CLH;dgr

28 April 2016

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

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

Dear Sir/Madam

Re: Human Rights Inquiry

INTRODUCTION

Thank you for the opportunity to make this submission.

The Bar Association of Queensland ('the Association') is a professional body representing the interests of barristers practising in this State. Among its main goals are promoting the rule of law and maintaining the high ethical standards of the Bar.

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

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

This submission approaches the topic on these bases:

1. There can be no reasonable objection to the protection of basic human rights;
2. The question for consideration is the best means of ensuring such protection of these rights involves new legislation.

The balancing of those considerations is a matter for the Committee and, ultimately, the Parliament.

There are two parts to this submission:

1. One which sets out the points that the Association sees as commending a charter or bill of rights;

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739

Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000

Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905

chiefexec@qldbar.asn.au

Constituent Member of the Australian Bar Association

2. One that states some of the risks and downsides in heavy reliance being placed (as a charter or bill of rights would require) on judicial review of legislation. These factors are ones which both the experience of charters of rights highlight and which legal doctrine and principle bring to light.

POINTS THAT COMMEND A CHARTER OR BILL OF RIGHTS

Need

The advantages of specific legislation such as a charter or bill of rights has been addressed and expressed in policy documents of the Law Council of Australia, the peak body representing lawyers in Australia.[1]

On the adequacy of existing protection of rights, the Law Council has stated that the existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. This statement is even truer in the context of the State legislative framework in that, unlike the Commonwealth Parliament, whose legislative authority is restricted to particular subject areas, the Queensland unicameral Parliament, subject only to the Commonwealth Constitution, has a wide plenary legislative power.

The Law Council also argues that insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound. Some further form of or vehicle for human rights protection is, on one view, needed.

Lessons from Reviews

The Committee and the Queensland Parliament can draw guidance from the experience of other Australian jurisdictions with a charter or bill of rights.

The Association draws the Committee's attention to the statutory 8 year review of the Victorian *Charter of Rights and Responsibilities Act* 2006. The review was conducted by a former chief executive of the Law Institute of Victoria and former managing partner at law firm, Maurice Blackburn, Michael Brett Young.[2] The Attorney-General, Martin Pakula, issued the terms of reference on 2 March 2015. That exercise was a wide review rather than one directed, as are this Committee's terms of reference, to the question whether a human rights Act should be considered in the first place.

Mr. Young's review, *From commitment to culture: the 2015 Review of the Charter of Rights and Responsibilities Act 2006* ("the Young review")[3] was tabled on 17 September 2015 and contains 52 recommendations. The terms of reference of that

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1 See the Bill of Rights Policy Statement at http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines (accessed 15 April 2016)

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

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

review, significantly, were directed to [4] making the Charter more accessible, effective and practical in protecting and promoting the human rights of Victorians.[5]

The Young review provides useful information for the Committee as to how any Bill of Rights for Queensland might be framed if one were to be enacted.

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

The Importance of Leadership

The Young review emphasises the importance of senior leadership in determining public sector culture.[6]

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

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

The Association urges the Committee to recommend that Parliament and the Government avoid a course of action of merely legislating for a bill of rights and then avoiding future commitment to, or support for, developing a human rights culture and promoting human rights protection.

The effectiveness of the legislation will be assisted by politicians and senior public servants providing leadership in promoting that culture.

Public servants whose job it is to implement legislation are assisted if that legislation is treated by government and their supervisors as having ongoing and lasting significance. This is particularly so in the case of a human rights Act.[9]

Binding the Public Sector

Section 38(1) *Charter of Rights and Responsibilities Act 2006* (Victoria) ("the Charter Act") provides that it is unlawful for a public authority[10] to act in a way that

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

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

6 The Young review, page 24

7 The Young review, page 25

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

9 The Young review, page 26

10 "Public authority" has a multi-faceted definition but s. 4(1)(a) of the Charter acts at the individual level by referring to a public official within the meaning of the *Public Administration Act 2004*

is incompatible with a human right[11] or fail to give proper consideration to a relevant human right when making a decision.[12] The obligation carries an exemption where Victorian or Commonwealth legislation makes it unreasonable to act otherwise.

One of the most effective ways for a human rights act to achieve benefits for ordinary people is to lay down enforceable standards for the way in which the public sectors carries out its role in administering existing legislation. This also provides a template by which public service agencies can plan their activities so as to be sensitive and responsive to the rights of the people with whom they interact.

The Young review has a number of recommendations based on experience to make this aspect of the work of a bill of rights more effective. These include the provision of suitable leadership referred to, above.

These also include ways of enforcing the obligation imposed upon public servants. One means of ensuring that agencies are complying with their obligations is to provide for reviews of those agencies by a body similar to the Anti-Discrimination Commission with a corresponding duty for public sector agencies to assist the Commission with its statutory functions including by the provision of information.[13] A discretion for the Commission to charge for some or all of the costs of a voluntary review is recommended by Mr Young as a means of spreading the load of enforcement and implementation across the whole of government.[14]

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

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

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

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

Influencing Legislation

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11 Section 3 of the Charter defines human rights as the civil and political rights set out in part 2 of the Charter.

12 The requirement has both a substantive and procedural aspect. The two aspects of the obligation are discussed at page 68 and following of the Young review.

13 The Young review, page 92

14 The Young review, page 94

15 The Young review, page 105

16 The Young review, page 129

A bill or charter of rights Act generally seeks to encourage that Australia's human rights obligations be considered as part of the legislative process.

For example, s. 28 of the Victorian Charter requires any Member of Parliament who introduces a Bill to the Parliament to prepare and lay before the Parliament a statement setting out whether and how the Bill is compatible with human rights (as defined in the Act) and, in respect of any incompatibility, the nature and extent of that incompatibility.

In this way, legislators are caused to consider human rights at the drafting stage of new legislation and to convey the results of their thought processes and analysis to their colleagues and the public.

Section 30 reinforces the statement of compatibility process by requiring the Scrutiny of Acts and Regulations Committee to consider any Bill introduced into the Parliament and to report to the Parliament as to whether the Bill is compatible with human rights.

The Young review makes recommendations to improve this part of the function of a bill of rights act by suggestions which go mainly to ensuring appropriate resources (including adequate time) for human rights analysis to be carried out including a requirement that would give, except in cases of legislation of great urgency, a reasonable minimum time for the Committee to consider and report on legislation.[17]

Construing and Applying Legislation

Encouraging courts to construe and apply legislation with an eye to the human rights protected by a Charter is an area that will pose some important questions for the Committee.

The High Court in *Momcilovic v The Queen* ("Momcilovic") considered existing provisions in the Victorian Charter and did not agree in all respects on how the legislation should be construed and applied.[18]

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

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

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

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

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17 See, particularly, the Young review at page 173. Obviously, the Committee will need to consider the structure and name of an analogous Committee of the Queensland parliament to carry out this task.

18 *Momcilovic v The Queen* (2011) 245 CLR 436, [2011] HCA 34 (8 September 2011)

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

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

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

The Young review recommended that s. 32 of the Charter be amended to require statutory provisions be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights.

Second, the Young review recommended that, where a choice must be made between possible meanings that are incompatible with human rights, the legislation specify that the provision be interpreted in the way that is least incompatible with human rights.

Thirdly, the Young review recommended that the proposed amendments make it clear that s. 7(2) must be applied in the process of assessing which interpretation of a statutory provision is most compatible with human rights.

And, fourthly, the Young review recommended that the amended s. 32 set out steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility.[20]

The review also recommended clarifying amendments to s. 7(2) to define "compatibility" and "incompatibility" which would make it clear that a provision which places a limitation on a human right which limitation is reasonable and demonstrably justifiable in a democratic society is, indeed, compatible with the human rights.

The Association recommends that the Committee draw upon the lessons of *Momcilovic,* although the Association would commend one exception to the approach of the Young review.

The requirement that statutory provisions be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights might be slightly altered. The requirement should be that statutory provisions be interpreted, so far as possible consistently with their language, in the way that is most compatible with human rights. Alternatively, the requirement could be that statutory provisions be interpreted, so far as it is possible to do so, in the way that is most compatible with human rights.

It seems to the Association that achieving the purpose of the legislation is the end result of the process of construing legislation. Legislation can guide that process, as acts interpretation legislation has always done. To suggest, however, that there is another purpose which is not the end result is incongruous in the Association's view.

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19 The Young review, page 144

20 The Young review, page 148

The Association would also suggest that the objective of any bill or charter of rights should be to ensure that the protection of human rights (which is Australia's obligation under the international instruments to which it is a party) should be considered at each point at which the law interacts with the person.

In short, there are arguments which favour the introduction of a bill of rights and there is both a recent example (in Victoria) and contemporary critiques of that model in the Young Report and the High Court, to inform the Committees.

SOME COUNTERVAILING FACTORS: ASPECTS OF THE EXPERIENCE OF CHARTERS AND LEGAL PRINCIPLE

In examining the arguments against adopting a charter, in this part of the submission the Committee adopts the Committee's terms of reference as headings for the sections that follow.

Effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms

In November 1998, the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland ('**LCARC**') published a report 'The preservation and enhancement of individuals' rights in Queensland: Should Queensland adopt a bill of rights?'.[21]

LCARC concluded that Queensland ought not adopt a bill of rights.

Part 3 of the LCARC report is entitled 'Existing rights protection in Queensland and its effectiveness'. Part 3.1 records that the following institutional factors operate to protect individuals' rights and freedoms in Queensland:

- Parliamentary democracy
- The common law
- Pre-legislative processes
- Legislation
- Constitutional rights
- International human rights law

Whilst recognising that legislation changes from time to time and the common law as determined by Judges develops, the mechanisms and systems that operated to protect rights and freedoms in 1998 are very much the same as those that operate today.

In Part 3.2 of its report, LCARC concluded that these mechanisms and systems added up to an 'effective, albeit complex, fabric of rights protection'.

LCARC noted that some submitters had argued that the common law and legislation were fundamentally flawed as measures of rights protection because they can be overridden by Parliament, which can enact legislation to limit or take away an existing statutory right or to reverse a judicial decision. Although the capacity of parliament to curtail basic rights was the 'down-side of parliamentary sovereignty', LCARC saw parliamentary democracy as having served Queensland well.

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[21] The report can be accessed here: http://www.parliament.qld.gov.au/documents/committees/LISC/1997/bill-of-rights/Report-12.pdf

LCARC observed that any decision on behalf of the government to curtail fundamental rights is subject to substantial public pressure not to do so, and ultimate censure by the people at election if it does. Recent political history offers an example. At the 2012 general election, the Liberal National Party, secured 78 out of 89 seats (the largest majority government in Queensland history). In 2013, that government introduced the *Vicious Lawless Association Disestablishment Act* ('VLAD'), aimed at criminal bikie gangs. Many Queenslanders thought the VLAD laws too strict and unduly curtailed freedom of association.[22] The Newman government lost the subsequent 2015 election. Although there were undoubtedly many factors that led to this result, it is reasonable to suggest that the outcome of the election was at least influenced by the public's views about the highly publicised and often criticized VLAD laws and the precedent they might be taken to establish.

The terms of reference require the Committee to consider 'possible improvements' to the existing mechanisms and systems.

One possible (although the Association accepts unlikely) improvement could be the reinstatement of the Queensland Legislative Council. An upper house of parliament could review and block legislation that unjustifiably limits or extinguishes individual rights and freedoms.

Another possible improvement could be a regular human rights audit, which would examine whether any Queensland statutes excessively infringe civil liberties. Such an audit could be carried out by independent persons and could be repeated on a periodic basis (say, every ten years).

The operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally

Human rights legislation was introduced in the Australian Capital Territory in 2004 and in Victoria in 2006.

The *Human Rights Act* 2004 (ACT) ('**ACT HRA**') and the *Charter of Rights and Responsibilities Act* 2006 (Vic) ('**Victorian Charter**') take a similar form. Both contain broad statements of human rights: see ss 8-27A of the ACT HRA and ss 8-27 of the Victorian Charter. Both acknowledge that human rights may be limited: see s 28 of the ACT HRA and s 7 of the Victorian Charter.

The ACT HRA and the Victorian Charter have four important features:

1. They lay down a 'human rights rule' for interpreting legislation. To use the ACT HRA as an example, s 30 of that Act stipulates that, so far as it is possible to do so consistently with its purpose, that legislation must be interpreted in a way that is compatible with human rights. Section 32(1) of the Victorian Charter is an equivalent provision to s 30 of the ACT HRA. The High Court held in *Momcilovic v R* that this interpretative

[22] The Association has made a submission to this effect to the Taskforce on Organised Crime Legislation headed by retired Supreme Court judge, Alan Wilson, which can be found here: https://publications.qld.gov.au/dataset/2370ab47-b1c2-4b71-bd61-9ff75099ae5f/resource/44baa7d9-f620-4bd4-b0fc-63007f9b3cdd/download/jag3080780v1submission18barassociationofqueenslandinquiryareas1234.pdf

rule applies in substantially the same way as the common law principle of legality but with a slightly wider field of application.[23] The rule therefore may be seen to operate in a manner similar to existing common law principle;

2. They give courts the power to make declarations about human rights. Again, using the ACT HRA as an example, s 32(2) of that Act provides that if the Supreme Court is satisfied that any ACT law is not consistent with a human right, the court may make a declaration to that effect. Section 36(2) of the Victorian Charter is an equivalent provision to s 32(2) of the ACT HRA.

   However, a declaration that legislation is not consistent with human rights does not affect the validity of that legislation: see s 32(3) of the ACT HRA and s 36(5) of the Victorian Charter. Three points may be made about this declaratory power:

   a. The theory underlying this power is that a declaration that a particular statute contravenes human rights puts political pressure on the government to amend that law.[24] In other words, the declaratory power is designed to place the courts squarely in the political arena. This may not be a role which the principle of parliamentary sovereignty supports given its encroachment upon democratic functions;

   b. The courts have always had, and retain, the ability to comment on whether legislation is consistent with individual rights and freedoms;

   c. Perhaps in recognition of the point in a. above, the declaratory power has only been validly used once in the ACT and Victoria and it has proved ineffective. In *Re Islam* [2010] ACTSC 147 the ACT Supreme Court declared that s 9C of the *Bail Act* 1992 (ACT) (which provided for a presumption against bail for a person charged with murder or a serious drug offence) was inconsistent with the right stated in s 18(5) of the ACT HRA, namely, that '*anyone who is awaiting trial must not be detained in custody as a general rule*'. The declaration was ignored by the ACT government in the sense that s 9C has not been amended. The declaration did not affect the validity of s 9C,and it gave Mr Islam no practical remedy, such as obtaining bail.

3. The third feature of the ACT HRA and the Victorian Charter is that they provide for 'compatibility statements'. Section 37 of the ACT HRA provides that the ACT Attorney-General must prepare a written statement about a Bill, which must state whether the Bill is consistent with human rights and, if it is not, how it is inconsistent. Section 28 of the Victorian Charter is an equivalent provision to s 37 of the ACT

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23 *Momcilovic v R* (2011) 245 CLR 1, 50 (French CJ), 92 (Gummow J), 123 (Hayne J), 217 (Crennan and Kiefel JJ), 250 (Bell J).

24 See eg 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* 9.

HRA. In Queensland, s 23(1)(f) of the *Legislative Standards Act* 1992 provides that an explanatory note for a Bill must include a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency. Under s 4 of the *Legislative Standards Act*, 'fundamental legislative principles' include requiring that legislation has sufficient regard to the rights and liberties of individuals. The introduction of 'compatibility statements' in Queensland would therefore be unnecessary. The existing requirement of assessing Bills for consistency with fundamental legislative principles requires consideration of the impacts upon human rights to a satisfactory standard. It is a workable approach.

4. The fourth feature is that they make it 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: see s 40B of the ACT HRA and s 38 of the Victorian Charter. A Minister is one example of a 'public authority': see s 40(1)(d) of the ACT HRA and s 4(1)(f) of the Victorian Charter. In 2011, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament ('SARC') conducted a review of the Victorian Charter.[25] SARC found that there was very little measurable data establishing a change in service provision or the performance of functions by public authorities. There is some suggestion in SARC's report that the Victorian Charter had merely reinforced the existing practice of public authorities and had had very little impact. There is also a concern that the obligation to act compatibility with human rights might generate complaints of lesser importance and not ones intended to be brought about by the legislative regime, for example:
   a. *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111 concerned whether a hospital had breached a patient's rights by banning him from smoking.
   b. *Islam v Director-General, Justice and Community Safety Directorate* [2015] ACTCA 60 concerned whether prison authorities had breached a prisoner's rights by not giving sufficient access to computer facilities.
   c. *Kuyken v Chief Commissioner of Police* [2015] VSC 204 concerned whether the Chief Commissioner of Police had breached policemen's rights by banning them from wearing beards.
   d. *Shields v Lay* [2013] VCAT 1986 concerned whether the Chief Commissioner of Police had breached a policeman's rights by banning him from wearing his long hair in a bun.

The 'human rights rule' for statutory interpretation and 'compatibility statements' may not be necessary: the first because it exists already in the common law and the second because of its lack of enforceability and its complicated relationship with principles of parliamentary sovereignty.

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[25] The SARC report can be accessed here: http://www.parliament.vic.gov.au/publications/committee-reports/2053-20110914sarc-charterreviewreport/download

Any declaratory power ought be carefully framed to avoid politicising the Courts and squarely to confront the 'countermajoritarian difficulty' of placing in the hands of unelected judges a power which has traditionally been the preserve of elected representatives in Parliament.

The Committee is also required to consider the operation and effectiveness of international human rights legislation.

LCARC considered the New Zealand *Bill of Rights Act* and, in particular, the *Canadian Charter of Rights and Freedoms*. LCARC undertook a study tour of Canada and discussed the *Canadian Charter* with over 130 people during 25 meetings. LCARC found there was no need for Queensland to introduce similar human rights legislation to that found in New Zealand or Canada.

After the LCARC report, the *Human Rights Act 1998* ('UK HRA') came into force in the United Kingdom. The ACT HRA and the Victorian Charter were largely modelled on the UK HRA. The main difference between the Australian legislation and the UK HRA is that the scope of the British 'human rights rule' for interpreting legislation is much wider.

Importantly Section 3(1) of the UK HRA enables British courts to read words into statutes, or to read statutes down, in order to ensure that they are compatible with human rights. This means that British statutes can have meanings not at first apparent, which in turn has serious implications for the doctrine of parliamentary sovereignty. The High Court's decision in *Momcilovic* is to the effect that the Australian Constitution would require amendment if a similar rule were to be introduced in any Australian jurisdiction.[26]

The costs and benefits (eg financial, legal and social)

In conducting its review of the Victorian Charter, SARC was unable to make any specific conclusions about the costs and benefits of that legislation. It did note, however, that the direct costs to government of implementing the Victorian Charter were more than $13M over a five year period.

Previous and current reviews and inquiries (Australian and international) on the issue of human rights legislation

The most relevant reviews and inquiries for the Committee to consider are the LCARC report and the SARC report. The report of the Law and Justice Committee of the New South Wales Parliament dated October 2001 is also useful and informative.[27]

Justice Mark Weinberg presented a paper on this topic at the Bar Association's 2016 Annual Conference[28] (copy **attached**). His Honour considered that, although the

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26 See Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1.

27 The report can be accessed here: https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf

28 Justice Mark Weinberg, 'Human Rights, Bills of Rights, and the Criminal Law', paper presented at Queensland Bar Association Annual Conference 2016.

Victorian Charter has been beneficial in some areas, its impact upon the administration of criminal justice and the safeguarding of fair trials has been considerably limited, and statistical evidence indicates that the Charter is rarely invoked in criminal matters. Consistent with what has been noted above the operation and inherent qualities of the common law, his Honour observed that:

> … there are those who quite legitimately consider that the common law, when properly applied, affords adequate protection to individual liberty, and that it is counter-productive to seek to enhance such protection through legislation.

In his conclusion, his Honour seemed to adopt the view that the common law offers much, if not all, of the protections one would expect of a human rights and responsibilities Act, when he referred to:

> …the adequacy of the richness of the common law in protecting, and jealously guarding, the rights of those accused of serious criminal offences.

The Association notes also the 2015 review of the Victorian Charter of Human Rights and Responsibilities Act. That review offers a useful reference point for understanding some of the benefits and the drawbacks with the lived experience of that Charter reveals.

While conscious of the constitutional differences between the United Kingdom and Queensland, the Joint Committee on Human Rights of the United Kingdom Parliament in consultation for its Twenty-Ninth Report on the proposal for a UK Bill of Rights (2008) should be considered, insofar as it highlights and discusses many emergent issues in the recognition and protection of human rights, but specifically in the context of a jurisdiction that has existing instruments in force (that is, the European Convention and the Human Rights Act 1998).

CONCLUSION

If the Committee decides that it would be appropriate and desirable to legislate for a human rights Act in Queensland, the terms of reference require that the Committee further consider:

- The 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;
- The functions and responsibilities under the legislation.

Many of these considerations have been considered in the sections above, such that the principal focus of what follows is the objectives of the legislation and rights to be protected.

The objectives of a "human rights" act that is not constitutionally entrenched are to recognise the identified rights, and to influence future legislative, judicial and administrative action to recognise those rights. Since such an act would not be

entrenched in the Constitution of Queensland 2001, it cannot have the function of overriding future legislative action.

As observed above, however, the *Legislative Standards Act* 1992 requires individual rights to be recognised in the drafting process, and the experience of other jurisdictions with such human rights legislation was that data measuring any change to administrative action in response to their introduction is not available.

Overall, it is likely that the objectives of such legislation are already satisfied by the existing laws enforced by the courts in Queensland.

The experience of other jurisdictions that have enacted such legislation directs attention of the rights to be protected in two ways:

> a first, that the focus tends to be on civic rights directed to ensuring equality of participation in public life (rather than, for example, social and economic rights);[29] and
>
> a second, that the rights tend to be "negative" rights that restrain government activity, rather than "positive" rights that require government to undertake positive acts. (Although it should be noted that existing Commonwealth anti-discrimination legislation permits the Parliament to enact special measures directed to correcting substantive inequality.[30])

The debate about the enactment of specific human rights legislation risks fastening upon the recognition of individual rights and freedoms only; that is, to the exclusion of correlative responsibility owed by the holders of those rights to each other. As one commentator recently remarked, all individual freedoms and rights are limited – by the freedoms and rights of others. The extent to which such legislation should recognise those responsibilities by its terms is complex.[31]

The Joint Committee on Human Rights of the United Kingdom Parliament, when considering the introduction of a British Bill of Rights in 2008, suggested that while correlative responsibilities were relevant to modern conceptions of human rights, their role and function in domestic instruments was (and ought to be) limited:

> The fact that there was considerable support for there being *some* place for responsibilities in a UK Bill of Rights is not surprising when one recalls the shift which took place in the nature of human rights law in the mid-20th century. The broadening of the values which were the concern of human rights law, from the bundle of freedoms which make up negative liberty to include rights to a bare minimum of security, entailed the recognition by human rights law of positive obligations on states and duties and responsibilities on individuals. Article 1 of the Universal Declaration of Human Rights expressly states that human beings "should act towards one

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29 See, generally, Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

30 See, in the context of the *Racial Discrimination Act* 1975 (for example), *Aurukun Shire Council v CEO, Office of Liquor, Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at [227]-[231], [243]-[249] per Keane JA.

31 The issue was debated in evidence before the Joint Committee on Human Rights of the United Kingdom Parliament in consultation for its Twenty-Ninth Report on the proposal for a UK Bill of Rights (2008), Ch 8.

another in a spirit of brotherhood." The preambles to both the ICCPR and the ICESCR also contain explicit references to duties and responsibilities:

> … realizing that the individual having duties to other individuals and to the community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

Responsibilities therefore often have some role to play in modern Bills of Rights, albeit falling far short of directly enforceable duties. It may be in the form of a preamble referring to responsibilities; a limitation clause acknowledging that some rights can be justifiably limited to serve some other competing interest; positive obligations on the state to protect the rights of individuals against other private individuals; the indirect effect of the Bill of Rights on the law governing private relations because of the duty on courts to interpret the common law compatibly, including the common law governing private relations; or a prohibition on abuse of rights. All of these are manifestations of responsibilities being taken into account in Bills of Rights and none are controversial."[32] (Emphasis in original)

The submissions made above have been limited to the model that has been referred to the Committee for inquiry; that is, for a human rights act that is not constitutionally entrenched.

Having regard to the Committee's terms of reference, it is beyond the scope of this submission to consider other models,[33] including a constitutionally entrenched model.

The Association thanks the Committee for the opportunity to make submissions in respect of this important inquiry.

The Association strongly supports the notion that, if a policy decision is made to adopt any such legislation that the Parliament and its draftors should look towards, and draws upon, the lessons learned in other Australian jurisdictions particularly the Australian Capital Territory and Victoria with this type of legislation.

In the event of a decision being made to progress such legislation, the Association would be happy to consider any draft bill.

Yours faithfully

Christopher Hughes QC
President

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32 Joint Committee on Human Rights of the United Kingdom Parliament in consultation for its Twenty-Ninth Report on the proposal for a UK Bill of Rights (2008), [278]-[279].

33 The four recognised models for bills of rights are discussed in Joint Committee on Human Rights of the United Kingdom Parliament in consultation for its Twenty-Ninth Report on the proposal for a UK Bill of Rights (2008), Ch 7.