



PRESIDENT
John Fraser

[REDACTED]
[REDACTED]
[REDACTED]

SECRETARY
Bonnie O'Brien

[REDACTED]
[REDACTED]

15 April 2016

**The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000**

By email: lacsc@parliament.qld.gov.au

Re: Inquiry about the appropriateness and desirability of a Human Rights Act (HR Act) for Queensland,

Dear Research Officer,

1. I write to you to as the President of the Association of Labor Lawyers QLD (Inc).
2. The Association of Labor Lawyers is a group of lawyers, professionals, students and advocates who aim to assist the Australian Labor Party in the implementation of progressive platforms and policies which help to achieve social justice, and as a body of lawyers we are concerned with the Rule of Law.
3. Our Association submits that the enactment of a Charter of Human Rights for Queensland is necessary enhancement to Queensland legislation which will reinforce the protection of human rights of all people in Queensland.
4. When drafting of the legislation to create a Charter of Human Rights for Queensland, it is essential that the interpretation issues and limitations of the Victorian Charter identified by Justice Weinberg and Mr Young are taken into consideration, for the reasons outlined below
5. Our Association strongly supports the introduction of a Human Rights Act by the Queensland Parliament to protect the freedom and liberty of all Queenslanders.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

6. Subject to some reservations below, our Association supports the introduction of legislation similar to the Victorian *Charter of Human Rights and Responsibilities Act 2006* ["the Victorian Charter"] incorporating some of the recommendations made by the 2015 review of the Victorian Charter.
7. A fundamental basic right in any democratic society, where the rule of law applies, is the right of an accused person to a fair trial.
8. The absence of express legislative recognition of the rights of those persons in our community who are least able to protect themselves, such as those suffering from mental illness, marginalised minorities and indigenous communities, needs to be addressed by the Parliament.
9. The key sections in the Victorian Act for the protection of human rights as they relate to trial (criminal) matters are:

- Section 21 - '*Right to liberty and security of person*'

Section 21(4) provides that a person who is arrested or detained must be informed at that time of the reason for that curtailment of liberty.

Section 21(5) provides that a person who is arrested or detained on a criminal charge, (a) must be promptly brought before a court; (b) has the right to be brought to trial without unreasonable delay; and (c) must be released if either paragraph (a) or (b) is not complied with

- Section 22 – '*Humane treatment when deprived of liberty*'

Section 22(1) provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Section 22(2) provides that an accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

Section 22(3) provides that an accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

- Section 24 – '*Fair Hearing*'

Section 24(1) provides that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court after a fair and public hearing.

- Section 25 – *'Rights in criminal proceedings'*

Section 25(1) provides that a person charged with a criminal offence has to be presumed innocent until proved guilty according to law.

Section 25(2) provides that a person charged with a criminal offence is entitled to what are described as a series of 'minimum guarantees'. These include the right to be informed promptly and in detail of the nature and reason for the charge; the right to have adequate time and facilities to prepare a defence and to communicate with a lawyer or adviser of the accused's choice; the right to be tried without unreasonable delay; the right to be provided, if eligible, with legal aid; the right to examine, or have examined, witnesses against him or her unless otherwise provided for by law; and the right not to be compelled to testify against himself or herself, or to confess guilt.

In addition, pursuant to s 25(4), any person convicted of a criminal offence has the right to have the conviction, and any sentence imposed in respect of it, reviewed by a higher court in accordance with law.

- Section 26 – *'Right not to be tried or punished more than once'*

Section 26 provides that a person may not be subjected to double jeopardy or double punishment once convicted or acquitted according to law.

- Section 27 – *'Retrospective criminal laws'*

Section 27(1) provides that a person must not be found guilty of a criminal offence because of conduct that was not criminal when it was engaged in.

Section 27(2) provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

10. In 2015 a comprehensive review of the operation of the Victorian Charter was undertaken by Mr Michael Young, a former CEO of the Law Institute of Victoria.
11. In considering the operation of sections 38 (conduct of public authorities) and section 39 (legal proceedings) Mr Young concluded that those sections were widely perceived as being poorly drafted and ineffective.¹ In particular, the

¹ From *Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) ('Charter Review') at 117ff http://assets.justice.vic.gov.au/justice/resources/f7185d30-454f-47bb-944e-14fb51bd699f/report_final_charter_review_2015.docx, website accessed 18 April 2016

Victorian Charter does not provide a new remedy for breach of those sections beyond the remedies that existed prior to the enactment of the Charter.

12. A significant provision in the Victorian Charter is section 138 which gives a trial judge a discretion to exclude evidence that was improperly or legally obtained. Although section 138(3) lists a number of matters that a court may consider when exercising the discretion given by the section, after being satisfied that the desirability of submission outweighs the undesirability of submission, a breach of a person's charter rights (including section 25) is not one of the matters that the court can take into consideration when exercising the discretion.
13. The provisions of section 32 of the Victorian Charter purport to have an effect on the interpretation of statute law and subordinate legislation.

“32. Interpretation

- (1) 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.
 - (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
 - (3) This section does not affect the validity of—
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.”
14. However, in a recent paper by Justice Weinberg,² after discussing the judicial consideration of the United Kingdom equivalent provision of section 32(1) and the effect of the decision of the High Court in *Momclivic v The Queen* (2011) 245 CLR 1, his honour stated:

“In any event, given the current state of affairs, there is a real question as to whether s 32(1) has any significant role to play in the process of interpreting penal provisions. It follows that the Charter's emphasis on the central precept of the criminal law, the right to a fair trial, may in fact be much ado about comparatively little.”³

2 Victorian Court of Appeal - *Human Rights, Bill of Rights, and the Criminal Law*, Bar Association of Queensland 2016 Annual Conference
3 P 17.

15. In his conclusion Justice Weinberg said:

“Overall, it is fair to say that the Charter has been beneficial in a number of areas. It is generally accepted that it has had a significant impact upon the way in which decision-makers were public authorities approach the daily tasks.

However, the Charter has been less effective in facilitating legal challenges based upon breach of charter rights. Of course, that was to some extent anticipated, and perhaps even intended.”

16. It is noted in the 2015 Review of the Victorian Charter⁴, that while some of the High Court Justices considered whether the Courts should ensure compliance with processes for a fair hearing and the provision of Charter protections in criminal trials, it remains unclear. Justice Gummow raised (but did not determine) whether section 6(2)(b) requires a court to apply the Charter even when the parties have not raised it.

17. We submit that consideration be given to these issues raised in the 2015 Review in determining the structure and application of a Human Rights Act for Queensland.

18. As also recommended in the 2015 Review of the Victorian Charter,⁵ adequate remedies in criminal trials would be appropriate to consider in a Human Rights Act for Queensland and a waiver of the Notice requirement to raise a Human Rights Act protection in a criminal trial be waived.⁶

We are happy to engage in further consultation on the drafting of a Bill and on other matter associated with the matter.

Yours faithfully



John Fraser

President



4 P 77.

5 Pp 126-127.

6 Pp 162-169.