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Patron: The Honourable James Thomas AM QC

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Email to: lacsc@parliament.qld.gov.au

Dear Research Director

Re: A Human Rights Act for Queensland**EXECUTIVE SUMMARY**

1. The Law and Justice Institute (**LJI**) supports the introduction of Human Rights Act for Queensland with the following features:
 - a. No power to strike down laws
 - b. A “reasonable limitations” provision
 - c. A statutory construction provision that promotes rather than forces human rights compatible interpretation of legislation
2. The LJI is particularly concerned with the protection of the rule of law in Queensland. To that end we commend the inclusion of a set of protected rights (along with others) dealing with:
 - a. Recognition and equality before the law
 - b. Right to justice
 - c. Right to a fair hearing
 - d. Minimum guarantees in criminal proceedings
3. This submission sets out the LJI’s preferred content of rights in the above categories based on what we consider to be the best formulations in comparable human rights instruments.
4. Contrary to the approach taken in Victoria, the LJI supports the inclusion of a right in criminal cases tried in the District and Supreme Courts to “effective legal representation”. This can be included without financial risk to the scheme of legal aid.
5. The LJI considers that there should be a stand-alone entitlement to take legal proceedings for unreasonable breaches of protected rights by public authorities
6. On balance, the LJI considers that monetary compensation should be available in limited cases for breaches of human rights. We acknowledge the force of arguments to the contrary.

INTRODUCTION

7. The LJI supports a Human Rights Act for Queensland. Consistent with the experience in Victoria, the ACT and New Zealand a Human Rights Act will place the protection of human rights at the centre of legislative decision-making and create a culture in public administration that recognizes, thinks about and justifies the impacts of decisions on the human rights of people in Queensland.
8. In recognition of the centrality of Parliamentary Sovereignty to our system of Government the LJI supports a Human Rights Act that does not give power to the Courts to strike down legislation.
9. Similarly, the LJI supports a provision that requires legislation *where possible* to be interpreted consistently with protected rights. That is, we support a provision of the kind in section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (hereafter the *Charter*) rather than the approach taken in the United Kingdom that permits words to be read in or out of legislation to – in effect – force a human rights compliant meaning to a statute that conflicts with the intent of Parliament in enacting it.
10. LJI also supports the reasonable limitation of rights protected under a Human Rights Act. The text of section 7 of the Charter is an orthodox statement of the principles developed from the Canadian ‘Oakes test’¹. The LJI supports a provision in those terms.
11. The LJI understands and expects that others will provide comprehensive submissions setting out the good reasons for supporting the enactment of a Human Rights Act – including the reasons discussed above.
12. Consistent with its mandate to support and promote the rule of law, the LJI directs this submission to two key issues:
 - a. The specific rights that should be protected by a Human Rights Act because they promote the rule of law; and
 - b. The consequences of decisions by public authorities which are in breach of rights protected by a Human Rights Act.

RIGHTS THAT PROTECT THE RULE OF LAW

What is the ‘rule of law’?

13. At its most simple level the rule of law is a protection against the arbitrary and unequal exercise of public power. The components of it are variously described but carry the same essential themes:
 - a. The law must be both readily known and available, and certain and clear
 - b. The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds

¹ *R v Oakes* [1986] 1 S.C.R. 103.

- c. All people are entitled to the presumption of innocence and to a fair and public trial
 - d. Everyone should have access to competent and independent legal advice
 - e. The Judiciary should be independent of the Executive and Legislature
 - f. The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law
 - g. No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being
14. It has become disturbingly commonplace over the past few years in Queensland for basic procedural protections to be revoked or changed beyond recognition in the interests of political expediency. Many of these protections date back to *Magna Carta* and have operated as a bulwark to the excessive exercise of public power for centuries. Collectively they give practical effect to the rule of law.

The role of a Human Rights Act in protecting the rule of law

15. A Human Rights Act will not – and should not – prevent Parliament from altering fundamental procedural protections as long as it is within its Constitutional power to do so. What a Human Rights Act can do is to ensure that when such a decision is contemplated the consequences and significance of it are laid bare and the Parliament is called upon to publicly justify it against the status of a protected human right.
16. The human rights instruments in Victoria, ACT and New Zealand each include rights that protect components of the rule of law but none is complete or particularly well structured.

The rights that should be included in a Human Rights Act to protect the rule of law

17. The following list identifies what LJI considers to be the rights critical to the protection of the rule of law and commends the formulations of those rights proposed below which are taken as noted from the Victoria, ACT and New Zealand human rights instruments. We have structured them in what we consider to be the most accessible order.

Recognition and equality before the law (based on section 8 Charter)

- a. Every person has the right to recognition as a person before the law.
- b. Every person has the right to enjoy his or her human rights without discrimination.
- c. Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

- d. Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

***Right to Justice (based on s. 27 New Zealand Bill of Rights Act 1990)
(hereafter NZBORA)***

- a. Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- b. Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- c. Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

The right to a fair hearing (based on s. 24 Charter)

- a. A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Rights in Criminal Proceedings (based on s. 25 Charter)

[NB a different approach to the right to legal representation is proposed and discussed later in this submission]

- a. A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- b. A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
 - i. to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands;
 - ii. to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her;
 - iii. to be tried without unreasonable delay;
 - iv. to represent him or herself personally or through a legal representative

- v. to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
 - vi. to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
 - vii. to have the free assistance of an interpreter if he or she cannot understand or speak English; and
 - viii. to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
 - ix. not to be compelled to testify against himself or herself or to confess guilt.
- c. A person charged with a criminal offence to be tried in the District or Supreme Court has the right to effective legal representation.
 - d. A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
 - e. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
 - f. If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
 - g. Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.
 - h. A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.
 - i. A child charged with a criminal offence has the right:
 - i. to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation;
 - ii. to be brought to trial as quickly as possible;
 - iii. if convicted, to be treated in a way that is appropriate given his or her age.
18. A number of the above-proposed rights warrant further discussion:

Rights that deal with issues already covered by legislation

19. A number of the rights that are proposed above are already dealt with by legislation, regulation or practice direction. Examples include retrospective penalties, access to interpreters and disclosure in criminal cases.
20. The purpose of including those rights in a Human Rights Act is not to make any statement about the adequacy or otherwise of existing regulation.
21. It is important that a Human Rights Act contain a *complete* statement of the indicia of a criminal process that complies with basic human rights. Further, the fact that existing protection of a right is adequate does not immunize the area from legislative change. Including rights of these kinds in a Human Rights Act ensures that any proposed change will be subject to the transparent and rigorous processes that their inclusion in a Human Rights Act will demand.

Equality and the definition of 'discrimination'

22. Equality before the law is a central component of the rule of law. It ensures that the law is not arbitrary. Giving content the notion of equality before the law requires us to identify what the absence of equality would look like or – in other words – when the application of the law will be discriminatory.
23. In turn, this requires the identification of the bases upon which a person cannot be discriminated against unless such discrimination can be demonstrably justified in a free and democratic society.
24. The proposed provision above replicates exactly section 8 of the *Charter*. "Discrimination" is then defined by reference to the protected attributes in section 6 of the *Equal Opportunity Act 2010* (Vic). There is no such equivalent list in Queensland legislation and a Human Rights Act would need to supply one. The Victorian list is tried and tested and appears to be comprehensive:
 - a. age;
 - b. breastfeeding;
 - c. employment activity;
 - d. gender identity;
 - e. disability;
 - f. industrial activity;
 - g. lawful sexual activity;
 - h. marital status;
 - i. parental status or status as a carer;
 - j. physical features;
 - k. political belief or activity;
 - l. pregnancy;
 - m. race;
 - n. religious belief or activity;
 - o. sex;
 - p. sexual orientation;
 - q. an expunged homosexual conviction;

- r. personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

The right to effective legal representation

25. The list of protective rights in criminal proceedings above includes, in cases tried in the District and Supreme Courts, a right to effective legal representation. In Victoria the equivalent right is heavily circumscribed by reference to eligibility for legal aid. As a result, the protection is essentially meaningless.
26. Effective legal representation in an indictable case tried in the District or Supreme Court is recognized as a precondition for a fair trial.
27. The High Court considered the advantages of representation by counsel in criminal trials in *Dietrich v The Queen*.² In particular:
- a. “It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious”.³
 - b. “An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown”.⁴
 - c. “Any litigant in person is at a disadvantage, above all an accused facing a serious criminal charge. Indeed, the adversary system that prevails in this country assumes the existence of contestants who are more or less evenly matched.”⁵
28. A general right to effective legal representation in trial courts reflects current practice. As a result of *Dietrich* if a person is unrepresented through no fault of his or her own in a criminal trial then the trial will be stayed until representation is in place.
29. The entitlement to place reasonable limits on rights would unquestionably permit the limitation of legal aid resources to those who cannot afford their own representation. Even so, the reality is that the vast majority of criminal trials are already legally aided because of the cost of private representation. Although we do not agree that a provision of the kind proposed above would place additional pressure on the legal aid scheme, the issue could be put beyond doubt by limiting the entitlement to those who could not otherwise afford the cost of effective representation.

² (1992) 177 CLR 292.

³ (1992) 177 CLR 292, 301-302 (Mason CJ and McHugh J).

⁴ (1992) 177 CLR 292, 302 (Mason CJ and McHugh J).

⁵ (1992) 177 CLR 292, 353-354 (Toohey J).

30. A right to *effective* representation again enshrines existing practice. The Victorian Court of Appeal in *DPP v Chaouk* [2013] VSCA 9 recently affirmed the proposition that the quality of legal representation can provide a basis to stay a proceeding if the nature of the representation (in that case a barrister without an instructing solicitor) creates a disadvantage for the accused person such that an unfair conviction is a real risk.

The right to trial without unreasonable delay

31. There may be concern that the inclusion of a speedy trial right leaves open the likelihood of serious criminal offences not being tried because of systemic delays. The experience in both New Zealand and Victoria is that this has not occurred. Rather, the protection of this right has ensured that delay which is attributable to fault on the part of prosecuting or investigating authorities is open to scrutiny and, in turn, those agencies have responded positively.
32. It must of course be recalled that a delayed criminal process is harmful not just to an accused person and his or family but to victims, witnesses and the community more generally.
33. A set of principles to determine when delay will be unreasonable have developed based on the proposition that there is no formula for determining what unreasonable delay is. Rather, the approach taken by senior courts in comparable jurisdictions is to weigh the time lapse against a series of factors first articulated by the Supreme Court of Canada in *R v Morin*⁶ and adopted in Victoria, New Zealand⁷ and considered by the Australian Capital Territory (ACT) Supreme Court⁸. The *Morin* factors are:
- a. Length of delay;
 - b. Waiver of time periods;
 - c. The reasons for the delay, including:
 - i. The inherent time requirements of the case;
 - ii. Actions of the Accused;
 - iii. Actions of the Crown;
 - iv. Limits on institutional resources; and
 - v. Other reasons for delay; and
 - d. Prejudice to the Accused.
34. Even where a breach of the right is found the remedy is very rarely a permanent stay of the proceedings. More often a stay will be conditional on certain actions being taken by the prosecuting authority to expedite a matter.

⁶ (1992) 12 CR (4th) 1 (SCC),

⁷ *Martin v Tauranga District Court* [1995] 2 NZLR 419

⁸ *R v Upton* [2005] ACTSC 52 at 19-21

35. In *Williams*⁹ the Supreme Court of New Zealand held that, “a stay is not a mandatory, or even a usual remedy. Staying the proceedings is likely to be the correct remedy only if the delay has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a Court to do so”. The Court cited *Attorney-General’s Reference (No 2)* with approval and it appears that the New Zealand and United Kingdom approaches are therefore as one. As in the United Kingdom, this represents a significant change from the earlier New Zealand approach to remedies under which a stay was the presumptive remedy where undue delay was established.
36. The LJI considers that the inclusion of a right to trial without unreasonable delay is critical in setting a culture that turns its face against excessive delay and helps to ensure that the exposure of people to the criminal justice system (whether as an accused person, a victim or a witness) is as short as is reasonably possible.

WHAT SHOULD HAPPEN WHEN A PUBLIC AUTHORITY BREACHES A HUMAN RIGHT?

Public authorities should be accountable for *unreasonable* limitations placed on protected human rights

37. Earlier in this submission we noted LJI’s support for an equivalent provision to section 7 of the *Charter* which would enshrine an entitlement to limit human rights when to do is demonstrably justified in a free and democratic society. In that sense, a Human Rights Act for Queensland would protect rights reasonably but not absolutely.
38. The LJI considers that public authorities should not be found to have breached rights unless the facial contravention of a right is not justified under a section 7-type test.
39. However, where it can be established that a public authority has breached a protected human right **and** where the limitation of the right that the breach causes is not justified under a section 7-type test there is no good policy reason why a legal action for such a breach should not be available.

There should be a stand-alone entitlement to commence proceedings for breach of a human right

40. In Victoria there was concern when the *Charter* was enacted that there would be a flood of litigation. As a result, sections 38 and 39 were enacted in a way that was intended to stifle any such flood.
41. Section 38 provides (among other things) that a public authority acts unlawfully if it makes a decision that is incompatible with a protected human right.
42. Section 39 provides that “If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful,

⁹ *Williams v The Queen* [2009] NZSC 41 at 18

that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter". This has become known as the "piggy back". That is, in order to seek relief for unlawfulness arising because of a breach of a protected human right there must already be a separate juridical basis for the unlawfulness of the decision quite apart from the *Charter*.

43. The LJI can identify no sound basis in public policy for this requirement. If acting incompatibly with a protected human right is (as section 38 says) unlawful then such unlawfulness should be capable of supporting an action in law quite apart from any need to identify a separate cause of action that would otherwise have existed.
44. In fact, the practical justification for section 39 being enacted (avoiding a flood of litigation) has not been borne out. We have had the advantage of reviewing the submission made by the Queensland Council of Civil Liberties and endorse the following description of the Victorian experience:

"It was intended to reduce litigation but has instead resulted in lengthier and more complex cases. 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 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%. This refutes arguments that an individual cause of action in a human rights charter would lead to a flood of litigation".

45. It follows that there is no good reason in policy or in practice to limit the ability to take legal proceedings (most often judicial review) for a breach of a human right by requiring a non-human rights based remedy to also be available. The LJI commends the approach in section 40C(2) of the ACT legislation.

On balance, compensation should be available for the unreasonable breach of a human right

46. As noted, section 38 of the *Charter* makes it unlawful for a public authority to make a decision that is incompatible with a protected human right. It will be recalled that such a finding requires a conclusion both that a protected right has been limited and that such limitation is not demonstrably justified in a free and democratic society.
47. The Victorian Court of Appeal recently considered in *In Bare v IBAC*¹⁰ whether – as a matter of statutory construction – a finding of invalidates the decision and thus amounts to jurisdictional error on judicial review. Warren CJ held that a breach of section 38(1) does not invalidate a decision.¹¹ Tate JA considered that the arguments were finely balanced and expressed no final view.¹² Santamaria

¹⁰ [2015] VSCA 197.

¹¹ [2015] VSCA 197, [151] (Warren CJ).

¹² [2015] VSCA 197, [396]-[397] (Tate JA).

JA seems to have considered that the force of the arguments told against invalidity but his Honour did not finally determine the issue.¹³

48. The LJI considers that Parliament should make clear that a decision of a public authority that limits a protected human right in a way that is not demonstrably justified in a free and democratic society is unlawful and thereby invalid.
49. The final issue in this regard is whether compensation should be available as a remedy for a breach of a human right. In New Zealand the Court of Appeal in *Baigent's Case*¹⁴ held that compensation was available when the *NZBORA* was otherwise silent on the question. In Victoria, section 39 expressly prevents any monetary award for breach being made.
50. There are sound arguments for both positions. Compensation is well recognized as a way of deterring unlawful conduct and of motivating litigation that may well be in the public interest. On the other hand, a compensation regime risks excessive litigation. The New Zealand experience tends to suggest that the latter concern is theoretical rather than real. There has been limited litigation seeking compensation and the awards when made have not been excessive.
51. On balance, the LJI recommends that compensation be available for a breach of a protected human right. If necessary, limitations of the kind applying to defamation proceedings could be included.

CONCLUSION

52. The LJI commends the enactment of a Human Rights Act for Queensland as a further safeguard of human rights. Experience in other jurisdictions has confirmed that human rights instruments can be extremely effective in creating a culture with public authorities of awareness of and care for the human rights of Queenslanders. Equally, as a statement of basic values a Human Rights Act requires transparent justification of law makers when taking steps that limit human rights. The genius of the approach taken in NZ, Victoria and the ACT is that these benefits do not come at the expense of Parliamentary Sovereignty or the separation of powers.

Yours faithfully,



For: Louisa Pink

**President
Law & Justice Institute (Qld) Inc.**

¹³ [2015] VSCA 197, [590]-[626] (Santamaria JA).

¹⁴ *Simpson v Attorney General* [1994] 3 NZLR 667 (known as "*Baigent's case*")