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Dear Sir/Madam

Human Rights Inquiry

Thank you for the opportunity to make this submission.

I apologise for providing this submission after the closing date but, nonetheless, request that it be received by and considered by the Committee..

The Committee is required to take certain matters into consideration in undertaking its inquiry, namely:

- The effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms;
- The operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally;
- The costs and benefits of adopting a Human Rights Act (including financial, legal, social and otherwise);
- Previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation.

Brett Young.² The Attorney-General, Martin Pakula, issued the terms of reference on 2 March 2015.

Mr. Young's review, *From commitment to culture: the 2015 Review of the Charter of Rights and Responsibilities Act 2006* ("the Young review")³ was tabled on 17 September 2015 and contains 52 recommendations. The terms of reference of that review, significantly, were directed to⁴ making the Charter more accessible, effective and practical in protecting and promoting the human rights of Victorians.⁵

The Young review provides useful information for the Committee with regard to many aspects of how a Bill of Rights for Queensland should be framed.

I will concentrate on a selection of recommendations which deserve particular comment. In doing so, I do not mean to suggest that other aspects of the Young review do not constitute useful resources for the Committee's work.

The Importance of Leadership

The Young review emphasises the importance of senior leadership in determining public sector culture.⁶ To be effective, this leadership needs to start at the top with the Government and its ministers. If the ministers show a commitment to human rights and show that they expect human rights to be promoted and protected in accordance with the legislation, their leadership will be beneficially reflected in the human rights culture of the public sector.⁷

The Young review also stresses the importance of leadership from the top echelons of the public service.⁸

² Mr. Young's background is set out in the Premier's announcement that he would conduct the review at www.AG.gov.au (accessed 12 February 2016).

³ Available from

<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/2015+review+of+the+charter+of+human+rights+and+responsibilities+act+2006>,

⁴ For example, term of reference 1(d) sought information as to "Ways to enhance the effectiveness of the Charter, including the development of a human rights culture in Victoria, particularly within the Victorian public sector".

⁵ Kate Browne, *Alternative Law Journal*, (2015) 40(4) AltLJ 287, available at <https://www.altlj.org/news-and-views/downunderallover/duao-vol-40-4/953-from-commitment-to-culture-victoria-s-charter-review-report-released> (accessed 12 February 2016). See, also, the Young review at page 8.

⁶ The Young review, page 24

⁷ The Young review, page 25

⁸ Queensland does not have a body precisely analogous to the Victorian Secretaries Board which is a formal body consisting of heads of each Department and other important agencies. See <http://vpssc.vic.gov.au/about-public-sector/the-victorian-public-sector/> (accessed 14 February 2016). The importance of leadership from public sector heads would appear to be equally important.

Anti-Discrimination Commission with a corresponding duty for public sector agencies to assist the Commission with its statutory functions including by the provision of information.¹³ A discretion for the Commission to charge for some or all of the costs of a voluntary review is recommended by Mr. Young as a means of spreading the load of enforcement and implementation across the whole of government.¹⁴

The Young Review also recommended that, not only should members of the public have a right to make complaints to the body similar to the Anti-Discrimination Commission, but that that body should be given a statutory function and appropriate resources to receive complaints and offer dispute resolution services.¹⁵

The Young review recommended an important change to the right to sue for breaches of the Charter by public sector agencies. The existing s. 39 of the Victorian Charter provides a right to sue for a remedy based on unlawfulness because of the Charter only in circumstances where a remedy based on the unlawfulness of an act or decision of a public authority was being pursued on other grounds.

The Young review recommended that the existing restriction that Charter litigation only be available where it was piggy-backed onto another cause of action should be removed. The Young review also recommended that the Victorian equivalent to Queensland Civil and Administrative Tribunal have an original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Charter.¹⁶

(This is not intended to replace the opportunity to seek judicial review using failures to comply with (or consider) Charter obligations as grounds for such review.)

I urge the Committee to recommend a broad range of ways, including civil enforcement proceedings in QCAT and applications for judicial review in the Supreme Court, by which the proposed Queensland legislation can be enforced by people who feel that their treatment by public sector agencies was not in accord with rights protected under the legislation.

¹³ The Young review, page 92

¹⁴ The Young review, page 94

¹⁵ The Young review, page 105

¹⁶ The Young review, page 129

Section 7(2) of the Charter Act falls within Part 3 of the Act that sets out the various human rights protected by the Charter. Section 7(2) seeks to introduce issues of reasonableness and proportionality to the construction of the Charter. It provides that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

Listed in the non-exhaustive set of factors to be taken into account are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the legislature's objective.

Section 31 of the Victorian Charter Act is a signature that the Charter is legislative in nature and there is no attempt by the Parliament to entrench its effect, thereby, binding future Parliaments. This is reflective of the type of human rights legislation which the Committee is directed to consider.

Section 31 of the Victorian Charter provides that Parliament may expressly declare ("an override declaration") that an Act or a provision of an Act has effect despite being incompatible with one or more of the human rights set out in the Charter.

It is s. 32 of the Charter Act that seeks to guide judicial interpretation of Victorian legislation so that it preserves human rights. Section 32(1) provides that, so far as it is possible to do so, consistent with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The decision in the *Momcilovic* litigation, although it sustained the Charter as valid, revealed differences of opinion about how the legislation should be construed and applied. The decision gave a narrow interpretation to s. 32 and excluded the matters provided for in s. 7(2) from the process of interpretation of legislation, including by application of s. 32.

The Young review stressed the confusion that has reigned in the light of some of the High Court's divided opinions on different issues.¹⁹

The Young review recommended that s. 32 of the Charter be amended to require statutory provisions be interpreted, so far as it is possible to do so

¹⁹ The Young review, page 144

I would also suggest that the objective of a bill or charter of rights should be to ensure that the protection of human rights, which is Australia's obligation under the international instruments to which it is a party, should be considered at each point at which the law interacts with people. The objective should not be to make maximum changes to the way in which legislation is currently construed or to ensure that the legislative impact of these provisions in a bill of rights is greater than the common law protections currently provided by the principle of legality.

Conclusion

I thank the Committee for the opportunity to make submissions in respect of this important inquiry.

I support the proposal that the Queensland Parliament legislate for a Human Rights Act in Queensland, other than through a constitutionally-entrenched model.

I strongly support the idea that, in legislating, the Parliament draws upon the lessons learned in other Australian jurisdictions with this type of legislation.

I, particularly, recommend that the committee draw upon the recent Young review of the Victorian Charter of Rights and Responsibilities.

I have attempted to identify some of the work of the Young review which will be of particular assistance to the committee.

Best regards



Stephen Keim SC

Chambers

20 April 2016