.

1.3 The implications of laws and decisions not being consistent with the legislation

The Victorian Charter does not prevent Parliament from passing legislation that is incompatible with human rights and it does not override other legislation or allow the Courts to strike down legislation that is incompatible with human rights. Courts must try to interpret laws in a way that is compatible with human rights, but they cannot go against the purpose of a legislative provision to make it compatible with human rights. Instead, the Victorian Charter promotes human rights compatible laws by making sure that human rights are taken into account in the legislative process. It sets up a mechanism for the Supreme Court to notify the Government and Parliament if it considers a law cannot be interpreted compatibly with human rights.[58]

While the Victorian Charter does not create an independent cause of action (s39), a breach of its provisions can assist in obtaining relief under some other cause of action. For example, excluding evidence obtained by a public authority in breach of a human right or construing an

[55] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 1.
[56] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.
[57] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 3.
[58] Ibid.

otherwise lawful act as unlawful by virtue of the requirement that legislation be interpreted consistently with human rights.[59]

The Victorian Charter also permits a person to seek a judicial review, a declaration of unlawfulness, an injunction or a stay of proceedings in an existing cause of action, by relying on the provisions of the Victorian Charter to establish a further cause of action. However, the Victorian Charter specifically excludes an award of damages for any breach of its provisions.[60]

1.4 The implications for existing statutory complaints processes

Under the Victorian Charter, a person who has concerns about their human rights can:[61]

(a) complain directly to a public authority via its internal complaints procedures;

(b) make a complaint to the Ombudsman for investigation in relation to administrative action, when the Ombudsman has jurisdiction;

(c) make a complaint to the Independent Broad-based Anti-corruption Commission (**IBAC**) in relation to police personnel and protective services officers; or

(d) raise the Victorian Charter in a court or tribunal where the claim can be attached to an existing legal claim.

In 2013-14 the VEOHRC received approximately 670 enquiries from individuals raising allegations of a breach of human rights. At present, the Commission cannot take human rights complaints under the Victorian Charter.[62] However, it can handle disputes under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic).

In the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (the 2015 Review) recommendations were made to facilitate the Victorian Charter's consideration by all relevant government complaint-handling and oversight bodies when Victorian Charter issues arise within their jurisdiction. This was intended to support the original approach to implementation of the Victorian Charter by integrating it across the Victorian public sector.

The Victorian Charter is everyone's business in the public sector. Public sector entities, including complaint-handling bodies, should have capacity to deal with human rights issues when they arise in their work. The recommendations did not suggest that all human rights related complaints should shift to VEOHRC. They suggested that specialist complaint-handling bodies like the Mental Health Complaints Commission, for example, should continue to be able to consider human rights issues that are raised in relation to public mental health service providers. It was also recommended to facilitate communication between complaint-handling and oversight bodies. This would allow, for example, the Ombudsman to advise VEOHRC about systemic issues where VEOHRC may want to target education.[63]

1.5 The functions and responsibilities under the legislation

In addition to placing human rights obligations on public authorities, and making sure that human rights are considered when laws are made and interpreted, the Victorian Charter creates particular roles for some statutory bodies:[64]

(a) the VEOHRC is an independent statutory agency and has a range of advisory and educative functions under the Victorian Charter, including:

[59] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.
[60] Ibid.
[61] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, <http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf> at page 97.
[62] Ibid at page 97.
[63] Ibid at page 11.
[64] Ibid at page 3.

(i) reporting to the Attorney-General annually on the operation of the Victorian Charter;

(ii) advising the Attorney-General on anything relevant to the operation of the Victorian Charter by request, reviewing public authorities' programs and practices to determine whether they are compatible with human rights;

(iii) providing human rights education;

(iv) intervening in legal proceedings when a legal question arises about the Victorian Charter's application or the human rights compatible interpretation of a law; and

(v) assisting with the statutory reviews of the Victorian Charter;

(b) the Commission can receive complaints under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic) and offer dispute resolution, but it cannot take human rights complaints under the Victorian Charter;

(c) the Victorian Ombudsman is an independent officer of the Victorian Parliament. Her office performs an oversight function, investigating complaints about administrative actions taken by a wide range of Victorian public authorities. The Ombudsman has power to enquire into and investigate complaints about alleged breaches of the Victorian Charter within her jurisdiction. Police and protective services officers are excluded from the Ombudsman's jurisdiction;

(d) IBAC has a function to ensure that police and protective services officers have regard to the human rights in the Victorian Charter and it can investigate police misconduct, including allegations of a breach of human rights. The Ombudsman and the Independent Broad-based Anti-corruption Commission have power to compel the production of information to support their investigations.

1.6 How any s. 109 Commonwealth Constitution inconsistency issues were resolved

Section 36 of the Victorian Charter allows the Supreme Court to issue a declaration of inconsistent interpretation if the Court finds a statutory provision cannot be interpreted consistently with a human right. The declaration is sent to the Government and the Minister responsible for the provision must prepare a written response within six months, for tabling in Parliament and publication in the Government Gazette. A declaration does not affect the validity of the law.[65]

Only one declaration of inconsistent interpretation has been made. In 2010 the Victorian Court of Appeal made a declaration under Section 36(2) in *R v Momcilovic*[66] that Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) could not be interpreted consistently with the Victorian Charter (Section 25 to be presumed innocent). This declaration was not referred to the Attorney-General, because it was the subject of an appeal.[67] A narrow majority of the High Court found Section 36 of the Victorian Charter to be constitutionally valid in *Momcilovic v The Queen*.[68]

In submissions and consultations for the 2015 Review, a number of people argued the power to make a declaration of inconsistent interpretation should be strengthened, and some

[65] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, <http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf> at page 159.
[66] (2010) 25 VR 436.
[67] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, <http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf> at page 160.
[68] (2011) 245 CLR 1.

suggested a declaration of incompatible interpretation should make the offending provision invalid. However, this change is not possible in the Australian constitutional context. While Section 36 of the Victorian Charter was found to be constitutionally valid by the High Court, if the section were to confer a power on the Court to invalidate legislation for incompatibility or even to trigger invalidity (in essence, a legislative power), then the section would certainly be found to be constitutionally invalid.[69]

1.7 The costs and benefits of adopting the human rights legislation in Victoria

Costs

The 2011 Review of the Charter of Human Rights and Responsibilities Act 2006 (**the 2011 Review**) noted the following costs associated with the Victorian Charter:[70]

(a) ***costs to government*** - the government submission reported that over 5 financial years from 2006-07 onwards, the total expenditure on the Victorian Charter implementation across government was approximately $13.5m, including funding for certain departments and agencies, grants for education and legal advice, training and development of resources, legal advice on the drafting of statutory provisions and litigation;

(b) ***costs to other public authorities*** - the Victorian Local Governance Association (**VLGA**) mentioned costs associated with review of policies and procedures, local laws, compliance reporting and training. However, no figures were provided by local councils or other public authorities such as statutory bodies or community sector organisations, and submissions were not received from key public authorities such as educational providers, suppliers of electricity, gas and water, public transport operators and tribunals;

(c) ***costs to SARC*** - the Victorian Charter has not led to a significant increase in time spent considering Bills and regulations by Scrutiny of Acts and Regulations Committee of the Parliament of Victoria (**SARC**). There has been a small rise (12%) in the number of Bills in relation to which human rights issues have been raised by SARC since the commencement of the Victorian Charter. The total SARC cost for conducting the 2011 Review has been approximately $130,000;

(d) ***system costs*** - SARC considers that the Victorian Charter related litigation has been very small, though it is increasing. The Bar Council noted that consideration of Victorian Charter questions in litigation have frequently been resource intensive and that to date barristers have provided significant pro bon services in meritorious cases. It therefore seeks the establishment of a public fund to facilitate the future representation of disadvantaged clients in Victorian Charter cases. SARC noted that any litigations has a system cost, in that in addition to legal costs, it takes up Court time. While there is no evidence that the cost has been significant to date, SARC considers that the Victorian Charter has resulted in system cost. However, SARC also notes the evidence of Victorian Legal Aid that litigation of rights issues can provide a cost saving where it results in changes to policies that affect many people;

(e) ***privileging the rights of criminals over victims*** - some submissions, for example the Institute of Public Affairs and the Police Association, argued that the Victorian Charter privileges the rights of criminals over victims. However, evidence at public hearings and a number of other submissions, for example the Federation of Community Legal Centres and Victoria Police, disagreed with this proposition; and

[69] Ibid at page 162.
[70] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 14.

(f) ***creating uncertainty in the law*** - many submissions criticising the Victorian Charter argued that the cause of action provisions and interpretive provision of the Victorian Charter have created uncertainty in the law, because of the broad drafting of the rights in the Victorian Charter which put too much power in the hands of the judiciary and effectively undermine parliamentary sovereignty. However, many submissions argue that this is not the case and that while the Victorian Charter, like other laws, provides some limited scope in the application of most laws for judges to make value judgements, judges are required to follow the law and apply precedent.

The VEOHRC submission to the 2011 Review summarised the Deloitte Access Economics list of potential costs as follows:[71]

(a) ***start-up administration costs*** - there is information available regarding the quantity of these costs and the timeframe of its impacts is short term;

(b) ***ongoing administration and legal costs of implementation*** - there is information available regarding the quantity of these costs and the timeframe of its impacts is annual (year-to-year); and

(c) ***compliance costs of agencies*** - this potential cost is difficult to quantify and the timeframe of its impacts is annual (year-to-year).

The 2009 National Human Rights Consultation Report summarised the potential costs of a Human Rights Act as follows (while these potential costs relate to an Act that would apply to all of Australia, they have some application to specific States):[72]

(a) unnecessary because Australia provides adequate protection of human rights through democratic institutions, constitutional protections, legislation and the common law, and Australia enjoys greater social equity than other countries that do have a Human Rights Act;

(b) an unacceptable shift of power from the legislature to the judiciary as such an Act would require judges to make policy decisions, could result in Courts 'rewriting' legislation, and would ultimately lead to the politicisation of the judiciary, undermining public confidence in the independence of the Courts;

(c) not result in better human rights protections, nor would it result in better laws, since parliament either would focus on pre-empting negative judicial consequences or would abdicate its duty in relation to difficult policy questions, leaving them to the Courts. It would not result in better government policies and services, and it would impose further costs on government agencies;

(d) might actually limit human rights or lead to other negative consequences for human rights protection. The very process of identifying and defining rights can limit them, and unintended or adverse consequences could flow from the protection of certain rights;

(e) would generate excessive and costly litigation, and the legal profession would be the main beneficiary. Such an Act could have adverse effects on the court system. Any further protection of rights can and should be achieved through democratic processes and institutions, without the creation of a Human Rights Act. Rights are best protected through a healthy democracy, a strong civil society and strong democratic institutions; and

(f) the economic costs of introducing a Human Rights Act would outweigh any particular benefits the Act might have to offer as it would transform social and political questions into legal ones, and this would turn moral debates about rights

[71] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 197.
[72] Commonwealth of Australia, 'National Human Rights Consultation Report', September 2009 at xxv.

into technical debates about statutory interpretation, undermining the potential for cultural change.

The September 2009 National Human Rights Consultation Report described that the Victorian Government's submission provided some information about the costs of that state's human rights Act in the period immediately after its implementation.[73] In 2006-07, the government allocated $6.5 million for human rights initiatives over 4 years to cover agencies such as Victoria Police, Corrections Victoria, the Department of Human Services, the Department of Justice and the VEOHRC. The government noted that under its devolved model the costs of meeting the Victorian Charter obligations are spread across government.

1.8 Benefits

The 2011 Review noted the following benefits associated with the Victorian Charter:[74]

(a) ***drafting of laws*** - SARC found that there was evidence of the existence of processes for human rights assessment of new statutory provisions. The government submission noted the significant training and other capacity development efforts directed towards officers responsible for drafting Bills, including the support provided by the Human Rights Unit;

(b) ***stakeholders' consultation in the development of proposed laws*** - the VEOHRC submission states that an aspect of assessing the human rights impact of new laws has been greater community engagement and consultation during the legislative development process. SARC considers that there is evidence to show how the Victorian Charter has been used in discussions about law reform, but not that the Victorian Charter has led to an increase in stakeholder engagement in law reform processes;

(c) ***reviews prompted by the Victorian Charter*** - SARC considers that while the Victorian Charter has contributed to framing review processes (for example the *Mental Health Act 1986* and the *Guardianship and Administration Act 1986*), it is not able to conclude that it was the catalyst for the decision to conduct the reviews;

(d) ***SARC's scrutiny function, and parliamentary debate*** - SARC's scrutiny function provides an extra and independent check on the compatibility of Bills and statutory provisions with human rights. This has resulted in an increase in the number of Bills in relation to which SARC has raised human rights issues, from 36% of all Bills in 2003 to 48% of all Bills since the commencement of the Victorian Charter;

(e) ***service provision*** - the evidence to this review in relation to service provision covered:

A. reports of reviews of policies and procedures by public authorities;

B. reports of substantive changes to the way in which services are provided;

C. perceptions of service users and their advocates about systemic improvements to services; and

D. the use of the Victorian Charter by advocates to address specific service issues;

[73] Ibid at 294.
[74] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 131.

(f) ***reviews of policies and procedures*** - the requirement in Section 38 to make decisions and act compatibly with human rights prompted public authorities to review their policies and procedures, including local laws and to develop tools to assist them to assess the human rights compatibility of new policies and procedures;

(g) ***reports of substantive changes to service provision*** - these include changes made to the Department of Education and Early Childhood Development's school reference guide, Victoria Police's audit of police cells and persons in custody review, and changes to aspects of prison system policies. Complaints processes within many local councils have been streamlined to make them more accessible;

(h) ***the use of the Victorian Charter by advocates to address service issues*** - advocacy organisations made submissions stating that they had observed a positive change in the behaviour of public authorities. A number of legal centres, Victoria Legal Aid and the Bar Council submitted that the Victorian Charter had assisted them to negotiate outcomes on behalf of clients and avoid litigation;

(i) ***increasing respect for rights within the community*** - a number of submissions claimed that the Victorian Charter had increased respect for human rights in the community, however information in other submissions, including VEOHRC's submission, indicate that there is a low level of awareness in the community about the Victorian Charter. SARC does not consider there is sufficient information to indicate that the Victorian Charter has helped increase respect in the Victorian community for people's rights.

The VEOHRC submission to the 2011 Review summarised the Deloitte Access Economics list of potential benefits as follows:[75]

(a) ***enhanced legal protection of human rights*** (including preventing unfair treatment) - this potential benefit is difficult to quantify but the timeframe of its impacts is immediate;

(b) ***improved well-being and liveability among Victorians*** - there are various metrics available to quantify this potential benefit but the timeframe for its impacts is longer term;

(c) ***increased economic participation of Victorians*** - data is readily available to quantify this potential benefit but the timeframe for its impacts is longer term;

(d) ***positive cultural change in public authorities*** - this potential benefit is difficult (and highly subjective) to quantify and the timeframe of its impacts is likely to be longer term; and

(e) ***positive cultural change in civil society*** - this potential benefit is difficult (and highly subjective) to quantify and the timeframe of its impacts is likely to be changes occurring slowly.

The September 2009 National Human Rights Consultation Report summarised the potential benefits of a Human Rights Act as follows (while these potential benefits relate to an Act that would apply to all of Australia, they have some application to specific States):[76]

(a) redressing the inadequacy of existing human rights protections by filling the gaps in the current human rights framework with a comprehensive statement of the fundamental rights and freedoms and a mechanism for ensuring compliance with those rights and freedoms;

[75] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 197.
[76] Ibid at xxiv.

(b) serving as an important symbolic statement of values;

(c) ensuring greater protection of the rights of minorities and other marginalised people by providing a set of human rights against which proposed laws and policies could be assessed and assisting in educating individuals and groups about their rights and empowering them to call for better promotion and protection of them;

(d) improving the quality and accountability of government as the 'dialogue' model would generate between the judiciary, the executive and the legislature a conversation about human rights and would encourage public debate on the subject, this would improve government policy, legislation, government service delivery and judicial decisions;

(e) engendering a culture of respect for human rights so that over time implementation of such an Act by politicians, public sector agencies and the Courts would lead to greater awareness of human rights in the community and greater consideration of and adherence to human rights principles by all sectors of the community;

(f) improving Australia's international standing in relation to human rights as domestic implementation of Australia's international human rights obligations would limit future criticism for noncompliance, would reduce the number of complaints made to international treaty bodies, and would bolster Australia's credibility when commenting on human rights abuses in other jurisdictions;

(g) bringing Australia into line with other democracies; and

(h) generating economic benefits, reducing the economic costs associated with policies that do not protect the lives and safety of Australians.

The Honourable Jim McGinty, (former Attorney-General of Western Australia) listed 10 reasons why Australia should adopt a Human Rights Act as part of our law as follows (while these potential benefits relate to an Act that would apply to all of Australia, they have some application to specific States):[77]

(a) greater protection of the human rights of all Australians;

(b) encouragement and furtherance of a human rights culture in the Parliament, the public service, the judiciary and in the broader community;

(c) promotion of a more egalitarian society;

(d) respect and empowerment for individuals;

(e) parliamentary sovereignty;

(f) better law making;

(g) an end to isolation;

(h) to honour Australia's international obligations;

(i) provision of an Australian forum for allegations of Australian human rights breaches; and

(j) enhancement of Australia's reputation as a good international citizen.

1.9 Key ways to enhance the effectiveness of the Victorian Charter

Inclusion of further rights

[77] The Hon Jim McGinty, 'A Human Rights Act for Australia', 2010, 12 UNDALR at 25.

Various commentators have submitted that the Victorian Charter must cover *all* rights in the ICCPR, except for those for which the Commonwealth Government has exclusive responsibility,[78] for instance Article 13 regarding deportation (as this is exclusively a federal issue). The recommended additional rights to be included are:

(a) self-determination in article 1 of both ICCPR and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);

(b) remedy for unlawful arrest or detention under article 9(5) ICCPR;

(c) prohibition on war propaganda and religious hatred under article 20 ICCPR;

(d) right to have birth registered under article 24(2) ICCPR; and

(e) right to marry under article 23 ICCPR.

Amended remedies and inclusion of an independent cause of action

The 2015 Review noted four key problems with the remedies currently available under the Victorian Charter:[79]

(a) ***lack of consequence*** - the Victorian Charter is flawed in that there is no clear way to remedy a breach of someone's human rights;

(b) ***focus on government administration rather than a remedy for the individual*** - from a community perspective, people do not always have a clear place to raise a human rights concern with government and get a response;

(c) ***accessibility*** - in some cases, the only way for a person to have their human rights considered by an independent person is to raise the matter with a superior court. Access to justice, therefore, can be out of reach for many Victorians and involves a more expensive jurisdiction; and

(d) ***convoluted litigation*** - as the case law stands, Victorian Charter issues can only be brought before a court or tribunal if they are linked to another claim such as a discrimination claim. The Victorian Charter question has to relate to the same conduct as the other claim, but the other claim does not have to be successful. As a result, people can only argue human rights issues in convoluted ways that raise difficult jurisdictional questions.

The VEOHRC has also expressed concern that the Victorian Charter provides a patchwork of options for dealing with complaints in relation to potential human rights breaches, with very little opportunity for a complainant to access independent dispute resolution services or to enforce their rights.[80] In particular, the need to attach a Victorian Charter claim to another claim significantly reduces the ability for individuals to obtain effective relief.[81]

The Castan Centre for Human Rights (**Castan**) recommends the Victorian Charter should be amended to provide for independent causes of action modelled on the UK Human Rights Act,[82] including access to damages. The UK model is preferred over the ACT version because the UK version provides judges with the full range of remedies available, including damages. It is argued that an independent cause of action is necessary to ensure that victims of breaches of human rights are able to access effective local remedies to redress human rights abuses.[83]

[78] See for example, Castan Centre.
[79] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf> at page 10.
[80] Ibid at 16-18.
[81] Ibid at 61-63.
[82] *Human Rights Act 1998* (UK), s 8.
[83] See, for example, Castan Centre.

Specifically, the 2015 Review recommended that the provisions and process for obtaining a remedy under the Victorian Charter be clarified and improved by: [84]

(a) amending the Victorian Charter to enable a person who claims a public authority has acted incompatibly with their human rights to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Victorian Charter in any legal proceedings. The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Victorian Charter should be similar to its jurisdiction in relation to unlawful discrimination under the *Equal Opportunity Act 2010* (Vic). If the Tribunal finds that a public authority has acted incompatibly with a Victorian Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages;

(b) if the Victorian Charter is raised in another legal proceeding, the court or tribunal should retain the ability to make any order, or grant any relief or remedy, within its powers in relation to that proceeding; and

(c) amending the Victorian Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Victorian Charter, without having to seek review on any other ground.

Improved definition of 'public authority'

VEOHRC has recommended that while the flexible definition of 'public authority' under the Victorian Charter should be maintained, the power to prescribe entities to be a public authority in should be used more frequently to provide greater clarity in relation to the application of the Victorian Charter to non-State entities.[85]

Amendment of the 'override provision'

Section 31 of the Victorian Charter enables Parliament in exceptional circumstances to declare that the Victorian Charter has no application to an Act or a provision of an Act. This means that the requirement to interpret the provision in a way that is compatible with human rights does not apply and the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision.

VEOHRC has submitted that impact of an override declaration is to undermine the 'dialogue' process established under the Victorian Charter between the Courts and Parliament.[86] VEOHRC notes that s 31 of the Victorian Charter is unnecessary. If Courts are unable to interpret a statutory provision consistently with human rights, the Court may make a declaration of inconsistent interpretation.

Castan also support the removal of the override provision, noting that such a provision was not thought to be necessary in the *Human Rights Act 2004* (ACT). Castan further note that while an override provision is included in Canada's constitutional model, this is in order to preserve parliamentary sovereignty, as the Canadian Courts have power to invalidate rights-incompatible legislation. In contrast, parliamentary sovereignty is preserved in the non-constitutional model in Victoria.[87] Castan notes that if an override clause is deemed

[84] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf>.
[85] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf>.
[86] Ibid.
[87] Castan, 18 citing Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422.

necessary, they recommend that that s 31 be amended to replicate the override/derogation provision in s 37 of the *South African Bill of Rights*.[88]

Clarifying the role of human rights in statutory construction

VEOHRC notes that the interpretive mandate is one of the primary vehicles for protecting and promoting human rights under the Victorian Charter. However, since *Momcilovic v The Queen* (2011) 245 CLR 1, there has been considerable uncertainty about the approach and scope of the provision. VEOHRC that the interpretive mandate of the Victorian Charter was intended to be a stronger rule of interpretation than ordinary principles of interpretation or the common law principle of legality and proposes that the Victorian Charter be amended to clarify that intention.[89]

Expand the role of the VEOHRC

The 2015 Review found that the Victorian Charter is missing some key elements of an effective regulatory system. Addressing this, the 2015 Review Report recommends the Victorian Charter be amended to enable the VEOHRC to offer dispute resolution. The 2015 Review noted that this would provide a clear path for people to raise concerns with government if they feel their human rights are not being respected.[90] VEOHRC have recommended that the model be based on the *Equal Opportunity Act 2010*, with dispute resolution provided as early as possible, appropriate to the nature of the dispute, and fair and voluntary.[91]

VEOHRC has also recommended they have a research function under the Victorian Charter, conducting research into any matter that would advance the objectives of protecting and promoting human rights under the Victorian Charter. It is noted that such a function would improve the capacity to reveal and address systemic human rights issues, as has been the case under the *Equal Opportunity Act 2010*.[92]

[88] Castan, 18 citing *Constitution of the Republic of South Africa 1996* (RSA), s 37. See further Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, especially 440, 458-461.
[89] Michael Brett Young, 'The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', (online), 2015, http://assets.justice.vic.gov.au/justice/resources/2cd89d3e-1d23-410b-8187-40f14de7c9dd/summary_report_charter_review.pdf>.
[90] Ibid.
[91] Ibid.
[92] Ibid.

Schedule 4 - Operation and effectiveness of the human rights legislation in the ACT

1.1 The objectives of the Human Rights Act 2004 (ACT) and the rights protected in the Australian Capital Territory (ACT)

The Human Rights Act came about as a result of a report released by the ACT Bill of Rights Consultative Committee in 2003. This report found that human rights protection in the ACT was highly fragmented, with the rights of ACT citizens being protected under an array of different Territory and Commonwealth legislations. On the basis of the committee's recommendations, the ACT Government enacted the Human Rights Bill with the dual objectives of:

(a) Improving the protection of human rights within the ACT

(b) Providing for the people within ACT a clear and accessible statement of their fundamental human rights

The Human Rights Act stipulates in Section 6 that 'only individuals have human rights'. While this section excludes the rights within the Act from apply to public or private entities, the broad phrasing of Section 6 means that people who are not residing in ACT (or even Australia) may still be applicable "individuals".

The rights protected by this legislation are enumerated from Section 8 to 27A of the Act. Rights that are stipulated in the Human Rights Act 2004 include:

(a) Recognition and equality before the law (s.8)

(b) Right to life (s.9)

(c) Protection from torture and cruel, inhuman or degrading treatment (s.10)

(d) Protection of the family and children(s.11)

(e) Freedom of movement (s.13)

(f) Freedom of thought, conscience, religion and belief (s.15)

(g) Rights of Minorities (s.27)

The Human Rights Act also specifies in Section 23 that there is a right to compensation for wrongful conviction. This is notable as there is no equivalent right to compensation found in the Victorian Charter. After an amendment to the act in 2012, a partial right to education was included in Section 27A. Furthermore, it must be noted that the rights of indigenous Australians are not specifically protected under the act.

The Act stipulates in Section 7 that it is not an exhaustive statement of the rights an individual has under domestic and international law.

1.2 How the Human Rights Act applies to the making of laws, courts and tribunals

The Human Rights Act employs a dialogue framework, meaning that after the general rights protected under the act are enumerated it provides obligations for each arm of government in relation to these rights.

Obligations upon Parliament:

(a) It firstly creates the obligation for the Attorney-General, at the introduction of a Bill into the Legislative Assembly, to state whether the Bill is consistent with human rights specified within the Human Rights Act. There is no requirement in this statement of compatibility to provide reasons why the Bill is consistent, however reasons must be given to explain if, and how, a Bill is not consistent with the Act;

(b) The Act further applies to the parliaments consideration of Bills, as it requires in section 38 that the relevant standing committee, namely the one to be nominated by the Speaker, to report to the Legislative Assembly about human rights issues raised by the Bill; and

(c) However, these two obligations upon the parliament within the Human Rights Act do not necessarily impact upon the making of laws. The ACT Human Rights Legislation does not stipulate that failure to fulfil either obligation impinges upon the validity, operation or enforcement of the Bill if it becomes legislation.

Obligations upon the Judiciary:

(a) This legislation requires that Courts interpret ACT law in a way that is compatible with the Human Rights Act to the extent that it is possible to remain consistent with the purpose of the law being interpreted. Furthermore, the Courts may draw upon international jurisprudence to interpret a human right;

(b) The Supreme Court of the ACT has the power to make a declaration of incompatibility if it finds that a piece of legislation (or subordinate legislation) is inconsistent with human rights. On making a declaration, the Courts have an obligation to give a copy of the declaration to the Attorney-General. While the Attorney-General must table the document in the Legislative Assembly and respond to the declaration within six months, it does not strike down the law in question; and

(c) The Judiciary must provide notice to the Attorney-General and the Human Rights Commissioner if a matter before the court is in regards to the Human Rights Act.

Obligations upon the Executive:

(a) Government decision makers and public authorities are also required, where possible, to interpret ACT Law in a way that is compatible with the Human Rights Act. This obligation thus extends to Tribunals, who belong within the Executive branch;[93]

(b) Public authorities are further under an obligation to act in a way that is consistent with human rights. There is only two exceptions for not acting in accordance to the stipulated rights:[94]

(i) There is express direction in law for the public official to act inconsistently with the Human Rights Act.

(ii) The law is unable to be interpreted consistently to the Human Rights Act;

(c) The Attorney-General's has a number of obligations under the Act in conjunction with the Parliament and the Judiciary, which are briefly stipulated above; and

(d) The Attorney-General may additionally intervene in judicial proceedings regarding the Human Rights Act by way of right.

Additional role of the Human Rights Commissioner:

[93] *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
[94] Sean Costello and Renuka Thilagaratnam, 'Reinvigorating the human rights dialogue' (2015) 128 *PRECEDENT* 16,18.

(a) The Human Rights Commissioner (a role that is established by the *Human Rights Commissioner Act 2005 (ACT)*) has been provided with additional functions under the Human Rights Act since the inception of the Commissioner role;

(b) The Commissioner may intervene in an action regarding the Human Rights Act with leave from the Court; and

(c) The Commissioner is to conduct a review the Human Rights Act every five years and provide the Attorney-General with the results.

The continuing uncertainty over the role of Administrative Tribunals:

(a) There is no clear obligations stipulated in the Human Rights Act 2004 for the ACT Civil and Administrative Tribunal (ACAT). It is unclear from the legislation whether ACAT can grant relief to individuals who have had their human rights impeded upon by a public official; and

(b) This issue was considered by the Supreme Court of ACT in *LM v Children's Court*, where it was determined on an interpretation of the Human Rights Act that it did not grant lower Courts and Administrative Tribunals such power.[95]

1.3 Actions and remedies available under the act

A person can bring a claim in the Supreme Court of the ACT if they are a victim of a public authority breaching its obligations under the Human Rights Act. This is broader than the Victorian Charter, which provides only for a person to bring an action in order to clarify their rights for another proceeding.

While this allows for a broader range of actions under the ACT legislation, it does not appear to have resulted in a floodgate of litigation. From 2009-2014, the act was only referred to in 110 Supreme Court cases and 41 Civil and Administrative Tribunal matters.

The Supreme Court can grant "relief it considers appropriate" if an action against the Public Authority succeeds. There is no entitlement to damages under the Act, meaning that the cost of implementing this framework is comparatively lower for a government than models offering damages. On the contrary, this diminishes the usefulness of the legislation for applicants.

1.4 Costs and Benefits of Adopting the Human Rights Act 2004 (ACT) in Queensland

Costs of Implementing the Human Rights Act (2004)

The social cost of directly implementing the Human Rights Act in Queensland is that it has proven to be of limited use in advancing the rights of individual. Factors contributing to the impracticality of the Act are as follows:

(a) Damages are currently not a remedy available under the Act. This means that claimants seeking compensation as a result of a breach will only be granted relief at the discretion of the Supreme Court. Excluding damages may deter would-be claimants, including those with meritorious claims, from bringing an action to court because of the cost and time associated with litigation in the Supreme Court;

(b) The ACT version of the Act remains one of the few human rights jurisdiction internationally that does not offer damages for a human rights breach;

(c) The lack of clarity regarding the extent to which Administrative Tribunals and lower Courts may assess and remedy breaches of public authority obligations under the HR Act is a continuing problem for litigants. This requires further clarification of

[95] *LM v Children's Court* [2014] ACTSC 26.

Section 40C, which sets out the legal proceedings in relation to public authority actions;

(d) There is no consequences to the validity of a law if it is inconsistent with the Human Rights Act, or if a process designed to promote the consideration of Human Rights in the passing of legislation is ignored. Without concrete obligations, the ideals of the Human Rights Act are unlikely to be institutionalised within the Parliamentary process;[96] and

(e) The Human Rights Act (2004) also does not address specifically the rights and needs relating to Indigenous Australians. While the general rights within the act work to the benefit of Aboriginal and Torres Strait Islander communities, it has been suggested that Human Rights framework in Australia should also specifically recognise their rights to 'land, languages, culture and traditional knowledge'.[97] Incorporating such a provision in Queensland would recognise the historical and continuing disadvantages facing Indigenous Australians.

The other potential cost of implementing the Human Rights Act is that it provides broad standing to individuals. As it only requires that you are a "victim" in terms of having your rights infringed by a public official to bring a claim, and given the matters cannot be heard by lower Courts or Administrative Tribunals, if implemented in Queensland it could result in a floodgate of litigation in the Supreme Court. While this has not been the case in the ACT, it is a possible cost of the Human Rights Act framework.

Benefits of implementing the Human Rights Act (2004)

The benefits the Human Rights Act (2004) is that it does not require high costs for the Queensland Government in terms of implementation, while still ensuring a continuing public discourse about human rights in the ACT. This is for the following reasons:

(a) It does not provide for the payment of damages to individuals for successful claims against a public official who has acted in a way that is inconsistent with Human Rights;

(b) It does not permit the Supreme Court of ACT to strike down laws which are inconsistent with the Act, which could result in extensive costs in terms of rewriting legislation'

(c) The validity of the act is not impeded upon if an obligation within the Human Rights act is not followed by parliament or a member of the executive in the legislative process; and

However, the dialogue framework of the legislation encourages the parliament, judicial and executive branches of government to engage in a public dialogue regarding human rights. This keeps issues regarding human rights prevalent in the parliamentary and public sphere.

[96] Shawn Rajanayagam, 'Does Parliament do enough? Evaluating statements of compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1053.
[97] Australian Human Rights Commission, *Human Rights and Aboriginal and Torres Strait Islander People*, <https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_ATSI.pdf>.

Schedule 5 - Operation and effectiveness of the human rights legislation in the UK

This section provides an overview of the application and operation of the *United Kingdom Human Rights Act 1998* (**UK HRA**) which came into force in 2000. In particular, it considers:

(a) what human rights are protected under the UK HRA;

(b) how human rights are protected under the UK HRA;

(c) the remedies available when human rights are denied or violated; and

(d) key ways to enhance the effectiveness of the UK HRA.

1.1 What human rights are protected under the UK HRA?

The UK HRA affords protection to most of the rights and fundamental freedoms set out in the European Convention on Human Rights (**ECHR**) and its specified Protocols (s1). Some of the key rights covered by the UK HRA include:

(a) The right to life (Art.2 of the ECHR);

(b) Freedom from torture or inhuman or degrading treatment (Art.3);

(c) The right to a fair trial (Art.6);

(d) No punishment without law (Art.7);

(e) Freedoms of belief (Art.9), free expression (Art.10) and assembly and association (Art.11);

(f) Freedom from discrimination (Art.14);

(g) Rights concerning property, education and free elections (Arts 1-3 of the First Protocol) as well as the abolition of the death penalty (Art.1 of the Sixth Protocol).[98]

It is significant that UK Courts must take into account the jurisprudence developed by the European Court of Human Rights as well as the opinions and decisions of the European Commission of Human Rights when determining a question in connection with the rights protected by the UK HRA (s2).[99]

1.2 How does the UK HRA protect human rights?

The UK HRA:

(a) Requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where it is not possible to do so, a court may quash or misapply subordinate legislation (such as Regulations or Orders) or, if it is a higher court, make a declaration of incompatibility in relation to primary legislation. This triggers a power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights;

(b) Makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully

[98] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.
[99] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.

under the Act if as the result of a provision of primary legislation (such as another Act of Parliament) it could not have acted differently.

Since the UK HRA came into force, people have been able to argue that a decision violated their rights by being, for example, a disproportionate interference with the right to respect for private or family life. So the language of human rights is becoming more and more a common way of judging whether a public authority has acted unlawfully.

The Courts will look, with "anxious scrutiny", to see if the interference with the right in question was really necessary to achieve one or more of the stated aims recognised by the Convention. If the answer is no, the Courts will find that the public authority has acted unlawfully. The Courts will not, however, simply replace the decision-maker's view with their own, and so their role is still one of "review" rather than a full redetermination of the original decision. It is just that the nature of the review is now more intensive; and

(c) Requires UK Courts and Tribunals to take account of Convention rights in all cases that come before them. This means, for example, that they must develop the common law compatibly with the Convention rights. They must take account of Strasbourg case law. For example, the Human Rights Act has been relied on to determine cases involving the competing interests of privacy and freedom of expression. Several well-known people have used Article 8 of the Convention (the right to respect for private life) to seek injunctions against newspapers to prevent them publishing personal stories about them.

Different judges have taken different views on how far they can 'reinterpret' existing law using their powers under s.3 of the Human Rights Act. However, there is now a line of cases that seems to demonstrate a consensus amongst the judges of the limits of Section 3.[100]

1.3 What remedies are available?

Where a court finds that the act of a public authority is unlawful, it may grant such relief or remedy as it considers just and appropriate, provided it is within its powers (s8). The relief may include an award of damages provided that it is necessary to afford just satisfaction to the person in whose favour it is made.[101]

In the United Kingdom, damages are also considered a remedy of last resort:

> *The emphasis is not on enriching successful applicants but on the role of compensation in making public and binding findings of applicable human rights standards*.[102]

Awards of damages have been fairly modest.[103]

The following cases provide examples of damages for human rights breaches in the UK:

(a) *R (Bernard) v Enfield London Borough Council*[104] – a severely disabled woman who was required to live in accommodation without wheelchair access unsuitable for her condition for 20 months was awarded £8,000;

[100] Rt Hon The Lord Falconer of Thoroton Secretary of the State for Constructional Affairs and Lord Chancellor, 'A Guide to the Human Rights Act 1998', October 2006, <https://www.justice.gov.uk/downloads/human-rights/act-studyguide.pdf>.
[101] Ankush Sharma, 'Alternative models for a Queensland charter or bill of human rights', *QLS Journal* (online), 5 August 2009, <ankush_sharma_from_1_-_qls_journal.pdf>.
[102] *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [58].
[103] See for example *Dobson v Thames Water Utilities* [2009] EWCA 28 [41]-[46]; *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254.
[104] [2003] HRLR 111.

(b) *R (KB) v Mental Health Review Tribunal*[105] – seven psychiatric patients were awarded for £750 to £4,000 for extensive delays by the Mental Health Tribunal to their requests for reviews of their compulsory detention and treatment; and

(c) *Van Colle v Chief Constable of Hertfordshire*[106] – parents of a witness who was murdered due to inadequate police protection were awarded £50,000.

1.4 What has not worked in UK in relation to HR legislation

Recently there has been much discuss ion of the prospect of replacing, or supplementing, the UK HRA with a British bill of rights. The UK governments' long-anticipated bill of rights consultation is expected to be released during 2016.

Amos identifies some major problems with the UK HRA:[107]

(a) Knowledge of the UK HRA;[108]

In its 2006 *Review of the Implementation of the Human Rights Act the UK,* the Department of Constitutional Affairs stated that the HRA had been widely misunderstood by the public and had been misapplied in a number of settings. Furthermore, deficiencies 'in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the wider community. This process has been fuelled 'by a number of damaging myths about human rights which have taken root in the popular imagination. The Lord Chancellor has recently confirmed such concerns, and stated his view that a Bill of Rights 'could give people a clearer idea of what we can expect from the state an d from each other'.[109]

(b) Respect for the UK HRA;

Closely linked to the first problem, the second problem is that there is an obvious lack of respect for the HRA throughout elements of the media and amongst prominent political and public figures which, building upon a lack of knowledge, is very likely to have engendered and entrenched disrespect for the HRA amongst public authorities and the general public.[110]

(c) The range of rights protected;

The range of rights protected by the UKHRA is considered to be poor, particularly the exclusion of economic, social and cultural rights.[111]

(d) The test for standing;

The final problem with the design of the UK HRA concerns the test for standing. Under Section 7(1) of the UK HRA only the victims of acts in compatible with Convention rights may bring proceedings under the UK HRA or rely on the Convention rights in other leg al proceedings. The victim test , modelled on Article

[105] [2004] QB 936.
[106] [2006] EWHC 360.
[107] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?', Volume 72, No.6, *The Modern Law Review*, November 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00773.x/epdf >.
[108] Terry Kirby, 'How effective is the Human Rights Act', *The Guardian*, 2 July 2009 <http://www.theguardian.com/humanrightsandwrongs/effective-human-rights>.
[109] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?', Volume 72, No.6, *The Modern Law Review*, November 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00773.x/epdf >.
[110] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?', Volume 72, No.6, *The Modern Law Review*, November 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00773.x/epdf >.
[111] Ibid.

34 of the ECHR, is narrower than the sufficient interest test which must be satisfied in order to bring an application for judicial review. Interest groups are able to bring claims under the HRA only if they themselves are the victims of an unlawful act, although it is still possible for them to provide support to victims who bring claims .[112]

(e) Proportionality and deference;

When determining whether or not there has been a violation of Convention rights, the majority of Convention rights are drafted in a way which requires Courts, and other decision makers, to determine whether or not the interference is proportionate when measured against a specified interest such as the prevention of crime or the protection of the rights and freedoms of others. Unused to dealing with this principle, more accustomed to traditional grounds of judicial review, and anxious to avoid 'merits review', there has been a tendency on the part of some judges to avoid engaging in a full proportionality analysis, such as would be engaged in by the ECtHR considering a similar question. Deference, the judicial practice of affording weight to the decision of the primary decision maker when determining the proportionality of an interference with Convention rights, has also been common.[113]

(f) The principle of comity.

British judges interpreting and applying the HRA are also responsible for the problem of 'comity' with the judgments of the ECtHR. Building on the directive contained in Section 2 of the HRA, which provides that a Court or Tribunal determining a question which has arisen in connection with a Convention right, must take into account these judgments whenever made or given, so far as relevant, ECHR case law is now essentially considered binding on domestic Courts. Absent a 'strong reason', it must always be followed. The disadvantages for the effective protection of human rights in the UK are numerous which is why inflexible application of the principle is considered to be a problem, even though there are also some advantages in maintaining a link to an external arbiter.[114]

(g) The meaning of public authority

The final problem with the UK HRA stems from the judicial interpretation of section 6 of the UK HRA which provides that it is only unlawful for 'public authorities' to act in a way which is incompatible with Convention rights. Whilst there has been little controversy concerning the judicial definition of the first class of 'core' public authority, there has been considerable criticism of the judicial approach to the meaning of the second class of respondent: 'functional' public authorities - those bodies which are only bound by the HRA in respect of their public acts, not their private ones.[115]

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[112] Ibid.
[113] Ibid. See also *A v Secretary of State for the Home Department (No 1)* [2005] AC 68 at [80] and RA Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859.
[114] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?', Volume 72, No.6, *The Modern Law Review*, November 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00773.x/epdf >,*R v Special Adjudicator, ex p Ullah* [2004] 2 AC 323 at [20] per Lord Bingham; *R (S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196 and *N v Secretary of State for the Home Department* [2005] 2 AC 296.
[115] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?', Volume 72, No.6, *The Modern Law Review*, November 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00773.x/epdf >.

Schedule 6 - Operation and effectiveness of the human rights legislation in Canada

1.1 Overview

This section generally canvasses the:

(a) current legal framework for the protection of human rights in Canada;

(b) predecessor framework for the protection of human rights in Canada;

(c) issues with Canada's current human rights framework; and

(d) advantages of Canada's current human rights framework.

1.2 The Human Rights Framework in Canada

Canada has a Charter of Rights and Freedoms, an entrenched constitutional document which empowers the Courts to strike down legislation passed by a duly elected Parliament if it contravenes a Charter provision.

The Charter provisions apply to all legislative and executive activities, at both the federal and the provincial level, and to the activities of any body or person exercising statutory authority, such as a municipality, a law society, a university or any public official.[116]

This does not mean that the federal and provincial governments can never pass a law which runs contrary to these Charter rights. But, according to Section 1 of the Charter, the burden is on the government to prove that the violation of a Charter right is justified. In other words, the government has to prove that its violation of Charter rights serves a pressing and substantial purpose and that the extent of the violation is appropriately balanced against that purpose.

The Canadian Parliament has also retained some of its legislative sovereignty by including an express (but limited) opt-out or override provision in Section 33 of the Charter. [117]

It should be noted that firstly, the Section 33 power can only be used to override the fundamental freedoms in Section 2 and the legal rights in Sections 7 to 15, but cannot be used to override the democratic rights (ss 3-5), the mobility rights (s 6), the language rights (ss 16-23), the aboriginal rights (s 25), the multicultural rights (s 27) and the gender equality rights (s 28) in the Charter.

Second, if the override is invoked in a statute, the override ceases to have effect after five years, unless it is expressly re-enacted every five years (see Section 33 of the Charter).

Thirdly, the use of the override is also limited as a practical political matter. Politicians will generally be reluctant to use it since they must expressly admit that their proposed legislation is in violation of the fundamental rights and freedoms. Apart from Quebec which still protests that the Charter and other constitutional changes of 1982 occurred without its consent, the override has not been used at all by the federal government and only once by a provincial government.[118]

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[116] Ferguson, G, *"The Impact of an Entrenched Bill of Rights: The Canadian Experience",* Monash Law Review, 16 Monash U.L Rev. (1990). By way of contrast, the Charter does not apply to protect basic human rights and freedoms in relationships between private parties, although Courts have been generous in interpreting the Charter so that the Charter applies to private bodies administering government programs (for example) (Billingsley, B, "*Changing Canadian Law for the New Century",* LawNow, 27 LawNow (2002-2003)).
[117] Supra, fn. 116.
[118] Supra, fn. 116.

The Supreme Court of Canada has made some important decisions in Charter cases over the past quarter century. Many of these cases have put into focus fundamental questions about Canadian values. Notably, for example, the court has:

(a) struck out a law which restricted the ability of women to legally procure abortions;[119]

(b) struck out a law which said that inmates serving prison sentences for more than two years couldn't vote;[120]

(c) struck out a law which required businesses, whether operated by Christians or not, to close on Sunday so as to preserve and protect Christian values;[121]

(d) upheld a law which excused parents from assault charges for spanking their children, provided that only reasonable force was used and only for corrective purposes;[122]

(e) upheld laws against spreading hate propaganda and against possession of child pornography because these laws imposed reasonable limits on freedom of expression;[123]

(f) upheld a law establishing road-side check stops because this was a reasonable limit on the right to legal counsel upon arrest or detention;[124]

(g) upheld a court order (issued under child welfare legislation) requiring a blood transfusion to be administered to the child of Jehovah Witness parents who objected to the transfusion for religious reasons;[125]

(h) required provincial human rights legislation to include protection against discrimination on the basis of sexual orientation.[126]

1.3 Framework for the protection of human rights prior to the Charter

Before the Introduction of the Charter in 1982, Federal and Provincial governments passed statutes (such as the Canadian Bill of Rights 1960) which recognized the basic human rights of Canadians. These statutes, which remain in place today, however, are not, and never have been, constitutional documents.

The 1960 Canadian Bill of Rights was almost entirely reproduced in similar or broader language in the 1982 Canadian Charter of Rights and Freedoms. There are only three provisions in the Bill that were not included in the Charter freedom against arbitrary exile of any person [Section 2(a)], the right to "enjoyment of property and the right not to be deprived thereof except by due process of law" [Section 1(a)], and the right "to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" [Section 2(e)].

The continuing value of Bills of Rights therefore, is that they add to Charter rights in limited ways. For example, there are several instances of the Canadian and Alberta Bills and the Quebec Charter being held to grant more rights than the Canadian Charter. [127]

[119] *R. v. Morgantaler* [1988] 1 SCR 30.
[120] *R. v. Sauve* [2002] 3 SCR 519.
[121] *R. v. Big MDrug Mart* [1985] 1 SCR 295.
[122] *Canadian Foundation for Children v. Canada* [2004] 1 SCR 76.
[123] *R. v. Keegstra* [1990] 3 SCR 697.
[124] *R. v. Thomsen* [1988] 1 SCR 640.
[125] *B(R) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315.
[126] *Vriend v Alberta* [1998] 1 SCR 493.
[127] They also do not have a limitation clause similar to section 1 of the Canadian Charter, which states that the guarantees are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In theory, this should allow the federal and provincial Bills/Quebec Charter to have broader application than the Canadian Charter. However, some commentators note that the lack of such limitation in the

However, Bills of Rights are ordinary pieces of legislation which can be changed or repealed at any time, more or less at the whim of the government. Recognizing that these human rights codes are, legally speaking, just ordinary statutes, Canadian Courts were reluctant to enforce them rigorously against the government.[128]

So, between the enactment of the Canadian Bill of Rights in 1960 and the introduction of the Charter in 1982, there was only one instance when the Supreme Court of Canada relied on the federal Bill of Rights to strike down a law.[129]

1.4 Issues with the Canadian Framework

The Chief Justice of the Supreme Court of Canada, the Rt. Hon. Beverly McLachlin, has recently identified concerns with the Canadian Charter:

(a) **Canadians do not understand the Charter -** a recent survey found that most Canadians don't know much about the Charter itself. Apparently, only 49% of Canadians are aware that the federal and provincial governments have the power to override Charter protections by invoking the notwithstanding clause. The authors of the survey summed up their findings as follows: "What emerges is an environment where Canadians may be generally aware of the principles of the Charter but lack an understanding of the mechanisms that make it work."[130]

(b) **The Charter leads politicians to shunt social problems to the courts** - a constitutional bill of rights affects the democratic process. It places social issues before the Courts that otherwise would have been within the exclusive purview of Parliament and the legislatures. Some have suggested that this leads to legislators shuffling "hot potato" items off onto the Courts through references on legal questions. Others suggest legislators may be prone to waiting for the Courts to tackle difficult questions that the legislators would rather avoid.

(c) **Criminal justice takes longer and is more costly**[131] **-** the Charter has made criminal trials longer and more complex by providing new grounds on which evidence can be challenged. Each challenge must be dealt with by the trial judge. These challenges take a great deal of time and pose particular difficulties on jury trials.

Other commentators have also noted the following concerns with the Charter:

(a) **Lack of timeliness of Judgements -** the time which the Supreme Court of Canada takes to issue a judgment after oral arguments are completed doubled in the first three years after the enactment of the Charter. In 1980 and 1981, the average time was four months, while in 1984 and 1985 the average time was eight months, and by 1986 the average time had ballooned to over ten months. In 1980 and 1981 combined, only two judgments took more than 12 months to deliver, while in 1984 and 1985 combined, 33 judgments took 12 months or more to be delivered.[132]

(b) **Increased Legal Complexity -** in addition to the dramatic rise in the number of cases initiated as a consequence of the Charter, the Charter brought a new

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Canadian Bill of Rights, in conjunction with its lack of status as regular non-entrenched legislation, has resulted in a conservative approach to interpreting them (see Bowal, P and Thul, D, "*Bill of Rights in Canada",* LawNow, 37 LawNow (2012-2013)).

[128] Bowal, P and Thul, D, "*Bill of Rights in Canada",* LawNow, 37 LawNow (2012-2013).

[129] Supra, at fn. 128. Specifically, in *R. v. Drybones [1970] SCR 282*, the Supreme Court of Canada struck out a provision of the Indian Act which prohibited a native from being drunk while off a reserve. The Court found that the law discriminated against off-reserve natives.

[130] Nik Nanos, "*Charter Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights"*, Policy Options (February 2007) 50 at 55.

[131] Although her Honour notes that other factors have contributed to this, such as technological advancements and complexities.

[132] Supra, fn. 116.

complexity to legal arguments and generally slowed down the whole process of legal proceedings. The great increase in the use of Charter arguments and the corresponding judicial time which is required to dispose of those arguments both orally and in writing has been a significant factor in the huge backlog which plagued Canadian Courts.[133]

(c) **Judicial Activism -** some people have criticized the Courts' approach as being too "activist" and going too far into areas of political and social policy. Others have complained that the Courts still have not gone far enough in using the Charter as a tool to force government action and social or economic reform.[134]

(d) **Politicising Judges -** while it is clear that the judiciary has always had a role in policy formulation, there is a risk of over-politicising judges. This may lead to political scrutiny of, and interference with judges and, as one commentator puts it, 'we are apt to drag the judiciary into the heart of our political storms - into the very cockpit of partisan political struggle…. At its worst, Canada could sink to the same partisan, ideological depths as the United States in the appointment of superior court judges'.[135]

(e) **Wealthy Litigant Interest Groups hindering Legislation** - it has been suggested that Charter challenges by wealthy, advantaged interest groups hinder the attempts of progressive governments to develop innovative legislation. Legislatures' fears of well-financed Charter challenges impose high transaction costs and: subtly shift the debate within government from a debate over the merits of policy to a debate over its constitutional adequacy [which] has more to do with second-guessing the Courts than with sensitive balancing.[136]

(f) **Increased Costs of Litigation -** a lawyer's research and trial preparation time has increased, which ultimately raises the cost of litigation. The increase in research time is understandable when one considers the volume of Charter materials and the nature of Charter litigation. Research efforts in Charter litigation are not necessarily confined to Canadian sources. Since provisions in the Canadian Charter are similar in part to provisions in the United States Bill of Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.[137]

1.5 Costs and Benefits of System

Virtually every public law of Canada is open to challenge under some provision of the Charter. Between 1982-1990, there were more than 4,000 reported Charter cases (3,000 or more dealing with criminal law, including police and prosecutorial behaviour), over 100 of which are decisions of the Supreme Court of Canada and, there is a vast but unknown number of unreported Charter cases.[138]

This sheer volume was unexpected.[139] By contrast, the European Court of Human Rights has only delivered about 100 reported judgments in 20 years under the European Convention for

[133] Supra, fn. 116.
[134] Supra, fn. 128.
[135] Supra, fn. 128.
[136] AJ Petter & PJ Monahan, 'Developments in Constitutional Law: The 1986-87 Term' (1988) 10 Sup Ct L Rev 61 at 133. The authors cite campaigns by lawyers against Ontario's attempts to introduce no-fault car insurance and a similar challenge by doctors opposed to Ontario's attempts to ban 'extra-billing' a practice by which doctors directly bill their patients for a premium over the maximum payable by the government health plan.
[137] Supra, fn. 116.
[138] See FL Morton & WJ Withey, 'Charting the Charter, 1982-85: A Statistical Analysis' (1987) 4 Can Hum Rts YB 65 [hereinafter 'Charting the Charter']. Professor Morton updated this research in a paper presented at the annual meeting of the Canadian Political Science Association, Quebec City, May 1989; see his related article 'Federal Character of Canada Being Eroded by Charter Rulings' Financial Post [June 3, 1989] 14. A later statistical analysis was prepared by Professors Morton, Withey and PH Russell and presented in a paper, 'The Supreme Court's First 100 Charter of Rights Decisions: A Quantitative Analysis,' at the annual meeting of the Canadian Political Science Association, Victoria, BC, May 27-29, 1990.
[139] Supra, fn. 116.

the Protection of Human Rights and Fundamental Freedoms; many claims are of course weeded out in advance by the European Commission of Human Rights.

The Rt. Hon. Beverly McLachlin, Chief Justice of Canada, has recently identified the following benefits of the Canadian Charter:[140]

(a) **Better Protection of Minority Rights -** the rights of those detained by the state are better protected because of the Charter. Canada also has a fairer criminal justice system because of the Charter, and the Charter has strengthened the protection of minority language rights. The Charter has introduced protections for minority and marginalized groups that are of vital importance… as former Prime Minister Chratien, "the Charter makes everyone more comfortable as a citizen"…;

(b) **Forum for Democratic Debate -** the Charter has created a forum for democratic debate on a host of subjects, from basic civil liberties to timely health care. This enriches and strengthens our democracy. Canada fights its battles and works out differences with laws and words - not with guns and mallets…; and

(c) **Example to the World** - the Charter has allowed Canada to stand tall in the world. The framers of the 1982 Constitution bargained for a constitutional change that would affirm Canada's status as an independent nation. The Charter that became the envy of the world. As former Prime Minister Jean Chretien put it, "a Charter that stands as an example to the world, and a model on which other countries have built and continue to build."

The Rt. Hon. Beverly McLachlin has also addressed some common myths regarding the Canadian Charter:

(a) **The Charter is not softer on criminals** - [It is a] "myth is that the Charter has put law, order and public safety at risk, by making it harder to convict felons and softening punishment. The belief that the Courts are too soft on crime is not new. In 1979, just three years before the Charter became part of the Canadian Constitution, a report prepared by the Solicitor General of Canada noted that 7 in 10 Canadians were of the view that the Courts did not deal harshly enough with those convicted of crime.' Perhaps the Charter has merely become the new kicking horse…;

(b) **No subjugation of parliamentary sovereignty** - The second most persistent Charter myth is the notion that the Charter subordinates Parliament and the provincial legislatures to the will of the judiciary. It is true that a constitutional bill of rights places before the Courts important issues that would formerly have been solely within the power of the legislative branch. It is also true that a constitutional bill of rights subjects legislation to judicial review, and that sometimes Courts set aside or modify laws adopted by the legislative branch. However, for the reasons that follow, this does not mean that the legislative branch is rendered powerless. First, when a law is found to be unconstitutional, there is often ample room for a legislative response under s. 1 of the Charter. Under s. 1, it is unusual for a court to find that the objective being pursued by Parliament or the provincial legislature is not pressing and substantial. If a law is found unconstitutional, in the vast majority of cases it is because the law impairs the relevant right or freedom more than is reasonably necessary. It will usually be open to Parliament or the provincial legislature to craft a law that meets its objective, while avoiding the constitutional defect identified by the court. The record shows that Parliament and the provincial legislatures often do so…; and

(c) **No subjugation of society's moral views-** A third and related Charter myth is that the Charter wrongly enables Courts to make decisions that go against popularly held moral views, thereby devaluing society's values and making Canada a "less-good" place to live. I concede that some court decisions on some issues go against the moral views of some Canadians. However, with respect to those who believe

[140] Rt. Hon. Beverly McLachlin, "*The Charter 25 years later: The good, the bad and the Challenge",* LawNow 32 LawNow (2007-2008).

otherwise, I believe it is simplistic to assume that this is a problem. More accurately, it is a reflection of the values stated in the Charter and of divided views of the populace on the extent to which the state should regulate private moral issues. In the eyes of some, such decisions - and the Charter that dictates them - are problems. But in the eyes of others, the decisions represent long- overdue justice."