AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

[redacted]
http://www.alhr.org.au/

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

18 April 2016

Dear Research Director,

Human Rights Inquiry

Australian Lawyers for Human Rights (ALHR) thanks the Legal Affairs and Community Safety Committee for the opportunity to make this Submission on whether it is appropriate and desirable to legislate for a Human Rights Act (HR Act) in Queensland, other than through a constitutionally entrenched model.

It is ALHR's view that a Queensland Human Rights Act or Charter of Human Rights will provide great benefit to the State of Queensland and its people for a wide range of compelling reasons as detailed in the Submission below.

If you would like to discuss any aspect of this Submission, please contact ALHR Qld [redacted]

Yours faithfully,

[redacted]

President
Australian Lawyers for Human Rights

Pree Sharma
Qld Co-Convenor
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EXECUTIVE SUMMARY

1. While there are a number of statutes protecting Queenslanders from various types of discrimination, they do not protect all Queenslanders' human rights. Neither does the common law provide sufficient additional protection.
2. Legislation is the ultimate expression of a society's rational choices about the kind of behaviour that is desirable or undesirable. Legislation should give primacy to redressing and preventing harm, which is also the aim of human rights law. Enshrining human rights in Queensland legislation therefore sets a minimum moral position and a desirable standard to be followed in redressing and preventing harm.
3. ALHR supports the immediate adoption of a HR Act in Queensland as an ordinary statute on the basis that a constitutionally entrenched model, although preferable for several reasons, cannot be adopted so quickly.
4. ALHR believes that the adoption of the HR Act as an ordinary statute will give Queenslanders a degree of immediate protection, educate Queenslanders about human rights and accustom them to the concept of taking rights into account, thus encouraging the introduction of a constitutionally entrenched model in the future.
5. The potential practical benefits of adopting a HR Act far outweigh any potential costs.

RECOMMENDATIONS

In this Submission, ALHR makes the following recommendations:

1. That the Queensland Parliament enact a Human Rights Act for Queensland on the basis that the benefits substantially outweigh the costs.

2. That a Queensland Human Rights Act be modelled upon the Dialogue Model of Human Rights with the features set out in Part 5 of this Submission.

3. That a Queensland Human Rights Act protect all civil and political rights, economic, social and cultural rights, and intergenerational and environmental rights, as well as any additional specific rights that the Queensland community identifies as particularly worthy of protection.

4. That thorough reference manuals and guides be developed for all public servants, including customised manuals for Police, frontline service-delivery staff and policy creators.

5. That a Queensland Human Rights Act have a stand alone cause of action mechanism (similar to the ACT model) such that the objects and purpose of any Queensland Human Rights Act are fully effected.

6. Those resources be developed to support the Legal Profession in understanding the change and ensuring a smooth introduction of human rights jurisprudence to Queensland.

7. That dedicated resources be developed for media professionals, community organisations and advocacy groups to explain the Act and its effects in simple English and in a manner communicable to disadvantaged or marginalised people.

8. That dedicated resources be developed for self-represented litigants to explain the Act and provide step-by-step guides to resolving an alleged human rights breach.

9. That a robust human rights based education packaged be introduced into the Queensland Curriculum for both primary and secondary school students, in accordance with the United Nations Declaration on Human Rights Education and Training.

10. That a Queensland Human Rights Act include provision for review every 5 years.

11. That a Queensland Human Rights Act *not* include a sunset clause.

1. INTRODUCTION

The Queensland Government is now faced with an historic opportunity to ride the wave of momentum towards greater human rights protection in Australia and codify basic universally accepted human rights for the benefit of all Queenslanders by enacting a Human Rights Act.

Australia remains alone amongst western liberal democracies as bereft of a constitutional bill of rights or a legislated federal Human Rights Act.

Human rights are neither conservative nor radical. By their nature, human rights are so fundamental to the experience of being human that they should be immune from political interference and constitutionally enshrined. However, where that is not possible – including due to the practical obstacles of constitutional reform – they must at least enjoy some legal protection.ALHR was established in 1993 and is a national network of legal professionals active in practising and promoting awareness of international human rights standards and norms including judicial officers, lawyers, barristers and law students across Australia who participate in human rights legal advocacy through active National, State and Territory committees and various thematic subcommittees. Through training, information, submissions and networking, ALHR promotes the principles and practice of human rights law in Australia.

ALHR's primary concern is that Australia should adhere to international human rights law and standards in both State and Commonwealth legislation. We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014[1] as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in both Commonwealth and State legislation is directly relevant to Australia's compliance with those obligations.

1.2 HISTORICAL CONTEXT

To fully appreciate the gravity of enacting a Human Rights Act in Queensland today, it is important to understand the historical context of the movement for codifying human rights in Australia.

Whilst Australia has signed and ratified the core international human rights law treaties and conventions[2], Australia remains alone amongst western liberal democracies for not having in place a federal human rights

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[1] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

[2] This includes the: International Covenant on Civil and Political Rights (UNGA Resolution 2200A (XXI), 16 December 1966, entry into force 23 March 1976) 999 UNTS 171. Australia signed: 18 December 1972, ratified: 13 August 1980 (ICCPR); International Covenant on Economic, Social and Cultural Rights (UNGA resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976) 993 UNTS 3. Australia signed: 18 Dec 1972, ratified: 10 Dec 1975 (ICESCR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA resolution 39/46, entry into force 26 June 1987) A/39/51 (1984); International Convention on the Elimination of All Forms of Racial Discrimination (UNGA resolution 2106 (XX), entry into force 4 January 1969) 660 UNTS 195 (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (UNGA resolution 34/180, entry into force 3 September 1981) A/34/46 (CEDAW); Convention on the Rights of the Child (UNGA resolution 44/25, entry into force 2 September 1990) A/44/49)(CRC); Convention on the Rights of Persons with Disabilities (UNGA resolution 61/106, entry into force 3 May 2008) A/RES/61/106(CRPD).

act or bill of rights. Historically Australia was a leader in developing the modern international human rights law ('IHRL') regime beginning with the birth of the United Nations; Australia assumed a lead role in drafting the 1945 Charter of the United Nations in which human rights protection takes a lead role; Australia took a lead role in being one of eight members of the drafting party for the 1948 Universal Declaration of Human Rights; and Australia was one of the 26 drafting parties of the International Convention on the Status of Refugees.

Despite all of this, Australia has not properly implemented its binding contractual obligations to the international community by way of domestically implementing the binding contents of core IHRL treaties, namely domestically legislating to protect all the basic universally recognised human rights contained in those core IHRL treaties. Australia has limited human rights protections by way of federal anti-discrimination legislation and as a result has arguably failed to fulfil its good faith obligation at international law as required by Article 26 of the 1969 Vienna Convention of the Law on Treaties. Consequently, Australia faces significant and ongoing international criticism for human right violations and failure to implement outstanding obligations as evidenced by the growing outcry amongst United Nations member states at Australia's first and second Universal Periodic Reviews before the UN Human Rights Council in Geneva in January 2011 and November 2015 respectively.

The first significant push for an Australian Bill of Rights, similar to that of the United States of America, stemmed back to the Constitutional Conventions of the 1890s in which the Australian Constitution was drafted. Amongst the advocates for a Bill of Rights was one of the first Chief Justices of the High Court of Australia, Justice Richard O'Connor, who argued quite prophetically:

> We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law.[3]

During the Conventions, Andrew Inglis Clark, the then Attorney-General of Tasmania who has been described by the current Chief Justice of the High Court of Australia as 'a leading intellectual force' for an Australian Bill of Rights[4] , noted his robust position for curbing government power in the following terms:

> A popular form of Government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public counsels, and arbitrary and unreasonable laws be enacted.[5]

Since the Constitutional Conventions of the 1890s, there have been numerous attempts to constitutionally enshrine a bill of rights. One attempt was made in the 1940s and again in 1988. In 1998, there was an inquiry in Queensland by the Legal, Constitutional and Administrative Review Committee as to whether Queensland should enshrine a bill of rights in the Queensland constitution.[6] The Committee ultimately concluded that it

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[3] Official Record of the Debates of the Australasian Federal Convention, 1891-1898, Sydney,(8 February 1898) 688.

[4] Chief Justice RS French, 'Protecting Human Rights without a Bill of Rights.' (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010), 3.

[5] Ibid.

[6] Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*,

was undesirable for Queensland to have a constitutionally enshrined Bill of Rights based on a US-model. However, the Committee did not consider the desirability of a legislative Human Rights Act or Charter of Rights and Responsibilities similar to the Victorian and Australian Capital Territory models.

Of course, the scope of the current Queensland inquiry relates only to a legislated Human Rights Act which can be subsequently amended or repealed by Parliamentary action.

There have also been a number of attempts to introduce a legislative Human Rights Act federally, however, none have been successful. While the Rudd government's 2008-9 National Human Rights Consultation received an unprecedented and historic public response calling for a federal Human Rights Act, the implementation inexplicably did not eventuate.

The first Australian attempt at a bill of rights was, in fact, not made by a Labor government, but by Queensland's conservative Nicklin Country Party government in December 1959.[7] The *Constitution (Declaration of Rights) Bill* sought to entrench democratic rights, the independence of the judiciary and rights on arrest or detention but was abandoned because of opposition.[8]

Rather than waiting for federal action, the Australian Capital Territory (ACT) and Victoria seized their opportunities and implemented human rights legislation in 2004 and 2006 respectively with the passage of the *Human Rights Act 2004 (ACT)* and the *Charter of Human Rights and Responsibilities 2006 (Vic).* As will be illustrated, both of these legislative regimes have been subject to review and remain in force due to the overarching benefits that they have provided. It is also important to note that both pieces of legislation have survived multiple changes in government, thereby demonstrating that human rights are not a politically partisan issue.

In December 1972, Australia signed the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant of Economic, Social and Cultural Rights* (ICESCR).[9] The ALP government of the time set about making legislative arrangements to properly implement the treaties into domestic law, as required by Articles 2 of both Covenants and Article 26 of the 1969 *Vienna Convention on the Law of Treaties*, which require contractual international human rights obligations to be implemented by contracting parties in good faith.

The then government attempted to incorporate the binding contents of the ICCPR into Australian law via the external affairs head of power in s51(xxix) of the Constitution through the passage of the *Human Rights Bill 1973,* which failed to be debated due to a double-dissolution election. During the second reading speech of the Bill on 21 November 1973, Attorney-General of the time, Lionel Murphy, noted the minimal legal protection of human rights in Australia stating:

> Australia ... is commonly regarded as a country where freedom and individuality are allowed to flourish. The Australian people are commonly believed to be jealous of their freedoms and to be strongly opposed to government interference in their lives. It is said that this commitment to freedom is the best safeguard against encroachments on that freedom. It is said to be more effective in ensuring freedom than a Bill of Rights. Yet one might well ask whether this is really so, whether actual experience bears it out... Despite our supposed commitment to freedom, we cannot be self-satisfied

Report No. 12 (1998).

[7] Ibid, 12.

[8] Ibid.

[9] Commonwealth Government Parliamentary Debates, Senate, 21 November 1973, Vol. 58, (Attorney-General Senator Lionel Murphy).

> about what is happening in Australia. No matter what the law may provide, those who are poor, who are socially disadvantaged, are denied the basic human rights of a full and satisfying life. There are too many in our community who fall into these categories for us to be complacent about the state of liberty in Australia. The aged, the chronically ill, the migrant groups and the Aborigines do not enjoy the full measure of human rights and dignity.[10]

ALHR submits that the above speech could be read today, over 42 years later, with equal impact and relevance to the state of the law and human rights in Queensland.

ALHR also submits that by enacting a Human Rights Act, Queensland will contribute to Australia properly and effectively implementing its outstanding international legal obligations and assist in growing Australia's political maturity such that Australia is a responsible international citizen and world leader in the area of international human rights and respecting and upholding international law.

Former Attorney-General Murphy concluded that '[t]he enactment of this legislation will be a significant milestone in the political maturity of Australia. It will help to make Australian society more free and more just.'[11] ALHR similarly submits that Queensland will be a freer, more just and more mature society with the passage of a Human Rights Act.

As former Western Australia Chief Justice, David Malcolm, has queried:

> Given that the United Kingdom has recognised that its common and statute law provides insufficient protection for fundamental human rights by pan-European standards, on what basis can Australia justify a lesser legal standard of protection of human rights than all of Europe, Canada, India, New Zealand, Pakistan and South Africa?[12]

1.3 Benefits of a Human Rights Act for Queensland

ALHR submits that a Human Rights Act would provide the following benefits to Queensland (these benefits are covered in more detail at Item 4 of this Submission) while involving minimal cost:

1. Enhanced Governance and Policy Making;
2. Developing a culture of Tolerance, Respect and Dignity;
3. Protecting the rights of Disadvantaged Queenslanders;
4. Fulfilling Australia's International Human Rights Obligations;
5. A Stronger and more Secure Economic Landscape;
6. Additional Checks and Balances on Government Power;
7. A Beneficial Dialogue Model;
8. Enhanced Access to Justice;
9. Enhanced Legislative Interpretation;
10. Enhanced Rights-based Political Culture; and
11. A Rights-Based Educational Culture.

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[10] Ibid.
[11] Ibid.
[12] David Malcolm, 'A Human Rights Act for Australia' (2006) 8 *Notre Dame Austl. L. Rev.,* 20.

1.4 About this Submission

This Submission addresses:

(a) the current legal landscape for human rights protections in Queensland highlighting the numerous gaps and limitations and strong justifications for law reform;

(b) the varied benefits that a legislated Human Rights Act will bring for the people and government of Queensland;

(c) how the current legal architecture in Queensland is significantly deficient when it comes to protecting basic human rights to the point where the rights and liberties of Queenslanders are regularly violated;

(d) the experiences in Victoria and the ACT and how they show that public service delivery and bureaucratic functions are enhanced and optimised where a Human Rights Act is enacted;

(e) the legislative instruments for human rights protections in other comparative jurisdictions (most notably Victoria and the Australian Capital Territory, but also in New Zealand, Canada and the United Kingdom) and analyses the lessons learned from those jurisdiction;

(f) a number of case studies from those other jurisdictions to highlight the current and significant shortfalls in legal protections for basic human rights in Queensland; and

(g) ALHR's proposed model for a Human Rights Act in Queensland including innovations based on the lessons learned from other jurisdictions.

In summary, ALHR submits that the introduction of a Human Rights Act is one fundamental and necessary step in the right direction for the protection of human rights in Queensland. By drawing on the experiences of Victoria, the ACT and New Zealand, in addition to that of many democracies around the world, we can ensure that the Queensland model is as refined and effective a model as possible.

2. The effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms

Term of Reference 2(a)

ALHR considers that the current legal architecture in Queensland is significantly deficient when it comes to protecting basic human rights to the point where the rights and liberties of Queenslanders are regularly violated. The system would benefit from improvements, the most significant of which would be the enactment of a Human Rights Act in Queensland.

2.1 Responsible Government and the common law

Responsible government

Opponents to human rights legislation argue that structural protections built into our political and constitutional system (such as federalism, the separation of powers, constitutional guarantees (implied or

explicit), responsible government and representative democracy) are sufficient to protect the rights and liberties of individuals.[13] Violations of rights are a result of individual fault, and are not reflective of systemic weaknesses.

However, the reality of the Australian political system has significantly undermined the protective capacity of representative democracy. This system facilitates the power of the majority which can have adverse effects for minority groups.[14] Elections often focus on the concerns of the majority and are generally unresponsive to concerns about individual and community rights.[15] The introduction of four-year terms in Queensland has further limited checks and balances.

UNICAMERALISM

Queensland is the only State in Australia to function without an upper house of parliament. The absence of a senate has resulted in a lack of accountability and oversight.[16] A single house of parliament also increases the likelihood of a 'super' or excessive majority.[17] Majority power has been strongly cautioned against.

During the 1980 Constitution Conventions, Andrew Inglis Clark, the then Attorney-General of Tasmania stated:

> A popular form of Government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public counsels, and arbitrary and unreasonable laws be enacted.[18]

A Human Rights Act would provide an additional check on power in Queensland to balance the structural lack of oversight in its unicameral system and improve the parliament's accountability.

COMMON LAW

The common law is inadequate to protect human rights in Queensland. Common law freedoms are vulnerable and may be overruled by parliament. Common law rights may be dissolved intentionally or unintentionally by the legislature. In NSW Chief Justice Bathurst[19] recently considered the multiplicity of ways in which modern NSW statutes, often inadvertently, undermine common law rights like legal professional privilege and the privilege against self-incrimination, let alone human rights. The development of the common law is a slow and unpredictable process, limiting its capacity to respond to human rights concerns effectively. The ability to

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[13] Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland Adopt a Bill of Rights?* (1998), 10-12.

[14] H Hobbs and A Trotter, 'How far have we really come: civil and political rights in Queensland' (2013) 25(2) *Bond Law Review* 166, 168.

[15] J McGinty, 'A Human Rights Act for Australia' (2010) 12 *The University of Notre Dame Australia Law Review* 1, 10.

[16] K Jones and S Prasser, 'Resisting executive control in Queensland's unicameral legislature' (2012) 27(1) *Australasian Parliamentary Review* 67, 70.

[17] K Galloway and A Ardill, 'Queensland: A return to the moonlight state' (2014) 39(1) *Alternative Law Journal* 3, 8.

[18] Ibid, 8.

[19] His Honour Chief Justice Tom Bathurst, "The Nature of the Profession: the State of the Law," Opening of Law Term Address, 4 Feb 2016, available at: <http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_speech.pdf> and see Appendix at http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_Appendix.pdf accessed 4 April 2016.

positively assert rights protected by the common law is limited by the requirement to demonstrate the infringement of a recognized and justiciable right.[20]

In this regard, Sir Anthony Mason, a former Chief Justice of the High Court,

> The common law system, supplemented as it presently is by statutes designed to protect particular rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights…. The common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be.[21]

THE PARLIAMENTARY COMMITTEE SYSTEM

Queensland's Parliamentary Committee has proven to be ineffective in substantively promoting and protecting human rights in Queensland due to the absence of a senate to populate committees and the effect of super majorities.

The effect of the Newman government gaining power in 2012 with such a large majority exposed the potential weaknesses of the committee system in Queensland. Only seven ALP representatives and four independents retained their seats, compared with 78 LNP members. This meant that it was no longer possible to maintain a fair representation among committee members, resulting in, on average, a 75% majority of LNP membership in committees.[22] The ability of committee system to scrutinise was further strained by the Newman government passing legislation soon after the election either without committee review or in situations where committees were placed under significant time constraints and given limited opportunity for public comment.[23]

The Parliamentary Joint Committee on Human Rights (PJCHR) and the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) are examples of how a human rights scrutiny committee could operate in Queensland. A Queensland human rights scrutiny committee, to examine any incoming bills for compatibility with human rights, would complement a Human Rights Act.

THE ANTI-DISCRIMINATION COMMISSION OF QUEENSLAND (ADCQ) AND ANTI-DISCRIMINATION LAWS

Australia is the only western liberal democracy without a federal Human Rights Act. Australia has ratified the core international human rights treaties and conventions. However, these have not been fully implemented into domestic law. Domestic anti-discrimination legislation has been a step towards the implementation of international law. Commonwealth anti-discrimination laws (which apply to Queensland residents) include:

1. *Racial Discrimination Act 1975* (Cth);
2. *Disability Discrimination Act 1992* (Cth);
3. *Sex Discrimination Act 1984* (Cth);

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[20] Chief Justice RS French, 'Protecting Human Rights without a Bill of Rights' (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010), 27.

[21] The Hon. A Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) Federal Law Review 1. See J. A. Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 Public Law Review 163.

[22] R Scott, 'Political Tsunami – the 2012 Queensland election and its aftermath in Parliament' (2012) 27(2) *Australasian Parliamentary Review* 89, 94.

[23] D Hurst, 'Newman to bypass committee checks', Brisbane Times (online), 14 May 2012 < http://www.brisbanetimes.com.au/queensland/newman-to-bypass-committee-checks-20120514-1ymg0.html>; K Galloway and A Ardill, 'Queensland: A return to the moonlight state' (2014) 39(1) Alternative Law Journal 3, 6.

4. *Age Discrimination Act 2004* (Cth).

Queensland's anti-discrimination legislation is contained in the 1991 *Anti-Discrimination Act* which covers sexual harassment, vilification on the basis of race, religion, sex or gender identity, discrimination on the basis of prohibits discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment , religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, or association with, or relation to, a person identified on the basis of any of these attributes.

Such discrimination is caught when it occurs in work, education, the provision of goods and services, superannuation or insurance, disposition of land, accommodation, club memberships and affairs, administration of state laws and programs, or local government.

The ability of federal anti-discrimination legislation to protect against human rights violations in Queensland faces significant barriers. Protection is limited to individuals possessing certain characteristics and only in certain areas of public life. A Human Rights Act would extend protections to those who fall outside this legislation, such as same sex couples, domestic violence victims and family carers. Anti-discrimination legislation and the ADCQ also lack the ability to proactively prevent breaches of human rights and promote equality and dignity. The Commission is reliant on individuals to lodge complaints.

2.2 Case Study: Vicious Lawless Association Disestablishment Act 2013 (Qld) (VLAD)

In 2013, the Queensland Government brought into effect legislation aimed at targeting the criminal activities of 'unlawful' motorcycle gangs. The laws were enacted without a parliamentary committee process and without public consultation. The laws infringe upon a number of fundamental human rights and threaten the independent and effective functioning of the judiciary.[24] ALHR has publicly expressed its concerns that these anti-association laws breach basic standards of human rights.[25] It has been recently announced that the VLAD laws will undergo a significant overhaul after resulting in only two convictions.[26]

The VLAD laws impinge upon a number of human rights recognised by the international community as requiring legal protection and to which Australia is obliged at international law to protect. These include:

- The right to equality before the law;[27]
- The presumption of innocence;[28]
- The right to a fair trial;[29]
- The right to be free from arbitrary detention;[30]

[24] Australian Human Rights Commission (AHRC), *Freedoms and Rights concerns in QLD Bikie Laws*, (18 October 2013) <https://www.humanrights.gov.au/news/stories/freedoms-and-rights-concerns-qld-bikie-laws>.
[25] 'Human rights lawyers slam Queensland bikie laws' *Brisbane Times* (online), 27 October 2013, <http://www.brisbanetimes.com.au/queensland/human-rights-lawyers-slam-queensland-bikie-laws-20131027-2w9c6.html>; F Nelson, 'High Court's anti-bikie law decision prompts calls for a Charter of Rights' Lawyers Weekly (online) (27 November 2014) <http://www.lawyersweekly.com.au/news/15997-high-court-s-anti-bikie-law-decision-prompts-calls>.
[26] 'Palaszczuk Government Plans Bikie Laws Overhaul', *The Australian* (online), 4 April 2016, <http://www.theaustralian.com.au/national-affairs/state-politics/vlad-laws-palaszczuk-government-plans-bikie-laws-overhaul/news-story/379559c14abf4e67eb2b923f39369e40>.
[27] ICCPR, Articles 14(1) and 26.
[28] ICCPR, Article 14(2).
[29] ICCPR, Article 14(1) and (3).

- The right to freedom of movement;[31]
- The right to freedom of assembly;[32]
- The freedom of association;[33]
- The right to freedom of expression;[34]
- The right to be free from cruel, inhuman or degrading treatment or punishment;[35]
- The right to work.[36]

From a human rights perspective, the following provisions are of particular concern:

a) the process by which an 'organisation' is deemed to be a criminal organisation;
b) the presumption of bail being reversed;[37]
c) the potential for the anti-association provisions to be applied to groups outside the intended targets;[38]
d) mandatory sentencing additions;[39] and
e) reverse onus provisions relating to the criminal purpose of groups.[40]

3. The Operation and Effectiveness of Human Rights Legislation in Victoria, The Australian Capital Territory and by Ordinary Statute Internationally (Including Previous and Current Reviews and Inquiries)

Term of Reference 2(b) and 2(d)

The experiences of Victoria and the Australian Capital Territory (ACT) and other jurisdictions demonstrate that the enactment of a Human Rights Act enhances good governance, fosters better policy making, encourages a smart culture of tolerance, respect and dignity, promotes a stronger economy, provides additional checks and balances on government power, fosters enhanced legislative interpretation and encourages a rights-based political culture all whilst maintaining parliamentary sovereignty.

This section contains a detailed comparative analysis of the jurisdictions of Victoria, the ACT, Canada, New Zealand and the United Kingdom (UK) which illustrate the benefits of a HR Act and also show that, despite the

[30] ICCPR, Article 9(3) and (4).
[31] ICCPR, Article 9(3) and (4).
[32] ICCPR, Article 21.
[33] ICCPR, Article 21.
[34] ICCPR, Articles 18 and 19
[35] ICCPR, Article 7.
[36] ICESCR, Article 6.
[37] *Bail Act 1890* (QLD), s 16(3A).
[38] K Galloway and A Ardill, 'Queensland: A return to the moonlight state.' (2014) 39(1) Alternative Law Journal 3, 6.
[39] *Vicious Lawless Association Disestablishment Act* 2013 (QLD), s 5(1)(a)-(c).
[40] Ibid, s 4 (a)–(d).

predictions of critics, the introduction of human rights legislation does not open the floodgates to excessive litigation.

We note that the UK's *Human Rights Act 1998* influenced the human rights legislation adopted in the Australian Capital Territory and Victoria.[41] These three acts adopt a 'dialogue model' of human rights protection where courts can make a declaration of incompatibility on statutes that they consider to be incompatible with human rights, but courts cannot remove the incompatibility.

A similar approach is taken in New Zealand where inconsistency with human rights will not invalidate legislation, and in Canada where the courts have a (limited) power to strike down legislation that does not comply with human rights, limited by the fact that the government may still override such decisions. This extensive preservation of Parliamentary sovereignty over human rights along with the 'reasonable limits' clauses used to limit human rights in some jurisdictions provide a bulwark against potential 'extreme' uses of the human rights legislation, being a concern often mounted by critics.

Where appropriate, and as contemplated in clause 2(d) of the Terms of Reference, comparisons have included analysis of any subsequent reviews or inquiries into the relevant instruments. Across the reports considered, the need to develop and cultivate a strong culture of human rights was emphasised as being an important future step, as was improving access to justice, in particular through the use of alternative dispute resolution mechanisms. Learning from the experiences of other common law jurisdictions with human rights legislation will help Queensland create a cutting-edge, best practice model for human rights amongst common law jurisdictions.

3.1 AUSTRALIAN CAPITAL TERRITORY

In the Australian Capital Territory, human rights are protected by the *Human Rights Act 2004* (ACT) ('ACT HR Act'), which came into force on 1 July 2004.[42] Only individuals human beings (and not all legal persons such as corporations) have human rights under the ACT HR Act.[43]

The ACT HR Act shares many similarities with the Victorian Charter. However, as noted above, unlike the Victorian Charter, the ACT HR Act provides for a stand-alone cause of action for breaches of human rights, as recommended by ALHR.

3.1.1 ANALYSIS

APPLICATION

The ACT HR Act applies to laws, actions and decisions made by public authorities, defined widely to include any 'entity whose functions are or include functions of a public nature, when it is exercising those functions of the Territory or a public authority, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).'[44] The meaning of 'public authority' does not include the Legislative Assembly or Courts except when acting in an administrative capacity.[45] The ACT HR Act outlines a list of factors to be considered in determining whether a particular function is of a 'public nature'.[46]

[41] *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[42] *Human Rights Act 2004* (ACT).
[43] Ibid, s 6.
[44] Ibid, s 40.
[45] Ibid, s 40.
[46] Ibid, s 40A.

The ACT HR Act impacts the law-making process, the interpretation of laws by the courts and the decisions made by public authorities. However, failure of a law or government action or decision to be compatible with human rights is not fatal to that law, action or decision.

LAW MAKING BY PARLIAMENT

All Bills introduced to the ACT Legislative Assembly must be accompanied by a statement of compatibility from the Attorney-General outlining whether the Bill is consistent with human rights.[47] As in Victoria, the Legislative Assembly's Standing Committee on Legal Affairs must scrutinise all new Bills and report to the Assembly regarding any human rights issues raised.[48] The incompatibility of a Bill with the human rights in the ACT HR Act does not invalidate the Bill.

JUDICIAL INTERPRETATION

Under s 30, all Territory laws must be interpreted in a way that is compatible with human rights so far as it is possible to do so consistently with the law's purpose.[49] International law and the human rights related judgments of other jurisdictions may be taken into account when interpreting the human rights.

The Supreme Court may make a 'declaration of incompatibility' if it is satisfied that the Territory law is not consistent with the human right.[50] The Supreme Court's declaration of incompatibility does not affect the validity, operation or enforcement of the law, or an individual's rights or obligations.[51] The Attorney-General must present the Legislative Assembly with the declaration of incompatibility, along with a written response to the declaration.[52]

PUBLIC AUTHORITIES

Section 40B of the ACT HR Act requires public authorities to act consistently with human rights. Public authorities include government agencies, Ministers, police and public employees, but not the Legislative Assembly or the courts (except in their administrative capacities).[53] It is unlawful for a public authority to act in a way that is incompatible with a human right or to make decisions without giving proper consideration to a relevant human right.[54] However this requirement does not extend to laws that expressly require an act to be done or decision to be made in a particular way that is inconsistent with a human right,[55] or where a law cannot be interpreted in a way that is consistent with a human right.[56]

CAUSE OF ACTION

Any person who claims to be the victim of a contravention of human right by a public authority may start a proceeding against the public authority under s 40C of the ACT HR Act in the ACT Supreme Court.[57] In *Hakimi v*

[47] Ibid, s 37.
[48] Ibid, s 38.
[49] Ibid, s 30.
[50] Ibid, s 32.
[51] Ibid, s 32(3).
[52] Ibid, s 33.
[53] Ibid, s 40.
[54] Ibid, s 40B(1).
[55] Ibid, s 40B(2)(a).
[56] Ibid, s 40B(2)(b).
[57] Ibid, s 40C.

Legal Aid Commission (ACT),[58] Refshaug J developed a seven-stage test in approaching the application of s 40C:[59]

1. What is the act or decision which is the subject of challenge?

2. Is the entity engaging in the relevant act or making the relevant decision a public authority under ss 40 and 40A of the ACT HR Act?

3. What is the human right engaged and what is its content?

4. Is the relevant act or decision apparently inconsistent with, or does it impose a limitation on, any of the rights protected in the ACT HR Act?

5. Is the limitation reasonable, insofar as it can be demonstrably justified in a free and democratic society having regard, inter alia, to the factors set out in s 28(2) of the ACT HR Act? Put another way, is the limitation proportionate?

6. Even if the limitation is proportionate, where the matter involves making a decision, did the decision-maker give proper consideration to the protected right?

7. Does the act or decision made under an Act or instrument give either no practical discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 30 of the ACT HR Act consistently with the protected right?

HUMAN RIGHTS COMMISSION

The Human Rights and Discrimination Commissioner has various important roles under the ACT HR Act, including the general review power in s 41 that allows major human rights audits to be conducted, shining a light on the practices of closed environments, such as secure mental health facilities and youth and adult detention centres.[60] These audits have led to powerful systematic changes, which were only possible because of the clear human rights standards and frameworks set out in the ACT HR Act. The Commissioner also provides human rights education and conducts community engagement for the public on the basis that, for human rights legislation to truly be effective, cultural and social change is necessary to maximise compliance.[61]

RIGHTS

The ACT HR Act covers a range of civil and political and economic, social and cultural rights taken from the ICCPR and the ICECSR (to which Australia is a contracting party and thereby the government of Victoria is arguably bound including by virtue of Article 27 of the 1969 Vienna Convention of the Law on Treaties). The ACT HR Act states that it does not contain an exhaustive list of rights under domestic or international law.[62] Civil and political rights can be found in Part 3 (ss 8-27) of the ACT HR Act, and the one economic, social and cultural right (the right to education) is found in Part 3A. The civil and political rights protected include the rights to: equality; life; privacy; vote and take part in public life; liberty and security of person; humane treatment when deprived of liberty; a fair trial (and other rights in criminal proceedings); compensation for wrongful conviction; not to be tried or punished more than once. They also include the rights to freedom of: movement, thought, conscience, religion and belief, assembly and association, expression, and the rights of ethnic, religious and linguistic minorities and Aboriginal and Torres Strait Islander peoples to their distinct

[58] (2009) 3 ACTLR 127, 129 ('*Hakimi*').
[59] *Hakimi* (2009) 3 ACTLR 127, 137.
[60] Ibid, 163; *Human Rights Act 2004* (ACT), s 41.
[61] Ibid, 166.
[62] Ibid s 7; H Watchirs and G McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insight for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 151.

cultures. Finally there are prohibitions on discrimination, forced work, torture and retrospective criminality plus protections of the family and children, and of children in the criminal process.

3.1.2 LIMITATIONS

The rights provided for in the ACT HR Act are not absolute. They are subject to a 'reasonable limits' clause in s28.

REASONABLE LIMITS CLAUSE

As under the Victorian Charter and the *Canadian Charter of Rights and Freedoms*,[63] the human rights enunciated in the ACT HR Act 'may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society ….'[64]

When deciding whether a limit is reasonable, consideration must be given to the factors stated in s 28(2) of the ACT HR Act being: 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 purpose that the limitation seeks to achieve. The same factors are set out in the 'reasonable limitations' clause in s 7(2) of the Victorian Charter as discussed above.

3.1.3. OPERATION

The Attorney General's role in certifying the compatibility of legislation with the ACT HR Act has had an important role on the development of policy and legislation. Issues that the legislature has considered from a human rights perspective include: sentencing laws, voting rights of prisoners, emergency electro-convulsive therapy, and exclusion from public employment due to criminal history.[65] These human rights considerations have prevented many potential unreasonable interferences on human rights. For example, following a fatal fight between illegal motorcycle gangs in 2009, the South Australia and New South Wales parliaments immediately proposed new legislation that restricted unconvicted gang members' freedom of association, freedom of movement and rights in the criminal process.[66] However, after the ACT Human Rights Commissioner provided advice to the Attorney-General that the laws were inconsistent with certain human rights, ACT and Victoria subsequently viewed these Bills as incompatible with their human rights legislation (compare with the situation in Queensland as described in paragraph 2.3).

The ACT's Scrutiny Committee has reduced the number of disproportionate restraints on human rights and acted as further check following the Attorney-General's certification of compatibility of legislation with human rights. For instance, in 2008 the Scrutiny Committee recommended that the *ACT Civil and Administrative Tribunal Bill* be amended to include notes that expressly preserve the privilege against self-incrimination, which was eventually agreed by the government.[67]

The enactment of the ACT HR Act was found not to have greatly added to the workload of courts and tribunals[68].The 2009 ACT Human Rights Act Research Project's review of the ACT HR Act concluded that the Act

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[63] Ibid.
[64] *Human Rights Act 2004* (ACT), s 28(1).
[65] A Byrnes, H Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009), 90.
[66] *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious and Organised Crime (Control) Act 2008* (SA).
[67] H Watchirs and G McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insight for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 144.
[68] Ibid, 145.

has improved the quality of lawmaking in the Territory and has helped to ensure that human rights concerns are given due consideration in the framing of new legislation and policy.[69] It also found that legal practitioners need to have a better understanding of both domestic and international jurisprudence so they can initiate arguments under the ACT HR Act.[70]

INTERPRETATION OF LEGISLATION

As noted above, s 30 of the ACT HR Act provides that so far as it is possible to do so consistently with its purpose, ACT laws must be interpreted in a way that is compatible with human rights. With regards to the court's interpretation on Territory laws in accordance with s 30, the court in *Fearnside*[71] followed the decision of Supreme Court of New Zealand in *Hansen.*[72] Justice Besanko in *Fearnside* adopted a three-step test to determine whether an act may be re-interpreted:[73]

1. Consider whether the legislation 'enlivens' a human right;
2. If 'yes', consider whether the legislation contains a limitation which is reasonable within s 28 (the reasonable limits clause discussed above); and
3. If the first question is 'yes', and the second question is 'no', it is necessary to consider and apply the interpretative principle in s 30.[74]

3.1.4 AMENDMENT

There is no prohibition on the amendment of the ACT HR Act, as it is an ordinary Act of Parliament.

3.1.5 REVIEWS

2009 REVIEW - WATCHIRS AND MCKINNON

In 2009, five years after the introduction of the ACT HR Act, a comprehensive analysis by Helen Watchirs and Gabrielle McKinnon identified a number of faults with the legislation, while noting importantly that the legislative protection of human rights brought on "paradigm shifts" in attitudes and approaches towards human rights issues in the ACT.[75]

Their review '*Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia*' offered analysis of key issues arising from the Act. They found that while the impact of the ACT HR Act on the general public was initially subtle, the most immediate impact was on the development of legislation and policies, largely due to the s 37 requirement that Statements of Compatibility be issued for new Bills[76] and to the requirements imposed on the Scrutiny Committee under s 38.[77] This section requires that the Scrutiny Committee reports to the Legislative Assembly regarding human rights issues raised by Bills presented

[69] The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009), 6.
[70] Chief Justice H Murrell, 'ACT Human Rights Act – A Judicial Perspective' (Speech delivered at the Conference on the Tenth Anniversary of ACT Human Rights Act, 1 July 2014), 23.
[71] *R v Fearnside (2009) 3 ACTLR 25 ('Fearnside').*
[72] *R v Hansen* [2007] 3 NZLR 1.
[73] *Human Rights Act 2004* (ACT), s 30.
[74] *Fearnside* 48.
[75] H Watchirs and G McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) UNSW Law Journal 136, 137.
[76] Ibid, 136, 141.
[77] *Human Rights Act 2004* (ACT), s 38.

to the Assembly.[78] Watchirs and McKinnon argue that the ACT model is ideal, because it has multiple mechanisms to consider implications of policy and legislation on human rights and offers greater protection and opportunities to filter limitations on rights than in a system with more limited scrutiny in the lawmaking process.[79]

Although it was predicted that the ACT HR Act would open the floodgates to litigation, its effect was modest.[80] While a concerted effort was made to ensure that the ACT HR Act would only protect the rights of individuals and not corporations, there have been cases where the ACT HR Act has provided "indirect protection to corporations through the general obligation imposed on the courts to interpret legislation"[81] in the light of human rights, though protection of corporate interests is generally very limited.[82] A valid criticism of the ACT HR Act is that advances in the protection of human rights in the courts were slow, despite a number of important decisions. Watchirs and McKinnon also noted that many of the earlier cases in which the ACT HR Act was cited did not involve 'any real examination of the content of the rights raised,'[83] merely making reference to the ACT HR Act. This result was as much a reflection upon the legal profession as upon the judiciary. Watchirs and McKinnon suggested that the 'express exclusion of monetary compensation as a remedy for a breach of human rights'[84] could be an explanation for the limited number of cases brought under the ACT HR Act, as the inability to claim compensation could deter genuine litigants who would incur significant costs in Supreme Court proceedings. Watchirs and McKinnon suggested that the model of monetary compensation in the UK Act should be followed in any future federal Human Rights Act.[85]

While the ACT Supreme Court has the ability to grant a 'declaration of incompatibility' under s 32 of the ACT HR Act, in 2010 Watchirs and McKinnon's noted that the power had not been used [86] although the ACT HR Act had led to significant changes in legal policies.

Watchirs and McKinnon assert that the ACT HR Act was important, in its first five years of operation, in enhancing the protection of human rights in the ACT, with a positive impact on policy and law-making evident from the beginning.[87] The independent (or 'stand-alone') right of action (in contrast to the 'piggy-back' model in the Victorian Charter) was commended as a valuable development, despite being underutilised. While the ACT HR Act had a positive impact, a significant drawback was that the Supreme Court was largely inaccessible for many people aggrieved by breaches of their human rights. Funding increases for advocacy organisations and community legal centres would assist people in asserting their rights. It was also suggested that adding a complaints handling role for human rights breaches to the functions of the Human Rights and Discrimination Commissioner may allow breaches to be resolved more simply.[88]

[78] Ibid, s 38.
[79] H Watchirs and G McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) UNSW Law Journal 136, 144-145.
[80] Ibid, 144-145.
[81] Ibid, 145-146.
[82] Ibid, 146.
[83] Ibid, 147.
[84] Ibid, 158.
[85] Ibid, 159.
[86] Ibid, 160.
[87] Ibid, 168-169.
[88] Ibid, 170.

ANU ACT Economic, Social and Cultural Rights Research Project Report

The ACT *Economic, Social and Cultural Rights Research Project Report* published in September 2010 proposed that certain economic, social and cultural rights drawn from the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) be given the same importance in the ACT HR Act as civil and political rights. It argued that inclusion of ESC rights would protect material interests that are not covered by existing rights and guarantees in the HR Act, federal and territory legislation, or the common law.[89]

3.1.6 SUMMARY

In summary the ACT HR Act protects human rights through the following core mechanisms:[90]

- **Compatibility**: the Attorney-General is required to certify whether he or she determines a particular Bill to be compatible with human rights;[91]
- **Scrutiny of legislation:** the Standing Committee on Legal Affairs (Scrutiny Committee) must report to the Legislative Assembly about human rights issues raised by Bills presented to the Assembly;[92]
- **Court's interpretation**: courts must interpret all Territory laws as far as it is reasonably possible, consistent with basic universally recognised human rights;[93]
- **Declaration of incompatibility**: ACT Supreme Court has the power to make a declaration of incompatibility where a Territory law is interpreted not to be consistent with human rights,[94] though such a declaration does not invalidate the law;
- **Human Rights Commissioner:** the Commissioner is responsible for providing human rights education to the public,[95] advising the Attorney-General on any matter relevant to the operation of the ACT HR Act[96] and conducting reviews on the effect of Territory law including the common law.[97] The Commissioner may also intervene in a proceeding involving human rights concerns with the permission of the court.[98]

These mechanisms are supported by a stand-alone cause of action for individuals which enables them to bring complaints about alleged breaches of their rights to the courts under the ACT HR Act.

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[89] H Zeffert, 'Time to expand the ACT Human Rights Act 2004? Report of the Australian Capital Territory Economic, Social and Cultural Rights Research Project' (2011) 17(2) *Australian Journal of Human Rights* 215, 217.
[90] H Watchirs and G McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insight for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 151.
[91] *Human Rights Act 2004* (ACT), s 37.
[92] Ibid, s 38.
[93] Ibid, s 30.
[94] Ibid, s 32.
[95] *Human Rights Commission Act 2005* (ACT), s 27(2).
[96] Ibid.
[97] *Human Rights Act 2004* (ACT), s 41.
[98] Ibid, s 36.

ALHR recommends that the Committee recommend that the Queensland Parliament implement a Human Rights Act model similar to the ACT model with a standalone cause of action and which protects the human rights of individual human beings (and not corporations and legal persons).

3.2 VICTORIA

The *Victorian Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter') was enacted in 2006 and came into force on 1 January 2007, though provisions in the Charter relating to obligations on public authorities and interpretation of laws did not come into operation until 1 January 2008.[99]

3.2.1 ANALYSIS

APPLICATION

The Victorian Charter applies to parliament, the courts and tribunals and public authorities.[100] Federal government agencies operating in Victoria and - unfortunately - private entities in non-governmental activities are excluded.[101] The Victorian Charter is described as a 'parliamentary rights model' based on human rights legislation in the United Kingdom, ACT and New Zealand.[102]

LAW MAKING BY PARLIAMENT

The human rights enshrined in the Victorian Charter must be taken into account when applying existing law and developing new policies and laws. When a Member of Parliament introduces a Bill to the Victorian Parliament it must be accompanied by a Statement of Compatibility, outlining whether the Bill is compatible with the rights in the Victorian Charter.[103] Additionally, the Scrutiny of Acts and Regulations Committee must report to Parliament on the consistency of each Bill with the rights in the Victorian Charter.

The Victorian Charter is drafted in a way that preserves the sovereignty of Parliament. The Parliament may still pass a Bill notwithstanding its non-compliance with the Victorian Charter by issuing an 'override declaration' under s 31. The override declaration must be accompanied by a statement explaining the exceptional circumstances justifying the override declaration.[104] The override declaration lasts for five years and may be re-enacted.[105]

JUDICIAL INTERPRETATION

Section 32 (1) of the Victorian Charter provides that all Victorian courts and tribunals are required to interpret 'so far as it is possible to do so consistently with their purpose, all statutory provisions … in a way that is compatible with human rights'.[106] Under s 32(2) international law and judgments from other jurisdictions can be considered when interpreting a statutory provision. The Attorney-General can intervene or be joined as a party to any proceedings where a question of law arises relating to application of the Victorian Charter.[107] Additionally, questions regarding the application of the Victorian Charter or the interpretation of a statutory

[99] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 2 and (Part 3) Divisions 3 and 4.
[100] Ibid, s 6. See s 4 for definition of 'public authority'.
[101] Ibid.
[102] G Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 893.
[103] *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 1(2)(c)-(d) and 28.
[104] Ibid, s 31(3).
[105] Ibid, s 31(7).
[106] Ibid, s 30.
[107] Ibid, s 34.

provision in accordance with the Charter that arise in a proceeding before a court, may be referred to the Supreme Court for determination.[108]

Under s 36 the Victorian Supreme Court has authority to make a 'declaration of inconsistent interpretation' that particular statutory provisions cannot be interpreted consistently with human rights.[109] The relevant Minister must provide each House of Parliament with a copy of the declaration and a written response and ensure both are published in the Government Gazette.[110] However, importantly, a declaration of inconsistent interpretation by the courts does not affect the validity of the statutory provision in question.[111] Nor can the Supreme Court make a declaration of inconsistent interpretation for any statutory provision which has been the subject of an 'override declaration' under s 31 (see above).

PUBLIC AUTHORITIES

Section 38 of the Victorian Charter provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.'[112] The Victorian Charter's s 38(1) requirement on public authorities will be sufficiently met in most circumstances where 'there is some evidence that shows the decision-maker seriously turned his mind to the possible impact of the decision on a person's human rights'.[113] A more stringent standard of judicial review than the traditional approach is necessary for review of unlawfulness under s 38.[114]

CAUSE OF ACTION

The Victorian Charter does not create a stand-alone cause of action for individuals to pursue a breach of their human rights.[115] Section 39(1) provides that '(i)f, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.' This means the Victorian Charter alone does not allow a person to bring a legal action against a public authority. However, if a person seeks relief in court on the basis of a separate, non-Charter ground, then they may also seek relief on the basis of the breach of the Victorian Charter (s 39).[116] This is referred to below as the 'piggy-back model' and is contrasted with the stand-alone cause of action model found in the ACT's *Human Rights Act 2004*.

The remedies available for the breach of the Victorian Charter include having a decision set aside, an injunction granted to stop a public authority, having evidence excluded from trial or an order made requiring a public authority to take steps to remedy a breach.

The Victorian Charter's 'piggy-back model' does not affect a person's right to seek a declaration of unlawfulness and associated relief (including an injunction, stay of proceedings or exclusion of evidence) nor the right to seek judicial review under the *Administrative Law Act 1978* or the *Rules of the Supreme Court*.[117]

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[108] Ibid, s 33.
[109] Ibid, s 36.
[110] Ibid, s 37.
[111] Ibid, s 36(5).
[112] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.
[113] Castles v Secretary of the Department of Justice (2010) 28 VR 141, 184.
[114] Patrick's Case (2011) 39 VR 373, 442.
[115] *Charter of Human Rights and Responsibilities Act 2006 (*Vic), s 39(3).
[116] M Young, From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, Victorian Department of Justice and Regulation, (2015) 119.
[117] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(2).

Damages cannot be awarded because of a breach of the Victorian Charter.[118] However a person may seek any relief or remedy on the ground that the act or decision of a public authority was unlawful.[119]

ROLE OF THE HUMAN RIGHTS COMMISSION

Under the Victorian Charter, the Victorian Human Rights and Equal Opportunity Commission ('VHREOC') does not handle complaints about breaches of the Charter but does have a number of other important roles. VHREOC advises the Attorney General on anything relevant to the Charter[120] and provides the Attorney-General with an annual report examining the operation of the Victorian Charter over that year[121] including any 'declarations of inconsistent interpretation' made by the courts (s 36) and 'override declarations' made by the Parliament (s 31).[122] Furthermore VHREOC provides education about human rights,[123] reviews public authorities' programs and practices to determine with compatibility with human rights[124] and assists the Attorney-General with the 4 and 8 year reviews of the Victorian Charter.[125] The VHREOC may also intervene in a proceeding involving human rights concerns with the permission of the court.[126]

The Victorian Ombudsman also investigates complaints regarding whether the actions of the government, local councils and public authorities have breached or have not properly considered the rights in the Victorian Charter.[127] Complaints about breaches of the Victorian Charter due to police misconduct can also be made to the Independent Broad-based Anti-corruption Commission.[128] The Victorian Ombudsman has published formal reports in recent years considering the human rights of people with mental illness, the human rights of people with disability and human rights issues raised by the excessive use of force by public transport officers.[129] The Victorian Ombudsman has also considered human rights-related complaints from prisoners and other individuals deprived of their liberty.[130]

RIGHTS

The rights in the Victorian Charter apply to all persons[131] which are defined to mean human beings,[132] not legal persons. The Victorian Charter rights are civil and political rights derived from the ICCPR (to which Australia is a contracting party and thereby the government of Victoria is arguably bound including by virtue of Article 27 of the 1969 *Vienna Convention of the Law on Treaties*), though some of the rights are modified or excluded.[133] The Victorian Charter provides the right to: recognition and equality before the law; right to life; protection

[118] Ibid, s 39(3).
[119] Ibid, s 39(1).
[120] Ibid, s 41(f).
[121] Ibid, s 41(a)(i).
[122] Ibid, s 41(a) (ii) and (iii).
[123] Ibid, s 41 (d).
[124] Ibid, s 41 (c).
[125] Ibid, s 41(e).
[126] Ibid, s 40.
[127] Victorian Equal Opportunity & Human Rights Commission, Victoria's Charter of Human Rights and Responsibilities, (undated), <www.humanrightscommission.vic.gov.au/index.php/the-charter#how-are-breaches-of-human-rights-addressed>.
[128] Victorian Equal Opportunity and Human Rights Commission, *About the Commission* (undated), <http://www.humanrightscommission.vic.gov.au/index.php/about-us>.
[129] Victorian Ombudsman, *Victorian Ombudsman Annual Report 2015* (2015), 42-46 <https://www.ombudsman.vic.gov.au/getattachment/d5ec1fed-8922-47ed-b89b-da4a3aba9a03>.
[130] Ibid.
[131] Ibid, s 6.
[132] Ibid, s 3.
[133] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic).

from torture and cruel, inhuman or degrading treatment; freedom from forced work; freedom of movement; privacy and reputation; freedom of thought, conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association; protection of families and children; take part in public life; liberty and security of person; humane treatment when deprived of liberty; fair hearing; rights in criminal proceedings and not to be tried or punished more than once. The Victorian Charter also provides for cultural rights; property rights; protection of children in the criminal process and a prohibition on retrospective criminal laws.[134]

At the Second Reading of the Charter of Human Rights and Responsibilities Bill 2006, Mikakos MP submitted that the Victorian Charter provides a basic framework of rights protection which many Victorians assumed they already had and strengthens and supports the Victorian democracy.[135]

3.2.2 LIMITATIONS

The rights set out in Part 2 of the Victorian Charter are not absolute and are subject to two limitations.

REASONABLE LIMITATION CLAUSE

Under s 7(1) the rights in the Victorian Charter are subject to such reasonable limits 'as can be demonstrably justified in a free a democratic society based on human dignity, equality and freedom'.[136] When considering this limitation, regard must be given to all the factors in s 7(2): the nature of the right, 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 purpose that the limitation seeks to achieve.[137] Consideration of these factors makes the operation of the Victorian Charter more transparent and accessible to the general public.[138] This limitation clause is largely mirrored by s 28 of the *ACT Human Rights Act 2004* (discussed below).

OVERRIDE CLAUSE

The Victorian Parliament may also issue an 'override declaration' pursuant to s 31, declaring that an Act or provision of an Act is incompatible with the Victorian Charter. Statutory provisions which are the subject of an override declaration do not have to comply with the Victorian Charter.

3.2.3 OPERATION

The *Victorian Human Rights: Charter Case Collection, April 2015* prepared by the Judicial College of Victoria also contains a comprehensive list of case summaries[139] which illustrate the impact of the Victorian Charter.

ISSUES WITH THE REVIEW OF UNLAWFUL DECISIONS OF PUBLIC AUTHORITIES UNDER S 39

Remedies through the Supreme Court are not readily available to all persons affected by unlawful decisions of public authorities. As noted above, there is no stand-alone cause of action under the Victorian Charter. Under

[134] *Charter of Human Rights and Responsibilities Act 2006* (Vic), Part 2.
[135] Victoria, *Parliamentary Debates*, Council, 20 July 2006, 2639 (Jenny Mikakos).
[136] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(1).
[137] Ibid, s 7(2).
[138] G Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 899.
[139] Judicial College of Victoria, *Victoria Human Rights: Charter Case Collection,* (14 April 2015) < http://www.judicialcollege.vic.edu.au/publications/charter-case-collection>

s 39, breaches of the Victorian Charter by government may be resolved in the courts only if they 'piggy back' onto another claim for a pre-existing cause of action (for example, discrimination).[140]

Commentators have suggested that there is difficulty in construing what exactly s 39 of the Victorian Charter means given its convoluted structure.[141] Attempts have been made to resolve the uncertainty of s39 particularly in the decision of *Director of Housing v Sudi*.[142] It remains unclear whether s 39 enables judicial review of decisions of public authorities on Victorian Charter grounds alone.[143] Only the Supreme Court may carry out judicial review pursuant to its inherent jurisdiction and the *Administrative Law Act 1978*.[144]

The effectiveness of a s 39 action for a breach of the Victorian Charter is limited not only by a victim's need to show some other cause of action but also by their capacity to litigate. In *Director of Housing v Sudi,* the Director of Housing applied to the Victorian Civil and Administrative Tribunal (VCAT) for a possession order pursuant to the *Residential Tenancies Act 1997* for the premises occupied by Mr Sudi and his child.[145] Sudi contended that the Director's decision was unlawful and sought to apply to the Supreme Court for judicial review of that decision. At first instance, the decision of the Director was found to be unlawful and the application for possession order was dismissed. Upon successful appeal, the Court of Appeal held that s 39 of the Victorian Charter did not enable VCAT to undertake judicial review of the lawfulness of the decision and that such questions are to be determined by the Supreme Court.

Mr Sudi was required to face the application for a possession order at VCAT and apply for a stay of those proceedings while also required to apply separately to the Victorian Supreme Court to seek review of that decision.[146] It cannot be suggested that the Supreme Court is an accessible forum especially in the context that Mr Sudi was a social housing tenant facing the prospect of eviction and homelessness.

INTERPRETATION OF LEGISLATION

As noted above, s 32(1) of the Victorian Charter requires that, '(s)o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' The Victorian Court of Appeal set out its approach to interpretation of legislation in accordance with s 32(1) in *Slaveski v Smith*:

> Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or

[140] Ibid, 49.
[141] J Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105, 114.
[142] (2011) 33 VR 559.
[143] *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 326 ALR 198, 308-10.
[144] *Director of Housing v Sudi* (2011) 33 VR 559, 563-4.
[145] Ibid.
[146] M Young, *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (Victorian Department of Justice and Regulation,* 2015), 122.

diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.[147]

3.2.4 AMENDMENT

There is nothing prohibiting the amendment and repeal of the Victorian Charter by Parliament as the Charter is an ordinary Act.

3.2.5 REVIEWS

2012 REVIEW - HUMAN RIGHTS LAW CENTRE

The Human Rights Law Centre's March 2012 review of the Victorian Charter, entitled *Victoria's Charter of Human Rights and Responsibilities in Action: Case Studies from the First Five Years*[148] ('2012 Review') contains 101 case studies. The case studies outline the positive impact that the Victorian Charter has had on a wide range of areas including the legislative drafting process, mental health, guardianship issues, superannuation and housing issues for same sex couples, corrections, privacy concerns, child safety, prevention of female genital mutilation, homelessness, domestic violence issues and the protection of the rights of persons with disabilities. There is a significant range of cases which illustrate the way vulnerable individuals have been able to use the Victorian Charter to protect their rights. The Human Rights Law Centre argues that the clear benefits that have been derived from the Victorian Charter will only increase over time as public awareness and provision of services continue to develop.[149]

Five main areas were identified in the Review as areas in which the Victorian Charter has had a significant impact:[150]

1. Formal scrutiny of legislation, with Parliament required to consider and safeguard human rights;[151]
2. The development of public services to protect human rights;[152]
3. Increased awareness of human rights in the wider public;[153]
4. A framework for the protection of human rights;[154] and
5. Policies in place to allow people to challenge arbitrary and unjust decisions in court.[155]

2015 REVIEW - PARLIAMENTARY 8 YEAR REVIEW

2015 marked eight years since the introduction of the Victorian Charter. The Victorian Government conducted a review to determine ways to improve the effectiveness of the Charter in protecting and promoting human rights[156] ('2015 Review'). The 2015 Review looked at the key areas of the Charter, and the roles of Parliament and oversight bodies.[157]

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[147] *Slaveski v Smith* (2012) 34 VR 206, 215.
[148] Human Rights Law Centre, Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation (2012), <http://www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf>.
[149] Ibid, 3.
[150] Ibid, 5.
[151] Ibid, 6.
[152] Ibid, 6.
[153] Ibid, 7.
[154] Ibid, 8.
[155] Ibid, 9.
[156] MB Young, From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities

It was acknowledged in the resulting 2015 parliamentary review report ('2015 Review Report') that, for the Victorian Charter to truly be effective, it is necessary to build a strong human rights culture, especially in the Victorian public sector, to promote decision making that facilitates human rights.[158] While legislation that protects rights is necessary, such legislation alone is insufficient, and promoting social and cultural change is fundamental to the success of the larger objectives of the human rights legislation.[159]

The 2015 Review Report also identified some key problems:

1. *Lack of consequence* – Presently, there is no clear way in which a breach of a person's human rights can be remedied, which is a fundamental flaw in the Victorian Charter, as there are essentially no consequences for violating a person's rights.

2. *A focus on government administration rather than remedies for individuals* - Many human rights concerns are investigated by the government in confidential processes, and therefore fail to directly address the relationship between the government and the community member who raised the initial concerns.

3. *Accessibility* - For human rights concerns to be considered in some cases it is necessary to raise the matter with a superior court, which can make access to justice both difficult and expensive. Not only does this serve as a barrier to justice, it is also inefficient, as many concerns could be resolved by tribunals and alternative dispute resolution.

4. *Complicated litigation* - At present, Victorian Charter human rights issues can only be brought by a court in situations where there is another claim, such as a discrimination claim, provided they relate to the same conduct. This s 39 'piggy-back model' makes arguing human rights issues difficult.[160]Therefore, ALHR recommends not implementing a 'piggy back model' and instead recommends implementing a stand alone cause of action model.

The 2015 Review Report suggests that compliance with the Victorian Charter could be better facilitated by supporting individuals with the resolution of issues particularly in instances where the Government has not been compliant.[161] The 2015 Review Report recommended that issues of compliance be mitigated through alternative dispute resolution, offered by the Victorian Equal Opportunity and Human Rights Commission.[162] Dispute resolution would be an effective way to deliver access to justice in instances where there are disputes between the government and the general community. The 2015 Review Report suggests it is important that the regulatory framework includes agencies with the ability to investigate systemic human rights issues. While the Victorian Ombudsman does have the jurisdiction to look into such issues, it is recommended in the 2015 Review Report that the role and jurisdiction of the Ombudsman be stated more clearly to facilitate better access.[163]

Act 2006 (Victorian Department of Justice, 2015), 130.
[157] Ibid, 8.
[158] Ibid, 19-20.
[159] Ibid, 22.
[160] Ibid, 12.
[161] Ibid, 60.
[162] Ibid, 88.
[163] Ibid, 88.

The 2015 Review Report also suggested that, while human rights scrutiny in law-making has had a positive impact on human rights considerations in new legislation, the process could be improved. The Scrutiny of Acts and Regulations Committee of the Victorian Parliament has short timeframes to consider and prepare reports on Bills, which also means that the public has limited opportunities to make submissions on the potential human rights impacts of proposed legislation.[164]

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) made a submission to the 2015 Review. VEOHRC recommended increasing the accessibility of Victorian Civil Administrative Tribunal (VCAT) and the provision of alternative dispute resolution processes[165] and that VEOHRC should have the function of conducting research into matters that would advance and promote human rights, which would in turn improve the capacity to identify and address systematic human rights issues.[166] Finally, VEOHRC proposed it ought to have the ability to initiate audits of public authority for compliance with the Victorian Charter if serious and significant issues of compliance were identified.[167]

3.2.6 Other Commentary

Submissions made to the 2015 Review suggest that Victorian Charter disputes ought to be dealt with by VCAT, which is less costly and more accessible than the Supreme Court. VCAT may be better suited in assessing the compliance of government decisions with the Victorian Charter given its merits - review jurisdiction. Additionally, the original jurisdiction of VCAT and alternative dispute resolution services provided would assist the resolution of Charter disputes.

Other commentators have suggested that the Victorian Charter should include compensatory damages along with pecuniary penalties, drawing an analogy to the regime under the *Fair Work Act 2009* (Cth).[168]

The Victorian Charter model has a number of similarities with the model recommended by the ALHR in this Submission.

In particular, ALHR supports the mechanisms that the Victorian Charter uses to protect human rights including:

- **Compatibility**: the Member of Parliament who introduces a Bill to Parliament is required to certify whether he or she views a particular Bill to be compatible with human rights.
- **Scrutiny of legislation:** the Parliamentary Scrutiny of Acts Committee must report to the Parliament about human rights issues raised by Bills.
- **Court's interpretation**: courts must interpret all laws consistently with the human rights.
- **Declaration of incompatibility**: the Supreme Court can issue a declaration of incompatibility where a law cannot be interpreted in a manner consistent with human rights, though such a declaration does not invalidate the law. The relevant Minister must provide a response to the declaration of incompatibility.

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[164] Ibid, 173.
[165] Victorian Equal Opportunity and Human Rights Commission, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 18.
[166] Ibid, 5.
[167] Ibid, 16.
[168] M Young, *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 130.

- **Public authorities:** must give proper consideration to human rights when making decisions.

However, in distinction, ALHR **recommends that Queensland adopt the ACT's stand-alone cause of action model**, rather than the Victorian Charter's 'piggy-back model' for establishing a cause of action for a breach of a human right.

3.3 UNITED KINGDOM

In the United Kingdom, human rights are protected under the *Human Rights Act 1998* (UK) ('UK HR Act').[169] The UK HR Act codified the rights contained in the *European Convention on Human Rights* ('ECHR') into part of domestic UK law, giving further effect to the rights and freedoms guaranteed in the EHCR. The UK HR Act came into force on 2 October 2000.[170]

The regime under the UK HR Act is different to human rights models discussed above in Victoria, the ACT, Canada and New Zealand to the extent that it is linked to the decisions of the European Court of Human Rights (ECtHR), which oversees the EHRC. In particular, appeals can be made by individuals in the UK to the ECtHR in Strasbourg regarding alleged breaches of the EHRC by the UK government. The ECtHR has discretion to make allowances (called a 'margin of appreciation') for European states which are party to the Convention to implement the Convention rights in the manner appropriate to their specific legal and cultural traditions.

Despite this difference, the UK HR Act provides a useful point of comparison as it uses legislation within a common law system to protect the human rights guaranteed in the Convention. As noted earlier, the 'dialogue model' in the UK HR Act (through the use of declarations of incompatibility) has influenced the human rights legislation adopted in the Australian Capital Territory and Victoria.[171]

3.3.1 ANALYSIS

ANALYSIS

The UK HR Act applies to the laws, actions and decisions made by the Crown and public authorities,[172] which is defined to include courts and tribunals, and any person whose functions are of a public nature, but does not include either House of Parliament nor a person exercising functions in connection with proceedings in Parliament.[173]

LAW MAKING BY PARLIAMENT

The Minister responsible for a Bill must make a 'statement of compatibility' before the Second Reading of the Bill.[174] This must state that:

- In the Minister's view, the Bill is compatible with human rights ("statement of compatibility"); or
- The Bill is incompatible with human rights but the government, nevertheless, wishes the Houses to proceed with the Bill.[175]

[169] *Human Rights Act 1998* (UK).
[170] Ibid, s 22.
[171] *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Victoria).
[172] *Human Rights Act 1998* (UK) s 22.
[173] Ibid, s 6.
[174] Ibid, s 19(1).
[175] Ibid.

This process has improved transparency and parliamentary accountability. In 2001, after the introduction of the UK HR Act, a Parliamentary Joint Committee on Human Rights ('Joint Committee') was appointed from both the House of Commons and House of Lords to scrutinise draft legislation and consider its compatibility with human rights. The function of the Joint Committee includes the scrutiny of Bills and legislative instruments that come before either House of Parliament for compatibility with human rights. The Joint Committee also looks into government responses to human rights judgements.[176] The establishment of the Joint Committee ensures transparency in government decision-making and hinders unlawful interferences with the rights protected in the UK HR Act.

JUDICIAL INTERPRETATION BY THE COURTS

Section 3 of the UK HR Act requires UK courts to interpret legislation in a manner compatible with the human rights set out in the European Convention. The UK HR Act has been drafted in a way that preserves parliamentary sovereignty. Section 4 provides that if it is impossible to interpret legislation to be compatible with Convention rights, courts may issue a declaration of incompatibility. However, a declaration of incompatibility cannot invalidate the legislation nor bind the partiers to the case the subject of the declaration. Under s 10 a government Minister has the discretion to make a 'remedial order' to remove the incompatibility by way of a resolution by each House of Parliament, however there is no legal obligation to do so. [177]

The UK Ministry of Justice's 2014 report *Responding to Human Rights Judgments* notes that since the introduction of the UK HR Act in 2000 there have been 29 declarations of incompatibility by the courts. Of those, eight were overturned on appeal, one is pending an appeal and the remaining 20 have been finalised by way of changes to legislation or by a 'remedial order'.[178]

PUBLIC AUTHORITIES

Section 6(1) of the UK HR Act requires public authorities to act consistently with human rights. It is unlawful for any public authority to act in a way that is incompatible with a right protected by the ECHR.[179] However, the prohibition does not apply where, as a result of one or more provisions of the relevant legislation, the public authority could not have acted differently, or where the legislation in question cannot be read or given effect in a way that is compatible with the rights protected in the Convention.[180]

CAUSE OF ACTION

For any breaches of rights contained in the ECHR, individuals no longer have to take their human rights cases to the ECtHR in Strasbourg. An application to Strasbourg may only be brought once all domestic remedies have been exhausted. Since the operation of the UK HR Act, human rights disputes can be resolved in UK domestic courts, which would afford individuals 'just satisfaction' for the wrong suffered.[181]

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[176] Liberty, *How the Human Rights Act Works,*< https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/how-human-rights-act-works>.

[177] Ibid, schedule 2.

[178] UK Ministry of Justice, *Responding to Human Rights Judgments: report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-2014* (2014), 32 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf>

[179] *Human Rights Act 1998* (UK) s 6(1).

[180] Ibid, s 6(2).

[181] Article 41 of the European Convention on Human Rights states that: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

Under the UK HR Act, claims that a public authority has acted incompatibly with ECHR rights may only be brought by 'victims', which is defined to be 'someone who would be a victim for the purposes of the Article 34 of the Convention if proceedings were brought in the ECtHR in respect of that act'.[182] The court may grant relief or remedy within its powers as it considers just and appropriate. The UK HR Act permits the award of damages, but only if the court held that the award is necessary to afford just satisfaction to the person, whilst taking into consideration the circumstances of the case. The court must take into account the principles applied by the ECtHR in pursuant to Article 41 of the ECHR in making determination regarding the award of damages.[183] The UK courts are mostly bound by the ECtHR jurisprudence, except in matters where they expressly consider the case law in ECtHR is wrong.[184]

RIGHTS

The ECHR is rights are mainly concerned with protecting civil and political rights as contained in the ICCPR. They include: the right to life, prohibition on torture, prohibition on slavery and forced labour, the right to liberty and security of person, the right to a fair trial, prohibition on retroactive criminalisation, the right to privacy, the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of association, the right to marriage, the right to effective remedy for violation of Convention rights, and a prohibition on discrimination. The UK HR Act also recognises certain rights in Protocols to the ECHR including the right to property, education, the right to regular, free and fair elections and the abolition of the death penalty.

3.3.2 LIMITATIONS

The UK HR Act adopts the Convention model for the limitation of rights. In the Convention, the protected rights fall into three classifications: absolute, limited or qualified. An absolute right cannot be interfered with under any circumstances. Examples of absolute rights are found in Article 3 which prohibits torture, inhuman and degrading treatment and punishment;[185] Article 4 which prohibits slavery and enforced labour;[186] and Article 7 which protects individuals from retrospective criminal penalties.[187]

Limited rights can be interfered with in specific circumstances on the balance of proportionality. The limitations on these rights are necessary to in order to achieve a balance between the protection of individuals and the public interest. For example, the right to liberty and security can be interfered on occasions of lawful arrest and detention on the basis of the authority's reasonable suspicion is weighed against national security in Article 5.[188] Qualified rights can be interfered with on three bases:

1. where the interference has its basis in law;
2. where the interference is done to secure a permissible aim set out in the relevant Article; and
3. where the interference that is essential in a democratic society, weighed against the overall interests of others.[189]

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[182] *Human Rights Act 1998* (UK), s 7(7).
[183] Ibid, s 8.
[184] *R. (Countryside Alliance) v. Her Majesty's Attorney-General* [2007] UKHL 52 (H.L).
[185] *ECHR,* Article 3.
[186] *ECHR*, Article 4.
[187] *ECHR,* Article 7.
[188] *ECHR,* Article 5.
[189] Department for Constitutional Affairs, United Kingdom Government, *A Guide to the Human Rights Act 1998*: Third Edition, (2006), 13 <https://www.justice.gov.uk/downloads/human-rights/act-studyguide.pdf>.

Examples of qualified rights include right to respect for private and family life (Article 8), religion and belief (Article 9), freedom of expression (Article 10), assembly and association (Article 11), right to peaceful enjoyment of property (Article 1) and right to education (Article 2).

3.3.3 OPERATION

INTERPRETATION PROVISION IN THE COURT

The House of Lords has held for human rights legislation, the judicial interpretative power goes beyond the ordinary power exercised by the courts. *Ghaidan v Godin-Mendoza*[190] concerns the issue of legislative interpretation in the UK HR Act. As noted earlier, s 3 of the UK HR Act provides that so far as it is possible to do so, legislation must be read and given effect in a way that is compatible with the Convention rights.

Lord Nicholls in the majority said:

> It is now generally accepted that the application of s 3 (the reading down provision) does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning … Section 3 may require the court to … depart from the intention of the Parliament which enacted the legislation … It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant.[191]

This case involved a homosexual partnership in which the deceased was the tenant of a premises, and the defendant was the deceased's partner. The claimant (lessor) brought a proceeding over the possession of the premises. The first instance judge held that the defendant did not have occupation of the premise as he was not a 'spouse', i.e. he was not cohabitating with the deceased as his wife or husband. However, the House of Lords viewed that the definition of 'spouse' treated homosexual partnerships less favourably. The court applied s 3 of the UK *HR Act* and found that although the definition of 'spouse' was unambiguous in the legislation, the human rights compatible meaning of the term would extend to homosexual relationships. The majority concluded that, for legislation to be given a rights compatible meaning, it was not a precondition that the legislation was ambiguous. This approach gives courts the power to adopt a meaning that is different from the original meaning expressly intended by the legislature. It is a more expansive approach to interpretation than that taken by the ACT courts in respect of the ACT HR Act (as discussed above).

Since the UK HR Act came into force in 2000, opinion polls have always demonstrated support for the protection of human rights in UK law.[192] Nevertheless, the UK HR Act has not 'become an iconic statement of liberty as it did in the US or with the South African Bill of Rights.'[193] The UK HR Act has been threatened with amendments or repeals over the years, and it was said to be mostly unfamiliar to the public.[194] Some had criticised the UK HR Act heavily as merely a 'transplant' of the Convention;[195] while the general public

[190] [2004] 2 AC 557 ('*Ghaidan*').
[191] Ibid, 571–572.
[192] Survey conducted by Ipsos MORI Social Research Institute for the UK Equality and Human Rights Commission: Kully Kaur-Ballagan et al, Public Perceptions of Human Rights (Equality and Human Rights Commission, 2009).
[193] M Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35(2) *Human Rights Quarterly* 386, 399.
[194] Ibid, 388.
[195] Ibid.

perceived the human rights that were protected as being too 'European,' lacking domestic applicability and failing to acknowledge UK norms.[196]

Statistics have shown that while public awareness of human rights and the UK HR Act was high, there was a low understanding of the substantive law.[197] The result of uncertainty and limited knowledge of the UK HR Act HRA was attributable to the complex language in the Convention and the lack of understanding of the Strasbourg jurisprudence.

The UK HR Act is ordinary legislation, but it is a somewhat inflexible instrument due to its deep ties with the Convention and the line of decisions in the ECtHR. For example, in a case concerning prisoners' voting rights, a UK court originally found the ban of voting right to be compatible with the Convention,[198] but later made a declaration of incompatibility after the ECtHR found it in breach of Article 3 of Protocol 1 to the Convention.[199] In *Marper,*[200] the majority of the House of Lords concluded that retention of samples and DNA profiles to be incompatible with Article 8,[201] but had later reconsidered the matter after the ECtHR found it in breach.[202] In *Countryside Alliance,*[203] the UK court considered the interpretation of Article 8 (the right to private life) to include protection to fox hunting as this reflects the tradition, life and culture of the British countryside, but since this has not become a ECtHR precedent, the court unanimously held that the scope of Article 8 does not extend to this area.[204]

3.3.4 UK Reviews

Due to the ever-changing nature of the UK HR Act (mostly due to the interplay between the ECtHR, the European Union and the Government of the day), it would be inefficient to detail every review of the UK HR Act, however, two reviews are particularly insightful to consider when implementing a best practice model of human rights legislation in Queensland.

2006 Review - Department for Constitutional Affairs

A review conducted by the Department for Constitutional Affairs in 2006 outlined the four main effects of the UK HR Act on substantive law:[205]

1. decisions of UK courts in pursuant to the UK HR Act had no significant impact on criminal law, or on the government's ability to fight crime;

2. the UK HR Act has impact upon legislation relating to counter-terrorism, but there is difficulty with decisions of the ECtHR;

3. the impact of the UK HR Act on UK law has generally been beneficial; and

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[196] Ibid, 400.
[197] MORI, A Quantitative Survey of Public Awareness and Attitudes Towards Human Rights, The HRA and its Underlying Principles (2005).
[198] *R. (Pearson) v. Secretary of State for the Home Department* [2001] EWHC Admin 239.
[199] *Hirst v. United Kingdom* (No.2) [GC], App. No. 74025/01, 2005 Eur. Ct. H.R. (2005).
[200] *R v. Chief Constable of South Yorkshire Police, ex parte Marper* [2004] UKHL 39 (H.L.) ('*Marper*').
[201] Ibid.
[202] *S and Marper v. United Kingdom* [GC], App. Nos. 30562/04, 30566/04, 2008 Eur. Ct. H.R. (2008).
[203] *R. (Countryside Alliance) v. Her Majesty's Attorney-General* [2007] UKHL 52 (H.L.).
[204] Ibid.
[205] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006) 1.

4. The UK HR Act has not significantly altered the constitutional balance between the three arms of government.

2011 REVIEW - JOINT COMMITTEE ON HUMAN RIGHTS AND THE EQUALITY AND HUMAN RIGHTS COMMISSION

In 2011, the UK Joint Committee on Human Rights and the Equality and Human Rights Commission ('the Commission') conducted reviews which indicated that while the UK HR Act had a positive impact on public service delivery and the enjoyment of human rights, there are a number of elements that undermine the effectiveness of the mechanism.[206] In particular a substantial lack of understanding of the UK HR Act including significant misconceptions as to whom the rights are guaranteed for, where the rights are derived from and the limitations of the UK HR Act's application.[207]

3.3.5 AMENDMENT

There is no prohibition on the amendment to the UK HR Act, as it is an ordinary act of parliament.

3.3.6 OTHER COMMENTARY

Shah and Poole (2009)[208] observe that since the enforcement of the UK HR Act, the House of Lords have shown to be willing to grant special leave on human rights matters. Despite the House of Lord's willingness to hear human rights matters, there has been a low win rate for human rights cases with only one-third of matters won in the House of Lords.

3.4 NEW ZEALAND

The *New Zealand Bill of Rights Act 1990* ('NZ Bill') commenced on 25 September 1990. The NZ Bills seeks to affirm, protect and promote human rights and fundamental freedoms in New Zealand as well as affirming New Zealand's commitment as a signatory of the International Covenant on Civil and Political Rights (ICCPR).[209]

The provisions of the NZ Bill apply, so far as practicable, for the benefit of all legal persons as well as the benefit of all natural persons.[210]

3.4.1 ANALYSIS

APPLICATION

The NZ Bill provides a framework for the people's relationship with the NZ Government and applies to the legislative, executive and judicial branches of Government of New Zealand and to any person or body in performance of any public function.[211] Quasi-governmental agencies including State-Owned Enterprises under the *State-Owned Enterprises Act 1986* (NZ) are also within the scope of the NZ Bill.

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[206] UK Equality and Human Rights Commission, The Case for the Human Rights Act, Part 1 of 3 Responses to the Commission on a Bill of Rights: HRA Plus Not Minus, (2010), 22. <http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/bor_full.pdf>.

[207] Ibid.

[208] S Shah and T Poole, 'The Impact of the Human Rights Act on the House of Lords' (2009 (8) LSE Law, Society and Economic Working Papers 8/2009 (Department of Law, London School of Economics and Political Science, 2009).

[209] *New Zealand Bill of Rights Act 1990* (NZ).

[210] Ibid s 28.

[211] Ibid, s 3

LAW MAKING

The NZ Bill requires that where any Bill of Parliament is introduced to the House of Representatives, the Attorney-General shall bring to the attention of the House of Representatives any provisions that appear to be inconsistent with the rights and freedoms contained in the NZ Bill.[212] However, s 4 preserves Parliamentary sovereignty by providing that no enactment shall be invalidated by reason of inconsistency to the NZ Bill and so breaches of this requirement are effectively non-justiciable.

JUDICIAL INTERPRETATION BY THE COURTS

With respect to interpretation of legislation by the courts, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZ Bill, that meaning shall be preferred to any other meaning.[213] The judiciary has read in the right to issue a declaration of incompatibility in respect of legislation into the NZ Bill following *Moonen v Film and Literature Board of Review*.[214]

However as noted above under s 4, the NZ Bill expressly prohibits courts from holding any provision of an Act to be impliedly repealed or revoked, by reason only that the provision is inconsistent with any provision of the NZ Bill.[215] Where an Act or provision within an enactment clearly contradicts the NZ Bill and cannot be given an interpretation consistent with the NZ Bill, section 4 allows for the Act or provision to override the NZ Bill.

CAUSE OF ACTION

While there are no remedial provisions under the NZ Bill, remedies for breaches of the NZ Bill have been developed by the courts which include:[216]

- exclusion of tainted evidence from a proceeding;
- issuing a stay of proceedings;
- the award of damages;
- remitting a decision to the decision maker for reconsideration;
- reducing the sentence of an offender;
- the issuing of an injunction or order requiring positive action;
- declaration that a public body has acted in contravention of the NZ Bill; and
- the issuing of formal declaration of inconsistency between NZ Bill and a particular statute.

RIGHTS

The rights and freedoms protected in the NZ Bill, reflect some of the rights and freedoms contained in the ICCPR (to which New Zealand is a party). The rights enunciated in the NZ Bill relate to:

- *life and security of the person* (ss 8 - 11), including the right not to be deprived of life, subjected to torture or cruel treatment and subjected medical or scientific experimentation. A right to refuse to undergo medical treatment is also included;
- *democratic and civil rights* (ss 12 - 18), including electoral rights, freedom of thought conscience and religion, freedom of expression, manifestation of religion and belief, freedom of peaceful assembly, association and movement;

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[212] Ibid, s 7.
[213] Ibid, s 6.
[214] [2000] 2 NZLR 9.
[215] *New Zealand Bill of Rights Act 1990* (NZ) s 4.
[216] V Thampapillai, 'A Bill of Rights for New South Wales and Australia' (The Law Society of New South Wales, Discussion Paper, January 2005), 22.

- *non-discrimination and minority rights* (ss 19 - 20) including freedom from discrimination and rights of ethnic, religious or linguistic minority; and
- *search, arrest, and detention* (ss 21 - 27) which relate to unreasonable search and seizure, liberty of the person, rights of persons arrested or detained, rights of persons charged, the minimum standards of criminal procedure, retroactive penalties and double jeopardy, and the right to justice.

Section 28 of the NZ Bill provides that just because a right is not expressly provided for, it does not mean that it does not exist or is restricted.[217] For example, the NZ Bill does not contain the right to privacy but privacy rights in New Zealand are protected by the *Privacy Act 1993* (NZ) and the tort of privacy.[218]

3.4.2 LIMITATIONS

The rights in the NZ Bill are subject to two limitations.

a) Under s 5. the rights and freedoms contained in the NZ Bill may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[219] This 'reasonable limits' clause can also be found in the Victorian Charter (s 7(1)), the ACT HR Act (s 28(1)) and the Canadian Charter (s 1).

b) Additionally, under s 4, the NZ Bill expressly prohibits courts from holding any provision of an Act to be impliedly repealed or revoked, by reason only that the provision is inconsistent with any provision of the NZ Bill.[220] Where an Act or provision within an enactment clearly contradicts the NZ Bill and cannot be given an interpretation consistent with the NZ Bill, it overrides the NZ Bill.

3.4.3 OPERATION

We refer the Committee to Professor Andrew Geddis of the University of Otago's excellent Submission on the NZ Bill for a more in depth analysis of the operation of NZ Bill.

3.4.4 AMENDMENT

Parliament may repeal or amend the NZ Bill through an ordinary Act of Parliament.

3.4.5 OTHER COMMENTARY

The New Zealand Ministry of Justice website has *Guidelines on the New Zealand Bill of Rights Act 1990*[221] for the public service to consider in relation to each provision of the NZ Bill. The Guidelines include an in-depth explanation of each right, 'policy triggers' for when the right might need to be considered, important considerations about the right, measures that help achieve compliance with the right and checklists to assist policy and practice makers comply with the NZ Bill.

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[217] *New Zealand Bill of Rights Act 1990* (NZ), s 28.
[218] New Zealand Government, Ministry of Justice, *New Zealand Bill of Rights Act 1990, <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/copy_of_new-zealand-bill-of-rights-act-1990>*
[219] Ibid s 5.
[220] *New Zealand Bill of Rights Act 1990* (NZ) s 4.
[221] See: <http://www.justice.govt.nz/publications/publications-archived/2004/guidelines-on-the-new-zealand-bill-of-rights-act>.

3.5 CANADA

The *Canadian Charter of Rights and Freedoms* ('Canadian Charter') was adopted as part of the Canadian Constitution Act (which 'repatriated' the Canadian Constitution from its British origins) in 1982.

The Canadian Charter effectively supersedes[222] the earlier, less effective *Canadian Bill of Rights* enacted in 1960 as an Act of Canadian Parliament. The *Bill of Rights* only applied to federal laws and actions, contained a narrower range of rights and could be amended by a majority in Parliament. The Canadian Charter, although constitutionally entrenched, is however subject to 'reasonable limits' and 'overrides' clauses as discussed below.

RIGHTS

The focus of the Canadian Charter is upon civil and political rights As contained in the ICCPR (to which Canada is a contracting party). The rights are grouped as follows:

- *Fundamental freedoms* (s 2), including freedom of conscience and religion, expression, peaceful assembly and association that are guaranteed to everyone in Canada.
- *Democratic Rights* (ss 3-5), including the right to vote (for Canadian citizens only) and maximum Parliamentary terms.
- *Mobility Rights* (s 6), including free movement and residence within Canada and the right to leave Canada (subject to extradition laws) for Canadian citizens.
- *Legal Rights* (ss 7-14) including the right to: liberty and security; not to be arbitrarily detailed or imprisoned; a range of rights on arrest or detention; procedural fairness rules if charged with an offence; not to be subjected to cruel or unusual treatment or punishment; not to give self-incriminating evidence in a proceeding. These rights are guaranteed for everyone in Canada.
- *Equality Rights* (s 15) including the right to equality before the law without discrimination based on race, origin, colour, religion, sex, age or mental or physical disability for everyone in Canada. However, the government may enact laws that ameliorate the hurdles faced by disadvantaged groups.

There are also *language rights* (ss 16-23) that guarantee the observance of the two official languages in Canada (English and French), in educational and official settings. The rights guaranteed by the Canadian Charter are not to be construed as denying other rights that exist in Canada,[223] including those enjoyed by Canada's indigenous people.[224] The Canadian Charter is interpreted in a manner that is consistent with the preservation of Canada's multicultural heritage,[225] and does not impact the operation of religious schools.[226] Canada also has a *Human Rights Act* (originally enacted in 1977 but now known as the '1985 Act') which seeks to protect individuals from discrimination in employment and in the provisions of goods, services and accommodation from the federal government (or from federally regulated companies such as banks, broadcasters and telecommunication companies).[227] The Canadian Human Rights Commission administers the

[222] The Bill of Rights has not been repealed, *per se*, but is not in use and has been superseded in effect by the Canadian Charter.
[223] *Canadian Charter of Rights and Freedoms* (Canada), s 26.
[224] Ibid, s 25.
[225] Ibid, s 27.
[226] Ibid, s 29.
[227] *Canadian Human Rights Act* (1985), ss 6-7 (Canada); Canadian Human Rights Commission, *How are human rights protected in Canada?,* (2013) <http://www.chrc-ccdp.gc.ca/eng/content/how-are-human-rights-protected-canada>

Human Rights Act and investigates and conciliates complaints about discrimination brought by individuals.[228] Some complaints that have merit are referred to the Canadian Human Rights Tribunal.[229] The Tribunal may order that a discriminatory practice cease or award compensation.[230] Similar human rights legislation operate in the provinces.[231]

The Provinces have also enacted HR Acts (some of which are called 'Charters' but are ordinary statutes) which are enforced by provincial human rights commissions, apply to both the public and private sectors, and deal with equal access to employment, housing and public services like education and health care.[232]

3.5.1 ANALYSIS

APPLICATION

The Canadian Charter covers a range of human rights that apply to 'all matters within the authority' of federal and state (i.e., 'provincial') Parliaments,[233] but does not cover social and economic human rights and does not apply to private activities including businesses and individuals.[234] The Canadian Supreme Court has developed an 'effective control test' to establish whether an agency or institution is under control of government in terms of its operations, policy-making and funding.[235]

LAW MAKING AND JUDICIAL INTERPRETATION

Canadian legislation must be compatible with the Canadian Constitution and, therefore, the rights guaranteed in the Canadian Charter. However, the Canadian Charter does not impose any specific requirements on the law making process[236] (such as statements of compatibility).

3.5.2 LIMITATIONS

The rights and freedoms in the Canadian Charter are not absolute and are subject to two robust limitations.

THE REASONABLE LIMITS CLAUSE

Where a violation by the government of a right guaranteed by the Canadian Charter is established, the court must consider whether the violation has been 'saved' by s 1, which provides that the Charter rights are

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[228] Canadian Human Rights Commission, *How are human rights protected in Canada?,* (2013).
[229] *Canadian Human Rights Act* (1985), ss 43-48.
[230] Ibid, s 53.
[231] Canadian Human Rights Commission, *How are human rights protected in Canada?,* (2013).
[232] New Brunswick Human Rights Commission, "30th anniversary of the Canadian Charter of Rights and Freedoms" 12 April 2012, Media Release, available at <http://www2.gnb.ca/content/gnb/en/news/news_release.2012.04.0297.html>, accessed 29 March 2016.
[233] *Canadian Charter of Rights and Freedoms* (Canada), s 32.
[234] Government of Canada, 'Section 32-33: Application of Charter', *Canadian Heritage,* (2014) <http://www.pch.gc.ca/eng/1355344632007/1355344738223#a33>.
[235] *McKinney v University of Guelph* [1990] 3SCR 229 see G Garton, 'Section 32(1)- Application of Charter,' *The Canadian Charter of Rights Decisions Digest,* (Justice Canada: 2005).
[236] There is a requirement under the Department of Justice Act for the Minister of Justice to examine all proposed legislation for violations of the Charter and report to the House of Commons. However, this has not occurred in practice. Kelly and Hennigar (2012) points out why. First, the Minister of Justice (a role fused with the Attorney General) is bound by the principle of cabinet solidarity and second, because such assessments relate to the 'reasonable limits' test (see below) which is a political judgment. They argue that the 'Minister of Justice's reporting duty is broken.' See JB Kelly and MA Hennigar, 'The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights' (2012) 10(1) International Journal of Constitutional Law 35, 38 and 51.

subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' A similar 'reasonable limits' clause can be found in Victorian, South African, New Zealand and ACT human rights legislation.[237]

A two–limbed test has been developed in Canada to decide whether a violation of a human right in the Canadian Charter is saved by s 1.[238] The first limb considers whether the government's objective is of sufficient importance to warrant the charter violation.[239] The second limb considers whether the method used to achieve the government's objective is reasonable, proportionate and impairs the right only to the extent necessary ('the minimal impairment test').[240] This test is similar to the legislated tests set out in the 'reasonable limits' clauses in the Victorian Charter and the ACT HR Act.

Where legislation has not been saved by s 1, it is usually due to failing the minimal impairment test.[241] Debeljak (2005) observes: 'reliance on the minimum impairment test facilitates dialogue. If, according to the judiciary, the impugned legislation was not the least rights-restrictive means of achieving the otherwise legitimate objective, the executive and legislature have room to manoeuvre.'[242]

THE OVERRIDE CLAUSE

Section 33 allows federal and provincial governments to expressly declare that a law that violates some (but not all) rights[243] in the Canadian Charter is exempt from the application of the Canadian Charter for five years. This exemption can be renewed after 5 years.[244]

Section 33 is designed, it is argued, to ensure that the democratically elected legislatures can maintain primacy over important public policy issues.[245] Section 33 can be used to override the fundamental freedoms, the legal rights and equality rights outlined above, but not the democratic rights, mobility rights or language rights. Thus, if legislation violates the Canadian Charter, the Parliament may (in many cases) still assert its legislative objectives, but must do so in a transparent manner.[246] This section is reflected in the Victorian Charter's s 31 'override declaration' provision.

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[237] J Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422, fn 61; see Charter of Human Rights and Responsibilities Act 2006 (Vic), s 7(1), Human Rights Act 2004 (ACT), s 28.

[238] *R v Oakes* [1986] 1 SCR 103, 137-8.

[239] Ibid.

[240] Ibid.

[241] J Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' [2002] 26 *Melbourne University Law Review* 285, 315.

[242] Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Right s and Responsibilities: Drawing the line between judicial interpretation and judicial-law making' (2007) 33(1) *Monash University Law Review* 1, 20.

[243] Those rights are the fundamental freedoms, the legal rights, and equality rights.

[244] *Canadian Charter of Rights and Freedoms (Canada)*, s 33(4).

[245] Government of Canada, 'Section 32-33: Application of Charter' *Canadian Heritage,* (2014) <http://www.pch.gc.ca/eng/1355344632007/1355344738223#a33>

[246] J Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Right s and Responsibilities: Drawing the line between judicial interpretation and judicial-law making' (2007) 33(1) *Monash University Law Review* 1, 24.

The override clause has not yet been used by federal Parliament and only in rare instances by provincial legislatures, usually when enacting legislation rather than in response to a ruling.[247] Quebec controversially used the override clause in 1988 regarding a law that required all signs to be in French. Commentators argue that, since then, use of the override clause has been considered politically difficult.[248]

Debeljak (2002) observes:

> '(n)o arm of government should have exclusive power to interpret the limits of liberal constitutional rights. Both the legislature and the judiciary have a legitimate role to play, as ss 1 and 33 reveal. These sections act as a brake on the excessive or unreasonably exercise of power of the legislature (s 1) and the judiciary (s 33).'[249]

The override provision found in s 31 of the Victorian Charter is modelled on s 33 of the Canadian Charter.[250]

CAUSE OF ACTION

Under the Canadian Charter any persons (including corporations)[251] whose constitutionally enshrined human rights have been infringed may apply to a competent court to obtain a remedy that the court considers 'appropriate and just in the circumstances' (s 24(1)).[252] Canadian constitutional law allows public interest standing for Charter disputes, where there is: a justiciable matter, a serious issue at stake and no other avenue to contest the legality of the government's action.[253]

Where a provincial or federal court finds that a law violates the Canadian Charter (and the violation is not saved by the 'reasonable limits' clause discussed below), the court may rule that the law or part of the law, is invalid and has no force.[254] This approach can be contrasted with the Victorian and ACT approach where a court may issue a declaration of incompatibility in relation to laws that violate human rights, but such a declaration does not invalidate those laws.

Challenges can also be brought against government action that violates the rights in the Canadian Charter. The

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[247] Government of Canada, 'Section 32-33: Application of Charter' *Canadian Heritage,* (2014) <http://www.pch.gc.ca/eng/1355344632007/1355344738223#a33>; Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422, fn 111.

[248] S. Choudhry and C. Hunter "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v NAPE" (2003) 48 *McGill Law Journal* 525, 535.

[249] J Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' [2002] 26 *Melbourne University Law Review* 285, 323.

[250] J Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422, fn 61.

[251] Big M Drug Mart Ltd, [1985] 1 S.C.R. 342, [37]. See also G Mitchell, The Supreme Court of Canada on S. 24(2) of the Charter, (CanLII, 2015) < http://www.canlii.org/en/commentary/charter24/paper.html#_ftn18>

[252] Canadian Charter of Rights and Freedoms, s 24; see also The Constitution Act (1982), s 52(1) (which the Canadian Charter is an annexure to) for challenging laws (rather than government acts) that violate the Canadian Charter. See discussion in K Roach, 'Enforcement of the Charter – subsections 24(1) and 52(1)' (2013) 62 Supreme Court Law Review 473, 490-491.

[253] *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607 noted in Oxford Pro Bono Publico, *Submission to the National Human Rights Consultation Committee* (2009), fn 171.

[254] *Canadian Constitution Act* (1982), s 52(1); K Roach, 'Enforcement of the Charter – subsections 24(1) and 52(1)' (2013) 62 *Supreme Court Law Review* 473, 500.

Canadian Supreme Court (akin to the Australian High Court) has held that the Canadian Charter allows courts discretion to 'create innovative and novel remedies' under s 24(1) in response to violations of Charter rights.[255] Remedies awarded by Canadian courts to rectify government violations of Canadian Charter rights include: declarations; mandatory injunctions; costs;[256] and damages to compensate for loss arising from a violation and, to a lesser extent, to vindicate rights or to deter future breaches.[257] For example, in a 2010 case, $5,000 in damages was awarded for an unconstitutional strip search to vindicate Charter restraints on intrusive powers and to deter future violations. Damages were not considered appropriate for a short-term (but unconstitutional) detention of the applicant's car. A declaration of a violation of the Canadian Charter was issued.[258]

Remedies can also be awarded to prevent the anticipated breach of a right, if there is a risk of irreparable harm[259]. Such remedies include interlocutory injunctions and stays of legislation pending a trial.[260] In criminal matters, anticipatory remedies have included the exclusion of evidence, or stays of proceedings where a court considers an unfair trial will occur unless the accused has legal representation.[261]

3.5.3 Operation

Commentators have observed that the Canadian Charter has developed 'an enhanced culture of liberty' through improved recognition of human rights at judicial and legislative levels, and increased public discourse around human rights.[262] A large-scale survey in 1988 found that the 'substantive majority' of Canadians agreed the Canadian Charter 'was a good thing for Canada.'[263] Between 1982 and 1997, 66 decisions struck down legislation for violating Canadian Charter rights.[264] Eighty (80%) percent of those decisions were followed by a legislative response, usually by way of a 'minor change' to the relevant law, which 'did not forfeit the objective of the legislation.'[265] These figures suggest that the Canadian Charter tends to facilitate the reconciliation of the Charter's values with wider social and economic policies, rather than acting as a hurdle to the fulfilment of the wishes of the elected majority.[266] Between 1997 and 2007, 23 decisions held a law to be invalid for breaching the Canadian Charter.[267] Of those decisions, 61% elicited a legislative response (usually a new law), but none amounted to new legislation 'overruling' the relevant decision in a manner similar to the s 33 'override' clause.[268]

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[255] K Roach, 'Enforcement of the Charter – subsections 24(1) and 52(1)' (2013) 62 *Supreme Court Law Review* 473, 511 referencing *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63.
[256] Ibid, 514-518.
[257] Ibid, 511-512 referencing *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, [47].
[258] Ibid, 511 referencing *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27.
[259] Ibid, 487-489.
[260] Ibid, 487-489.
[261] Ibid, 521-522 and 526.
[262] Legislative Assembly of Queensland, Should Australia adopt a bill of rights? (1998), 51 referencing R Penner, 'The Canadian experience with the Charter of Rights: Are there lessons for the United Kingdom?' (1996) Public Law, 104, 114-115.
[263] G Williams, 'Legislating for a Bill of Rights' *Department of the Senate Occasional Lecture Series at Parliament House 17 March 2000 (2000).*
[264] Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the line between judicial interpretation and judicial-law making' (2007) 33(1) *Monash University Law Review* 1, 17-18.
[265] Ibid, 17-18.
[266] Ibid, 18.
[267] PW Hogg, AA Bushell Thornton &WK Wright, 'Charter Dialogue Revisited-Or 'Much Ado About Metaphors"' (2007) 45 *Osgoode Hall Law Journal* 1, 51-52.
[268] Ibid, 51-52.

Some examples of areas where the Canadian Charter has had positive and significant impact include:

- Increasing legal safeguards and accountability around policing. For example, in 2012 the Supreme Court regarded a law allowing police to tap telephones without a warrant as violating the Canadian Charter rights to be free of unreasonable search and seizure, due to the lack of oversight and accountability measures in the law. The Supreme Court asked that the legislation be rewritten with suitable accountability safeguards.[269]

- Recognition of the rights of the LGBT community through the right to non-discrimination under the law.[270] Gay marriage was recognised as constitutional by the Supreme Court in 2005[271] following a range of provincial court decisions to that effect on the basis that the traditional definition of marriage violated the equality clause under the Canadian Charter.

- Safeguarding Aboriginal rights. In 1990, the Supreme Court held that the Canadian Charter's recognition of Aboriginal rights in s 35(1) imposes a duty on the government to consult Aboriginal peoples where resource developments or other action (such fishing regulations) restrict or infringe on the exercise of recognised Aboriginal rights.[272]

- Ensuring equality of health rights. In 1997 the Supreme Court held that sign language and interpreters may be required to guarantee equal access to health services for those with hearing impairment.[273]

- Correctional centre conditions, which have been the subject of legal challenges in relation to natural justice issues and the prohibition on cruel and unusual treatment.[274]

3.5.4 Amendment

As the Canadian Charter is part of the Canadian Constitution, it is difficult to amend. Changes to the Canadian Charter require the support of federal Parliament and seven of the ten provincial legislatures, whose population must comprise at least half of Canada's total population.[275]

3.5.5 Other reviews and Commentary

The 2000 Canadian Human Rights Act Review was a comprehensive review that examined the *Human Rights Act* (1985). The Review examined ways in which the legislation could combat systematic discrimination in Canada[276] and included tools to help improve the protection of human rights. One area that was emphasised was improving access to justice, largely through reforms of the complaints system.[277] The process for making a complaint was lengthy, with the Tribunal taking an average of a year to dispose of a complaint, and a decision taking an average of 5 months after hearings.[278] It was recommended that mediation and improved access to advocates and tribunals be emphasised and that time limits be introduced to reduce the process time for

[269] *R v Tse* [2012] 1 SCR 531.
[270] *Vriend v Alberta* [1998] 1 S.C.R. 493. See also D Clement, W Silver, D Trottier 'The Evolution of Human Rights in Canada' (Canadian Human Rights Commission, 2012) 40.
[271] *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698.
[272] *R v. Sparrow,* Supreme Court of Canada, [1990] 1 SCR 1075 . See discussion in D Inman, St Smis and D Cambou, 'We Will Remain Idle No More": The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples' (2013) 1 *Goettingen Journal of International Law* 251, 260.
[273] *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.
[274] See for example *Trang v Alberta (Edmonton Remand Centre),* 2010 ABQB 6.
[275] Government of Canada, *An Overview of the Canadian Charter of Rights and Freedoms* (2013).
[276] Canadian Human Rights Act Review Panel, Canadian Human Rights Act Review (2000), 13.
[277] Ibid, 46.
[278] Ibid, 47.

complaints.[279] The need for improved access to the dispute resolution process was emphasised by the panel as being necessary to comply with the requirement of the *International Covenant on Civil and Political Rights* to provide an 'effective remedy'[280] for human rights violations.[281]

3.6 OTHER AUSTRALIAN JURISDICTIONS OR RELEVANT COMMENTARY

3.6.1 Reviews & Submissions from States without Human Rights Acts

2007 Australian Human Rights and Equal Opportunity Commission Submission to the WA Parliament

In 2007, the Australian Human Rights and Equal Opportunity Commission ('AHREOC') lodged a Submission with the Western Australian Parliament's inquiry into whether a Human Rights Act would be appropriate for Western Australia.[282] AHREOC submitted that a Human Rights Act could significantly improve human rights protection in WA by:

- creating a dialogue between the three arms of government;
- fostering a culture of human rights in the law and policy making process and in the broader state community;
- creating a greater level of public transparency and debate about the role of Parliament in protecting human rights; and
- by preserving parliamentary sovereignty by making sure that Parliament has the 'last say' about whether legislation complies with a Human Rights Act.

AHREOC made a wide range of recommendations, many of which align with the recommendations made by ALHR in this Submission. In particular, AHREOC recommended that the WA adopt a Human Rights Act as an ordinary act of Parliament, based upon the dialogue model, similar to Victoria, the ACT, New Zealand and the United Kingdom. This would preserve parliamentary sovereignty and make the legislation adaptable to changes while still requiring parliamentary committee scrutiny. Furthermore, it was recommended that the WA Human Rights Act should have a preamble modelled on the Victorian Charter that sets out in plain language the community values underpinning the Victorian Charter. AHREOC also submitted that the WA Human Rights Act should:

- protect economic, social and cultural rights and, civil and political rights. AHREOC argued that these rights are indivisible and interdependent. Adjudicating on economic, social and cultural rights may be practically difficult due to the inherent links with political and economic rights. At least initially, the WA Human Rights Act should focus on civil and political rights. However, concern should also be had to economic, social and cultural rights to the extent that Parliament should consider the impact of new laws and policies on these rights in its pre-legislative process but limit the functions of the Courts to matters concerning civil and political rights;

- require compatibility statements when Bills are introduced in Parliament identifying whether a Bill is compatible with human rights, and if it is not, the nature and extent of the incompatibility and

[279] Ibid, 47.
[280] ICCPR, Part II, Article 2.
[281] Canadian Human Rights Act Review Panel, Canadian Human Rights Act Review (2000), 50.
[282] Australian Human Rights and Equal Opportunity Commission, *Submission on the Human Rights for WA Discussion Paper and Draft Human Rights Bill 2007,* (2007).

reasons for the adoption of the Bill despite the incompatibility. Failure to present a statement would not invalidate the legislation, but such legislation should be subject to a two-year sunset clause;

- establish a parliamentary committee on human rights;
- allow courts to consider relevant international jurisprudence when interpreting human rights;
- contain a broad provision modelled on clause 32 of the Victorian Charter, holding that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights';
- allow a superior court to declare certain laws to be incompatible with the WA Human Rights Act but not the power to strike down incompatible legislation. Following such a declaration, the Minister responsible must table a written response within six months;
- create a freestanding action for legal remedies for victims or potential victims of an act or decision by a public authority which is unlawful under the WA Human Rights Act; and
- allow for relief that the court considers 'just and appropriate' (as per s8(1) of the UK HR Act). Appropriate remedies would include declarations that the authority has acted unlawfully, injunctions preventing the giving effect to an unlawful decision, orders setting aside the unlawful decision, appropriate compensation and reparation, and other remedies as considered just and appropriate.

2006 HUMAN RIGHTS LAW RESOURCE CENTRE SUBMISSION TO THE TASMANIAN LAW REFORM INSTITUTE

In 2006, the Human Rights Law Resource Centre lodged a Submission with the Tasmanian Law Reform Institute ('2006 Submission') which was undertaking a similar inquiry into whether a Human Rights Act would be appropriate for Tasmania.[283] The 2006 Submission argued that human rights legislation:

- has a significant impact on public sector culture, improving the way government interfaces with the community;
- has proven effective in dissuading governments from unreasonably curtailing human rights;
- establishes mechanisms for parliament to become aware of ways in which human rights may have been overlooked or inadvertently breached;
- instils a broad understanding of the effects of government actions upon the rights of individuals through education rather than coercion, and
- will not necessarily create a torrent of litigation.

The Human Rights Law Resource Centre submitted that while some rights are protected through specific legislation, a comprehensive statement of human rights is necessary to prevent the breach of any person's individual rights from slipping through the gaps. The 2006 Submission recommended that Tasmania adopt a

[283] Human Rights Law Resource Centre, Submission to the Tasmanian Law Reform Institute: Respecting, Protecting and Fulfilling Human Rights in Tasmania, (2006) <http://hrlc.org.au/files/D4XTTTZGU9/Final%20Submission.pdf>.

Charter of Human Rights in legislative form using a model similar to that recommended by the ALHR in this Submission (and also to that suggested by the AHREOC's 2006 Submission to the WA Parliament discussed above), including that the Tasmanian Charter should:

- protect the civil and political and economic and social rights in the ICCPR and ICESCR;
- protect the human rights of individuals, not corporations;
- use the dialogue model;
- require compatibility statements accompany Bills introduced to Parliament;
- require scrutiny of Bills by an independent Parliamentary committee for human rights incompatibility;
- require that all legislation should be interpreted and applied, and if necessary read down, in a manner compatible with the rights;
- allow the Supreme Court to make Declarations of Incompatibility about legislation that cannot be interpreted in a manner compatible with human rights;
- require the Minister responsible to respond to any Declarations of Incompatibility within 6 months;
- allow the courts to refer to international and comparative jurisprudence when interpreting rights;
- require public authorities to act in a manner that is compatible with human rights, and give proper consideration to the rights when making decisions;
- provide for remedies including declaration, injunctions, damages, compensation and reparations and any other remedies considered just, appropriate and equitable; and
- be reviewed at regular intervals.

The Human Rights Law Resource Centre's 2006 Submission also suggested that the Tasmanian Charter should provide that certain rights are absolute and not subject to derogation, restriction or limitation and that absolute rights should include (without limitation): the right to life, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, the right to freedom from slavery or forced labour, the right not to be imprisoned for a contractual debt, freedom from retrospective criminal punishment, the right to recognition as a person before the law, freedom of thought, conscience and religion, the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, the prohibition of taking hostages, abductions or unacknowledged detention, the prohibition against incitement to discrimination, hostility or violence, and the obligation to provide access to effective remedies for breaches.

Furthermore, the Human Rights Law Resource Centre submitted that if the Tasmanian Charter allowed for limitations on human rights, the limitations must meet a range of criteria including: being compatible with the objects and purposes of the Charter, provided for by law, not arbitrary or unreasonable, compatible with the right to non-discrimination, necessary and demonstrably justifiable, requiring that it is based on one of the

grounds which permit limitations, e.g. public order, public health, public morals, national security, etc., responds to a pressing need, pursues a legitimate aim, is proportionate and reasonable adapted to its aim, and is the least restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Finally the Human Rights Law Resource Centre submitted that a Commission should be created with broad powers to conciliate and handle Charter-related complaints and claims. A complaints procedure should be implemented to respond to allegations of breaches of economic and social rights. Standing should be broad and include any person or organisation directly aggrieved, or with a special interest, or intervening in the public interest or acting for or on behalf of an individual or group that is unable to bring proceedings on their own behalf. Adequate resources should be provided to relevant commissions, the Tasmanian Legal Aid Commission, community legal centres and other human rights and community organisations.

2001 STANDING COMMITTEE OF LAW AND JUSTICE, NSW

It is interesting to note that the Chair of the 2001 Inquiry which recommended that NSW have a 'committee to scrutinise bills' rather than a Bill of Rights[284] has himself come round to the view that an Australian HR Act is now desirable.[285] Chief Justice Bathurst[286] has also expressed doubt upon whether the power scrutiny committees wield in theory in NSW 'translates into practical boundaries being placed on the legislative encroachment of rights.'[287]

3.7 A SERIES OF CASE STUDIES FROM THE UK EXPERIENCE

In their publication "*The Human Rights Act – Changing Lives"*, the British Institute of Human Rights identified five key conclusions resulting from the implementation of the UK human rights legislation. Firstly, that that the language and ideas of human rights have a dynamic life beyond the courtroom. While human rights have traditionally been considered to belong to a strictly legal context, the legislation has promoted human rights as a part of everyday life. Secondly, that human rights have a wide application to persons of varied backgrounds and experiences. Thirdly, that the legislation supplements and extends the scope of existing anti-discrimination legislation to include fairness of treatment, dignity and respect. Human rights recognizes that not all forms of ill-treatment may be considered discriminatory, regardless of the harm they cause. Fourthly, human rights provide a framework for balancing competing rights and interests. Lastly, the legislation encourages and drives an emerging cultural change surrounding human rights and empowering individuals.

Specific case studies illustrating significant benefits from the UK HR Act experience include:

- With respect to challenging discrimination, a mental health hospital in the UK had the practice of sectioning off asylum seekers who spoke little or no English without the assistance of an interpreter. After participating in a BIHR session, the discourse of human rights successfully challenged this practice on the

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[284] Standing Committee of Law and Justice, NSW Parliament, *A NSW Bill of Rights*, 2001, available at <https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf>

[285] Ron Dyer, "Should Australia have a Bill of Rights?" Evatt Foundation Website, available at <http://evatt.org.au/papers/should-australia-have-bill-rights.html>, accessed 4 April 2016.

[286] His Honour Chief Justice Tom Bathurst, "The Nature of the Profession: the State of the Law," Opening of Law Term Address, 4 Feb 2016, available at: <http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_speech.pdf> and see Appendix at <http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_Appendix.pdf> accessed 4 April 2016.

[287] Ibid, par 22 and ff.

bases of the right to equality, the right not to be discriminated against on the basis of language, and the right to liberty. [288]

- Human rights language was also used to secure accommodation for a woman and her children who had experienced domestic violence. She had previously been denied accommodation but this changed after it had been explained to the public authority that under the Act the authority had an overriding obligation to protect her right to not be treated in an inhuman and degrading way and her right to family life.[289]

- The right to family life was also used to revised a decision made by a local authority to separate a couple married for 65 years due to differing medical needs[290] and also in the case of a woman fleeing domestic violence who was threatened with her children being placed into foster care.[291]

- The right to respect for a private life was used to stop early morning raids at an accommodation for newly arrived asylum seekers which took place without interpreters. Advocates argued that there were alternative, more dignified, ways to verify the identities of those staying at the facility.

- Human rights legislation was also used to challenge blanket policies such as eviction in the context of an asylum seeker who was threatened with eviction whilst giving birth. The advocate was successful in getting the NASS to reconsider their decision to give time for the organisation to apply for a 'hard case support' under the *Immigration and Asylum Act* 1999. Their application was successful and alternative accommodation was secured.

4. THE COSTS AND BENEFITS OF ADOPTING A HR ACT INCLUDING FINANCIAL, LEGAL, SOCIAL AND OTHERWISE

TERM OF REFERENCE 2(C)

If a HR Act is adopted and properly enforced so that its aim of harm reduction and protection of Queenslanders' human rights is fully carried into effect, there will be enormous direct and indirect benefits to Queensland society.

Not only will Queenslanders have the benefit of having a mechanism by which their human rights can be enforced; the introduction of a HR Act will educate society, set higher standards, and enhance democracy in Queensland by encouraging a more inclusive, rights-based society.

Legislation does not have to involve costly court cases in order to achieve a beneficial social effect, because of its normative and educative roles, as the experience with the HR Act in the UK has shown. The experience there has been that, without there being a large number of court cases, "local authorities reviewed their policies to make sure they treat the vulnerable with dignity and respect and users of a wide range of public services have used the UK Act as a tool to argue for better and fairer services."[292]

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[288] L Matthews, S Sceats, S Hosali and J Candler, 'The Human Rights Act – Changing Lives' (2008) British Institute of Human Rights 8 <https://www.bihr.org.uk/changing-lives>.
[289] Ibid, 11.
[290] Ibid, 14.
[291] Ibid, 15.
[292] "Human Rights Act Mythbuster", Liberty website at https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster Accessed 3 April 2016.

Only legislation can change the perception in the community that people have the right to behave a particular way.[293] Legislation provides moral support to those people whose natural instincts are against the particular harm proscribed by the law.[294] One is on much stronger ground when one can say that a particular behaviour is not acceptable *because it is illegal*. The process of defining something legally as unacceptable indicates that the behaviour is both unjust and *alterable*, and encourages people not to put up with that behaviour. Legislation can make people stop and think about what they are going to do - which is a useful thing. While legal rights themselves may be hard to enforce, the process of establishing that one has a right not to be treated in a certain way has, for example in the context of sexual discrimination, changed many people's view of the conduct from "It's only natural" to "That's unacceptable."[295]

If we frame regulations that are protective; that recognise the harms of breaching human rights and take steps to remedy those harms, we are more likely to set a desirable precedent for future governments than if we refuse to redress obvious present harms. The fact that some cases may be difficult to decide does not mean that we should give up our responsibilities and refuse to draw the line.[296] As Campbell says,

> *if the populace does not retain an idea of and commitment to fundamental rights, courts are in no position to sustain the vitality and force of this essential element of democracy. Democracy was not achieved by judicial activism and is unlikely to be sustained by it. If the people and their representatives do not have a lively sense of human rights, and a strong sense of responsibility towards the values they represent, then fundamental constitutional rights, implied or otherwise, will be ineffective*.[297]

4.1 Enhanced Governance and Policy Making

Former Victorian Attorney-General and Charter champion Rob Hulls stated that the Victorian Charter has been effective in "changing the culture of government and public life so that human rights are brought from the periphery to the core".[298] As with the famous UK example of the elderly couple in the nursing home, its "real impact… has been in those small places of which Eleanor Roosevelt spoke – actions and decisions by policy makers and service providers which make a difference to individual lives". Ultimately, Hulls concludes that the Victorian Charter "has achieved a shift in the way that public institutions work, making consideration of rights an essential, rather than a luxury item, in the business of doing government."[299]

Reports in the ACT concluded that the ACT HR Act) has had a 'positive impact on political debate and consideration of policy issues by Government'.[300] Additionally, the legislation provides 'an impetus for agencies to properly consider human rights obligations and consult within and across different areas of government on the implications of their bills'.[301]

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[293] See Marjorie Henzell, *Hansard*, House of Representatives, 16 November 1994, 3420, speaking about legislation which imposes criminal sanctions in the context of the Racial Hatred Bill 1994 (Cth).

[294] HREOC (1983).

[295] Robert W. Gordon, "New Developments in Legal Theory" in David Kairys (ed) *The Politics of Law: A Progressive Critique*, Pantheon Books, New York, 1990, 413 at 423.

[296] Simon Lee, *The Cost of Free Speech,* Faber & Faber, London, 1990, 56.

[297] T D Campbell, "Democracy, Human Rights, and Positive Law" (1994) 16 *Sydney Law Review* 195, 205.

[298] C Merritt, 'Victorian pioneer Hulls calls for Queensland Charter of rights', The Australian (online), 22 May 2015 <http://www.theaustralian.com.au/business/legal-affairs/victorian-pioneer-hulls-calls-for-queensland-charter-of-rights/news-story/29729eae54f7c0a9f0b8c3e4054ee7cf>.

[299] Ibid.

[300] ACT Justice and Community Safety Directorate, *Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation (March 2012*) at 2, <http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf>.

[301] ACT Justice and Community Safety Directorate, Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation

It has been suggested that the main impact of a HR Act upon government and the judiciary is not so much to effect a shift of power as to expand the role of government policy development and to require the modification of administrative procedures. All levels of government need to be aware, through adequate training, of the scope of the rights which the HR Act protects so that those rights can be taken into account in policy development and administrative procedures can be adjusted if necessary. [302]

By conducting a parliamentary inquiry and subsequently introducing a Human Rights Act in Queensland, the current Government can demonstrate to the community that it cares about the fundamental human rights of Queensland citizens. As in other jurisdictions where a Human Rights Act has been enacted, the legislated protection of human rights in Queensland will improve government decision-making and send a strong message to the community that the democratic values of equality, fairness and justice are taken seriously by the Queensland Government.

4.2 Developing a Culture of Tolerance, Respect and Dignity

A Queensland Human Rights Act would be but one component of creating a human rights culture in Queensland. The Act would do this by creating awareness, education and encouraging discussion within the community. In his second reading speech for the Victorian Charter, Mr Hulls reflected on the power of the legislation as a 'symbolic and educative tool for future generations and new arrivals in Victoria. This will help us become a more tolerant society, one which respects diversity and the basic dignity of all.'[303]

For government, the benefits of building this culture include building a relationship with the community, identifying problem areas, improving democratic legitimacy and reinforcing other areas of policy. Public authorities can benefit the quality of service, decision-making, organisational risk, builds reputation and credibility. Not only will this significantly benefit the morale and efficiency of the public sector, it will also have significantly beneficial impacts throughout Queensland's schools and on the growing minds of tomorrow's leaders. This is supported by international experience as noted by the Equality and Human Rights Commission of the United Kingdom.[304] In their 2014 report, the Victorian Equal Opportunity and Human Rights Commission noted that:

> …after eight years of operation, the use of the Charter has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues.[305]

This has been proven to encourage action within the community.[306] Creating a dialogue surrounding issues of human rights has been an important tool for individuals to articulate their rights and achieve meaningful

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(2012), 2 <http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf>.

[302] "The Impact of the Human Rights Act: Lessons from Canada and New Zealand", University College London, 1999, p 25 ff, available at <https://www.ucl.ac.uk/spp/publications/unit-publications/37.pdf>, accessed 4 April 2016.

[303] Fmr Victorian Attorney General R Hulls, Second reading speech, Charter of Human Rights and Responsibilities Bill (May 2006) 1290. Available at <http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Feb-Jun%202006/Assembly%20Extract%204%20May%202006%20from%20Book%205.pdf>

[304] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 8.

[305] Victorian Equal Opportunity and Human Right Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 1.

[306] British Institute of Human Rights, The Human Rights Act: Changing Lives at 5.

outcomes through a process of negotiation rather than litigation.[307] Similarly, analysis of five years of operation of the NSW racial vilification legislation indicated that such legislation provided a focus for education strategies carried out by the Anti-Discrimination Board which would not have been as effective without the civil and criminal sanctions of the racial vilification provisions to back them up.[308] The HR Act can increase transparency and accountability in government by giving all Queenslanders the ability to challenge laws, policies and decisions made by public authorities that have the potential to impact their human rights. A Human Rights Act would promote a more egalitarian society, offer greater protection to the marginalised and directly address disadvantage by requiring government to consider human rights in its resource allocation decisions.[309]

4.3 PROTECTING THE RIGHTS OF DISADVANTAGED QUEENSLANDERS

A Human Rights Act would help vulnerable Queenslanders in areas such as public housing, domestic violence, treatment of the aged and access to health services.[310] . People living in remote and rural communities are disadvantaged with respect to their right to education,[311] health,[312] adequate standard of living,[313] and the right to vote. Queensland is a proud multi-cultural society unique in its wide population dispersion. Queensland has had significant population growth over recent years, with migrants playing a major role in this development. Queensland's population speaks more than 220 languages, holds more than 100 religious beliefs and has come from more than 220 countries. In 2011, 20.5% of Queenslanders were born overseas. [314]Policy can often focus on the concerns of the majority and can overlook issues faced by cultural minorities. A Human Rights Act would ensure that policy takes into account problems faced by disadvantaged Queenslanders including from those in minority groups.

This can be seen from a number of Victorian examples of how the Charter has helped disadvantaged groups:with better accessibility on public transport; a more flexible approach to tax collection for disadvantaged families; better enforcement of the right to a fair hearing; ratepayers having the opportunity to interact with the local Council and a fairer approach to evictions of disadvantaged people. [315]

DOMESTIC VIOLENCE

Victoria's plan to prevent violence against women 2010-2020 takes a human rights approach to the prevention of domestic violence through a range of initiatives aimed at empowering women and promoting leadership and equality through collective responsibility across a range of social, home and work environments.[316]

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[307] Human Rights Law Centre, Victorian Charter in Action: Case studies (2012) 9.

[308] Nancy Hennessy & Paula Smith, "Have we got it right? NSW Racial Vilification Laws Five Years On" (1994) 1 *AJHR* 249.

[309] Human Rights Law Centre, *Background Paper – A Human Rights Act for Queensland* (2016) at 7, < http://www.humanrights4qld.com.au/resources> 1.

[310] J McGinty. "A Human Rights Act for Australia" [2010] *UNDAULawRw* 2; (2010) 12 *The University of Notre Dame Australia Law Review* 1.

[311] *UN International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child ICESCR andUNCRCC.

[312] ICESCR.

[313] Ibid.

[314] Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Diversity Figures Snapshot* (2015). Available from https://www.communities.qld.gov.au/resources/multicultural/communities/diversity-figures-snapshot.pdf

[315] Human Rights Law Centre, Victoria's Charter of Human Rights and Responsibilities in Action, 2012, available at: <http://www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf>

[316] Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the

Aboriginal Affairs Victoria combines the UN *Declaration on the Rights of Indigenous Persons* and the *Charter* in developing strategies which engage community participation between communities and government.[317]

PRIVACY

A vulnerable female client who was being intimidated by a neighbour sought permission from her landlord, a public housing authority, to erect a fence around her rented property. The Submission to the public housing authority relied on, amongst other things, the client's right to privacy. Permission to erect the fence was granted.[318]

HOMELESSNESS

A Victorian example illustrates how the rights of disadvantaged persons may be protected under a HR Act. The Homeless Persons Legal Clinic successfully relied on the Charter to frame their campaign against a proposed law, which sought to criminalise sleeping in cars. They argued the bill was incompatible with the rights of homeless persons, namely the freedom of movement, right to life and right to security and liberty. [319]

INDIGENOUS AUSTRALIANS

The Victorian government has passed an Act that creates a framework for agreements to be made between state and traditional landowner groups. The Act affords traditional landowners cultural rights as protected by the Charter and to identify and maintain a spiritual relationship with the land. The Act also provides for effective resolution for native title disputes.[320]

4.4 FULFILLING AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

A Human Rights Act in Queensland would improve the current legal framework and work towards ensuring that international human rights obligations are upheld in Queensland. Australia is a party to seven of the major international human rights treaties.[321]

ICCPR and ICESCR, which Australia has signed and ratified, requires federal constituent states to operate within and comply with the human rights obligations contained in the treaties. These conventions protect a broad range of civil and political rights as well as creating obligations on government to develop a range of economic, social and cultural rights. Australia is also a party to a number of other international treaties relating to human rights. Adopting these standards into a HR Act is no longer progressive reform, but fulfilling obligations and meeting a minimum standard.

Enacting a Queensland Human Rights Act would:

Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix I.

[317] Ibid.

[318] ACT Welfare Rights and Legal Centre.

[319] PILCH Homeless Persons Legal Clinic: *Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006,* June 2011), 15.

[320] Victorian Equal Opportunity and Human Rights Commission, *Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006*, (July 2011), Appendix I.

[321] This includes: the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) 1975; *International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976; International Covenant on Civil and Political Rights (ICCPR) 1980; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1983; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1989; Convention on the Rights of the Child (CRC) 1991; and the Convention on the Rights of Persons with Disabilities 2008).*

a) improve the current legal framework and work towards ensuring that international human rights obligations are upheld in Queensland; and
b) show Queensland leading the ways in assisting Australia to properly and responsibly implement its outstanding contractual IHRL obligations.

4.5 Stronger and More Secure Economic Landscape

Implementing a strong human rights legislative framework in Queensland can lead to a stronger and more secure landscape by creating greater rights-confidence for everyday Queenslanders economy. There is a growing body of evidence to suggest that the presence of a strong human rights framework facilitates greater productivity in the economy, however, ALHR accepts that this area of inquiry requires further research.[322] It has been reported that 'countries that demonstrate a higher respect for human rights experience higher economic growth'.[323] An example of this comes with the Productivity Commission concluding that reducing disability discrimination can increase productive capacity.[324] A HR Act can apply this principle more broadly to all groups that may be impacted by barriers to gaining employment.

A human rights legislative framework with an inbuilt complaints mechanism would also reduce the need for litigation and associated costs. In the UK experience – despite criticisms that human rights legislation would open the floodgates - the the number of human rights cases that were brought after the introduction of human rights legislation reduced by 50% in comparison to before the introduction of the act.[325]

4.6 Additional Checks and Balances on Government Power

Queensland is more vulnerable to abuses of Parliamentary process than other States and Territories due to having a unicameral parliament. With a lack of an upper house to review the laws passed by the House of Representatives and to add a balance in numbers to constitute Parliamentary oversight committees, there is an increased risk of abuses of power and lack of oversight.

A HR Act would provide an additional safeguard to Queenslanders' rights and freedoms by acting as an additional check and balance on government's power. This is especially needed following the curtailing of the Crime and Misconduct Commission in Queensland and because of the effect of super majorities. In the ACT's legislature, the ACT HR Act is reported to have made 'a genuine cultural difference to the way the Assembly goes about its work.'[326]

4.7 A Beneficial Dialogue Model

ALHR is supportive of adopting a 'dialogue model' of a HR Act. A dialogue model ensures that the doctrine of Parliamentary supremacy cannot be undermined. Under the dialogue model, a HR Act would be an ordinary Act of Parliament, not one which invalidates other laws, except as achieved by ordinary principles of interpretation. A declaration of incompatibility made by the courts would not have the effect of invalidating

[322] Human Rights Law Centre, *Background Paper – A Human Rights Act for Queensland* (2016), 14, < http://www.humanrights4qld.com.au/resources>.
[323] ACT Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004*, (2014) 30.
[324] Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report (Volume 1, Report No 30) (30 April 2004) at 134-135, <http://www.pc.gov.au/inquiries/completed/disabilitydiscrimination/report/disability-discrimination.pdf>
[325] R Verkaik, 'Lawsuits on human rights halve despite European Act', *The Independent (*Online), 20 April 2009.
[326] ACT Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004*, (2014), 30.

the impugned statute that is incompatible with human rights standards. Rather, it would provide a mechanism for the Parliament to reconsider the law in the light of the human rights issues.

4.8 Enhanced Access to Justice

The introduction of a Human Rights Act in Queensland will increase access to justice for all Queenslanders. A Human Rights Act would allow for legal avenues of appeal or redress for Queenslanders who have had their rights breached, with access to a range of practical remedies.[327] A Human Rights Act would improve access to justice, especially for disadvantaged groups and Queenslanders living in rural and remote areas. This could be achieved by allowing for complaints to be heard in Queensland and also by guaranteeing procedural rights and the right to legal representation.[328]

4.9 Enhanced Legislative Interpretation

The introduction of a Human Rights Act in Queensland could increase the standard of legislative interpretation in Queensland Courts. Human rights legislation in other jurisdictions frequently require the courts to interpret legislation in a way that is compatible with the rights protected in the human rights legislation, in addition to considering international and comparative human rights jurisprudence.[329] Through the issuing of incompatibility statements, the requirement for a response from Parliament, and the courts' involvement in human right violations, the introduction of a Human Rights Act could enhance legislative interpretation and ensure that it is more aligned with fundamental rights and freedoms.

4.10 Enhanced Rights-Based Political Culture

A Human Rights Act can increase transparency and accountability in government by giving all Queenslanders the ability to challenge laws, policies and decisions made by public authorities that have the potential to impact their human rights. It would serve an important educative function and raise public awareness through education and public discussion and promote tolerance and understanding in the community. It would promote a more egalitarian society and offer greater protection to the marginalised and directly address disadvantage by requiring government to consider human rights in its resource allocation decisions.

4.11 A Rights Based Educational Culture

A Queensland Human Rights Act will have significant and enhancing impact on the education of all Queenslanders about the respect and dignity to be afforded to one another. Not only will this significantly benefit the morale and efficiency of the public sector, it will also have a significantly beneficial impacts throughout Queensland's schools and on the growing minds of tomorrows leaders.

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[327] Human Rights Law Centre, *Background Paper – A Human Rights Act for Queensland*, (2016), 8.

[328] This can be seen in both the UK and Victoria. Victorian Equal Opportunity and Human Rights Commission, *Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006* (1 July, 2011) (Case Study 17).

[329] Human Rights Law Centre, *Background Paper – A Human Rights Act for Queensland* (2016), 7.

5. RECOMMENDATIONS

TERM OF REFERENCE 3 – OBJECTIVES OF THE LEGISLATION AND RIGHTS TO BE PROTECTED, HOW THE LEGISLATION WOULD APPLY TO THE MAKING OF LAWS, COURTS AND TRIBUNALS, PUBLIC AUTHORITIES AND OTHER ENTITIES, THE IMPLICATIONS OF LAWS AND DECISIONS NOT BEING CONSISTENT WITH THE LEGISLATION, THE IMPLICATIONS OF THE LEGISLATION FOR EXISTING STATUTORY COMPLAINTS PROCESSES AND THE FUNCTIONS AND RESPONSIBILITIES UNDER THE LEGISLATION.

5.1 A DIALOGUE MODEL OF HUMAN RIGHTS

This section provides some further detail on our recommendations listed in Part 1 of this Submission.

ALHR recommends the adoption of an evolved and improved version of the 'dialogue model' of human rights legislation used in Victoria, the ACT and the UK. The 'dialogue model' has widespread support from respected legal commentators.[330] It requires all three arms of government - the executive, the parliament and the judiciary - to engage in a dialogue with each other when a proposed law or policy may be inconsistent with human rights. The 'dialogue model' encourages debate and increases awareness of human rights issues across the different arms of government and amongst the public. The mechanics of the dialogue model are discussed in detail in our studies of the human rights legislation in Victoria, the ACT and the UK in Part 3.

One of the major criticisms of the enactment of human rights legislation is the potential for the courts to become 'politicised.' Specifically, critics argue that human rights legislation could lead to situations where courts rather than Parliament decide difficult policy decisions. This, it is argued, would effectively constitute a transfer of legislative power from the parliament to the courts thereby undermining parliamentary sovereignty - one of the cornerstones of Australia's democratic system of government. Adopting the 'dialogue model' avoids this problem as it preserves the legislative supremacy of the Parliament. Under the 'dialogue model' courts have an interpretive and declaratory role. Importantly, the courts **cannot** strike down legislation that contravenes human rights. Instead the courts must refer the legislation back to Parliament. The Parliament can decide how to respond to a declaration of incompatibility.

The Honourable Justice Margaret McMurdo, President of the Queensland Court of Appeal, has previously explained the basics of this system as follows:

> It works on the understanding that the executive will operate in a manner consistent with human rights by reporting to a democratically elected parliament. Both the executive and parliament will be held accountable by the courts. The parliament, elected by the people, has the final power to pass laws, even law overriding human rights. Together with the executive, parliament scrutinises bills for human rights compliance before they become law. The judiciary interprets legislation in a manner consistent with human rights and has power to declare parliament's legislation incompatible with human rights. But a central aspect of the dialogue model is that courts do not have power to declare

[330] F Brennan, 'The Practical Outcomes of the National Human Rights Consultation' (Speech delivered at the Judicial Conference of Australia Colloquium, Circular Quay, Sydney, 12 October 2013); The Hon Justice M McMurdo, 'An Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression?' (2009) 13 *Southern Cross University Law Review* 37, 42; George Williams, 'Legislating for a Bill of Rights Now' (Speech delivered in the Department of the Senate Occasional Lecture Series at Parliament House, 17 March 2000).

> legislation invalid or inoperable. That power remains with parliament which is answerable only to the people.[331]

As the Honourable Justice McMurdo observed, 'Parliament alone would have the power to repeal impugned legislation and would continue to be answerable only to the electors.'[332] Under the dialogue model courts cannot force the Parliament to change or enact laws to ensure they are compatible with human rights. This remains the Parliament's prerogative.

5.2 Objectives & Purpose

ALHR has recommended that the purpose of a Queensland Human Rights Act should be fundamentally to protect people from prejudice and to raise the bar of respect and dignity for those disadvantaged in society, by outlining, promoting and protecting these basic rights, freedoms and responsibilities for all people in Queensland. As demonstrated throughout this Submission the experience with human rights legislation in other jurisdictions is that it is often the most disadvantaged in society that have benefitted from having recourse to the human rights framework.

ALHR supports a Human Rights Act that enshrines civil and political rights along with social and economic rights. A cause of action under the Human Rights Act should apply equally to the breach of civil and political rights and economic, social and cultural rights. This would be reflect the indivisibility of all human rights and the position that all rights be treated equally with the same emphasis.[333] Enforceability of economic and social rights is not a novel concept, with widespread adjudication already in place across the world and, particularly, in South Africa which has created a significant amount of jurisprudence as a result of the economic, social and cultural rights protected by the South African Bill of Rights.[334]

5.3 Application

5.3.1 Functions and Responsibilities of the Government

The 'dialogue model' of human rights protection that ALHR supports for implementation in Queensland would alter the functions and responsibilities of the Government in the following way:

1. **Compatibility**: The Member of Parliament who introduces a Bill to Parliament is required to also present a Statement of Compatibility, either in the Objects Clause or in the Explanatory Notes, that addresses whether the particular Bill is compatible with human rights and to give appropriate reasoning and evidence to support this conclusion. Any limits on relevant rights must be such as are demonstrably justified in a free and democratic society.

2. **Scrutiny of legislation:** A Parliamentary Joint Standing Committee on Human Rights scrutinises new Bills introduced to Parliament for their consistency with human rights and whether any limits on human rights are justified. The Committee reports their findings on the Bill before the second reading. The Parliament may decide to pass the Bill despite its incompatibility with human rights through a mechanism similar to Victoria's 'override declaration' clause.

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[331] The Hon Justice M McMurdo, 'An Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression?' (2009) 13 *Southern Cross University Law Review* 37, 42; G Williams, 'Legislating for a Bill of Rights Now' (Speech delivered in the Department of the Senate Occasional Lecture Series at Parliament House, 17 March 2000).

[332] Ibid.

[335] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), 370-1.

[335] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), 370-1.

3. **Court's interpretation**: courts must interpret all laws consistently with the human rights enshrined in the Human Rights Act and in a manner that is also consistent with the purpose of the law. The court will then make a determination as to whether the limitations on the relevant human rights are demonstrably justified.

4. **Declaration of incompatibility**: where a law cannot be interpreted in a manner consistent with human rights, the Supreme Court can issue a declaration of incompatibility, though such a declaration does not invalidate the law. The relevant Minister must provide a response to the declaration of incompatibility and Parliament then has the opportunity to reconsider the legislation in light of what has transpired during this process. [335]

5. **Public authorities:** must give proper consideration to human rights when making decisions.

The proposed Queensland Human Rights Act should require the Queensland government and all public servants, local councils, police and any other public authority to utilise the Act as a guideline when developing policies, drafting bills, delivering services and making judicial and administrative decisions. To assist this process ALHR has recommended that all policy documents, Cabinet Submissions or departmental proposals include a Human Rights Impact Statement.

The change in processes and responsibilities of the government as described above would enhance the accountability of all arms of government, foster a culture within government which aims to preserve and protect human rights and encourage public debate and interaction between branches of government.

5.3.2. Legislative Inconsistency or Incompatibility

As noted above ALHR recommends that, as is the case in Victoria, the ACT, the UK and NZ, scrutiny mechanisms should be implemented in order to rectify laws and decisions that are inconsistent with the proposed Human Rights Act for Queensland. These mechanisms are discussed in more detail below.

ALHR recommends the proposed Queensland Human Rights Act should incorporate a process wherein all bills and amendments presented to Parliament be accompanied by a Statement of Compatibility, either in the Object Clause or in Explanatory Notes, that indicates if the legislation is compatible with the Human Rights Act and to give appropriate reasoning and evidence to support this conclusion. The *Federal Human Rights (Parliamentary Scrutiny) Act 2011* stipulates that all new Bills and disallowable legislative instruments must be accompanied by a Statement of Compatibility assessing the compatibility of the legislation with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. This model could be implemented in Queensland.

ALHR also recommends that a Parliamentary Joint Committee on Human Rights be established to scrutinise Bills introduced to Parliament for consistency with human rights. Following the Victorian model, the Parliamentary Scrutiny Committee should be required to report on when inconsistencies exist and Parliament may only declare an override of the Human Rights Act in exceptional circumstances.

The Parliamentary Joint Committee on Human Rights for Queensland could follow the federal model, in which Scrutiny of Bills and legislative instruments for compatibility with human rights is the major purpose of the Committee. The Committee is also able to inquire more thoroughly into Bills and legislative instruments including calling for Submissions, holding public hearings and calling for witnesses, when it considers this appropriate.

[335] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), 370-1.

WHAT DOES IS IT MEAN TO INTERPRET LEGISLATION IN ACCORDANCE WITH HUMAN RIGHTS?

ALHR recommends that a Queensland Human Rights Act should clearly outline the manner in which the courts should undergo the process of interpreting legislation consistently with human rights, to remove any chance of confusion or misapplication of the human rights legislation. ALHR supports the recommendation in Professor George Williams and Mr Daniel Reynolds' Submission to the Inquiry on this point.[336] The Williams/Reynolds research suggests a provision as below:

INTERPRETATION

(1) So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.

(2) For the purpose of this section, international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered.

The Williams/Reynolds provision is largely consistent with the recommendation made by Michael Young in his 2015 review on behalf of the Government of the ACT human rights legislation.[337] The benefits and technicalities of this suggestion are dealt with in the Williams/Reynolds Submission.

5.3.3 STANDALONE CAUSES OF ACTION

In order for a Queensland Human Rights Act to be effective,, it needs to be enforceable.

ALHR is of the view that a Queensland Human Rights Act must have a standalone cause of action with enforceable remedies where public authorities have breached human rights. This is the model used in the ACT and the UK. In contrast, the 'piggy back' cause of action model used by the Victorian Charter where a challenge to a breach of human rights in the courts must be joined to a non-Charter cause of action, has made the process of legally pursuing violations complex, expensive and drawn-out and requires the involvement of lawyers (as discussed above in Part 3 of this Submission). The need for a non-human rights related cause of action (in tort or otherwise) before a Human Rights Action can be "joined" is inconsistent with the nature and objectives of human rights protections. The function and form of remedies for human rights violations differ from damages or equity.[338]

ALHR recommends a stand-alone cause of action similar to that used in the ACT. The existence of a standalone cause of action will:

1. demonstrate that the Queensland Government takes its human rights obligations seriously;
2. empower individuals to assert their own rights; and
3. be a reminder to public authorities that there are consequences for breaches of human rights.

One of the main criticisms of creating a standalone cause of action under a proposed Human Rights Act is that it will lead to an overwhelming increase in litigation. While this has not been experience with the ACT's human rights legislation (nor with the UK, as mentioned above), ALHR agrees with the approach of the Australian Human Rights Commission in their Submission to the National Human Rights Consultation in 2009 in response to this concern. That is, that a properly funded, accessible and affordable alternative dispute resolution

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[336] Ibid.

[337] M B Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, (Victorian Department of Justice and Regulation, 2015), 148.

[338] Oxford Pro Bono Publico, *Submission to the National Human Rights Consultation, (* June 2009),[8.3]. See also: *Taunoa v Attorney-General* [2008] 1 NZLR 429 (NZSC) [259] and *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), [55].

process would reduce the impact of a Human Rights Act on the judicial system.[339] See further, 'Impacts on Existing Statutory Complaints Processes' below.

5.3.4 Remedies

Breaches of human rights under the Queensland Human Rights Act should give rise to enforceable remedies. Therefore, the Queensland Human Rights Act needs to empower the court to be able to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring positive action (such as redressing loss or damaged suffered by the aggrieved), injunction and damages. These remedies are consistent with the powers of the courts when hearing federal discrimination claims under the *Race Discrimination Act 1975*, the *Sex Discrimination Act 1974*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004.*[340] Further, effective remedies are essential to comply with Australia's obligations under core international human rights instruments and would add additional legitimacy to Queensland's Human Rights Act.[341]

The absence of a remedial provision in human rights legislation has not precluded courts (for example in New Zealand) developing extensive remedial jurisdiction.[342] However, ALHR recommends that the Queensland Human Rights Act should provide clear and unambiguous remedial provisions and the ability to award other remedies as the court sees fit. Unfortunately, due to the nature of human rights litigation, an exhaustive list of remedies may not be possible. While some violations may be addressed with compensation, damages, or an order of a preferable decision, some litigants may call for more unusual remedies like public apologies, rehabilitation, rectification or guarantees of non-repetition.[343].

The legislation and subsequent manuals should ensure decision-makers have wide discretion in making remedial determinations, and also make clear that non-compensatory relief like apologies are an important part of any remedial package.

5.4 IMPLICATIONS

5.4.1 Impacts on Existing Statutory Complaints Processes

Developing the powers of statutory complaints bodies

The need for fast and accessible complaint resolution mechanisms for complaints about human rights violations has been a common theme in reviews of human rights legislation across many jurisdictions. The Victorian Ombudsman has the ability to review administrative actions of public authorities are incompatible with the Victorian Charter, and has provided assistance to vulnerable individuals using the Victorian Charter. The Victorian Ombudsman submitted to the 2015 review of the Victorian Charter that '(b)y looking at public administration through the lens of human rights, my office is able to encourage a culture of human rights compliance across the public sector."[344] The Inquiry should investigate how the roles of the Queensland

[339] Australian Human Rights Commission, *Submission to the National Human Rights Consultation*,(June 2009), 67.
[340] *Human Rights Commission Act 1986* (Cth), s 46PO(4).
[341] Oxford Pro Bono Publico, *Submission to the National Human Rights Consultation*, (June 2009), [8.1].
[342] Ibid, 8.2
[343] Ibid), 8.3.
[344] Victorian Ombudsman, *Submission to the Review of the Victorian Charter of Human Rights and Responsibilities,* (2015), 11 < https://www.ombudsman.vic.gov.au/getattachment/3c954cd0-e341-4a85-831d-ae9a58d7d034>.

Ombudsman and the Queensland Anti-Discrimination Commissioner may change to facilitate complaints about public authorities based on violations of a Queensland Human Rights Act.

HUMAN RIGHTS COMMISSION

The Inquiry should also investigate the possibility of creating a Queensland Commission on Human Rights. This Commission would be an independent body with the power and expertise to promote and advocate for human rights issues in Queensland, as well as investigate and identify violations of human rights on its own volition. The promotional powers ALHR envisions would largely mirror the experience of the Australian Human Rights Commission, and research indicates that creation of a "culture" of human rights is often more important than enforcement.[345]

While promotion and advocacy would be the main role for this Commission, it would also need to have the power to initiate proceedings into perennial or systemic institutional human rights violations or long-term issues of non-compliance. Individuals (in particular vulnerable individuals) may lack the opportunity, expertise, time or money to bring legal proceedings on such issues.

5.5 PROCEDURAL CONSIDERATIONS

5.5.1. TRANSITION PERIOD

The Victorian Charter, introduced in 2006, provided for a transition period so that obligations on public authorities did not apply to any act or decision made before 1 January 2008, however, the Victorian Charter had some retrospective effect. The requirement to interpret legislation in a manner that is compatible with human rights of course applies to all legislation, irrespective of when it was passed.

ALHR supports adopting the transition approach used in the Victorian Charter of Human Rights as it provides clarity with regards to application of a Queensland Human Rights Act.

5.5.2. REVIEW TIMELINES

The Victorian Charter has statutory review timeframes at 4 and 8 years after enactment. ALHR proposes that a Queensland Human Rights Act adopt this review timeframe.

5.5.3 SUNSET DATE

ALHR does not support legislating a sunset date.

5.5.4 MANUALS AND INFORMING THE CHANGE

ALHR supports the creation of subordinate legislation, if required, and manuals to assist public officials and the public to understanding the implications of a Queensland Human Rights Act on their actions and decision-making. New Zealand's *Attorney-General's Guidelines on New Zealand Bill of Rights Act*, discussed in Part 3 is a useful example of such a manual.

Any effective human rights education or training package needs to encompass what the targeted individual needs to know about human rights, the process through which the targeted individual will learn about human rights (including continuing education), and why this knowledge is important or necessary.[346]

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[345] UK Joint Committee of Human Rights, *The Case for a Human Rights Commission* (6th Report, 2002–03 Session) HC (2002–03) 489, HL (2002–03) 489. <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf> quoted in Oxford Pro Bono Publico, *Submission to the National Human Rights Consultation* (June 2009), [6.1].

[346] AEC Struthers, 'Human rights education: educating about, through and for human rights,' (2015) 19(1) *The*

We draw the Inquiry's attention to the *2011 United Nations Declaration on Human Rights Education and Training*.[347] This Declaration provides a helpful framework for determining how Queensland should go about educating and communicating the human rights agenda. In particular, the Declaration highlights the need to frame human rights education through three lenses:[348]

- Education *about* human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection;
- Education *through* human rights, which includes learning and teaching in a way that respects the rights of both educators and learners; and
- Education *for* human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.

Most literature regarding the Declaration highlights educating primary and secondary students about human rights, and subsequently the Human Rights Act should form an important part of Queensland students' civic education. We also draw the Inquiry's attention to the 2011 United Nations Manual on *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators* for additional information on this point.[349]

ALHR reiterates the importance of producing simple and targeting training packages for key segments of the population. Manuals for legal professionals, decision-makers, policy officers and administrative staff are obvious. Community organisers, media professionals and educators will also need to be equipped with the right tools to effectively communicate the change and process to the individuals most likely to be affected by the introduction of the Human Rights Act.

5.6 Future Federal Human Rights Act for Australia

Submissions to the 2009 *National Human Rights Consultation* on the issue of Human Rights and Federalism expressed a preference for an "opt-in" system as a means of harmonising various States' Human Rights legislation. ALHR submits that Queensland's Human Rights Act may need a provision allowing for Queensland to "join-up" to a future National Human Rights Act.

Once again ALHR thanks the Committee for the opportunity to explore and consider the opportunities for and impacts of a proposed Human Rights Act for Queensland. ALHR strongly believes that by enacting a Queensland Human Rights Act the current parliament will secure for present an future Queenslanders an enhanced and optimised standard of living and culture of tolerance, respect and dignity that sets Queensland at a significant advantage from other Australian states and territories that have not enacted the same. ALHR hopes the Committee will gain useful knowledge from the hard and dedicated work of ALHR's many and various voluntary contributors. ALHR welcomes any further inquiries of the Committee in regards to this submission and ALHR stands ready to assist the Committee on its important task regarding whether to recommend to the Queensland Parliament that it should enact a Human Rights Act for Queensland.

International Journal of Human Rights 53, 56.

[347] United Nations General Assembly, *United Nations Declaration on Human Rights Education and Training*, UNDOCs A/Res/66/137 adopted 19 December 2011 (16 February 2012), Article 2(2), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf>

[348] AEC Struthers, 'Human rights education: educating about, through and for human rights,' (2015) 19(1) The *International Journal of Human Rights* 53, 55-57.

[349] United Nations Office of the High Commissioner for Human Rights, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators - Professional Training Series No. 18* (Office of the High Commissioner for Human Rights, 2011) <http://www.ohchr.org/Documents/Publications/EvaluationHandbookPT18.pdf>.