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Dear Sir/Madam,

SUBMISSION TO QUEENSLAND HUMAN RIGHTS INQUIRY

Thank you for the opportunity to make a submission to this most important inquiry.

SUMMARY

The history of Queensland is one of authoritarianism and intolerance[1]. Whilst the most recent election result might suggest the population is not as supportive of this approach as it once was clearly this approach to government has not died.

The protection of civil liberties and human rights in this state is piecemeal. What is needed is a comprehensive regime to protect our basic rights. Interstate experience indicates that the most beneficial effect of such a regime will be to change the culture of government in this State.

In the Council's submission this committee ought to recommend a constellation of changes to our political system which in the Council's view are best designed to achieve this objective:

1. There should be statutory protection of human rights by a Human Rights Act ("the HRA").
2. The rights to included should be those found in the Victorian Charter.
3. The HRA should bind public authorities including government departments and statutory authorities and entities and persons performing public functions.
4. The HRA should invest individuals with a right to challenge the lawfulness of a decision of a public authority on the basis of a violation of human rights and require the executive government to take human rights into account in the policy process.
5. The HRA should provide that all draft legislation introduced to parliament must be accompanied by a human rights compatibility statement.
6. The Human Rights Act should require the courts to interpret legislation in a way that is compatible with human rights in so far as it is possible to do consistently for the statute's purpose.
7. The HRA should empower the courts to make a declaration or finding that a law cannot be interpreted in a manner consistent with the right protected under the Act. Such a declaration or finding should not operate to invalidate the law but would require a response from the parliament.
8. Finally, there should be a right to seek compensation for breaches of the civil and political rights.

This Parliament has the opportunity to set a national standard. Should this Parliament pass a Human Rights Act it will reinvigorate the case for the same reform in other States and nationally. This is a change whose time has come.

[1] See eg Ross Fitzgerald *From 1915 to the early 1980s* UQP 1984

PART I: CONSIDERATION OF THE ADOPTION OF A STATUTORY HUMAN RIGHTS ACT

1.0 The Effectiveness of Current Laws and Mechanisms for Protecting Human Rights in Queensland and Their Improvement

Currently there are three basic means by which human rights are protected in Australia that are directly applicable to Queensland:

- The common law;
- The Federal Constitution;
- Federal and State legislation.

1.1 The common law

The traditional view is that the common law is positioned to protect individual rights. This view has been aptly expressed by Sir Robert Menzies when writing in opposition to Lionel Murphy's Human Rights Bill of 1973:

> "When we, in Australia, come to discuss civil and political rights it is necessary to remember that one of the functions of the common law devised over a course of centuries in England and adopted by us by inheritance has been to protect the individual against infringement of his personal rights."[2]

The common law generally works to protect rights through the presumption of legality that provides that "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."[3] Among the principles to which this presumption of legality is applied are the following:

- In criminal trials, the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt;[4]
- The right to exclude other people including agents of the government from private premises;[5]
- The double jeopardy principle;[6] and
- Legislation does not authorise the State to take property without compensation.

It should be noted that, such is the nature of the common law, common law principles that protect human rights can be overridden by carefully worded legislation. In this respect the

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[2] Melbourne, *Herald,* 13 March 1974, 4.
[3] *Re Bolton, ex parte Beane* (1987) 162 CLR 514 at 532 (Brennan J). See also *Al-Kateb v Goodwin* (2004) 219 CLR 562, [20].
[4] See *R P S v The Queen* (2000) 199 CLR 620 at 630.
[5] See *Coco v The Queen* (1994) 179 CLR 427.
[6] See *R v Carroll* (2002) 213 CLR 635.

common law alone has a limited ability to protect human rights from a government who would seek to circumvent them.

1.2 Constitutional Protections

1.2.1 Express Federal Constitutional Protections

The Australian Constitution is binding on Federal, State and Territory parliaments and courts. The writers of the Australian constitution explicitly decided not to include a Federal Bill of Rights. There are however a small number of guarantees of rights restraining State Parliaments which generally speaking have been narrowly interpreted:

- Section 92 – provides for free trade amongst the states
- Section 117 – prohibits discriminating against people on the basis of their residence of a state

Section 92 – Free Trade Amongst the States

Section 92 of the Constitution provides that:

> "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

As well as preventing discriminatory burdens on interstate trade and commerce,[7] this section has led to the creation of a right of freedom of movement across the state boundaries. A notable case is that of *R v Smithers*[8] which concerned a New South Wales Act that criminalised a person who moved to New South Wales after having committed in another state an offence which carried a maximum sentence of death or imprisonment for more than a year, and who had been released from prison for a period of less than three years. This was held to breach section 92 of the Constitution.

More recently it has been held that the right to freedom of movement between states is not absolute and that a law regulating another subject matter incidentally affecting this right will not be unconstitutional if it was reasonably necessary for the purpose of preserving an ordered society under a system of representative and responsible government, and that the burden was not disproportionate to that end.[9]

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[7] *Cole v Whitfield* (1988) 165 CLR 360.
[8] (1912) 16 CLR 99.
[9] *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 307-8 (Mason J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

Section 117 – Protection against discrimination on the basis of State residence

Section 117 provides that:

> "A subject of the Queen, resident in any State shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

This section was originally given a narrow interpretation but has since been given a broad interpretation consistent with the purpose of the section as granting "equality of treatment within each State"[10] under the Federation, and enhancing "national unity and a real sense of national identity".[11]

The section creates individual protection for interstate residents who are Australian citizens against State and Commonwealth laws "wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident".[12]

1.2.1.1 Summary of existing Constitutional provisions

The existing Constitutional provisions provide very limited rights to restrain the Queensland Parliament and case law demonstrates that the High Court has given them a rather restricted application.

1.2.2 Implied Constitutional Rights

Within the Constitution there are necessary implied rights to give effect to the Constitution and its express rights. The High Court has found two such implied rights:

- Implied right of freedom of political communication; and
- Implications from the separation of powers.

Implied Right of Freedom of Political Communication

In order to give effect to a system of representative and responsible government under sections 7 and 24 of the Constitution, the Constitution protects the freedom of communication concerning government or political matters that enables the people to exercise a free and informed choice as voters.[13] The freedom restrains Commonwealth and State laws. However, the right is not an absolute right. Whether a law infringes on the freedom is decided upon consideration of:

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[10] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 559-60 (Toohey J).
[11] Ibid 485 (Mason J).
[12] Ibid 559 (Toohey J).
[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

1. Does the law burden freedom of communication about government and political matters?
2. If so, is the law reasonably appropriate and adapted to serve a legitimate end consistent with a representative and responsible government?[14]

The High Court has found that legislation that burdens the freedom of political communication was not unconstitutional due to serving a legitimate purpose such as preventing violence in public places,[15] maintain public order[16] and keeping assembly and discourse in public places free from threat, abuse or insult.[17]

The Separation of Powers

The chapters of the Constitution provide a clear separation of powers between the legislature, the executive and the judiciary at Commonwealth and State level. Most important is the separation between the executive and the legislature on the one hand and the judiciary on the other, to protect judicial power from being arbitrarily exercised from the government. This is an important safeguard in a democratic society to ensure due process and fairness to individuals and to ensure courts are independent from the whim of the majority.

This constitutional principle is not clear cut. Key considerations are whether the legislation confers on judges or the court a function that is repugnant to traditional judicial process that creates a perception that the courts are being used as the instrument of the executive. Accordingly, state legislation has been struck down where legislation preventatively detained a specific individual past the period of the sentence as it rendered the State Supreme Court as an instrument of the legislature;[18] where legislation required the Court to make a control order against a person if satisfied that the person is a member of a declared organisation as declared by the State Attorney General;[19] and where legislation confers power on a Supreme Court judge to declare an organisation to be a 'declared organisation' without giving reasons for their decision.[20] In such cases the High Court has stressed the importance of procedural safeguards such as right to appeal and rules of evidence and discretion of courts.[21]

1.3 Legislative Implementation of International Law

In Australia, international treaties that the Executive have become signatory to have no direct effect in its internal laws without legislation.[22] That is not to say that Australian Courts do not give consideration to international treaties that Australia is signatory to. Indeed it has been

[14] Ibid.
[15] *Coleman v Power* (2004) 209 ALR 182 at 230 (Gummow and Hayne JJ), at 246-7 (Kirby J).
[16] Ibid 193 (Gleeson CJ).
[17] Ibid 257 (Callinan J).
[18] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[19] *South Australia v Totani* (2010) 271 ALR 662.
[20] *Wainohu v New South Wales* (2011) 278 ALR 1.
[21] See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
[22] *The Minister for Immigration v Teoh* (1995) 128 ALR 353 at 361.

held by the High Court that "the courts should, in a case of ambiguity, favour a construction of a... statute which accords with the obligations of Australia under an international treaty".[23] However, what this does mean is that the principal means by which Australia's human rights obligations have been implemented is through legislation by the Commonwealth powers under the external affairs power in the Constitution and by States under their remaining powers.

Such is the nature of legislation, a law that seeks to apply regardless of an international obligation can do so through repealing the section, not including a certain obligation into implementing legislation, or stating that a section applies regardless of the other Act. For State laws this is subject to section 109 of the Constitution which provides that a State law cannot be inconsistent with a Commonwealth law. This provision has proved fundamental in striking down Queensland Acts that were racially discriminatory for its inconsistency with the *Race Discrimination Act 1975* (Cth).[24]

International Convention on the Elimination of All Forms of Discrimination (CERD) and the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The *Race Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth) are legislative provisions giving effect to Australia's obligations under the CERD and CEDAW. The Acts prohibit discrimination on the basis of race or sex in all areas of public life including administration of Commonwealth laws, accommodation, workplace and education.

In Queensland, the *Anti-Discrimination Act 1991* (Qld) makes it illegal to discriminate against someone in the work, education, state governments laws and programmes, accommodation, supply of goods and services, on the basis of characteristics such as sex, relationship status, pregnancy, breastfeeding, family responsibilities, parental status, race, impairment, religious belief or activity, political belief or activity, trade union activity, gender identity, or sexuality.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR provides for the protection of civil and political rights such as the right to a fair trial, the right to freedom of conscience and religion, and the right to be free from torture.

The ICCPR has not been specifically implemented in legislation; rather it is contained in the schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). The HREOC Act gives the Australian Human Rights Commission the function "to inquire into any act or practice that may be inconsistent with or contrary to any human right" protected by the instruments listed in the schedule, including the ICCPR.[25] This enables the Commission to conduct enquiries in relation to acts or practices complained of as being inconsistent with

[23] Ibid 363.
[24] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[25] HREOC Act, s 11(1)(f).

these instruments. However, the Commission lacks any power to penalise contravening bodies or enforce the rights under the ICCPR. As the United Nations Human Rights Committee noted in August, 2003, this does not provide an effective remedy to those whose rights under the ICCPR have been violated.[26]

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides for the protection of economic, social and cultural rights such as the right to housing, right to an adequate standard of living, the right to safe working conditions and the right to education.

The ICESCR has been neither implemented in self-contained legislation or is it included in the HREOC Act. It has been implemented in parts through the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) which prohibits discrimination on the basis of age or disability in public life. Some of these rights are of course protected in Queensland by the *Anti Discrimination Act*. These Acts do not protect other economic, social or cultural rights in Australian domestic law as per its international obligations.

Convention on the Rights of the Child (CROC)

The CROC provides for the protection of the rights of children such as the right of all children to express their views freely on all matters affecting them, the right of survival and development, and consideration of the best interests of the child as the primary consideration in all actions concerning children.

The CROC is not implemented in self-contained legislation but is included in the schedule of the HREOC Act. It has also been implemented in part in the *Age Discrimination Act 2004* (Cth) and the *Family Law Act 1975* (Cth).[27]

Convention Against Torture (CAT)

The *Crimes (Torture) Act 1988* (Cth) criminalises an act of torture if conducted by a public official/s or people acting in an official capacity or with the consent of a public official outside Australia.[28] The charged person must either be an Australian citizen or present in Australia at the time of prosecution.

The Queensland Criminal Code also criminalises torture.[29]

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[26] University of Minnesota's Human Rights Library. *Mr Edward Young v Australia, Communication No.941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).* Available at http://www1.umn.edu/humanrts/undocs/941-2000.html.

[27] See *Family Law Act 1975* (Cth) s 60CA which provides that the best interests of the child is the paramount consideration in parenting orders.

[28] *Crimes (Torture) Act 1988* (Cth) s 6.

[29] *Queensland Criminal Code 1899* (Qld), s320A.

1.4 Queensland Legislation

1.4.1 *Legislative Standards Act 1992* (Qld)

The Act establishes the Office of the Queensland Parliamentary Counsel, which is charged with responsibility for drafting all government Bills[30] and providing advice to Ministers and government entities about the application of fundamental legislative principles to any proposed legislation.[31]

Fundamental legislative principles are defined as "the principles relating to legislation that underlie a parliamentary democracy based on the rule of law."[32] These principles include requiring that legislation has sufficient regard to the rights and liberties of individuals.[33]

Section 4(3) provides a list of examples as to whether legislation has sufficient regard to rights and liberties of individuals, such as whether the legislation—

> (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
>
> (b) is consistent with principles of natural justice; and
>
> (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
>
> (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
>
> (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
>
> (f) provides appropriate protection against self-incrimination; and
>
> (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
>
> (h) does not confer immunity from proceeding or prosecution without adequate justification; and
>
> (i) provides for the compulsory acquisition of property only with fair compensation; and
>
> (j) has sufficient regard to Aboriginal tradition and Island custom; and
>
> (k) is unambiguous and drafted in a sufficiently clear and precise way.

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[30] *Legislative Standards Act 1992* (Qld) s 7(a).
[31] Ibid s 7(g)(ii)
[32] Ibid s 4(1).
[33] Ibid s 4(2)(a).

Assessing adherence to these principles is the role of each portfolio committee.[34] While it appears that there is a system in place requiring the consideration of human rights in Queensland's legislative process, the lack of any judicial oversight illustrate the limitations of this system.

This Act encourages good practice in terms of giving due consideration to rights and the need to provide justification that is potentially scrutinised prior to enactment. However, the lack of oversight is a crucial and absent element – a gap a Queensland Charter of Human Rights would fill.

1.4.2 Right to Vote

The right to vote in elections for Queensland elections is regulated by Queensland legislation. Until 1965 such legislation prohibited Aborigines resident in Queensland from voting. The right to vote is also regulated by citizenship, minimum age and residency requirements.[35] A person who may meet these requirements may nonetheless be disqualified from voting if serving a sentence on a full-time basis for an offense against an Australian law where the detention is attributable to the sentence concerned.[36] A person may also be disqualified if they are of unsound mind such that they are incapable of understanding the nature and significance of enrolment and voting.[37]

2.0 Operation and Effectiveness of Human Rights Legislation in Victoria, the Australian Capital Territory and By Ordinary Statute Internationally

2.1 The Victorian and Australian Capital Territory (ACT) Charters

Both Charters provide a list of human rights that are explicitly protected by the Charter,[38] and in the circumstances that they may be permissibly limited.[39] In terms of pre- legislative procedure, Victoria requires the Scrutiny of Acts and Regulations Committee to consider all introduced Bills for human rights compatibility.[40] This process is similar in the ACT, with the relevant standing committee reporting to the Legislative Assembly on any human rights issues in introduced Bills.[41]

Furthermore, statements of compatibility must be provided to the Parliament detailing how the Bill is consistent and inconsistent with human rights, by the proposing Member of

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[34] *Parliament of Queensland Act 2001* (Qld) s 93.
[35] *Electoral Act 1992* (Qld).
[36] Ibid ss 101(3), 101(4).
[37] Ibid s64(1)(a)(i).
[38] *Charter of Human Rights and Responsibilities Act 2006* (Vic) *('Victorian Charter')* Pt 2; *Human Rights Act 2004* (ACT) ('ACT Charter') Pt 3.
[39] *Victorian Charter* s 7; *ACT Charter*, s 28.
[40] *Victorian Charter*, s 30.
[41] *ACT Charter*, s 30.

Parliament in Victoria,[42] and by the Attorney-General in the ACT.[43] However, it should be noted that failure to comply with these provisions will not invalidate the legislation.[44] Furthermore, the Victorian Charter allows Parliament to make an express declaration of incompatibility in any Act.[45] While the Charter also provides for such a declaration, it should only be utilised in exceptional circumstances.[46] The new legislation is not subject to the courts' interpretative or declaratory powers.[47]

Both charters also provide for all laws to be interpreted consistently with human rights, so far as the purpose of these laws will allow.[48] The courts are also equipped with powers to issue a declaration of inconsistent interpretation[49] or of incompatibility[50] where an interpretation compatible with human rights is not possible. Finally, both charters require a written response to the statement within six months by the responsible Minister in Victoria[51] and the Attorney-General in the ACT.[52]

The greatest strength of this system is the explicit recognition of rights in the jurisdiction, and the requirement that Parliament actively consider them in drafting legislation. This is illustrated in the pre-enactment processes, detailed above, which make such considerations a commonplace occurrence, and requires those derogating from the enunciated rights to do so on justifiable grounds and in a public manner. While a failure to follow these processes does not invalidate the legislation, it nevertheless introduces the risk of losing political capital if a member or political party is seen to be flouting its human rights obligations. In terms of judicial power, the courts are empowered to interpret (to an extent) statutes in a rights consistent manner, and can issue statements of inconsistency where such an exercise is impossible. While these powers are limited they nevertheless provide a positive step in implementing procedural protections for human rights in Australia.

2.2 United Kingdom Approach – *The Human Rights Act 1998* (UK)

The Human Rights Act 1998 (UK) is similar in structure to the Victorian and ACT Charters, however it is informed by the rights enunciated in the European Convention on Human Rights (ECHR) rather than those chosen by the Parliament. The Act has a similar pre-enactment process requiring the responsible Minister to submit a statement of compatibility, or an

[42] Ibid s 28.
[43] Ibid s 37.
[44] *Victorian Charter*, s 29; *ACT Charter*, s 39.
[45] *Victorian Charter* s 31.
[46] Ibid s 31(4).
[47] *ACT Charter* s 30.
[48] *Victorian Charter* s 32; *ACT Charter*, s 30.
[49] *Victorian Charter*, s 36.
[50] *ACT Charter*, s 32.
[51] *Victorian Charter*, s 37.
[52] *ACT Charter*, s 33.

acknowledgement that it is incompatible but that the government wishes to proceed with the Bill.[53] In terms of interpretation, UK courts are required to interpret legislation in a way that is compatible with ECHR rights, as far as it is possible.[54] While it does not explicitly provide for limitations to be imposed on ECHR rights, in the context of the presumption of innocence, the European Court of Human Rights ('ECtHR') has found restrictions are permissible if they are "confined within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence."[55] UK courts are empowered under the Act to make a declaration of incompatibility where an interpretation consistent with the ECHR is not possible.[56] Finally where such a declaration is made, the Parliament is not required by the Act to undertake any action, however the Parliament has the power to make remedial orders.[57]

It is worth noting that as of 2014, out of the twenty settled declarations of inconsistency, Parliament has amended the incompatible legislation in nineteen cases, with one under review.[58] This illustrates that while there are weaknesses in a system of this nature, it can also be effective where there is a culture that respects rights. It should be noted that disgruntled UK citizens can take action before the ECtHR. The decisions of the Court are binding on the UK Parliament. No such recourse will be available to Queenslanders.

The most significant difference between the UK and the Australian approaches has been the use of the interpretation power to both read down legal burdens to evidential ones,[59] as well as read in or out words to make the provisions rights consistent.[60] This issue is discussed below.

3.0 Costs and Benefits of Adopting a Human Rights Act

3.1 Costs of adopting a Human Rights Act

3.1.1 Political and Social Costs

There are concerns that a Human Rights Act would involve significant political and social costs. These concerns can be summarised as follows:

1. Diminishing of parliamentary sovereignty

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[53] *Human Rights Act 1998* (UK) s 19.

[54] Ibid s 3.

[55] *Salabiaku v France* (European Court of Human Rights, Court, Application No 10519/83, 7 October 1988), [19].

[56] *Human Rights Act 1998* (UK) s 4.

[57] Ibid s 10.

[58] Ministry of Justice, *Responding to Human Rights Judgments - Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2013–14,* House of Commons Corporate Report (2015), 32.

[59] *R v Lambert, Ali and Jordan* [2002] 2 AC 545; *Attorney-General's Reference No.4 of 2002* [2005] 1 AC 264.

[60] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

2. Involving courts in public controversy
3. Ineffectiveness of a Human Rights Act.

The Council disagrees with each of these concerns and seeks to rebut them in turn.

In respect of the first concern, the Council agrees with opponents to a Human Rights Act who state that the final say in matters should lie with elected officials. It is for this reason that a statutory Human Rights Act is an appropriate means of both protecting human rights and maintaining parliamentary sovereignty. Under this model a court cannot strike down legislation. It can only make a ruling of incompatibility and refer the matter to the Parliament. This leaves in the end the final say on the issue to the parliament. In fact, the model proposed here is even more favourable to parliamentary sovereignty than, for example, the Canadian Charter of Rights where the parliament must take a positive step in order to overturn a decision of the court that a piece of legislation breaches the Charter. Under the statutory model the parliament can do absolutely nothing and the law will not change.

In regards to the second concern, the Council notes that the courts have always had to make difficult policy decisions. Some of them have been quite radical including the reform of the common law to accommodate the *laissez faire* economic and industrial system of the eighteenth century. Even the daily work of the courts in determining negligence questions has the potential to draw the courts into controversial areas. The Council does not believe that the courts will lose public confidence through the implementation of a Human Rights Act.

Finally, in regards to the observation of the ineffectiveness of Human Rights Act, the Council concedes as a matter of historical fact that there have been such instruments in dictatorships such as Stalinist Russia and Zimbabwe. Similarly, the American Bill of Rights did not prevent the mass internment of Japanese during World War II, nor prevent Abraham Lincoln from suspending *habeas corpus* during America's civil war and detaining 10,000 people. However, it must be identified that it was not the politicians who desegregated the schools in the south of America – it was the African Americans who challenged desegregation in the Supreme Court. This is a perfect example of how a human rights instrument provided a peg for the disadvantaged to hang their hat on, so to speak.

In this submission the Council has already pointed out its very strong view that a Human Rights Act is not a panacea. It will only work if there is a culture supporting human rights and sufficient political activism to ensure that human rights are in fact respected. Robert Dahl, an American political thinker, argues that the effect of a Bill of Rights may over time be to diminish the strength of the norms in the political culture because the participants no longer feel the need to practice self-restraint because the courts can be relied upon to prevent the violation of fundamental rights and liberties.[61] The model being supported by the Council here should not have that effect because legislation held to be incompatible with the Act will only be repealed if the politicians decide to do so. It may indeed still need political action to

[61] Robert Dahl, *Democracy and its Critics*, Yale: Yale University Press.

ensure that this occurs and an accompanying strong human rights culture to guide such action.

3.1.2 Financial Costs

While the financial costs will be influenced by the specific design of a Queensland charter, the Victorian Charter provides an illustration.

The Scrutiny of Acts and Regulations Committee, in their 2011 Charter Review Report stated that for the five financial years, from 2006–07 to 2010–11, the total expenditure on Charter implementation across government was $13,488,750. This includes:

- Charter implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services (DHS) and Victoria Police)
- the Human Rights Unit within the Department of Justice
- funding for VEOHRC's Charter-related work
- grants provided by the Department of Justice for Charter education and legal advice
- other identified human rights staff in the Victorian Public Service
- Charter-related training and the development of resources
- legal advice obtained for the initial audit of legislation in preparation for the introduction of the Charter
- legal advice on the drafting of statutory provisions or general legal advice in relation to the Charter
- legal advice obtained for the preparation of statements of compatibility
- Charter-related litigation involving the Department of Justice, DHS and Victoria Police.[62]

However, they acknowledged this was not inclusive of all costs incurred by the Victorian Government, only those submitted to the Committee.

3.2 Benefits of adopting a Human Rights Act

In the Council's view there are three strong arguments for a Human Rights Act.

The first major improvement that a Human Rights Act would bring is comprehensive protection for human rights. Of course, the comprehensiveness of the Human Rights Act will depend on what rights are protected in the Act.

Secondly, a Human Rights Act with a statutory cause of action would give disaffected, disadvantaged, marginalized and other aggrieved persons in society a place to redress their

[62] Scrutiny of Acts and Regulations Committee, 2011, *Review of Charter of Human Rights and Responsibilities Act 2006*, 141.

grievances.[63] With breaches of human rights judicially enforceable an incentive is created to avoid non-compliance and rights considerations are entrenched into policies and practices.

Thirdly, a Human Rights Act, by giving legal recognition to certain fundamental rights helps create a culture in which law-makers and the executive become educated about them and more respectful of them. It provides a catalyst for best practice standards and policy reviews in government without placing an unreasonable constraint on decision makers.

As seen through the Victorian experience, a Human Rights Act can have a number of beneficial impacts across legislative action and decision-making. Throughout the ten years of this statutory regime, there has been a gradual but noticeable improvement in the way public authorities go about decision-making, much of which has been achieved through negotiation and education.

This can be seen in the 20 detailed case studies on homelessness produced in the Public Interest Law Clearing House's 2011 report which stated that 11 out of the 20 were resolved through negotiation with the others being referred to Victorian Civil and Administrative Tribunal (VCAT).[64] This highlights a shift towards negotiated outcomes, rather than litigation countering the common argument that human rights charters cause of flood of litigation (as discussed below). The case of the Mesfin family is an example: a family of seven were kept in public housing property but used the Charter to identify their hardships and the impact of eviction on their rights. It was apparent that eviction was not the best solution, and the matter was resolved without referral to VCAT. While not all of the case studies resulted in eviction being avoided, a common theme was the requisite consideration of human rights that would not have been present in a non-charter system. This highlights the usefulness of a charter in shifting away from 'one size fits all' policy decisions in complex cases to evaluations based on individual circumstances. Further, as public body decisions are not always consistent, a charter provides a common set of standards to be applied, supported by recourse to the courts if necessary.

In terms of legislative action, the greatest impact of a Human Rights Act can be seen through the 'dialogue model'. As the PILCH report notes, it "entrenches a system where human rights are considered from the outset in developing laws, public authorities build human rights in their practices and decision-making processes and service delivery, and as a last resort there are courts and tribunals which provide recourse."[65] Examples of this in Victoria are discussed below in **4.1.1**.

Additionally, these processes have another tangible benefit in their ability to save costs through the positive outcomes the Charter encourages. A useful illustration of this arises from

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[63] Gareth Evans, 1973, 'An Australian Bill of Rights?' *45(1) The Australian Quarterly* 4, 15.
[64] PILCH: Homeless Person's Legal Clinic, 'Charting the Right Course: Submission to the Inquiry into the Charter of Human Rights and Responsibilities', 6 June 2011.
[65] Ibid 28.

the Australian Housing and Urban Research Institute's report,[66] highlighting that the cost of providing homelessness preventing services can be offset by the reduced use of other services arising from homelessness. The report concluded that for a family who falls into homelessness, the costs to government are $12,000 per annum in health and justice costs, and $26,000 in direct homelessness program costs if they engage with a homelessness service. For each eviction avoided through rights-based negotiated outcomes, the government saves $38,000.

4.0 Previous and Current Reviews and Inquiries on the Issue of Human Rights Legislation

4.1 Reviews and Inquiries in Australia

4.1.1 Victoria

Sections 44 and 45 of the Victorian Charter mandated a review of the Charter after four and eight years respectively. These occurred in 2011 and 2015.

For the 2011 submissions, the Victorian Equal Opportunity and Human Rights Commission described the four-year experience as follows:

> "There is evidence that the first four-years of the Charter's operation has supported Parliament sovereignty in law making. A number of mechanisms in the Charter are designed to give Parliament the information it needs to make informed decisions about human rights: the Commission's annual reports, statements of compatibility on bills, reports from the Scrutiny of Acts and Regulations Committee, declarations of inconsistent interpretation from the Supreme Court. Each one of these is about communicating to Parliament and then letting Parliament make the decisions it thinks best on behalf of the community."[67]

The Charter has also provided a clear and transparent human rights framework to many areas of challenging law making, where there may be competing interests in the community or where individual rights must be balanced against the interest of the broader community. This can be seen through the reviews of major pieces of legislation, such as the *Mental Health Act 1986* and the *Guardianship and Administrative Act 1986*, both of which deal with the limitation of liberty and the protection of the human rights of vulnerable people

Where the Parliament chooses to limit human rights, it does so transparently and demonstrates to the community why it has taken this course of action. This was evident in the passage of the *Summary Offences and Weapons Control Amendment Act 2009*. The

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[66] Australian Housing and Urban Research Institute, 'The Cost-Effectiveness of Homelessness Programs: Final Report', June 2008.

[67] Victorian Equal Opportunity and Human Rights Commission, *Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, 15.

Commission strongly supports the role of the Charter in supporting the exercise of parliamentary sovereignty.[68]

In 2015, Mr Michael Brett Young was commissioned to and submitted the eight-year report titled 'From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.' Mr Young, among a number of conclusions, found that the Charter-required parliamentary scrutiny had had a positive impact on human rights compatibility of new laws.[69]

4.1.2 Australian Capital Territory

The ACT Act has undergone three reviews, which have focused on its operation and the issue of adding economic, social and cultural rights to the Charter, which is outside of the scope of this submission. In a 2014 publication by the ACT Human Rights and Discrimination Commissioner, it was noted that the "Act's main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work. The Act and the standards that it upholds are frequently invoked in parliamentary debates by members across the political divide."[70]

4.1.3 Other States

The Tasmanian and Western Australian Governments commissioned public consultation into human rights protections in 2006 and 2007 respectively. Both concluded that a human rights charter should be enacted.[71]

4.2 Reviews and Inquiries Internationally

4.2.1 The United Kingdom

In 2006, the Department of Constitutional Affairs reviewed the Act in a publication entitled 'Review of the Implementation of the Human Rights Act.' It concluded that the Act had had no impact on the Government's ability to fight crime, and a "significant but beneficial effect upon the development of policy by the central Government."[72]

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[68] Ibid 15-16.

[69] Michael Young, 'From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006', 14.

[70] ACT Human Rights and Discrimination Commissioner, 2014, *Look who's talking: a snapshot of ten years of dialogue under the* Human Rights Act 2004, 13.

[71] Gilbert + Tobin Centre of Public Law, 'Charters of Human Rights in Australia: An Overview' - http://www.gtcentre.unsw.edu.au/node/3070. In WA the recommendation came from a report chaired by Mr Fred Chaney a Minister in the Fraser Government

[72] Department of Constitutional Affairs, 'Review of the Implementation of the Human Rights Act', 1.

4.2.2 New Zealand

Human rights in New Zealand are protected through statutory measures in the form of the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993* (NZ). The 2010 Human Rights Commission Report analysed the country's human rights framework and concluded:

> "In 2004 the Commission found that there was much to celebrate about New Zealand's human rights record; that New Zealand had the key elements essential for the protection, promotion and fulfilment of human rights; and that most people experienced the fundamental rights and freedoms in their daily lives and had the opportunity to participate in all aspects of society. ... [This Report] confirms that New Zealand continues to meet and often surpasses human- rights standards in many respects."[73]

PART II: SUBSTANCE OF A STATUTORY HUMAN RIGHTS ACT

5.0 Objectives of the Human Rights Act and What Rights to Be Protected

5.1 Objectives of the Human Rights Act

The objectives of the Human Rights Act would be to:

- Give legal recognition to certain fundamental rights which assist to create a culture in which law makers, the executive, judges and the community become educated about them and more respectful of them;
- Provide comprehensive protection for human rights; and
- Give disaffected, disadvantaged, marginalised and other aggrieved persons in society a place to take their grievances to have them heard and a remedy granted. [74]

5.2 Rights to Be Protected under the Human Rights Act

The Council's position is that *prima facie* all the rights set out in the ICCPR and ICESCR ought to be protected.[75]

As the Council sees it, there are two issues of contention:

- The protection of economic, social and cultural rights; and

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[73] Human Rights Commission, 'Human Rights in New Zealand 2010', 6-7.

[74] Gareth Evans: *An Australian Bill of Rights?* 45(1) *The Australian Quarterly*, March 1973, 15.

[75] In making this comment the Council wishes to make it clear that it sees international human rights instruments as, at best, a minimum position. The Council differs in what it views as the relevant standard in a number of areas. For example, the Council has a longstanding policy that freedom of speech should reflect the traditional civil libertarian position which would, for example, oppose anti-vilification legislation.

- The protection of reproductive rights.

In short, the Council accepts that any proposal to include economic, social and cultural rights in a Human Rights Act will give rise to the most controversy. In recognition of that our position is that at least initially a Human Rights Act ought to only provide statutory protection for those rights which have been included in the Victorian Charter of Rights and Responsibilities Act.

5.2.1 Economic, Cultural and Social Rights

The Council takes the view that, for a number of reasons, economic, cultural and social rights are not justiciable in the same way civil and political rights. Those reasons are:

1. Giving judges final power to determine economic, social and cultural rights will give them power which they are not suited to exercise, nor is it appropriate for judges to exercise in a democratic society the same power to enforce economic, social and cultural rights as do in the context of civil and political rights; and
2. Economic, social and cultural rights as expressed in instruments such as the ICSCER are too vague.

The Council respectfully submits that courts are not adequately equipped to determine the appropriate resource allocation between areas of government responsibility or, in fact, to determine what programs in any area are likely to best achieve the most effective outcome. It is in the area of economic, social and cultural rights that the most amount of money needs to be spent. It is in these areas then that the handing over of power to the courts to determine the nature and extent of the rights in these particular fields are likely to result in courts re-writing in a significant fashion the budgets of states. The Council agrees with the view that ultimately the proper allocation of budgets is an essentially political matter. It is inappropriate in a pluralistic society organised along democratic lines that significant budgetary allocations are determined by people other than elected representatives.

Furthermore, remedies for the violation of civil and political rights have largely been established in practice in the type of orders which can be made by courts or tribunals, and in the system of constitutional and administrative law generally. The appropriate remedies for economic, social and cultural iniquities are in a much earlier stage of evolution. We need only remind ourselves that the Keating government's Job Compact actually involved a vast set of experiments to determine what programs would best alleviate unemployment, particularly long term unemployment. It is respectfully submitted that most judges have no capacity for determining what arrangements or what programs might best alleviate problems which might the subject of decisions relating to economic, social and cultural rights. In the end it is only the executive that is capable of determining what programs will most effectively alleviate poverty, improve housing availability or lead to the best outcomes in health.

This point on non-judiciable rights has been expanded upon by the Joint Committee on Human Rights of the Parliament of the United Kingdom ("the Joint Committee") which noted that:

> "The objection of indeterminacy is more pertinent in relation to the protection of some of the covenant rights than in relation to others. Trade union rights for example are protected under Article 8 of the Covenant are not characterised by indeterminacy; neither is the right to protection against forced labour under Article 6. Other of the Covenant rights are formulated in considerably more general terms including for example the right to the highest attainable standard of health under Article 12 of the ICESCR. Rights guaranteed in broad terms may, however, contain elements which are sufficiently determinate to be enforced in the courts. Aspects of the rights to an adequate standard of health relating to non-discrimination in its application and to the procedural propriety in its implementation are likely to be deemed appropriate for consideration in the courts. The right to adequate housing under Article 11 of the ISESCR encompasses a right not to be forcibly evicted without due process of law - a right sufficiently determinate to be enforced in the courts."[76]

In the Council's submission these objections can be overcome by

- A statutory model that will not invalidate incompatible law such that the final say on budgetary issues will lie with the politicians; and
- drafting that part of the Human Rights Act relating to economic, social and cultural rights so as to clearly circumscribe the Court's right of review.

In its subsequent report, the Joint Committee recommended that the Parliament should follow the approach which has been adopted by the South African Constitutional Court to economic, social and cultural rights.[77] This approach is cognisant of the capacity of the State to meet its economic, social and cultural rights must be assessed in the light of its resources and that questions of the practical implementation of this obligation being left to the determination of the executive. The judicial test is that of reasonableness: (1) the measure must be reasonable and (2) the measure must be reasonably implemented. This approach does not entitle anyone to demand that a minimum service be provided to them but that the state acts reasonably to provide for the protection of the economic, social and cultural rights on a progressive basis.[78] The determination of reasonableness may in fact have budgetary implications but is not, in themselves, directed at rearranging budgets.

The Council does depart from the Joint Committee when it refuses to include in its Bill obligations relating to the standard of living. In fact, as we have previously noted, the Joint Committee actually acknowledged that trade union rights and the right to protection against forced labour are in fact not subject to indeterminacy. We would take the view that those rights should be included in a Human Rights Act.

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[76] Joint Committee, 'Twenty-First Report of Session 2003-04', 20 October 2004, [59].
[77] Joint Committee, 'Twenty-Ninth Report of Session 2007-08', 21 July 2008, [171].
[78] *The Minister of Health & Ors v The Treatment Action Campaign & Ors (No. 1)* (2002) (5) (SA) 721, 739.

By way of summary the Council adopts the view of the report of the ACT Bill of Rights Consultative Committee that:

> "The inclusion of economic, social and cultural rights in the ACT Human Rights Act may prompt concerns that such rights will expose the ACT government to debilitating financial liability. For a number of reasons, the Consultative Committee considers that these fears have no basis in the proposed Human Rights Act. First, the draft legislation makes clear that the obligation to implement economic, social and cultural rights is not absolute, and may be limited in reasonable ways to take account of budgetary realities. Second, the Human Rights Act allows the Supreme Court to consider a range of remedies for the breach of a human right, some of which have no financial implications. Finally, the draft legislation allows the Legislative Assembly, rather than the courts, to take the final decision on the reasonableness of laws and policies. Even were a particular practice or policy found to breach an economic, social or cultural right, the legislature has the power to enact legislation authorising such a policy or practice." [79]

5.2.2 Reproductive Rights

The Council accepts that this is a contentious area, not least for certain members of this committee. In its most recent formulation of its policy in this area the Council has taken the view that a woman should have a right to have an abortion up to the 24th week of pregnancy without committing any offence. After that period, it should only be legal subject to certain restrictions such as necessary for the woman's health. This approach is consistent with abortion law in Victoria.[80] In the Council's view this represents an appropriate compromise between the different views in the community on this issue.

The Council submits that the 'right to life' provision under the Human Rights Act should be the same as the Victorian Charter.[81]

Our submission is that the issue of reproductive rights should be referred to the Law Reform Commission for review as occurred in Victoria.

6.0 How the Human Rights Act would apply to:

6.1 The making of laws

The Human Rights Act should provide that all draft legislation introduced to parliament must be accompanied by a human rights compatibility statement and the extent of any inconsistency. The compatibility statement must be issued by either the Member of

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[79] ACT Bill of Rights Consultative Committee, 'Toward an ACT *Human Rights Act*' May 2003, [5.46].
[80] *Abortion Law Reform Act 2008* (Vic) ss 4, 5.
[81] Victorian Charter s 9.

Parliament proposing the Bill or the Attorney-General. If incompatible legislation is passed by Parliament it must be declared legally effective despite its incompatibility.

6.2 Courts and tribunals

The Human Rights Act should require the courts to interpret legislation in a way that is compatible with human rights in so far as it is possible to do consistently for the statute's purpose.

The Human Rights Act should empower the courts to make a declaration or finding that a law cannot be interpreted in a manner consistent with the right protected under the Act and refer the matter to Parliament.

6.3 Alternative to Courts

If despite our arguments to the contrary Committee members consider a Human Rights Act gives too much power to judges an alternative would be to give more power to elected members of parliament. One such model is that of Sweden where minorities in the Riksdag are granted procedural rights including:

- Bills affecting any right under the Human Rights Act may be held in suspense over an election at the request of ten Members of Parliament, unless 5/6th of Members of Parliament approve the Bill
- If one tenth of the Members of Parliament request – and one third then vote in favour – a referendum may be held in respect to a Bill affecting any right under the Human Rights Act with the Bill being held in suspense. The referendum is held at the same time as the election[82]

Of course given that the Riksdag has 3 times more members than this Parliament these numbers would have to change. So that in the first situation 6 might appropriate.

6.4 Public authorities and other entities

The Human Rights Act should bind public authorities including government departments and statutory authorities and entities and persons performing public functions.

The Human Rights Act should invest individuals with a right to challenge the lawfulness of a decision of a public authority on the basis of a violation of human rights and require the executive government to take human rights into account in the policy process.

As a Human Rights Act will be directed at government action and public authorities, private entities and individuals will not be bound by the Act when they are not exercising public functions. The ACT Act has a provision allowing private entities to 'opt in' to the obligations

[82] The Constitution Unit, 'Checks and Balances in Single Chamber Parliaments: a Comparative Study', February 1998, 14.

of public authorities.[83] Such a provision should also be included to further the objective of creating a rights culture in Queensland.

7.0 Implications of Laws and Decisions Not Being Consistent with the Legislation

The Council is cognisant of the concerns surrounding parliamentary sovereignty and contention with courts overturning legislation on the basis of human rights. For this reason the Council supports a statutory Human Rights Act. Under such a model a court cannot strike down legislation for its incompatibility with the Human Rights Act. It can only make a ruling of incompatibility and refer the matter to the parliament. Such a declaration or finding should not operate to invalidate the law but would require a response from the Parliament. This leaves in the end the final say on the issue to the parliament.

8.0 Implications of the Legislation for Existing Statutory Complaints Processes

In Queensland, there are two statutory bodies that deal with complaints: the Queensland Anti-Discrimination Commission and the HREOC. The former resolves complaints of discrimination, sexual harassment, vilification, victimisation and other contraventions of the *Anti-Discrimination Act 1991 (Qld)*. The latter investigates and resolves throughout Australia complaints of discrimination, harassment and bullying based on a person's sex, disability, race or age.

As can be seen these complaints processes redress the right to not be discriminated against. The statutory protection of more civil and political rights should not affect these statutory bodies given their longevity and resources place them in the best possible position to continue their functions. Instead the scope of the Queensland Anti-Discrimination Commission should be expanded to receive and conciliate complaints under the Human Rights Act.

9.0 Functions and Responsibilities under the Human Rights Act

9.1 Functions

9.1.1 A Cause of Action for Damages

The Council submits that there should be an entitlement to bring an action for damages for breach of the Human Rights Act in any competent State court.

The Victorian experience, discussed above, allows a rights-based cause of action only on the back of existing legal claims. It was intended to reduce litigation but has instead resulted in lengthier and more complex cases.[84] In 2008, the ACT introduced section 40C(2) into their Charter which permitted an individual right of action. Based on research conducted by Professor George Williams AO, while there was a spike in the number of cases concerning

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[83] ACT Charter, s 40D.

[84] Law Institute of Victoria, Submission No 79 to the Independent Reviewer, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Vic), 19.

breach of the Charter in 2009, this was not sustained. Prior to the introduction of section 40C(2), the percentage of ACT cases mentioning the Charter was just below 8%, and as of 2015 it sits just below 10%.[85] This refutes arguments that an individual cause of action in a human rights charter would lead to a flood of litigation.

9.1.2 Interpretation Clause

Arguably the centerpiece of the Human Rights Act will be a clause requiring the courts to interpret legislation in a manner consistent with the human rights it provides for.

The interpretation clause in the UK has been interpreted as applying:

> "Even if there is no ambiguity in the language in the sense of the language being capable of two different meanings... [it] requires the courts to find an interpretation compatible with convention rights if it is possible to do so...it will sometimes be necessary to adopt an interpretation which linguistically may appear strained."[86]

Subsequently in *Ghaidan v Godin-Mendoza*[87] it was held that the interpretation clause:

> "...may require a court to depart from the unambiguous meaning the legislation would otherwise bear... [it] may require the court to depart from the intention of the parliament which enacted the legislation."

In the Council's view Australia should not go down this path because it would represent a serious intrusion by the courts into the role of the parliament. The Council supports an interpretation clause along the lines of the ACT and Victoria Charters. The Charters makes it clear that the obligation of the courts is "to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so, *consistently with the purpose of the legislation*".[88] This approach does not permit the court to read in or out words, or depart from its clear meaning.[89] Such a clause is consistent with the common law presumption of legality, discussed above.

9.2 Responsibilities

The Council opposes the inclusion of any statement of duties or responsibilities of individuals or the State government. In our view the argument for the inclusion of an express statement of duties or responsibilities in the human rights act is entirely misconceived. The whole architecture of human rights involves a series of rights and duties bestowed on individuals by nature of them being human with states having significant obligations to protect and uphold them. An express statement is accordingly not required.

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[85] Professor George Williams AO, 'Submission to Human Rights Act Inquiry', 11 March 2016.
[86] *The Queen v A* [2001] UKHL 25, [44] (Lord Steyn).
[87] [2004] UKHL 30, [30].
[88] ACT Charter, s 30; Victorian Charter, s 32.
[89] *R v Momcilovic* [2011] HCA 34.

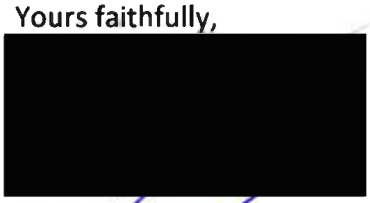
10.0 Summary

In the Council's view the case for a Human Rights Act is quite simply irrefutable. In saying that the Council does not think that a Human Rights Act will constitute a revolution in either sense. That is, a Human Rights Act will not create a human rights nirvana in Queensland. Nor will it wreck the separation of powers between the branches of the government or destroy our democracy. What it will do is represent a bold statement of commitment by the Queensland Government to bring human rights closer to the heart of political culture in this state and provide a place where the marginalized and disadvantaged in our community can seek redress for their grievances.

This submission was prepared with the assistance of the QCCL's interns for 2016 Mark Young, Myrella-Jane Byron and Ameera Ismail

The QCCL thanks you for the opportunity to make this submission and trusts it will be of assistance to you in your deliberations.

Yours faithfully,



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18 April 2016