

18 April 2016

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000
By email: laesc@Parliament.qld.gov.au

Dear Research Director

Human Rights Inquiry

We are final year students at Griffith University Law School. We have a strong interest in graduating and practicing in a state where the human rights of all residents are respected and where there are appropriate avenues for human rights breaches to be rectified. We firmly believe that the introduction of a Human Rights Act for Queensland will significantly benefit all Queenslanders.

In this submission we will respond to Terms of Reference 2(a) and 2(b). This submission will form part of our assessment for the course 6000LAW Law Reform. The final assessment is due 25 June 2016. In order to contribute to the work of the Inquiry we have prepared this preliminary submission and we hope to provide the Inquiry with our larger submission addressing more of the Terms of Reference in late June. If you have any questions regarding the course and our work in it please contact Associate Professor Kieran Tranter, Griffith University Law School,

[REDACTED]

We greatly appreciate the assistance of Associate Professor Susan Harris-Rimmer in the preparation of this submission.

Kind regards,

Mason Clarke

Kate Marchesi

Sara Mitchell

Frances-Ellen Peek

Emily Reyher.

Executive Summary

In firmly supporting a Human Rights Act for Queensland, we propose the following recommendations:

- Queensland's Human Rights Act must encompass civil, political, economic and social rights in order to protect the broadest range of fundamental human rights;
- To ensure that appropriate safeguards are in place, a Parliamentary Committee must be established to ensure that all legislation is compliant with Queensland's Human Rights Act;
- An expert independent statutory body, such as the Human Rights Commission, must be established within Queensland and empowered to oversee and advise on the operation of a Human Rights Act;
- While Parliamentary sovereignty must be maintained, Queensland courts must be vested with the power to invalidate a law that is inconsistent with the Human Rights Act;
- Queensland's Human Rights Act must establish an accessible individual complaint mechanism and afford private parties a cause of action regarding a breach of human rights. Further, alternate dispute resolution mechanisms, such as mediation, must be encouraged in order to avoid unnecessary cost and delay to the individual;
- The definition of 'public nature' must be expanded to ensure that the broadest range of human rights infringements fall under the jurisdiction of the Human Rights Act;
- An 'opt in' clause must be created for companies under the Human Rights Act in an attempt to foster a culture of human rights within Queensland;
- Review of Queensland's Human Rights Act must occur on a regular basis, specifically at 4 year intervals, to ensure that the legislation reflects current local and international community expectations regarding human rights protection; and
- Rights within Queensland's Human Rights Act must be narrowly and precisely defined to ensure that rights are accurately interpreted as per Parliament's intention and forcefully applied.

Introduction

Unlike some other jurisdictions in Australia, human rights in Queensland are not protected or guaranteed by specific legislation. A lack of legislation codifying human rights means that they may be subject to abuse or impingement. The Australian Human Rights Commission concluded in their submission to the National Human Rights Consultation led by Chair Frank Brennan in 2009:

Australia's strong traditions of liberal democracy, an independent judiciary and a robust media have been sufficient to protect the rights and freedoms of most people in Australia, most of the time. However, not all people in Australia can be confident of enjoying this protection in respect of all aspects of their lives all of the time.¹

This submission will consider legislation enacted in other jurisdictions in Australia and overseas to illustrate how a Queensland Human Rights Act is an essential step in ensuring that Queenslanders may enjoy fundamental rights and freedoms. In making this submission, various case studies will be examined to show how such an enactment could protect human rights. This is most significant for those most in need whom for lack of financial or educational resources or otherwise, are more at risk of having their rights infringed. The positive aspects of legislation throughout Australia and the world have been recommended for the inquiry to consider and potential limitations of existing legislation have been highlighted.

Queensland Case Study

A recent Queensland example of a young, homeless Indigenous woman, Rosie² who had been in the care of the Department of Child Safety highlights the need for a Human Rights Act in Queensland. Rosie had been using drugs, was homeless, in a violent relationship and had recently given birth. Upon her delivery the Department of Child Safety removed Rosie's child.³

¹ Australian Human Rights Commission, *National Human Rights Consultation*, submission (2009) 2.

² Pseudonym.

³ Aimee McVeigh, 'Rosie is the Reason we need a Human Rights Act', *Brisbane Times* (online), 12 September 2015 <<http://www.brisbanetimes.com.au/queensland/rosie-is-the-reason-we-need-a-human-rights-act-20150910-gjjblr.html>>.

A Magistrate refused to return the baby to Rosie even after advocates had found supported accommodation and petitioned for her case. Rosie's lawyer expressed frustration that she had no legal avenues to argue Rosie's right to be with her son, knowing that defined rights to enjoy identity and culture exist for Indigenous citizens of Victoria.⁴

The clear designation of cultural rights, as seen in Victoria, could have dramatically changed the outcome of a case akin to Rosie's. The adoption of legislative provisions requires regulatory bodies, like Department of Child Safety, to consider and maintain each individual's human rights, making them a priority in decision making. The absence of current laws and mechanisms protecting human rights in Queensland is fostering an environment of violation due to an inability to prevent breaches of human rights before they occur.

⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19 (2) (a) and (2) (c).

Term of Reference 2(a): Human rights laws and mechanisms in Queensland

This section responds to Term of Reference 2(a). It is argued that the current laws and mechanisms aimed to protect human rights in Queensland are ineffective and can be improved by a Human Rights Act. This section will not address current Commonwealth mechanisms that aim to protect human rights.

Anti-Discrimination Legislation

The most significant law protecting human rights in Queensland is the *Anti-Discrimination Act 1991* (Qld) which is overseen by the Anti-Discrimination Commission. Anti-discrimination legislation faces significant barriers in terms of its ability to protect human rights. Protection is only afforded to people possessing certain characteristics or to discrimination occurring in certain types of public places. For example, if complaints are not made on particular grounds, such as discrimination on the basis of race,⁵ gender identity or age,⁶ the Anti-Discrimination Commission has no avenue to pursue action under the *Anti-Discrimination Act 1991* (Qld). Further, any human rights infringement must occur within a particular area, such as a workplace or educational institution, to fall under the jurisdiction of the *Anti-Discrimination Act 1991* (Qld). If an individual's rights are infringed in another area, the current Anti-Discrimination Laws fail to adequately address the issue.⁷ The current anti-discrimination legislation also lacks the ability to act proactively in preventing breaches of human rights due to its complaint mechanism function.

The utilisation of current anti-discrimination legislation to defend individual's rights is 'inefficient, costly, time-consuming and ineffective in eliminating and preventing unlawful discriminatory conduct.'⁸ A review performed in 2010 found key issues, including: 'the inherent problems with legal form; the challenges in demonstrating indirect discrimination; the burden of proof; the use of a normative white comparator; and the poverty of the track record of current...

⁵ *Anti-Discrimination Act 1991 (Qld)* s 7 (g).

⁶ *Anti-Discrimination Act 1991 (Qld)* s 7 (f) and (m).

⁷ *Anti-Discrimination Act 1991 (Qld)* s 12.

⁸ Mini Zou, Submission No 57 to the Attorney-General, *Inquiry into a Human Rights Act for Queensland*, 30 January 2012, 1.

[legislation] in addressing discrimination’.⁹ The burden of proof imposes one of the largest inadequacies in protecting human rights, especially for matters of race discrimination, with such matters holding ‘lower resolution rates overall.’¹⁰ This has been attributed to ‘the difficulties complainants often have in demonstrating a link between their race and the alleged less favourable treatment and the associated limited case precedent in this area’.¹¹ Adoption of a Human Rights Act would allow for a clear defence of rights without having to rely on the currently flawed *Anti-Discrimination Act 1991* (Qld) to protect unexpressed rights.

The Common Law and the Courts

The common law recognises select rights and freedoms, such as the right against self-incrimination, aspects of the right to a fair trial,¹² aspects of the right to privacy,¹³ the presumption of innocence,¹⁴ and the onus of proof for criminal cases.¹⁵

However, the common law’s ability to protect these traditional rights and freedoms is significantly limited; the general constitutional principle is that state Parliaments can override these traditional rights and freedoms with clear words.¹⁶ An example of this is the enactment of the *Vicious Lawless Association Disestablishment Act 2013* (Qld). This piece of legislation was aimed at reducing criminal activity among unlawful bkie gangs but also had significant impacts on traditional common law rights and freedoms, including mandatory sentencing, the waiving of bail, parole and a reversal of the onus of proof.¹⁷ The Australian Human Rights Commission expressed concern over the threat that these laws pose to the right to equal treatment before the

⁹ Margaret Thornton and Trish Luker (2010) *The New Racism in Employment Discrimination: Tales from the Global Economy* 31 *Sydney Law Review* 1.

¹⁰ Margaret Thornton and Trish Luker (2010) *The New Racism in Employment Discrimination: Tales from the Global Economy* 31 *Sydney Law Review* 1.

¹¹ *Ibid.*

¹² *Dietrich v The Queen* (1992) 177 CLR 292.

¹³ *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

¹⁴ *Carr v Western Australia* [2007] 232 CLR 138. See also *Woolmington v DPP* [1935] AC 462.

¹⁵ *Woolmington v DPP* [1935] AC 462.

¹⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2015) 22.

¹⁷ Catherine Armitage, ‘Human rights chief Tim Wilson Slams Anti Bkie Laws,’ *Brisbane Times* (online), (8 January 2014

<<http://www.brisbanetimes.com.au/queensland/human-rights-chief-tim-wilson-slams-antibikie-laws-20140108-30h1g.html>>.

law¹⁸ and the freedom of association and expression in addition to the practice of identifying and targeting a class of people.¹⁹ The broad drafting of the legislation also captured all types of associations, not just outlaw motorcycle gangs.²⁰ While recent recommendations have caused review and repeal of certain provisions within the *Vicious Lawless Association Disestablishment Act 2013* (Qld), the presence of a clear and defined Human Rights Act in Queensland could have prevented the initial enactment of the legislation.

A Human Rights Act would empower the Courts to consider human rights in their decision making process. At present, the judiciary has no rights framework to rely upon when making decisions. The example of Rosie given above could have had a very different outcome if the Magistrate was required to take into consideration fundamental human rights under a Human Rights Act.

Queensland's Parliamentary System

Queensland is unique in that it lacks an upper house of Parliament. Many commenters argue that an upper house is essential to provide crucial checks and balances.²¹ This weakness highlights the need for additional protection of rights in Queensland to avoid abuses of power. It is arguably even more important now after the successful referendum in Queensland regarding four-year terms of Parliament. This has consequences for the Parliamentary Committee system, which is intended to provide scrutiny. If a supermajority is achieved, the Parliamentary Committee system is rendered ineffective in providing accountable and transparent scrutiny.²²

¹⁸ Queensland Government, *Taskforce on Organised Crime Legislation* (2016) Queensland Government Publications <<https://publications.qld.gov.au/dataset/taskforce-on-organised-crime-legislation>>.

¹⁹ Catherine Armitage, 'Human rights chief Tim Wilson Slams Anti-Bikie Laws,' *Brisbane Times* (online), (8 January 2014) <<http://www.brisbanetimes.com.au/queensland/human-rights-chief-tim-wilson-slams-antibikie-laws-20140108-30h1g.html>>.

²⁰ Amnesty International, *Queensland Bikie Laws breach International Fair Trial Standards* (5 November 2013) Amnesty International <<http://www.amnesty.org.au/news/comments/33255/>>.

²¹ Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State' (2014) 39(1) *Alternative Law Journal* 3, 8.

²² Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State' (2014) 39(1) *Alternative Law Journal* 3, 8.

The Crime and Corruption Commission

The primary function of the Crime and Corruption Commission (the Commission) is to investigate and report on crime, official misconduct and corruption.²³ The Commission relies on the lodgement of complaints to investigate and act.²⁴ However, the recent reforms in 2014 by the Newman LNP government removed the Commission's ability to proactively advise and educate on potential risks of future official misconduct and corruption.²⁵ While the Commission is an independent body, this demonstrates how its powers can be changed and limited by government legislation. While the Commission has a broad range of powers relating to these matters, including coercive powers and powers to conduct public inquiries,²⁶ its limited scope means that its potential to investigate issues relating to human rights violations in Queenslanders is severely limited. The everyday experience of disadvantaged Queenslanders, such as Rosie in the example above, is outside the scope of the Commission. The Commission is therefore ill equipped and unable to protect human rights violations in other areas outside its statutory ambit.

The Queensland Ombudsman

The Ombudsman's office also plays a role in protecting the rights of Queenslanders. It can investigate the actions of public agencies that may be unlawful, unreasonable, unfair, improperly discriminatory or otherwise wrongful.²⁷ While this service is helpful for Queenslanders who have been adversely affected by government decision making, it lacks the capacity to prevent breaches of human rights and to make human rights a priority of public service delivery. In fact, of the 43,586 claims made in 2015 only 3,881 were acted upon.²⁸ While this inaction can be contributed to by a percentage of unsubstantiated claims it is unlikely that over 91% of the claims put forward were groundless due to the omission of a Human Rights Act in Queensland. This reflects a large inadequacy within the current laws and mechanisms that protect human rights in Queensland, seeing offences as unproven unless certain requirements are met despite the actual legitimacy of such claims.

²³ *Crime and Corruption Commission Act 2001* (Qld) s 15.

²⁴ Crime and Corruption Commission, *2015-2015 Annual Report* (2015) 4.

²⁵ *Crime and Misconduct and Other Legislation Amendment Bill 2014* (Qld).

²⁶ Crime and Corruption Commission, *2015-2015 Annual Report* (2015) 4.

²⁷ *Ombudsman Act 2001* (Qld) s 12.

²⁸ Queensland Ombudsman, *2014 - 2015 Annual Report* (2015), 13.

Possible Improvements

The following improvements could be achieved through the implementation of a Queensland Human Rights Act. These suggested improvements are made following the recommendations of the 2015 review of the Victorian Charter.²⁹

Establishing a Body Able to Deal With All Human Rights Issues

A Human Rights Act must establish an independent and dedicated body to deal with issues of human rights across a range of areas. The major limitations of the current Queensland mechanisms, such as the Ombudsman and the Crime and Corruption Commission, is their inability to act across a broad range of areas. A specialised body such as the Victorian Equal Opportunity and Human Rights Commission in combination with the Ombudsman would have the ability to hear complaints of human rights violations that transcend the jurisdiction of other bodies. This body could hear all matters relating to human rights violations in both public and private life.

Education

One of the most significant impacts of the Victorian Charter has been its ability to promote education and institute cultural change.³⁰ According to the 2015 review of the Victorian Charter, education and further development of a human rights culture continues to be a focus for Victoria.³¹ This can be seen in a number of examples throughout the Victorian public service, including the Department of Treasury and Finance, the Department of Human Services and the Department of Health, taking steps to ensure that employees are educated on issues of human rights, the Victorian Charter, and how it relates to them.³² Almost two-thirds of local councils have provided human rights training on the Victorian Charter and ongoing professional development programs.³³ Non-government Organisations have also developed training programs

²⁹ Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

³⁰ Human Rights Law Centre, 'Victorian Charter of Rights and Responsibilities in Action (case study 31)' (2015) 7.

³¹ Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) recommendation 3.

³² Human Rights Law Centre, 'Victorian Charter of Rights and Responsibilities in Action (Case Study 32)', (2015) 8.

³³ Human Rights Law Centre, 'Victorian Charter of Rights and Responsibilities in Action (Case Study 43)' (2015) 8.

to target disadvantaged Victorians such as Women's Health West, Fitzroy Legal Service and the Eastern Community Legal Service.³⁴

A Human Rights Act in Queensland must also create a body, similar to the Victorian Equal Opportunity and Human Rights Commission, that would be responsible for educating Queenslanders and public officials about human rights. This education could be delivered through an enquiry line, free information, training services, seminars and debates. The body would also be able to produce reports about the operation of the Human Rights Act. The 2015 review of the Victorian Charter affirms education about human rights as a continuing focus for the Victorian Equal Opportunity and Human Rights Commission.³⁵

Preventing human rights violations before they occur

Changing the way Queensland delivers public services and education would play a key role in preventing instances of human rights violation. Queensland's Human Rights Act could provide for a review of public service delivery through a human rights lens. Many of the Victorian examples show how the majority of human rights violations occur through the everyday interactions between government departments and people.³⁶

The obligation for government to consider the impacts of legislation, before it is passed, on human rights would be the first step in this process. For an example of how this has worked in Victoria, the Homeless Persons Legal Clinic successfully used to the Victorian Charter to advocate for the rights of homeless. The Victorian Government was set to introduce legislation which would criminalise sleeping in cars. Human rights advocates argued that the Bill would be inconsistent with freedom of movement, right to life and the right to security and liberty. The law

³⁴ Human Rights Law Centre, 'Victorian Charter of Rights and Responsibilities in Action (Case Studies 93, 98 and 94) 8.

³⁵ Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) recommendation 6-8.

³⁶ Human Rights Law Centre, 'Victoria's Charter of Human Rights and Responsibilities in Action' (2012) 7.

was successfully redrafted due to this campaign and implementation guidelines were developed.³⁷

The Victorian Parliamentary Scrutiny Committee has also amended incompatible legislation to reflect the guarantees provided by the Victorian Charter. This included the *Superannuation Legislation Amendment Act 2010* (Vic) which amended several pieces of legislation to allow older same sex couples to access superannuation reversionary benefits. This process has also resulted in the introduction of new bills including the *Supported Residential Services (Private Providers) Act 2010* (Vic). With regards to domestic violence, it was also confirmed that the *Family Violence Prevention Act 2008* (Vic) indirectly promotes, and is consistent with, the right to life.

³⁷ Human Rights Law Centre, 'Victoria's Charter of Human Rights and Responsibilities in Action (Case Study 79)' (2012) 9.

Term of Reference 2(b): Human Rights Legislation in Victoria, the Australian Capital Territory and by Ordinary Statute Internationally and Lessons for Queensland

This section responds to Term of Reference 2(b). It is argued that current legislation protecting human rights in Victoria, the Australian Capital Territory and by ordinary statute internationally, specifically in the United Kingdom and New Zealand, is effective. Queensland can learn from this experience when drafting a Human Rights Act.

Victoria

In 2006, Victoria became the first Australian state to implement legislation regarding human rights when the *Charter of Human Rights and Responsibilities Act 2006* (Vic)³⁸ (the Charter) was passed by the Bracks Labor Government.

Coming into operation on 1 January 2008, the Charter's purpose was to place obligations on public authorities to identify and respect the human rights of all people in Victoria.³⁹ Based on the human rights protected under the *International Covenant on Civil and Political Rights*,⁴⁰ the Charter identifies twenty fundamental human rights that all people are entitled to.⁴¹

All public authorities must comply with rights protected under the Charter when performing their duties to the public, whether that be creating new laws or developing new policy.⁴² To ensure this, when new laws are being developed, a Statement of Compatibility must be issued detailing

³⁸*Charter of Human Rights and Responsibilities Act 2006* (Vic).

³⁹*Charter of Human Rights and Responsibilities Act 2006* (Vic), s1.

⁴⁰*International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴¹*Charter of Human Rights and Responsibilities Act 2006* (Vic), ss8-27.

Section 8: Right to recognition and equality before the law; Section 9: Right to life; Section 10: Right to protection from torture and cruel, inhuman and degrading treatment; Section 11: Right to freedom from forced work; Section 12: Right to freedom of movement; Section 13: Right to privacy and reputation; Section 14: Right to freedom of thought, conscience, religion and belief; Section 15: Right to peaceful assembly and freedom of association; Section 17: Right to protection of families and children; Section 18: Right to take part in public life; Section 19: Cultural rights; Section 20: Property rights; Section 21: Right to liberty and security of the person; Section 22: Right to humane treatment when deprived of liberty; Section 23: Rights of children in the criminal process; Section 24: Right to fair hearing; Section 25: Rights in criminal proceedings; Section 27: Right not to be tried or to be punished more than once; Section 27: Right to protection from retrospective criminal laws.

⁴²*Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.

how the new law complies with the fundamental rights protected by the Charter.⁴³ If a law does not comply with the rights set out in the Charter, the Statement of Compatibility must detail how and why the rights are being contravened.⁴⁴

The Charter also empowers several statutory bodies to oversee and advise on the Charter when necessary. The Victorian Equal Opportunity and Human Rights Commission is an independent group capable of reviewing the practices implemented by public authorities in addition to providing human rights education.⁴⁵ Additionally, the Victorian Ombudsman has the ability to independently enquire and investigate complaints relating to the rights protected by the Charter.⁴⁶

Due to the constantly progressing discussion regarding human rights, Parliament recognised that for the Charter to serve the community to the greatest extent possible, a review system must be incorporated into the Charter so as to allow a reflection on how effective the Charter has been. Sections 44 and 45 of the Charter detail the requirement for a review after four years and then once more after eight years.⁴⁷

The effectiveness of the Charter in promoting equity and justice for all people can be directly seen in cases where the rights protected under the Charter have enabled litigants to achieve justice. In January 2009, just months after the Charter came into operation, a thirteen year old child with Asperger's Syndrome was successful in gaining entitlement to disability assistance due to the rights protected by the Charter.⁴⁸ Another instance occurred where a person who was living in public housing, but was not a tenant, successfully applied to the Victorian Civil and Administrative Tribunal to have the tenancy created in their name following the death of the tenant whom they had been living with.⁴⁹ In addition to the successful litigation, the Law Institute of Victoria acknowledged an increase in percentage of Bills considered in Statements of

⁴³*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s28.

⁴⁴*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s28.

⁴⁵*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s40.

⁴⁶*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, sch (2).

⁴⁷*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, ss44-45.

⁴⁸Victorian Equal Opportunity and Human Rights Commission, *The 2009 Summary report on the operation of the Charter of Human Rights and Responsibilities* (2009), 28.

⁴⁹Victorian Equal Opportunity and Human Rights Commission, *The 2009 Summary report on the operation of the Charter of Human Rights and Responsibilities* (2009), 28.

Compatibility to 'engage or otherwise affect human rights' increased from 63% in 2007 to 98% in 2010, indicating an 'an increased awareness and understanding' of human rights.⁵⁰ These figures, in addition to successful litigation, lend support to the theory that the Charter, in its present form, has been successful in addressing the community's demand for human rights to be incorporated into law. Indeed, the independent eight year review of the Charter titled 'From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006',⁵¹ acknowledged the Charter's success in promoting and protecting human rights.⁵²

However, the same review also recognised multiple areas where the Charter could be modified to continue to achieve the legislation's purpose of protecting human rights to the greatest extent possible. The first area the review visits is the acknowledgment that the Charter has progressed beyond 'simple compliance with the law' and as such there is a requirement to develop a greater human rights culture, with specific focus on education.⁵³ The review also suggests empowering statutory bodies with the ability to offer dispute resolution to 'provide a clear path for people to raise concerns' when they believe they have had their human rights violated.⁵⁴ In addition to statutory bodies, the review also suggests the creation of a remedies process, based on the model set out in the *Human Rights Act 2004* (ACT),⁵⁵ which would allow members of the community to go before Victorian Civil and Administrative Tribunal to judge whether their rights had been breached.⁵⁶ The review states this would greatly improve accessibility as well as implementing consequences for breach of human rights.⁵⁷ These recommendations, in addition to others such as

⁵⁰Law Institute of Victoria, *Inquiry and review of the Charter of Human Rights and Responsibilities Act 2006* (Vic) (2011), 20.

⁵¹Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

⁵²Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 16.

⁵³Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 5.

⁵⁴Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 8.

⁵⁵*Human Rights Act 2004* (ACT).

⁵⁶Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 10.

⁵⁷Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 10.

greater clarity on how human rights affect statutory construction⁵⁸ and the requirement for further review in another four years,⁵⁹ suggest ways that the already successful Charter can improve to best serve the interests of the Victorian people.

Furthermore, in their submission to the review, the Victorian Equal Opportunity and Human Rights Commission proposed that the Commission should have the function of conducting research into any matter that would advance the objectives of protecting and promoting human rights.⁶⁰ Such a function would recognise the ever-advancing field of human rights and improve the capacity to identify new human rights issues as they arise. Finally, the Commission also suggests that it should be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information.⁶¹

Despite the evident areas in which the Charter can be modified to fulfil its duty to the community, the Charter has taken a momentous, and ultimately successful, leap towards the incorporation of fundamental human rights in the community.

Australian Capital Territory

The Australian Capital Territory was the first jurisdiction in Australia to codify international human rights through legislation. The *Human Rights Act 2004* (ACT) protects various rights of the International Covenant on Civil and Political Rights (ICCPR).⁶² These rights may be limited if an ACT law reasonably limits a right under the Act where it is demonstrably justified.⁶³

⁵⁸Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 13.

⁵⁹Mr Michael Brett Young, *From commitment to culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 20.

⁶⁰Victorian Equal Opportunity and Human Rights Commission, *8-Year Charter Review (2015)*, 1.

⁶¹Victorian Equal Opportunity and Human Rights Commission, *8-Year Charter Review (2015)*, 1.

⁶² The relevant sections set out in Part 3 of the *Human Rights Act 2004* (ACT) are as follows. Recognition and equality before the law (s 8); Right to life (s 9); Protection from torture and cruel, inhuman or degrading treatment etc (s 10); Protection of the family and children (s 11); Privacy and reputation (s 12); Freedom of movement (s 13); Freedom of thought, conscience, religion and belief (s 14); Peaceful assembly and freedom of association (s 15); Freedom of expression (s 16); Taking part in public life (s 17); Right to liberty and security of person (s 18); Humane treatment when deprived of liberty (s 19); Children in the criminal process (s 20); Right to a fair trial (s 21); Rights in criminal proceedings (s 22); Compensation for wrongful conviction (s 23); Right not to be tried or punished more than once (s 24); Retrospective criminal laws (s 25); Freedom from forced work (s 26); and Rights of minorities (s 27).

⁶³ *Human Rights Act 2004* (ACT) s 28.

The Act operates through a ‘dialogue model,’ giving specific responsibilities to each arm of government.⁶⁴ In doing so, the Act does not directly override any existing legislation but instead outlines various mechanisms with which the arms of government can introduce human rights considerations with respect to existing law. The judiciary is required, pursuant to s 30 of the Act, to interpret as far as possible, other Territory legislation in a manner consistent with the human rights provisions.⁶⁵ In doing so, international law may be considered when interpreting the rights.⁶⁶ If the Supreme Court is satisfied that an ACT law is inconsistent with a human right of the Act, the Court may make a declaration of incompatibility.⁶⁷ Though in doing so, the validity, operation and enforcement of the law is not affected.⁶⁸ Rather, the Attorney-General is to prepare a written response to present to the Legislative Assembly on the declaration.⁶⁹ In addition, the Attorney-General is required by the Act to prepare a written compatibility statement for each Bill presented to the Legislative Assembly stating whether the Bill is consistent with the Act and if not, how.⁷⁰ Finally, the Act establishes the office of the Human Right Commissioner who possesses a right of intervention in a proceeding before a court.⁷¹

The initial reviews of the Act concluded that it was achieving its overarching purpose of ‘bringing rights home’ to Canberra, however there were amendments to be made to apparent shortcomings.⁷² These shortcomings were addressed by the *Human Rights Amendment Act (2008)* (ACT) that introduced a direct duty on public authorities to comply with human rights

⁶⁴ ACT Department of Justice and Community Safety (JACS), *Human Rights Act 2004 Twelve Month Review Report* (2006), 2.

⁶⁵ *Human Rights Act 2004* (ACT) s 30.

⁶⁶ *Human Rights Act 2004* (ACT) s 31.

⁶⁷ *Human Rights Act 2004* (ACT) s 32 (2).

⁶⁸ *Human Rights Act 2004* (ACT) s 32 (3).

⁶⁹ *Human Rights Act 2004* (ACT) s 33.

⁷⁰ *Human Rights Act 2004* (ACT) s 37.

⁷¹ *Human Rights Act 2004* (ACT) ss 35, 36 and 40.

⁷² ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 3.

and an independent right of action in the ACT Supreme Court for a breach of this duty.⁷³ These amendments now appear in the Act in ss 40B and 40C respectively.⁷⁴

As outlined above, through the ‘dialogue’ of the Act, the courts are participants in a discussion with other arms of government.⁷⁵ They are not the ultimate authority on whether laws are consistent with human rights; especially since an incompatibility declaration has no true effect on the validity of new laws.⁷⁶ With that said, in the five year review of the Act, the courts were identified as mere spectators in the ‘dialogue’ intended by the Act, drawing into question the Act’s ability to generate discussion between the different arms of government.⁷⁷ In the next review, following the introduction of ss 40B and 40C in 2009, the courts were seen to be more involved in the discussion of human rights, sparking a peak in cases being heard in court.⁷⁸ Since then however, there has been a decline in the percentage of cases being heard in the ACT Supreme Court and despite the number of cases mentioning the Act, it has only affected a small number of outcomes.⁷⁹ It is suggested that the reason for such limited success in the courts is inaccessibility of aggrieved people to pursuing a right of action after a limitation on their human rights.⁸⁰ Especially since the judgment of *LM v Children’s Court*⁸¹ where the Supreme Court suggested that a remedy under s 40C can only be awarded by the ACT Supreme Court and cannot be granted by lower courts.⁸²

⁷³ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 3.

⁷⁴ *Human Rights Act (2004)* (ACT) ss 40B and 40C.

⁷⁵ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 4.

⁷⁶ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 4.

⁷⁷ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 5.

⁷⁸ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 5.

⁷⁹ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 5, quoting Chief Justice Murrell.

⁸⁰ Helen Watchirs et al, ‘Five years’ experience of the *Human Rights Act 2004* (ACT): Insights for human rights protection in Australia’ (2010) 33(1) *UNSW Law Journal* 136, 170.

⁸¹ *LM v Children’s Court* [2014] ACTSC 26.

⁸² ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 6.

The Act has made arguably the strongest and most positive change in the legislature. The Legislative Assembly has had to engage in more thorough pre-enactment deliberation before enacting legislation, as a result of s 38 of the Act.⁸³ This has meant that the legislation being produced is of better quality and is vastly made with protected human rights in mind. It has been said to have made a ‘genuine cultural difference’ to the legislature and the way that the Assembly conducts work.⁸⁴ Similarly in the executive there have been positive changes however there are many recommendations indicating that the government and ACT Department of Justice and Community Safety need to continue working to address the lack of education about how the Act operates and to work on informing those affected by legal developments regarding agencies and other bodies.

Many recommendations have been made over the many reviews. The ten year review recommended addressing the clarity of s 40C of the Act and how it applies to lower courts as at present, the interpretation of this section is potentially deterring people from pursuing a cause of action under the Act.⁸⁵ Additionally, it has been recommended that requirements of compatibility statements made when Bills are first tabled with the Legislative Assembly be strengthened to extend to legislative instruments as well as Bills.⁸⁶ Finally, the executive has been instructed to address the lack of education present in the community.

In addition to those recommendations, surrounding commentary provides arguably the most compelling recommendations that Queensland could consider in enacting a Human Rights Act. The first of these recommendations suggests prohibiting Parliament from making any law that is inconsistent with the Human Rights Act. As the Act does not necessarily prevent enactment where an act may be inconsistent with rights, there is suggestion that this provision could be

⁸³ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 13.

⁸⁴ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 13.

⁸⁵ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 13.

⁸⁶ ACT Human Rights & Discrimination Commissioner, *Look who’s talking: 10 years of the Human Rights Act* (2014), 19.

strengthened. Moreover, providing courts with the ability to invalidate a law that proves to be inconsistent with rights in the Act is recommended as the Act merely provides for a declaration of incompatibility. The declaration has no guarantee of invalidation if the law proves to be inconsistent with the Act, which in many ways makes the provision questionable as it may be used to thwart the very protections it seeks to provide. In preparing an Act for Queensland it is recommended that these potential downfalls of the Act be considered and improved upon.

Ordinary Statute Internationally

It should be noted that within this part ordinary statute refers to domestic human rights legislation, such as that which currently exists in the Australian Capital Territory and Victoria. Consideration of constitutional entrenchment of human rights legislation or a constitutional bill of rights, such as that in the United States, is outside the scope of this paper and Parliamentary Inquiry.

The following discussion will focus on the operation of domestic human rights legislation within the United Kingdom and New Zealand.

United Kingdom

Recognition of human rights within the United Kingdom is not a modern concept.⁸⁷ As Lord Slynn notes, the extensive and complex body of human rights law can be traced back to fundamental ideals acknowledged and protected by lawyers from ancient Greek and Roman society.⁸⁸ Prior to the enactment of the *Human Rights Act 1998* (UK), the United Kingdom relied on its common law tradition of negative rights to protect the human rights of its citizens.⁸⁹ As a result, English Government prior to the mid twentieth century did not enact legislation to protect fundamental human rights such as freedom of speech and movement.

⁸⁷Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 1st ed, 2013) 17-20.

⁸⁸Gordon Slynn, 'The Development Of Human Rights In The United Kingdom' (2004-2005) 28 *Fordham International Law Journal* 477, 477.

⁸⁹Rabinder Singh, 'The Moral Force Of The United Kingdom's Human Rights Act' (2013) 11 *New Zealand Journal of Public and International Law* 39, 40-41.

Due to the 'savage violation'⁹⁰ of human rights perpetrated in World War Two, the reactive, rather than prescriptive, system of human rights protection in the United Kingdom came under scrutiny.⁹¹ This scrutiny and criticism accelerated as the United Kingdom became more integrated with Europe during the 1970s and 1980s.⁹² In an attempt to create a robust system to protect human rights, the *Human Rights Act 1998* (UK) was enacted.

In looking to the experience of the United Kingdom, Queensland must precisely define rights within a Human Rights Act to ensure that interpretation by the judiciary accurately reflects Parliament's intentions. Due to the United Kingdom's membership to the European Union, the judiciary went to great lengths to interpret the *Human Rights Act 1998* (UK) in accordance with the European Conventions⁹³ and law.⁹⁴ As a result, the judiciary commenced an almost legislative function in creatively construing the meaning of the *Human Rights Act 1998* (UK) as opposed to interpreting it in accordance with ordinary language.⁹⁵ Throughout much clarification, the interpretation of the *Human Rights Act 1998* (UK) is now settled. However, this highlights the need for the Queensland Parliament to be clear in its legislative intention, precisely define any terms and ensure that the relationship between a Human Rights Act and any conflicting legislation is made clear.

Further, Queensland's Human Rights Act must contain a clear scheme for balancing interests. As the United Kingdom discovered, difficult questions arise regarding the balancing of interests of a private party and the interests of the public. For example, Article 6 of the *Human Rights Act*

⁹⁰Gordon Slynn, 'The Development Of Human Rights In The United Kingdom' (2004-2005) 28 *Fordham International Law Journal* 477, 481.

⁹¹Chris Brown, 'Universal Human Rights: A Critique' (1997) 1(2) *The International Journal of Human Rights* 41, 52-53.

See also Robert French, 'Human Rights Protections In Australia and the United Kingdom: Contrasts and Comparisons Part I' (2015) 42(2) *Brief* 14, 16 regarding current mechanisms for Parliamentary scrutiny in the United Kingdom.

⁹²Rabinder Singh, 'The Moral Force Of The United Kingdom's Human Rights Act' (2013) 11 *New Zealand Journal of Public and International Law* 39, 47.

⁹³For example, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). See JoAnne Sweeney, 'The United Kingdom's Human Rights Act: Using its Past to Predict its Future' (2010) 12 *Loyola Journal of Public Interest Law* 39, 40.

⁹⁴Robert French, 'Human Rights Protections In Australia and the United Kingdom: Contrasts and Comparisons Part II' (2015) 42(3) *Brief* 30, 34.

⁹⁵Gordon Slynn, 'The Development Of Human Rights In The United Kingdom' (2004-2005) 28 *Fordham International Law Journal* 477, 495.

1998 (UK) requires a 'fair and public hearing'⁹⁶ for all parties before a Court. However, as Lord Slynn notes, lawyers have creatively, and successfully, argued that a trivial violation of the right to a fair trial should result in a case being quashed.⁹⁷ As a result, the public interest in convicting an alleged criminal was arguably unduly regarded as insignificant. Therefore, Queensland must ensure that key interests, particularly in a criminal case, are balanced adequately and appropriately when drafting a Human Rights Act.

New Zealand

Much like the United Kingdom, New Zealand adopted the *New Zealand Bill of Rights Act 1990* (NZ) as a result of political pressure. In doing so, the *New Zealand Bill of Rights Act 1990* (NZ) recognises 'inherent and fundamental'⁹⁸ civil and political rights such as freedom of thought, conscience and religion.⁹⁹

To ensure that the *New Zealand Bill of Rights Act 1990* (NZ) was not an empty idealist statute, drafters ensured that any rights included were narrow and had clear permitters.¹⁰⁰ As Justice Keith notes, narrow drafting of the provision prohibiting discrimination within the *New Zealand Bill of Rights Act 1990* (NZ) ensured that a 'broad protection of equality before the law could not be used to invalidate many measures regulating economic activity.'¹⁰¹ Without careful drafting, excessive delay and expense may be incurred by the taxpayer. Hence, to ensure that Queensland has a meaningful Human Rights Act, narrow drafting, and particularly narrowly defined rights, is essential.

⁹⁶*Human Rights Act 1998* (UK) sch 1 Pt 1 art 6.

⁹⁷Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 1st ed, 2013) 215. See also Gordon Slynn, 'The Development Of Human Rights In The United Kingdom' (2004-2005) 28 *Fordham International Law Journal* 477, 496.

⁹⁸Rabinder Singh, 'The Moral Force Of The United Kingdom's Human Rights Act' (2013) 11 *New Zealand Journal of Public and International Law* 39, 40.

⁹⁹Claudia Geiringer and Matthew Palmer, 'Human Rights and Social Policy in New Zealand' (2007) 30 *Social Policy Journal of New Zealand* 12, 12.

¹⁰⁰K J Keith, 'The New Zealand Bill of Rights Act 1990- An Account of its Preparation' (2013) 11 *New Zealand Journal of Public and International Law* 1, 9.

¹⁰¹K J Keith, 'The New Zealand Bill of Rights Act 1990- An Account of its Preparation' (2013) 11 *New Zealand Journal of Public and International Law* 1, 9.

Summary of Lessons for Queensland

In order to create an effective and sustainable Human Rights Act, Queensland must take advantage of experience, spanning approximately three decades, of the Australian Capital Territory, Victoria and ordinary statute within the United Kingdom and New Zealand. In short, Queensland must:

- Ensure appropriate safeguards are in place by vesting the Queensland Supreme Court with the ability to invalidate laws inconsistent with a Human Rights Act;
- Empower an independent statutory body to oversee and advise on the operation of a Human Rights Act;
- Review the Human Rights Act on a regular basis, specifically at 4 year intervals, to ensure that the law reflects current local and international community expectations regarding human rights; and
- Narrowly and precisely define rights within a Human Rights Act to ensure that rights are accurately interpreted as per Parliament's intention and forcefully applied.

By taking into account this experience, the Queensland will be well placed to enact a meaningful and effective Human Rights Act that protects the fundamental rights and freedoms of Queenslanders.

Conclusion

This submission has examined the effectiveness of current laws and mechanisms protecting human rights within Australia, particularly in Victoria and the Australian Capital Territory, and internationally. As a result, it is clear that Queensland lacks a robust legislative scheme that consistently guarantees the protection of citizens' fundamental human rights and an accessible scheme of remedy for any human rights infringement. It is our firm belief that Queensland must enact an effective, forceful and meaningful Human Rights Act.

Protecting human rights in Queensland should not be a question of progressive reform; it is about meeting a minimum standard of respect and dignity in our community. Queensland is in a fortunate position, being able to consider legislation of Victoria, the Australian Capital Territory and other jurisdictions around the world. Parliament must be guided by this legislation when enacting a Human Rights Act for Queensland, to ensure that it becomes a real tool to guarantee human rights and is easily accessed by those who most need its protection.