Submission to the Human Rights Inquiry

Legal Affairs and Community Safety Committee

April 2016

This submission was researched and written by senior law students **Tom Mackie, Courtney Pallot** and **Keilin Anderson** under the guidance of Centre Director, Monica Taylor. A number of UQ law academics affiliated with the Centre's activities provided valuable input throughout the development of this submission. The Centre acknowledges and thanks **Associate Professors Tamara Walsh** and **Peter Billings, Dr Melanie O'Brien** and **Dr Rebecca Ananian-Welsh** for their involvement and support.

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About the UQ Pro Bono Centre

The UQ Pro Bono Centre (the Centre) is an initiative of the TC Beirne School of Law at the University of Queensland. The Centre works in close partnership with the private legal profession, community legal centres (CLCs), charities and statutory agencies including Legal Aid Queensland.

The Centre's primary purpose is to create dynamic and meaningful opportunities for law students to participate in the delivery of pro bono legal services. We take very seriously the idea that law school is a place where law students should critically engage with issues of access to justice, unmet legal need and human rights. Through their involvement with the Centre we hope that our law students will develop a lifelong professional commitment to public service, wherever their paths in law take them.

This submission is:

- Written and researched by senior law students under the guidance of academic experts;
- Informed by the perspectives of Centre stakeholders, especially CLCs and their clients, with whom the Centre enjoys a strong and strategic relationship;
- Supported by law students, whose views as future lawyers in Queensland we consider to be important to this Inquiry.

A collaborative submission

A number of CLCs with whom the Centre partners have provided input into this submission through the provision of client case studies. They include the Refugee and Immigration Legal Service, the Youth Advocacy Centre and the Prisoners' Legal Service. The Centre acknowledges the tireless work of these organisations and other CLCs in providing frontline legal services to people living in Queensland, many of whom experience violations of their human rights on a daily basis.

Individuals and organisations that broadly endorse this submission are listed in the **Appendix.**

Tom Mackie Courtney Pallot Keilin Anderson

Introduction

Thank you for the opportunity to make a submission in relation to this Inquiry. It presents an exciting opportunity to imagine a future Queensland underpinned by a strong human rights landscape.

'Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.'[1] The Australian Human Rights Commission states that human rights 'are based on principles of dignity, equality and mutual respect, which are shared across cultures, religions and philosophies. They are about being treated fairly, treating others fairly and having the ability to make genuine choices in our daily lives.'[2]

A Human Rights Act, even at state level, will implement Australia's obligations under the human rights treaties we are party to. Australia is a party to the seven major human rights treaties:

- International Covenant on Civil and Political Rights (ICCPR)[3]
- International Covenant on Economic, Social and Cultural Rights (ICESCR)[4]
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[5]
- Convention on the Rights of the Child (CROC)[6]
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[7]
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[8]
- Convention on the Rights of Persons with Disabilities (CRPD)[9]

Under each of these treaties, Australia is obligated to uphold and protect a wide variety of rights for persons within its territory (and in some circumstances, outside Australian territory). As an element of the Australian governmental and legal structure, the state of Queensland is required to ensure the protection of the rights of all persons within Queensland.

Even if we consider the idea that there are 'natural rights' that exist inherently for each person,[10] in our modern legal system these rights are difficult to enforce without specific legislative provisions that allow every person to take action when their rights are violated, and thus a Human Rights Act will provide an avenue by which such rights can be upheld.

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[1] OHCHR, Human Rights, 'Human Rights Indicators', (2012), available at http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf.
[2] Australian Human Rights Commission, 'What are human rights?', available at http://humanrights.gov.au/about/what-are-human-rights.
[3] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia ratified 13 August 1980.
[4] Opened for signature 19 December 1966. Australia ratified 10 December 1975.
[5] Adopted and opened for signature by General Assembly resolution 39/462 of 10 December 1984. Australia ratified 8 August 1989.
[6] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entered into force 2 September 1990).
[7] Adopted by the General Assembly resolution 2106 (XX)2 of 21 December 1965. Australia ratified 30 September 1975.
[8] Opened for signature 1 March 1980. Australia ratified 28 July 1983.
[9] Adopted on 13 December 2006 by General Assembly resolution A/RES/61/106; opened for signature 30 March 2007. Australia ratified 17 July 2008.
[10] As considered by philosophers and theorists such as John Locke, and statesmen such as Thomas Jefferson.

Alternatively, if we view rights as a function of a community's cultural and environmental variables,[11] the Australian and Queensland community is one that supports and upholds rights and freedoms as part of our core values, and thus a Human Rights Act would be in conformity with social perspectives and structure. 'Respect for human rights is the cornerstone of strong communities in which everyone can make a contribution and feel included.'[12] Human rights are universal: they 'derive from needs or values or preferences that every person shares or ought to share'.[13]

Queensland is in the fortunate position of being able to learn from the other Australian states and territories which have already enacted human rights legislation, Victoria and the Australian Capital Territory (ACT). The Centre therefore supports a Queensland Human Rights Act that implements provisions that avoid issues already highlighted by the relevant reviews in ACT and Victoria.

The implementation of a Human Rights Act is a first step in an evolving process. New bodies within and outside parliament can evolve to accommodate a Human Rights Act, in a gradual and careful way in accordance with parliamentary processes, deliberation and accountability.

This submission is in two parts. Part I puts forward the Centre's position with respect to the content and form of future Queensland Human Rights Act. Part II provides detailed research regarding the experience of other jurisdictions that have already trodden this well-worn path. We hope that the Committee will find Part II useful in its consideration of the Terms of Reference, 2 (a – d).

Summary of Recommendations

The Centre recommends:

1. That Queensland adopt a Charter of Rights or Human Rights Act.

2. That the Queensland Human Rights Act fully incorporate ICCPR and ICESR rights at the outset.

3. That the Queensland Human Rights Act incorporate a right to self-determination for Aboriginal and Torres Strait Island people in Queensland.

4. That the government commit to consulting with Aboriginal and Torres Strait Islander people and groups with a view to incorporating particular rights for those peoples in the Queensland Human Rights Act, either upon enactment or as soon as practicable following enactment.

5. That the Queensland Human Rights Act incorporate specific rights for children, particularly as regards to their treatment within the criminal justice system.

6. That the Queensland Human Rights Act incorporate disability rights, including a right to equal participation in, and access to, facilities and services.

[11] As considered by philosophers and theorists such as John Stuart Mill.

[12] Australian Human Rights Commission, 'What are human rights?'available at <http://humanrights.gov.au/about/what-are-human-rights>

[13] Duncan Kennedy, *A Critique of Adjudication*, Harvard University Press (1998), 305.

7. That the Queensland Human Rights Act include a non-discrimination clause with specific reference to the following attributes: sex, gender or gender identity, sexual orientation, religion, race, ethnicity, disability, marital status, pregnancy or age.

8. That the Queensland Human Rights Act incorporate a right to a healthy environment.

9. That the Queensland Human Rights Act require a statement of compatibility to be issued with any new Bills and subordinate legislation.

10. That a bipartisan standing committee be established to review the human rights implications of new and existing legislation.

11. That the Queensland Human Rights Act include an interpretative provision to enable courts to interpret laws compatibly with human rights. That interpretative provision should expressly prescribe an interpretative approach in line with the recommendations of the Young Review.

12. That the Queensland Human Rights Act include a limitation clause similar to that in the Victorian and ACT legislation.

13. That the Queensland Human Rights Act include a provision similar to that in Victoria and the ACT that permits the Supreme Court of Queensland to issue a declaration of incompatibility.

14. That the Queensland Human Rights Act provide for a freestanding cause of action to be brought for any alleged breaches of human rights.

15. That Courts have the discretion to award damages to complainants who successfully establish a breach under the Queensland Human Rights Act.

16. That QCAT be given original jurisdiction to hear proceedings about breaches of human rights under the Act.

17. That the Queensland Anti-Discrimination Commission be empowered to perform investigatory, reporting, conciliation, intervention, research and reporting functions for a future Human Rights Act.

18. That private agencies contracted to deliver government services be subject to a Queensland Human Rights Act.

19. That an opt-in clause for private sector businesses be included in a Queensland Human Rights Act so as to incentive private sector compliance.

PART I – HUMAN RIGHTS ACT: CONTENT AND FORM

1. Is Human Rights Protection in Queensland Necessary?

Despite Australia being a party to many international human rights treaties and conventions, enforcement of human rights remains difficult without their incorporation into domestic law. In Queensland there is no parliamentary process requiring the government to directly consider the impact of legislation on human rights. This is of particular concern in a unicameral system that does not have an upper house to review legislation.[14]

Queenslanders only have the benefit of a limited patchwork of rights protection (for example, through the common law and anti-discrimination legislation) in conjunction with reviews conducted by its parliamentary committee system to prevent abuse of executive power and ensure protection of citizens' rights. Recent events in Queensland have demonstrated the inadequacy and fragility of these human rights protections. The former Queensland Government led by Premier Newman introduced a number of laws abrogating key rights within the ICCPR and ICESCR, as well as core principles of the Australian legal system. These laws included:

a) *Vicious Lawless Association Disestablishment Act 2013* (Qld), which impacted the: right to freedom of association, movement and assembly;[15] rights in detention;[16] the rule of law;[17] and the reversal of the onus of proof.[18]

b) *Tattoo Parlours Act 2013* (Qld), which impacted the Right to Work;[19]

c) *G20 (Safety and Security) Bill 2013* (Qld), which undermined: legitimate peaceful protest;[20] the presumption in favour of bail; and the appropriate placement of the burden of proof on the prosecution.

Thus it is evident that, even with the existing mechanisms, the absence of human rights protections in law-making procedures has led to the introduction of legislation abrogating citizens' rights. It is this erosion of rights that demonstrates the need for a Human Rights Act in Queensland.

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[14] K Jones and S Prasser, 'Resisting executive control in Queensland's unicameral legislature - recent developments and the changing role of the speaker in Queensland' (2012) 27 *Australasian Parliamentary Review* (1): 67, 69.
[15] *Vicious Lawless Association Disestablishment Act 2013* (Qld); Working for Queenslanders (authorised by Alex Scott), *A Bill of Rights for Queensland* (2015) <http://www.together.org.au/files/3814/3018/9626/bill_of_rights_A51.pdf> Dr Rebecca Ananian-Welsh, 'Queensland holds lessons for states set to crack down on bikies, 18 June 2015: <https://theconversation.com/queensland-holds-lessons-for-states-set-to-crack-down-on-bikies-43317>
[16] Wellington, Peter. *Submission to Select Committee into Certain Aspects of the Queensland Government Administration related to Commonwealth government Affairs*, 18 November 2014, 3.
[17] Ibid.
[18] Ibid.
[19] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Art 6.
[20] *Human Rights Law Centre.* Queensland G20 Bill: Sweeping new police powers threaten human rights (17th October 2013) <http://hrlc.org.au/queensland-g20-bill-sweeping-new-police-powers-threaten-human-rights/>

2. Implications of a Queensland Human Rights Act

The implications of a Human Rights Act largely depend upon the model adopted, and the rights and mechanisms contained within it. Issues of content and form are considered below (not listed in order of priority). It is important to note that Queensland is in the extremely fortunate position of having access to twenty-two years of human rights experience and jurisprudence (ACT and Victoria combined) regarding rights legislation and is ideally placed to resolve content and form issues.

2.1 Legal Implications

i. A statutory Human Rights Act provides flexibility, by enabling its alteration through an ordinary Act of Parliament. This exposes the Act to the robustness of the legislative process, and allows it to evolve and adapt to reflect new challenges and protection of rights.[21] Though there have been concerns raised that this leaves rights open to abuse or curtailment, the experience of both the ACT and Victoria highlights the difficulty parliaments face if they attempt to curtail rights, after they have given them to the people.

ii. In the context of legislative scrutiny, the introduction of human rights legislation will likely improve the accountability deficit inherent in Queensland's Parliament by virtue of its unicameral structure.

iii. A Human Rights Act will help to enforce community consultation processes in the enactment of legislation, as well as ensure transparency and accountability of government. If the Queensland Parliament intends to curtail citizens' rights in enacting new legislation, it must make its intention clear. This is also likely to result in less litigation arising from ambiguous language in a statute (and therefore requiring a court to exercise its statutory powers).

iv. Concerns have been raised that a Human Rights Act would result in inappropriate transfer of power to judges. Judges are appointed by government and their decisions may be appealed, however, they also enjoy security of tenure and are not directly accountable to the electorate. Some have argued that this leaves "scope for judicial interpretation…to override parliamentary sovereignty".[22] The issue is that a right could be interpreted broadly or narrowly depending upon the judge or bench considering it.[23] However, by drafting a human rights act in the Dialogue Model, and by ensuring that an interpretative clause is appropriately drafted as to preserve democracy and not confer legislative power on the judiciary, such critiques can be addressed. [24] For example, Australian parliaments have been prepared to preserve laws that a court has declared to be incompatible with human rights, thus preserving parliamentary supremacy. This proves that current arrangements need not be displaced. The Dialogue Model is examined in detail in section 5.

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[21] Michael Kirby, 'A Bill of Rights for Australia - But Do We Need It?' (Speech delivered at the Legislative Council Chamber, Queensland, 4 October 1994).
[22] Australian Study of Parliament Group (Queensland Chapter). *A Bill of Rights for Queensland*, (Brisbane, 12 July 1999), 8.
[23] Sir Harry Gibbs, 'The Protection of Rights in Australia' (2001) 47 *National Observer* 13.
[24] Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations Under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340.

v. A Human Rights Act would facilitate best practice outcomes and dispute resolution processes, without inhibiting the powers of any one arm of government.

vi. Concerns relating to increased litigation under a human rights instrument have proven to be unfounded, given the modest judicial consideration of the legislation in both the ACT and Victoria.[25] The modest use of the Human Rights Act in Victoria might reflect the fact that there has not been a direct duty on public authorities to observe human rights in administrative decision-making and a corresponding right to relief for individuals whose rights are breach. If there is to be such a duty in a Queensland Human Rights Act, once could reasonably expect the courts to be called on more frequently than in Victoria (to date), to adjudicate.

2.2 Social Implications

The provision of rights in one legislative instrument facilitates accessibility and simplicity, by setting out rights in one location, and giving citizens the tools to challenge policies that may affect their rights. The Centre agrees with advocates of the current human rights campaign in Queensland, who state that such an instrument will "improve the relationship between the government and Queenslanders as a result of consultation, transparent decision-making and increase accountability".[26] Social implications of a Human Rights Act include:

2.2.1 Addressing disadvantage to protect the human rights of marginalised Queenslanders. The **case studies** in this submission demonstrate how a Human Rights Act might better protect the rights of marginalised Queenslanders; better protection of human rights is a fundamental social benefit.

2.2.2 Contributing to the development of a human rights culture across the State. This cultural transformation cannot be underestimated, and will likely cut across primary, secondary and tertiary educational settings, workplaces, public sector authorities, private businesses and the community at large.

2.2.3 The potential to influence other state jurisdictions to follow down a similar path. By enacting a Human Rights Act, Queensland will be a 'tipping point' state and a model and leader in the federation on the protection of human rights.[27]

Recommendation 1: That Queensland adopt a Charter of Rights or Human Rights Act.

[25] J Gans, 'The Impact of the *Human Rights Act 2004* (ACT) on Other Australian Jurisdictions', paper written for *Ten Years of the ACT Human Rights Act: Continuing the Dialogue*, 1 July 2004, 4.
[26] Working for Queenslanders (authorised by Alex Scott), *A Bill of Rights for Queensland* (2015), 2.
[27] In 2007, the Tasmanian Law Reform Institute recommended the adoption of human rights legislation. Similar recommendations have also been made in Western Australia.

Case Study 1 – Youth Advocacy Centre

In 2015, YAC represented 'John', a 16-year-old who was charged with three offences that were alleged to have occurred 15 months to 2 years beforehand when he was fourteen (14) and (15). Between the time of the alleged commission of these offences, John had resolved other matters and completed the penalty imposed for those offences. He had found a job and he was concerned that further proceedings and punishment orders may jeopardise his employment.

John had already been previously charged for the most recent of the three "fresh" offences and the police had failed to deliver a brief of evidence within eight weeks and consequently the charge was withdrawn.

Due to the significant impact of delay, YAC brought an application on behalf of John to stay all three "fresh" charges.

The *Youth Justice Act 1992* contains a principle that "a decision affecting a child should, if practicable made and implemented within a timeframe appropriate to the child's sense of time" (schedule 1 of the *Youth Justice Act 1992*).

This section is not as direct as the requirement contained in Article 40 of the Convention on the Rights of the Child (CROC):

> *40.1 States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner and consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in this society.*
>
> *40.2 To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*
>
> > *(b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:*
> >
> > > *(iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his parents or legal guardians.*

This Article was relied upon the ACT in *Perovic v. CW CH 05/1046 ACT Childrens Courts Unreported (1 June 2006)* where it was held there is a distinction between the general right to a fair trial which applies to adults, and the special rules which the legislature intended to apply to children involved in the criminal process.

Whilst ultimately successful in obtaining a stay, the absence of a Human Rights Act in Queensland meant that a full day hearing was required, involving calling witnesses to establish the adverse consequences of delay. The adoption of a Human Rights Act may therefore alleviate the adverse consequences of significant delay in the commencement of charges against children, particularly if it includes specific provisions for child rights.

3. Which Rights?

3.1 Civil and Political Rights

The Centre recommends that all rights enshrined in the *International Covenant on Civil and Political Rights* (the *ICCPR)* be included. Australia has signed and ratified this treaty and such rights already form the basis of the Victorian Charter and ACT Act.[28]

3.2 Economic, Social and Cultural Rights

Australia is also a party to the *International Covenant on Economic, Social and Cultural Rights* (the *ICESCR*) which protects rights such as just and favourable conditions of work and access to adequate housing. These rights are recognised as 'fundamentally important to human security, happiness, and fulfillment' and an 'essential part of the human rights equation'.[29] Indeed the 1948 Universal Declaration of Human Rights (UDHR) proclaimed both political and economic rights, and there is strong argument in soft and hard law and scholarship that the UDHR provisions amount to customary law (and in some cases, *jus cogens*).[30] The preambles to the two subsequent covenants also refer to the enjoyment of both classes of rights.[31]

The tendency to divide ICCPR and ICESCR can be traced back to their time of drafting during the period of the Cold War. ICESCR rights were initially separated and have in the past been regarded as 'unenforceable,' 'exclusively promotional' or entirely non-justiciable.[32] However, that view has shifted in recent years and academic commentary now counsels against a division of rights and highlights 'extensive interconnections between political freedoms and the understanding and fulfillment of economic needs'.[33] It is also notable that Australia ratified the ICESCR five years prior (1975) to its ratification of the ICCPR (1980).

The importance of ICESR rights can be summarised as follows:

- ESCR rights are often more important than ICCPR rights for those living in poverty;
- Human rights do not exist in isolation and are interdependent;
- Recognition of this interdependence improves decision and policy making;
- The arbitrary division of rights does not make sense to the person whose rights are violated, or who is experiencing marginalisation or disadvantage;
- The granting of social and economic rights is essential for full and democratic citizenship.[34]

The Victorian and ACT experiences provide Queensland with some guidance in relation to ICESCR rights. The initial Victorian inquiry saw recommendations to include ICESCR rights

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[28] See sections 8 – 27 in both *Human Rights Act* 2004 (ACT) and *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
[29] Scott Leckie and Anne T Gallagher, *Economic, Social, And Cultural Rights* (University of Pennsylvania Press, 2006).
[30] See, e.g., Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International & Comparative Law* (1995-1996), 287-397.
[31] Amartya Sen, *Development As Freedom* (Knopf, 1999).
[32] Ibid 24.
[33] Craven, M., *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development*, Oxford Clarendon Press (1995); Amartya Sen, *Development As Freedom* (Knopf, 1999); Scott Leckie and Anne T Gallagher, *Economic, Social, And Cultural Rights* (University of Pennsylvania Press, 2006); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford, Oxford University Press (2008).
[34] Sen, above n 31.

in the charter from bodies such as the Law Institute of Victoria.[35] These rights were not originally included in the charter but the option of later considering the addition of rights on review was noted. Most recently, submissions to the 2015 Victorian Review reveal a view that a separation of rights is 'illusory' and that an Act with solely ICCPR rights constitutes only a 'minimal baseline.'[36] In its recommendations, the Young Review recognised the support for ICESR rights but left the issue as a priority for future review.[37]

After just one year of operation, the ACT began progressively incorporating additional rights. This process of reviewing ICESCR rights in phases is ongoing with section 27A's inclusion of right to education being the initial step.[38] Considering the experiences of ACT and Victoria, and in light of international commentary on the interdependence of ICESR rights, the Centre recommends full incorporation of ICESCR and ICCPR rights at the outset. **Case study 2** demonstrates the importance of ICESCR rights to highly vulnerable individuals such as refugees living in Queensland. **Case study 3** highlights the fundamental importance of a healthy environment at a time of unprecedented climate change.

Recommendation 2: That the Queensland Human Rights Act fully incorporate ICCPR and ICESR rights at the outset.

Case Study 2 – Environmental Defenders Office

Without a clean, healthy environment, the basic human rights to life, health, work and education all cannot be fully realised. As stated in the Rio Declaration, human beings are "at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[39]

A Human Rights Act would be a step forward in the effectiveness of Queensland laws in protecting our human right to a healthy environment, and would also help to give more rights to those whose lives are impacted by environmental abuses.

- Protection of the right to a healthy environment will likely require government to consider more fully how proposed legislation or policy might impact on the environment on which we depend for our livelihoods and health.
- By providing a requirement for the consideration up front of the impact a proposed project, law or policy might have on the human right to a healthy environment, there is less chance that litigation might be undertaken to challenge that project, law or policy on the basis of the impacts to the right to a healthy environment.
- The rights of marginalised Queenslanders whose livelihood is dependent on a healthy environment – such as farmers - are not given as strong a weight as the rights of others. They frequently suffer impacts to their air and water quality which would not be allowed to occur in urban Queensland. A Human Rights Act would help to address the imbalance between needs of rural Queenslanders and those living in cities.
- A Human Rights Act would likely result in greater transparency and accountability with respect to development proposals.

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[35] Law Institute of Victoria 2005 Submission, 5.

[36] MB Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (*Young Review*), September 2015, 227 – 229. See also Submissions to 2015 Review by Law Institute of Victoria, Castan Centre for Human Rights Law, Professor Rosalind Dixon and Professor George Williams AO.

[37] Young Review, above n 36, pp. 227 – 229, 238.

[38] ANU, 'ACT Economic, Social and Cultural Rights Research Project', *Australian Research Council* (2010), and Government response to the review (2012). See also ANU Human Rights Research Project Report, The Human Rights Act 2004 (ACT): The First Five Years of Operation (2009).

[39] Rio Declaration on Environment and Development: <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>

Case Study 3 – Refugee and Immigration Legal Service

A woman and her two young children have been sponsored for Australian permanent residence by the woman's husband. A decision on their visa application has not yet been made, but they live lawfully in Australia on bridging visas. They experience family violence and the police intervene. For their safety, the woman and children are removed from their home and referred to emergency accommodation. The woman does not speak English fluently.

They apply for Special Benefit payments from Centrelink, but because they are on bridging visas they are ineligible. Without a regular income, domestic violence refuges are unable to offer stable accommodation. Because they are not yet permanent residents, the family is not eligible for state housing.

The children are subject to international student fees levied by Education Queensland, which the woman cannot afford. The woman remains fearful of her husband, and would like to apply for a Domestic Violence Protection Order, but cannot afford legal representation.

Because of their circumstances, Child Safety investigates whether the children should be removed from their mother. The woman is confused by the various government agencies and community organisations with which she has to interact. Some use interpreters when speaking with her, but not all. The community organisations generally do not receive funding to pay for interpreters.

A Human Rights Act that included economic, social and cultural rights, as well as child rights, would provide an avenue for the woman and her children to obtain housing and to stay together as a family. The Act would allow the woman and her children to argue that multi-level government and service provider policies which reject providing services to the woman and her family are in violation of the rights to housing and family. For example, the CROC provides that 'States Parties shall recognize for every child the right to benefit from social security' (Art. 26); and the ICESCR mandates the right of every person 'to an adequate standard of living for himself and his family, including adequate food, clothing and housing'.

3.3 Specific rights

The Centre also advocates for an Act that highlights the rights of specific groups for whom additional or particular protection should be afforded.

The Centre emphasises the importance of including rights particular to Aboriginal and Torres Strait Islander people in Queensland. Recent reports reveal the life expectancy gap remains at 10 years.[40] There is arguably insufficient recognition or protection of these rights at a Commonwealth level, and notably within the Constitution.[41]

The right to indigenous self-determination is seen as a crucial cultural right as enunciated by articles 3, 4, and 5 of the UN General Assembly Declaration on the Rights of Indigenous Peoples (UNDRIP). This right was not included in the original Victorian Charter however the

[40] Close the Gap Campaign Steering Committee, *Progress and priorities report* 2015, February 2015
[41] Larissa Behrendt, *Its Broke So Fix It and Quit Getting Us to Pay the Highest Price for Its Faults: Arguments for a Bill of Rights, Bill of Rights Conference,* The Gilbert and Tobin Centre for Public Law/The Australian Human Rights Centre, June 21 2002.

2015 Young Review recommended recognition of the specific indigenous right to self-determination.[42]

Cultural rights are particularly relevant with regards to Aboriginal and Torres Strait Islander people. The Canadian Charter of Rights and Freedoms provides a provision that states the Charter does not derogate from 'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'. This is a limited provision, and it is recommended that a Queensland Human Rights Act include a more comprehensive provision that makes explicit reference to the granting of specific cultural rights to Aboriginal and Torres Strait Islander people. This provision should be drafted in consultation with Aboriginal and Torres Strait Islander community groups.

Another category of rights that should be considered for inclusion is child rights, where those rights are specific to children and not overlapping with general human rights. Of particular importance are child rights within the legal system, where children are especially vulnerable. For example, in Queensland, children of 17 are considered adults in the justice system, which is contrary to the CROC obligation to take 'into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society' when a child is 'alleged as, accused of, or recognized as having infringed the penal law' (Art. 40). Thus, for example, relevant child rights could be included in the main provision on the rights to fair trial and to recognition before the law.

A final rights category that is crucial to consider is disability rights. The CRPD is a complex and intricate convention that requires a great deal of consideration in terms of implementation, so this category of rights may be one that is included over time, with consideration first for the basic rights such as equality and accessibility. These rights can also be linked to broader rights such as access to justice (for example, sign language interpretation) and the fundamental umbrella right of non-discrimination.

There should also be inclusion of particular groups in the overall rights within the Human Rights Act. As such, the umbrella non-discrimination clause should ensure a broad reach, meaning that all provisions of the Human Rights Act apply equally, with discrimination prohibited on the grounds of sex, gender or gender identity, sexual orientation, religion, race, ethnicity, disability, marital status, pregnancy or age.

Recommendation 3: That the Queensland Human Rights Act incorporate a right to self-determination for Aboriginal and Torres Strait Island people in Queensland.

Recommendation 4: That the government commit to consulting with Aboriginal and Torres Strait Islander people and groups with a view to incorporating particular rights for those peoples in the Queensland Human Rights Act, either upon enactment or as soon as practicable following enactment.

Recommendation 5: That the Queensland Human Rights Act incorporate specific rights for children, particularly as regards to their treatment within the criminal justice system.

Recommendation 6: That the Queensland Human Rights Act incorporate disability rights, including a right to equal participation in, and access to, facilities and services.

Recommendation 7: That the Queensland Human Rights Act include a non-discrimination clause with specific reference to the following attributes: sex, gender or gender identity, sexual orientation, religion, race, ethnicity, disability, marital status, pregnancy or age.

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Recommendation 8: That the Queensland Human Rights Act incorporate a right to a healthy environment.

Case Study 4 – Prisoners' Legal Service

'Barry' was involved in crime throughout his formative years, and as such already had an extensive criminal history established upon his entry into prison. He was first placed in the mainstream prison population, but was moved into solitary confinement after committing serious offences in custody. Barry has been in solitary confinement for over 15 years.

Within solitary confinement he is entitled to very little. For example under the *Corrective Services Regulation 2006* (Qld) a person in separate confinement must be given the opportunity to exercise in fresh air for at least two daylight hours a day.[43] Fresh air and daylight however, do not necessitate being outside. For these two hours Barry is taken to an exercise yard with three brick walls, one glass wall and a grated roof – he has not actually been outside in 20 years with the exception of being transported between prisons in the prison truck.

The excessively regulated environment of solitary confinement often results in trivial issues escalating into security breaches that are used to justify Barry's ongoing detention in solitary confinement. For example, regulations allow prisoners in solitary confinement to take one piece of fruit with then into the exercise yard. On one occasion, the fruit on offer was smaller than usual so Barry took two pieces with him. Corrective Services Officers announced to him that this would be recorded as a violation of good behaviour. Barry felt frustrated by the pettiness of this restriction and responded by verbally abusing the officers.

As a result of Barry having no control over anything in his life, he has no normal social interactions. For him to get the food he wants or access to cleaning products for his cell he feels he must use threats. He states the guards provoke him, but then he is the one who gets written up for unacceptable behaviour if he retaliates. This creates a catch 22-type situation – Barry will not be released from solitary confinement unless he can show he can exercise self-control and voluntary good behaviour, but for him to show these characteristics he needs to be released from solitary confinement.[44] The impact of solitary confinement on Barry's mental health is becoming increasingly marked. He spreads his faeces on the walls in an attempt to annoy officers and exercise some control over his life.

In 2006, the Queensland Court of Appeal recognised in *Garland* that it is not a requirement of putting someone on a solitary confinement order that the chief executive be satisfied that the prisoner be contained humanely if such an order was to be made. Furthermore, it is not a condition of such an order that the prisoner be contained humanely such that if it is not complied with the order becomes unlawful.[45] The introduction of a Human Rights Act in Queensland might result in prisoners in solitary confinement, such as Barry, being subject to less excessive regulations and ultimately being treated more like human beings. This may result in more opportunities for the prisoners to show self-development and move out of the solitary confinement environment. For prisoners like Barry, this is often their only goal.

[43] *Corrective Services Regulation 2006* (Qld) s 5.
[44] *Garland v CE, Dept Corrective Services* [2006] QCA 568 [47].
[45] Ibid 21.

4. Law-making in Queensland with a Human Rights Act

4.1 Statement of Compatibility

A Human Rights Act in Queensland should require all arms of government to have regard to human rights in making, applying and administering of laws.

The Centre respects the importance of parliamentary sovereignty and the need for governments to pursue policy. While the purpose of a Human Rights Act is to encourage parliament to legislate consistently with human rights, it is acknowledged that there are often competing rights and interests in a given situation. It will thus be necessary for government, at times, to introduce laws that affect rights. Where this occurs, there ought to be the clearest statutory intent. A statement of compatibility ensures due consideration is given to this requirement.

Both the ACT and Victorian Acts require parliament to consider a bill's compliance with their Human Rights Act. The Victorian and ACT reviews have found that this mandatory consideration of laws has the following benefits:

- Significant impact on policy development; [46]
- Informed parliamentary debate;[47]
- Greater human rights scrutiny of legislation;[48]
- Embedding human rights in government processes;[49]
- Enhancing transparency and accountability;[50]

Similarly, a Queensland Human Rights Act should also require statements of compatibility to be issued with any new Bills and subordinate legislation.

Recommendation 9: That the Queensland Human Rights Act require a statement of compatibility to be issued with any new Bills and subordinate legislation.

4.2 Improve the parliamentary committee system

When the Queensland Parliament created the Scrutiny of Legislation Committee under s80 *Parliament of Queensland Act 2001* (Qld), it was tasked with considering the "application of fundamental legislative principles to particular Bills and particular subordinate legislation" and determining whether proposed legislation had sufficient regard to the rights and liberties of individuals and the institution of Parliament.[51] However, the Committee of the Legislative Assembly's 2015 *Review of 2011 Committee System Reforms*,[52] highlights key weaknesses of the Committee System as a framework of review:

[46] Above n 36,189.
[47] Ibid.
[48] Ibid.
[49] Human Rights Law Centre Submission to Young Review, 16.
[50] Victorian Council of Social Service Submission to Young Review, 2015.
[51] *Parliament of Queensland Act 2001* (Qld) s 103; *Legislative Standards Act 1992* (Qld) s 4; J Alvey, 'Parliament's Accountability to the People, the Role of Committees: a Queensland View' (2008) 23 *Australasian Parliamentary Review* 1, 62, 62;
[52] Committee of the Legislative Assembly, Parliament of Queensland, *Report No. 13 Review of 2011 Committee System Reforms* (2015).

1. Referral is at the discretion of the House of Representatives;[53]
2. Of the few Bills referred, most are limited to 'technical scrutiny';[54]
3. Inadequate formal consideration by Parliament of the reports conducted;[55]
4. Recommendations made by Committees are not binding.[56]

In anticipation of a Human Rights Act, the current parliamentary committee system in Queensland should be improved. A bipartisan standing committee could be established to review the human rights implications of all proposed or existing legislation. A reinvigorated committee system such as this would provide a further check and balance alongside and in addition to the requirement for a statement of compatibility.

Recommendation 10: That a bipartisan standing committee be established to review the human rights implications of new and existing legislation.

5. Inconsistent laws and decisions

A Human Rights Act should empower courts and tribunals to adjudicate on laws and public authority decisions inconsistent with the human rights protected by the Act. The Human Rights Act should contain adequate mechanisms to deal with laws and public authority decisions that breach the protected human rights.

5.1 Dialogue Model

Recognising the supremacy of parliament, the Centre considers that a Queensland Human Rights Act should not affect the 'validity, operation or enforcement'[57] of the inconsistent law itself. Rather, potentially inconsistent laws should be subject to the functions of a Human Rights Act in the Dialogue Model. Therefore, any Queensland Human Rights Act should provide for: (1) an interpretation provision; (2) a limitation (proportionality) clause; and (3) the power for the courts to issue a declaration of incompatibility.

5.1.1 Interpretation Provision

The Centre supports the inclusion of an interpretation provision that instructs the courts to attempt to interpret legislation in a way that is compatible with human rights. Courts should also be able to consider 'international and comparative human rights jurisprudence'[58] in the interpretative process. **Case Study 1** (above) provides a clear demonstration of how the consideration of international human rights law in the courts' interpretative process could have a tangible impact on the protection of human rights.

In formulating an appropriately drafted interpretative clause, the committee should pay regard to the unclear jurisprudence[59] that has emerged from the Victorian interpretative provision. The uncertainty pertains to the remedial strength of the interpretative clause. In dispute is the

[53] Committee System Review Committee, Parliament of Queensland, *Review of the Queensland Parliamentary Committee System* (December 2010); Committee of the Legislative Assembly, Parliament of Queensland, *Report No. 13 Review of 2011 Committee System Reforms* (2015).
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] See *Human Rights Act 2004* (ACT) s 32(3); *Charter of Human Rights and Responsibilities Act* (Vic) s 36(5).
[58] *Charter of Human Rights and Responsibilities Act* (Vic) s 32(2).
[59] See, e.g. *R v Momcilovic* (2010) 25 VR 436; *Momcilovic v The Queen* (2011) 245 CLR 1.

extent to which courts, during the interpretation process, should be able to depart from the 'literal or grammatical meaning' of the statute, in order to reach a rights-compatible reading.

One line of judicial reasoning[60] has found that the Victorian interpretative provision, in effect, codifies the principle of legality; an existing canon of statutory interpretation.[61] Under this analysis it is thought that the provision does not permit a court to undertake a strained interpretation that departs from the ordinary meaning of the statute, and thus does not permit remedial interpretation.

An alternative position is that the interpretation provision in the Victorian Charter comprises its own, distinct canon of statutory interpretation.[62] Such a rule of interpretation is thought to be stronger than the principle of legality, in that it is a direction from the legislature[63] to interpret laws 'compatibly with the Charter's rights.'[64] It should be noted that this position requires any interpretation to remain consistent with the overarching legislative intention of parliament according to the High Court's approach in *Project Blue Sky*.[65] Furthermore, the provision does not extend to conferring legislative function on the courts.[66]

Crucially, the latter approach allows the interpretation provision to take on more of a remedial character vis-à-vis the 'principle of legality' characterisation, although not to the extent seen in the United Kingdom.[67] The fundamental benefit of drafting an interpretative provision in this way is that **Queensland courts would have the ability to provide direct relief for the particular complainant whose human rights have been abused, where such an interpretation is possibly consistent with parliamentary intention.**

Therefore, in resolving this uncertainty, the Centre endorses the recommendations of the Young Review[68] that the latter approach should be preferred. We therefore recommend that an interpretative provision in Queensland should be absolutely clear that it comprises a "stronger rule of interpretation than the principle of legality."[69] We urge that this additional clarity in the legislation would learn from and improve upon the experience in the ACT and Victoria, and would be crucial in avoiding litigation (including constitutional challenges) aimed at resolving uncertainty.

Recommendation 11: That the Queensland Human Rights Act include an interpretative provision to enable courts to interpret laws compatibly with human rights. That interpretative provision should expressly prescribe an interpretative approach in line with the recommendations of the Young Review.

5.1.2 Limitation Clause

The Centre accepts that human rights are not absolute and that "justifiable limitations on rights are an expected and acceptable part of resolving conflicts between rights, and between rights and other values in a democratic society."[70] Consequently, the Centre supports a

[60] *R v Momcilovic* (2010) 25 VR 436; *Momcilovic v The Queen* (2011) 245 CLR 1 (French CJ).
[61] *Coco v The Queen* (1994) 179 CLR 415.
[62] See, e.g. *Momcilovic v The Queen* (2011) 245 CLR 1 (Gummow, Hayne, Bell JJ and Heydon J); *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (Tate JA).
[63] Debeljak, above n 24, 382.
[64] Young Review, above n 36, 144.
[65] *Momcilovic v The Queen* (2011) 245 CLR 1 (Gummow J), 92, see also (Crennan, Kiefel and Bell JJ); citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.
[66] *Momcilovic v The Queen* (2011) 245 CLR 1 (Gummow, Hayne JJ), [146] and [280], (Bell J), [683].
[67] See, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[68] Young Review, above n 36, 146-148.
[69] Young Review, above n 36, 146.
[70] Debeljak, above n 24, 347.

limitation clause analogous to those adopted in Victoria and the ACT.[71] The practical effect of a limitation clause in a Queensland Human Rights Act is that a potentially inconsistent law will be deemed 'consistent' if it passes the proportionality test expressed in the provision.

While the matter is outside the scope of this submission, the Centre would also advise the committee to consider an alternative position to a general limitation clause. Certain rights (such as the right to life, and freedom from torture) are absolute and should not be subject to a limitation clause. Under the ICCPR, certain rights are non-derogable, meaning that Australia is obligated to uphold and protect those rights at all time. These non-derogable rights are:

- the right to life
- freedom from torture or to cruel, inhuman or degrading treatment or punishment
- freedom from slavery
- the right to not be imprisoned merely on the ground of inability to fulfil a contractual obligation
- the right not to be not be prosecuted for doing something that was not prohibited by law at the time and place it was committed
- the right to recognition everywhere as a person before the law
- the right to freedom of thought, conscience and religion

Thus the committee should carefully consider the wording of any limitation clause, and ensure that it does not provide for limitation of non-derogable rights.

The committee should also be aware of the uncertainty arising from the procedural application of the limitation clause in the Victorian Charter.[72] The lack of clarity as to how and when the limitation clause relates to the interpretation and declaration of incompatibility provisions has impaired the efficacy of the Victorian Charter.[73] A limitation clause in Queensland should be clearly drafted to avoid this uncertainty.

Thee Centre therefore recommends the implementation of a similar proportionality test to that expressed in VIC/ACT, namely that a human right may be subject to '*to such reasonable limits as can be demonstrably justified in a free and democratic society*'[74] and taking into account prescribed 'relevant factors'.[75] We also support any additional provisions that may be required to clearly establish the procedural application of the provision.

Recommendation 12: That the Queensland Human Rights Act include a limitation clause similar to that in the Victorian and ACT legislation.

5.1.3 Declaration of Incompatibility

The Centre supports the inclusion of a provision that would permit the Supreme Court to issue a declaration of incompatibility whereby a law cannot be interpreted compatibly with human rights, and is not considered a 'demonstrably justifiable' limit. Providing for declarations of incompatibility in a Queensland Human Rights Act would be valuable for two reasons:[76]

1) The declaration publically notifies parliament and the broader community that the law in question is inconsistent with human rights, therefore holding the legislature accountable for the respect of human rights;

[71] See *Human Rights Act 2004* (ACT) s28; *Charter of Human Rights and Responsibilities Act* (Vic) s7.
[72] See *Momcilovic v The Queen* (2011) 245 CLR 1.
[73] Young Review, above n 36, 142-144.
[74] *Charter of Human Rights and Responsibilities Act* (Vic) s 7 (2).
[75] *Human Rights Act 2004* (ACT) s 28(2); *Charter of Human Rights & Responsibilities Act* (Vic) s7(2).
[76] The Victorian Bar Council, Submission to National Human Rights Consultation (2009), 31.

2) Provides parliament with the opportunity to review and remedy the inconsistent law.

Once again, the Centre supports the inclusion of an analogous provision to that in Victoria and the ACT.[77] The provision should require the Attorney-General to present to parliament a report outlining the government's response to the declaration within 6 months.[78] As noted above, the declaration should not affect the operation or validity of the inconsistent law.

Recommendation 13: That the Queensland Human Rights Act include a provision similar to that in Victoria and the ACT that permits the Supreme Court of Queensland to issue a declaration of incompatibility.

6. Remedies: A freestanding cause of action

The Centre supports the inclusion of remedies to deal with public authority decisions that are inconsistent with human rights. We therefore support the provision of a freestanding cause of action to challenge public authority decisions, based solely on a breach of protected rights within the Act.

A freestanding cause of action would stand in line with Australian obligations under international human rights instruments, for example, Article 2(3)(a) of the ICCPR:

> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an **effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity.* (emphasis added)

In fact, a 'failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant'.[79]

With regards to the context of an 'effective remedy', the Human Rights Committee has emphasised the necessity of state parties providing reparation to individuals whose rights have been breached, determining that without reparation, the obligation to provide an effective remedy is not discharged.[80] In particular, the Human Rights Committee 'considers that [requirement under] the [ICCPR] generally entails appropriate compensation', but that reparation can include 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.[81]

A cause of action is critical in ensuring that individual complainants have recourse to resolving a breach of their human rights. It also matters in promoting a culture in public authority bodies that respects human rights in decision-making. The Victorian Charter, which does not have a freestanding cause of action, relevantly highlights why one is necessary. The Young Review notes that 'without a clear way to remedy a breach of someone's human rights, the regulatory model for the Charter will continue to be flawed'.[82] Also noted in the review was that a lack of consequence in a HR Act means the benefits linked to consequence, such as changed behaviour and deterrence, are lost.[83]

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[77] *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act* (Vic) s 36.
[78] See, eg, *Human Rights Act 2004* (ACT) s 33.
[79] Human Rights Committee, General Comment No. 31, para. 15.
[80] Human Rights Committee, General Comment No. 31, para. 16.
[81] Ibid.
[82] Young Review, above n 36, 12.
[83] Ibid.

The Centre considers that this cause of action should offer a range of judicial remedies, including 'declarations, injunctions and orders to cease the offending conduct'. [84] Furthermore, and as distinct from the cause of action currently offered in the ACT, damages should be available. The availability of damages would incentivise claimants and legal representatives 'who may be otherwise deterred by cost and time involved' in pursuing litigation.[85] This is particularly relevant when considering that the majority of complainants under a Human Rights Act cause of action would be disadvantaged and would not likely have the resources to pursue costly litigation.

Recommendation 14: That the Queensland Human Rights Act provide for a freestanding cause of action to be brought for any alleged breaches of human rights.

Recommendation 15: That Courts have the discretion to award damages to complainants who successfully establish a breach under the Queensland Human Rights Act.

6.1 The procedure for a freestanding cause of action

In its General Comment No.31 on the ICCPR, the Human Rights Committee has emphasised the importance that state parties establish 'appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law' (para. 15).

The Centre recommends that remedy for this cause of action should not be limited to the Supreme Court, in contrast to the position in the ACT. Restricting the cause of action to the Supreme Court would unduly limit access to justice. For instance, the ACT Human Rights and Discrimination Commission's 10-Year Review found the ACT's direct right of action was 'under-utilised' and 'out of reach' for plaintiffs who will often be vulnerable members of the community, due to the expenses and time required to bring an action in the Supreme Court jurisdiction.[86]

Instead, the Centre recommends that QCAT be given original jurisdiction to hear the freestanding cause of action.[87] Since its establishment in 2009 QCAT has proven itself as a key mechanism in improving Queensland's access to justice.[88] Recent reviews indicate the tribunal is achieving its specific access to justice functions outlined in section four of the *Queensland Civil and Administrative Tribunal Act* 2009.[89]

The committee should also consider the possibility of empowering other inferior courts and tribunals with a particular focus on certain areas of law to hear matters. Many inferior courts not only offer a more accessible path to remedying wrongs but also can offer 'specific jurisdictional expertise'. [90] For example, the Children's Court could hear allegations of breaches of human rights that relate to child protection and youth justice issues. The ACT 10-Year Review noted that this expertise affords such courts with the ability to properly weigh

[84] Human Rights Law Centre, 'A Human Rights Act for Queensland: A Discussion Paper' (2015), 9.
[85] Human Rights and Discrimination Commissioner ACHRC, L*ook who's talking: A Snap of ten years of dialogue under the Human Rights Act 2004* (2014) 3, 7.
[86] Ibid, 6.
[87] See also Young Review, above n 36, Recommendations 23 and 27.
[88] Queensland Law Society, A*ccess to Justice Scorecard: evaluating access to justice in Queensland: 2014 Data Analysis and Report*, 2014.
[89] Department of Justice and Attorney General, *Review of the Queensland Civil and Administrative Tribunal Act 2009*, Consultation paper, December 2012.
[90] Human Rights and Discrimination Commissioner ACHRC, above n 69, 7.

up the impact of the public authority's breach of the individual's rights in light of all relevant factors, and are thus well placed to issue Human Rights Act remedies.[91]

The Centre submits that a right of appeal should exist from QCAT, and other inferior courts and tribunals with jurisdiction, to the Supreme Court. Furthermore, as is the case in the ACT, the Centre supports an Act where an individual can also raise a breach of their human rights as an issue in any existing legal proceeding or complaint.[92]

Recommendations 16: That QCAT be given original jurisdiction to hear proceedings about breaches of human rights under the Act.

7. Public Authorities

A Queensland Human Rights Act should require public authorities to act consistently with human rights and give proper consideration to these rights in forming decisions. The Centre supports the introduction of an Act that empowers a body to investigate, report on and conciliate human rights complaints, intervene in relevant legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform of the Act.

The Centre recommends that the current Queensland Anti-Discrimination Commission could, with appropriate resourcing, fulfil this role. In particular, the recommendations raised by Victoria's 2015 Young Review regarding clear definition of what constitutes a public authority should be considered in drafting an Act for Queensland.[93]

Recommendation 17: That the Queensland Anti-Discrimination Commission be empowered to perform investigatory, reporting, conciliation, intervention, research and reporting functions for a future Human Rights Act.

8. Business

Under a Queensland Human Rights Act, compliance from public authorities should extend to any private entities contracted to carry out executive functions such as aged care, disability services, child protection services or prison facilities. The Centre also supports a mechanism similar to that in the ACT where other private entities may opt-in to the responsibilities imposed on public authorities. We note that the recent 2015 Young Review of the Victorian model also recommended a similar provision be added to their charter.[94] We consider this feature would help foster human rights dialogue and a human rights-respecting culture in the business sector.

Recommendation 18: That private agencies contracted to deliver government services be subject to a Human Rights Act.

Recommendation 19: That an opt-in clause for private sector businesses be included in a Queensland Human Rights Act so as to incentive private sector compliance.

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[91] Ibid.
[92] See, e.g. *Human Rights Act 2004* (ACT) s 40C.
[93] Young Review, above n 36, Recommendations 12 – 19.
[94] Above n 36, Recommendation 15.

PART II – LESSONS & INSIGHTS FROM OTHER JURISDICTIONS

9. Learning from other jurisdictions - ACT, Victoria and beyond

This part of our submission examines interstate and international approaches to legislating for human rights protection. It focuses on the Victorian and ACT experience. The experience of the *Human Rights Act 2004* (ACT) led directly to the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), as well as the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Although Part II examines judicial decisions and case law, we note the greatest success of human rights legislation in these states - shifts in parliamentary processes, organisational culture and community awareness - have taken place outside the courts.

9.1 The ACT

In its first decade of operation, the *Human Rights Act 2004* (ACT) was considered in 6.6% of tribunal cases and 7.6% of appeals.[95] The ACT has had one court declaration of incompatibility, which still stands after the government dropped an appeal.[96] There has been no legislative response to this. The Act has been mentioned or considered in approximately thirty judgments outside the ACT itself.[97]

In February 2015, the ACT Human Rights and Discrimination Commissioner published case studies under the *Human Rights Act.* These included the following examples: [98]

- In *Davies v State of Victoria,*[99] the Supreme Court of Victoria held that the treatment of a disabled resident in being dragged naked down a hallway in a Community Residence was in breach of the right to freedom from cruel and degrading treatment.
- In *R v YL,*[100] the Court cited the right of the child to protection in refusing to compel a seven-year old child to appear in court to give evidence (against his will) in an assault case.
- In *R v Rubino,*[101] the ACT Supreme Court granted bail to a man charged with aggravated burglary, theft and criminal damage. The man had made five previous requests for bail, and the court found these previous applications were approached in a manner that "offended against the presumption of liberty in s18 of the HRA".
- In *Allat & ACT Government Health Directorate (Administrative Review),*[102] the Tribunal found that documents held by a Mental Health Clinical Review committee investigating the death of the applicant's wife while under psychiatric care should be released under Freedom of Information laws.

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[95] Honourable Justice Margaret McMurdo, McMurdo, Hon Justice Margaret, 'A Human Rights Act for Queensland', (Speech delivered at the University of the Sunshine Coast Inaugural Law Oration, University of the Sunshine Coast, 23rd September 2015).
[96] *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 146; J Gans, 'The Impact of the *Human Rights Act 2004* (ACT) on Other Australian Jurisdictions 7.
[97] J Gans, above n, 4. See also *R v Griffin* [2007] ACTCA 6; *Ratheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19; *R v DA* [2008] ACTSC 26; *R v Fearnside* [2009] ACTCA 2.
[98] ACT Human Rights and Discrimination Commissioner, 'Collation of Factsheets on each right under the ACT *Human Rights Act 2004*', (February 2015).
[99] [2012] VSC 343.
[100] [2004] ACTSC 115.
[101] [2012] ACTSC 157.
[102] [2012] ACAT 67.

Published case studies from the ACT Welfare Rights and Legal Centre also provide useful examples of where the *Human Rights Act* has promoted dignity and addressed disadvantage:[103]

- The right to protection of family life enabled a woman to remain in a public housing property with her children after her mother died (despite the lease being in the mother's name). The woman had earlier been in contact with child services, and there was a risk that her children would be taken from her if she had nowhere to live. The woman was granted a lease over the property.
- The protection of family life enabled a homeless client, who had outstanding debts to the public housing authority from a previous tenancy, to be housed as a priority candidate.

9.2 Victoria

Though the *Human Rights Act 2004* (ACT) was the model for Victoria's Charter, the Victorian Parliament adopted different models for parliamentary scrutiny and remedies by attempting to 'cherry-pick' the best features of the ACT and overseas models. South Africa's 'reasonable limits' clause, the UK's interpretation and public authority provisions and Canada's override declaration clause were all included in the Victorian Charter. Notably, the ACT subsequently proceeded to incorporate most of these additional features (with the exception of the override declaration clause) following its review in 2008.[104]

Victoria was the first Australian jurisdiction to issue a statement of incompatibility after the government enacted legislation allowing random knife searches at train stations in 2009.[105] The government has enacted the override clause at least twice; first, in the adoption of the uniform legal profession scheme with NSW,[106] and second, barring the Charter's application to law preventing a prisoner (who committed a massacre) from being paroled after expiry of his non-parole period.[107] This second use of the override clause did not raise concerns either for the human rights agency, the Victorian Human Rights and Equal Opportunity Commission or the Human Rights Law Centre.[108] Victoria has had one court declaration of incompatibility that has since been quashed in a High Court appeal.[109]

In *Re Major Crimes,*[110] Chief Justice Warren used the Charter to read a "derivative use" immunity into the coercive questioning system in Victoria. In this case, the government's human rights agency intervened to propose the rights-compatible reading that was eventually adopted by the Chief Justice. The Victorian Parliament did not challenge the decision, but has since introduced a bill focusing on 'bikie laws', which expressly removes the 'derivative use' immunity found in *Re Major Crimes*. Its statement of compatibility for the bikie laws states that the limit is reasonable.

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[103] Human Rights Legal Centre, *Case Studies: How a Human rights Act can Promote Dignity and Address Disadvantage* (1 April 2009) Human Rights Legal Centre <http://hrlc.org.au/case-studies/#ACT>

[104] *Human Rights Amendment Act 2008* (ACT); J Gans, 'The Impact of the *Human Rights Act 2004* (ACT) on Other Australian Jurisdictions), 3.

[105] Statement of Compatibility for the Summary Offences and Control of Weapons Acts Amendment Bill 2009.

[106] *Legal Profession Uniform Law Application Act 2014* (Vic), s 6.

[107] *Corrections Amendment (Parole) Act 2014* (Vic), cl 3.

[108] J Gans, above n 24, 7.

[109] Ibid.

[110] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381.

Published case studies on the Victorian Charter from its first five years of operation identify its substantial impact in five key areas:[111]

1. The Charter plays a crucial preventative role in stopping human rights abuses by requiring the Victorian Parliament to consider and safeguard human rights in the process of legislating.[112] For example, the *Superannuation Legislation Amendment Act 2010* was amended to ensure equality and non-discrimination on the basis of sexual orientation or age, and allowed "older same sex couples to access superannuation reversionary benefits".[113]

2. The Charter has facilitated public bodies and government departments to initiate organisational, cultural change to embed principles of freedom and equality.[114] For example, Victoria Police undertook a Human Rights Unit Project to identify practices that potentially impact upon human rights with a view to implementing reform.[115]

3. The Charter has initiated Human Rights Education and Empowerment Programs designed to promote greater awareness of the rights enshrined in the Charter and to educate citizens on how effective action can be taken.[116] For example, the Department of Human Services and Department of Health have facilitated a Human Rights Community of Practice, and incorporated a 'Charter Component' into staff training, progression, and performance standards to equip employees with the knowledge to perform their daily work in a manner consistent with the Charter.[117]

4. The Charter provides for a language and framework of ideas in which human rights can more effectively be realised, without litigation.[118] For example, the Homeless Persons Legal Clinic utilised the Charter to advocated against a proposed law criminalising sleeping in cars, on the basis that it was incompatible with rights within the Charter relating to freedom of movement, right to life, security and liberty.[119]

5. The Charter has had a positive impact by allowing citizens to challenge arbitrary or unjust policies and decisions in court.[120] These challenges have predominantly arisen in issues of access to justice, homelessness and mental health. For example, in *Homeground Services v Mohamed*,[121] the Victorian Civil and Administrative Tribunal found that a welfare agency acted unlawfully under the Charter by evicting a young tenant from transitional housing where that tenant would likely have become homeless as a result.[122]

   Another example is *R v White*,[123] where the court held that the imprisonment of a person with a severe psychiatric condition who had been found not guilty of murder

[111] Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities: Case Studies from the First Five Years of Operation* (March 2012).
[112] Ibid 6.
[113] Ibid 16.
[114] Ibid.
[115] Ibid 19.
[116] Ibid 7.
[117] Ibid 26.
[118] Ibid 8.
[119] Ibid 9.
[120] Ibid.
[121] [2009] VCAT 1131.
[122] Human Rights Law Centre, above n 111, 9.
[123] [2007] VSC 142.

was inconsistent with the right to freedom from cruel treatment, right to liberty and security and freedom from arbitrary detention set out in the Charter.[124]

9.3 International jurisdictions

International examples of Human Rights legislation also prove instructive.

9.3.1 Canadian Charter of Rights and Freedoms 1982

Though the Canadian Charter of Rights and Freedoms is constitutionally enshrined, it was originally introduced as ordinary statute in 1960. In the period before constitutional entrenchment, the Canadian Supreme Court struck down legislation on one occasion for breaching the Bill of Rights.[125] The courts now have the power to render legislation null and void if it offends the Charter, although the parliaments are permitted to pass legislation 'notwithstanding' its implications on the rights in the Charter.[126] Under the Harper government, many pieces of legislation were passed notwithstanding that they were in violations of rights under the Charter. As a result, the current Trudeau administration will be undertaking a review of legislation passed under the previous governments in order to seek solutions for laws that are incompatible with the Charter. This demonstrates that not only were people's rights not being protected under the Charter but that subsequent governments are obligated to spend time and resources adjusting legislation to comply with the Charter. Therefore the right of parliaments to pass legislation notwithstanding implication on rights in a Human Rights Act should not be absolute and only permitted in limited circumstances.

9.3.2 New Zealand Bill of Rights Act 1990

The experience of the *New Zealand Bill of Rights Act* illustrates the important role of the legislation in both an interpretative and criminal procedure context. The Bill of Rights has operated to determine the scope of rights relating to search and seizure, right to counsel, right to silence, exclusion of evidence and right to adequate time and facilities to prepare a defence.[127]

- In *Attorney-General v Van Essen & Ors*,[128] A man who had his home searched unreasonably and unlawfully was awarded $10,000 in public law damages, due to the search breaching his rights under the Act.
- In *Police v Kholer*[129], the NZ Court of Appeal held that the right of a person arrested to have access to counsel (and in private) is inherent in the right to a fair trial under s23(b) of the Bill of Rights.

9.3.3 United Kingdom Human Rights Act 1998

The UK *Human Rights Act* has given effect to most of the Articles in the European Convention on Human Rights. The British Institute of Human Rights published its report, *The Human Rights Act - Changing Lives*, which found:

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[124] Human Rights Law Centre, above n 111, 9.
[125] *R v Drybones* [1970] SCR 282.
[126] *Charter of Rights and Freedoms* (Canada) *1998*, s 33.
[127] Justice Susan Glazebrook, 'The New Zealand Bill of rights Act 1990: Its Operation and Effectiveness' (Speech delivered at the South Australian State Legal Convention, 22nd and 23rd July 2004).
[128] [2015] NZCA 22.
[129] [1993] 3 NZLR 129 (CA).

- The right to respect private life and right not to be discriminated against on grounds of sexual orientation allowed a physically disabled man to challenge the decision of his local authority to refuse attending a gay pub with him, where heterosexual users of the service were supported to attend pubs and other events.[130]
- The Charter was utilised to enforce positive obligations on a domestic violence authority to protect the right of a woman and her children not to be treated in an inhuman and degrading way by a violent ex-partner.[131]
- The right to private and family life and the right to marry was utilised by staff at a hospital to enable a long-term mental health patient to consent to marriage.[132]

10. Reviews of human rights legislation in Australia

This part of the submission examines reviews of human rights legislation in Australia.

10.1 Human Rights Act 2004 (ACT)

The ACT legislation has been the subject of three mandated reviews within its first decade of operation.[133] Submissions to the 12-Month Review Report released by the Department of Justice and Community Safety addressed several recurring issues. These were: inclusion of economic, social and cultural rights; whether there should be a direct right of action against public authorities; the availability of a specific remedy for breaches; and additional measures to enhance a human rights culture. The review recognised that the presence of a Human Rights Act had greatly increased the consideration of human rights by the legislature in the framing and passing of Bills.[134] However, the Review also noted that judicially, the Act was only considered in a small handful of cases, and had not been considered in any great depth by the courts.[135] Following the Review, parliament implemented:

- A duty on public authorities to comply with the legislation; and
- Confirmed the legislation's creation of an independent right of action in the Supreme Court for breaches of the Human Rights Act without entitlement to claim damages.

The five-year review concluded in 2009 concluded that the courts and tribunals had, up until that point, remained a "spectator to the HRA dialogue", although there was growing indication that its application in the Supreme Court was increasing. The review acknowledged the Act had improved the quality of law-making in the ACT, through the 'statement of compatibility' requirement.[136]

A five-year report was prepared by the ACT Human Rights Act Research Project of the Australian National University in May 2009. The Report noted that:

- The HRA was referred to in 91 cases across the ACT's courts and tribunals;
- There was a lack of comprehension by the legal profession as to the potential of the HRA provisions; and
- The passing of the Act had "succeeded in creating a fledgling human rights culture in the ACT."

[130] L Matthews et al, *The Human Rights Act - Changing Lives*, British Institute of Human Rights, 8.
[131] Ibid 11.
[132] Ibid 8.
[133] Human Rights and Discrimination Commissioner ACHRC, above n 85, 3.
[134] Ibid 12.
[135] Ibid 4.
[136] Ibid.

The Report made a series of recommendations, including: imposition of a duty on public authorities to comply with human rights; training programs for public authorities; power of the Supreme Court to award damages; a statement of reasons to accompany compatibility statements; expanding the Human Rights Commission to include a complaints-handling function; an express referral power; methodology training for the judiciary; and human rights audits.

The ten-year report by the ACT Human Rights and Discrimination Commissioner outlined persisting concerns with the operation of the Charter, including:[137]

- Accessibility to justice under the Act, including initiating proceedings and obtaining remedies;
- Insufficient compatibility statements for private members bills and secondary legislation; and
- Doubts about the effectiveness of the incremental approach to including other economic, social and cultural rights in the Act, beyond the right to education.

10.2 Charter of Rights and Responsibilities 2006 (Vic)

The Victorian Charter has been the subject of two Reviews by the Victorian Scrutiny of Acts and Regulations Committee, in 2011 and 2015.[138] Of the 3,834 public submissions to the 2011 Review, **95% supported retaining or strengthening the Charter**.[139]

The 2015 Young Review outlined the following key points:

- Breaches of human rights need to be 'fully justiciable' through a stand-alone cause of action and remedies. This would be best achieved by allowing VCAT to hear claims of incompatibility.[140]

- Fears of excessive litigation have not come to fruition in Victoria. This has also not been an issue in the ACT.[141]

- A number of submissions to the review noted a 'lack of clarity in the Charter's definition of functional public authorities.' This raised concerns during review that individuals were unsure whether certain entities were bound by the Charter. It was recommended that the Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights, and that it is unlawful for a public authority to make a decision that is incompatible with a human right.[142]

- Concern remains in regards to section 32, which requires all statutory provisions to be interpreted in a way that is compatible with human rights. This provision is noted as 'highly contentious and much litigated' particularly since *Momcilovic v The Queen* (2011) 245 CLR 1. The Review recommended specific amendments to section 32 to clarify interpretation processes. [143] (The Centre substantially endorses these recommendations in Section 5, above).

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[137] Ibid.
[138] Young Review, above n 36.
[139] Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities: Case Studies from the First Five Years of Operation* (March 2012) 5.
[140] Young, above n 36, 27.
[141] Ibid, 128.
[142] Ibid, 58 – 79.
[143] Ibid 139 – 150.

- Restrictions to the Charter's use remain due to access to justice concerns for individuals most at risk of human right breaches.[144]

- The ongoing need for regular review and reporting of the legislation and its effect particularly in relation to the addition of further rights.[145]

[144] Ibid 12, 249.
[145] Ibid 229 and recommendation 52.

Appendix

The following law school academics broadly endorse this submission:

Monica Taylor [redacted]

Dr Melanie O'Brien [redacted]

Associate Professor Tamara Walsh [redacted]

Dr Rebecca Ananian-Welsh [redacted]

Dr Paul Harpur [redacted]

Associate Professor Peter Billings

The following organisations broadly endorse this submission

PRISONERS' LEGAL SERVICE INC.
Justice Behind Bars

YOUTH ADVOCACY CENTRE INC

EDO Qld.
Environmental Defenders Office

RAILS
REFUGEE & IMMIGRATION LEGAL SERVICE INC

The following students broadly endorse this submission

Full Name	Degree (ie. BA/LLB)	Year of study
Rachael Molnar	LLB/ BCom	5
Gabrielle Davis	LLB	3
Aileen Wu	LLB/ BCom	5
Anna Simpson	LLB/Ba	5
Victoria Allen	LLB (Grad Entry)	4
Aaron Vass	BA/LLB	3
Dylan Kerr	BA/LLB	5
Wei Shih	LLB/BA	4
Tanya Sinha	LLB/BA	7
Hamish Swanson	LLB/BA	4
Emilie BIDALET	LLM (Exchange)	4
Angelene Counter	BA/LLB	4
Otis Platt	BA/LLB	5
Tammy Tang	BA/LLB	5
Finn Semple	BA/LLB	3
Ryan Pieszko	LLB/BBusMan	4
Brooke Allcock	LLB (Grad Entry)	2
Sophie Ryan	BA/LLB	3
Timothy Guazzo	BEcon/LLB	5
Nicholas Casey	BA/LLB	3
Arthur Chandler	LLB	4
Anna Fanelli	BA/LLB	7