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Dear Committee Secretary

Human Rights Bill 2018

Thank you for the opportunity to make a submission to this review of the Human Rights Bill 2018. We do so in a personal capacity.

The Queensland Human Rights Bill ('the Bill') follows the same general model as the human rights legislation in the United Kingdom, New Zealand, the ACT and Victoria. It does not seek to fundamentally alter the roles of, or relationships between, the three branches of government. Rather, it aims to encourage dialogue about human rights protection between the branches, and foster a human rights culture within government.

The Bill builds on the experience of the human rights legislation in those jurisdictions, and the ACT and Victoria in particular. It is the best drafted and most effective shield of people's rights yet seen in Australia.

There are several ways in which the Bill could be made more effective. Our submission focuses on aspects of the Bill that could be improved to clarify and strengthen its operation, to: ensure effective parliamentary scrutiny; strengthen the role of human rights in statutory interpretation; and ensure effective remedies for human rights breaches by 'public entities'.

ENSURING EFFECTIVE PARLIAMENTARY SCRUTINY

The Bill follows the ACT and Victorian models in attempting to improve parliamentary scrutiny of legislation on human rights grounds. Bills must be accompanied by a ‘Statement of Compatibility’ (s 38); and parliamentary committees are required to consider and report on a Bill’s compatibility with human rights (s 39).

The Queensland Bill follows the ACT model of spreading the scrutiny function between portfolio committees, rather than the Victorian and federal model of conferring the human rights scrutiny function on a single committee. This has advantages and disadvantages. One disadvantage may prove to be that no committee develops expertise in human rights scrutiny. An advantage may be that portfolio committees have greater expertise on the policy area of legislation they are scrutinising.

There are several things that Queensland may be able to learn from the Victorian experience of parliamentary scrutiny. The impact of Victoria’s *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Victorian Charter’) on parliamentary debate about human rights has been disappointing. Statements of Compatibility and reports by Victoria’s Scrutiny of Acts and Regulations Committee (‘SARC’) are rarely raised in parliamentary debates.¹ Several reasons have been suggested for this, including that SARC:²

- is dominated by the Legislative Assembly and by the major parties;
- sees its role as limited to technical scrutiny, despite its mandate to engage with policy issues in reporting on whether a limit on rights is ‘reasonable’; and
- members receive limited education and support.

Another key concern in Victoria is that its scrutiny committee is not given enough time to carry out its function. The parliamentary sitting calendar means that SARC often has as few as nine working days to scrutinise and report on a Bill before it proceeds to debate. In that time the Committee is expected to read and analyse the Bill along with its accompanying statement of compatibility; invite submissions from the public and, if it chooses to do so, hold hearings; produce a draft Charter report; circulate that to all Committee members for discussion and approval; and then, publish the report in the Alert Digest. Finally, before the Bill proceeds to a debate, it is expected that parliamentarians will have the opportunity to read and consider the report.

There is a solution, which in this case has already been adopted by the ACT, at least in relation to amendments proposed by the Government to their own Bills: a requirement that no Bill proceed to debate until the Committee has reported. A requirement of this kind in the Queensland Bill, extended to all forms of legislation rather than merely amendments, would ensure that the relevant parliamentary committee has the time it needs to conduct its analysis.

¹ Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Growing a Human Rights Culture: 2016 Report on the operation of the Charter of Human Rights and Responsibilities* (2017), 43; James B Kelly, ‘A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act*’ (2011) 46 *Australian Journal of Political Science* 257, 270.

² Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 176-79; Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Australia’ (2018) 41 *UNSW Law Journal* 40, 69-73.

INTERPRETATION OF LEGISLATION BY COURTS

Section 48 of the Bill provides that:

All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

While this is worded differently to the ACT³ and Victorian⁴ interpretive provisions, the differences in wording seem unlikely to produce major differences in the operation of s 48.

In the early years of the Victorian Charter, there was a view amongst some judges and scholars that s 32 permitted courts to adopt a ‘remedial’ approach to interpreting legislation, as occurred in the UK House of Lords’ decision in *Ghaidan v Godin-Mendoza*.⁵ A ‘remedial approach’ allows courts to strain the meaning of the words used in legislation so as to make the legislation consistent with human rights.

In *Momcilovic v The Queen*,⁶ six members of the High Court found that the Victorian Charter’s interpretive provision does not permit courts to take a ‘remedial approach’ to interpretation. Four justices suggested that a ‘remedial approach’ might be inconsistent with the judicial function.⁷

Since *Momcilovic*, Victorian courts have taken the view that s 32 simply codifies the common law principle known in Australia as the ‘principle of legality’ and extends its application to a wider range of rights.⁸ The ‘principle of legality’ is a presumption that Parliament does not intend to limit fundamental human rights. In order to rebut the presumption, Parliament must express its intention to limit rights with sufficient clarity.

The result is that Victorian courts have tended to rely on the far more settled common law interpretive principles where they are available—which they usually are.⁹ Section 32 of the Victorian Charter has thus had little effect on interpretation in Victoria.

The Queensland Parliament should strengthen the effect of s 48 to give it more effect than its ACT and Victorian equivalents. We do not suggest attempting to give courts the power to interpret legislation in a ‘remedial’ way. The Queensland Parliament should amend s 48 to provide:

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.

³ *Human Rights Act 2004* (ACT) s 30.

⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

⁵ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. See, eg, *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 54–55 [214]–[216]; Simeon Beckett, ‘Interpreting Legislation Consistently with Human Rights’ (2008) 58 *ALAL Forum* 43.

⁶ *Momcilovic v The Queen* (2011) 245 CLR 1 (*‘Momcilovic’*) (Heydon J dissenting).

⁷ *Momcilovic* (2011) 245 CLR 1, 93 (Gummow J, with whom Hayne J agreed), 178–82 (Heydon J) (finding that s 32 of the Victorian Charter did require a remedial approach and was hence invalid), 250 (Bell J).

⁸ See Bruce Chen, ‘Making Sense of *Momcilovic*: the Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006* (2013) 74 *ALAL Forum* 65. Chen argues that this approach is based on French CJ’s judgment, and it is not clear that this reflects the position of the other judges in *Momcilovic*.

⁹ Though there is evidence of this pre-*Momcilovic* as well (eg *Hogan v Hinch* (2011) 243 CLR 506).

This would indicate to courts and tribunals that s 48 is intended to be stronger than its Victorian and ACT counterparts, and that where there are multiple possible interpretations of a provision, the courts should prefer the interpretation that best protects human rights, over all other interpretations.

REMEDIES FOR HUMAN RIGHTS BREACHES BY ‘PUBLIC ENTITIES’

Section 58 of the Bill places two obligations on ‘public entities’. The first is a substantive obligation to act and make decisions that are compatible with rights. The second is a procedural obligation to give ‘proper consideration’ to rights in making decisions. These obligations are similar to those placed on public authorities by the ACT and Victorian human rights legislation. One notable improvement is the Bill’s clarification that the substantive obligation applies to both *actions* and *decision-making*. This is a point of ongoing uncertainty in the Victorian context; although the uncertainty does not seem to have caused many practical difficulties.¹⁰

The most effective way of ensuring that the government complies with these obligations is not through litigation. Rights are best protected by building a strong ‘human rights culture’ within government; that is, a culture in which rights are considered and prioritised in all government decision-making.¹¹ This requires training and education of public servants, development and re-development of operational policies and processes, and strong leadership and commitment from senior public servants and Ministers.¹² To a large extent, these things are beyond Parliament’s power to control or legislate for.

However, there is also a legitimate role for courts, tribunals and other independent oversight bodies. Even where a strong human rights culture exists, things will go wrong. Effective independent oversight and complaints mechanisms are important to ensure that public entities comply with their human rights obligations.¹³ The Bill recognises this by providing for two avenues for members of the public to seek redress where they believe a ‘public entity’ has unlawfully infringed their rights: a complaint to the Queensland Human Rights Commissioner; and review by the Supreme Court.

Complaints to the Human Rights Commission

One of the main problems with the Victorian and ACT human rights Acts is the absence of an accessible, affordable and effective complaints mechanism.¹⁴ The Bill overcomes this problem by providing for a low-cost mechanism of resolving complaints through the Human Rights Commission. This is an excellent feature of the Bill. Our only comment is that the

¹⁰ Janina Boughey, ‘The Scope and Application of the Charters’ in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) 36, 46-47.

¹¹ VEOHRC, *First steps forward: The 2007 report on the operation of the Charter of Human Rights and Responsibilities* (2008) 63–67; Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), ch 1; the VEOHRC 2016 Report is titled ‘Growing a human rights culture’.

¹² Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), ch 1.

¹³ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 86.

¹⁴ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 99; Janina Boughey and Adam Fletcher, ‘Administrative Decision-Making under Victoria’s Charter’ (2018) 25 *Australian Journal of Administrative Law* 10, 21-26.

Queensland Parliament should undertake to ensure that the Commission has adequate ongoing funding to perform its important role.

Legal Proceedings

Section 59 of the Bill provides that remedies may be sought in the courts on the ground that a public entity has acted unlawfully (that is: breached either its substantive or procedural obligations under s 58(1)), but only where those remedies were otherwise available. Subsection (3) provides that a person is not entitled to damages as a result of a public entity having breached its obligations under s 58.

The section appears to be based on s 39 of the *Victorian Charter*. Its wording is different, and may be clearer, but the effect of s 59 of the Bill appears to be the same as s 39 of the *Victorian Charter*.

Section 39 has been one of the most problematic aspects of the *Victorian Charter*.¹⁵ It has been described as 'irremediable'¹⁶ and 'convoluted and extraordinarily difficult to follow'.¹⁷ It is not clear precisely what a person needs to demonstrate to meet the condition that they 'may seek relief or remedy in respect of[the] act or decision...on a ground of unlawfulness arising [otherwise than] because of this *Charter*.'¹⁸ While the Bill makes it clear (in s 59(2)) that a person does not need to prove that they are *entitled* to a remedy otherwise than because of s 58, questions still remain about exactly what they will need to demonstrate. For instance, will an individual need to demonstrate that they have *standing* to challenge the action otherwise than because of s 58? Do they need to demonstrate that their non-human rights argument for unlawfulness is plausible? Or do they simply need to demonstrate that the act or decision is the *kind* of act or decision that would otherwise be amenable to relief.

Two other difficulties have arisen as a result of s 39 of the *Victorian Charter*, which also arise under the Bill.

(a) Remedies against private entities with public functions

Section 9 of the Bill defines the 'public entities' to whom the Bill's obligations applies. Subsection (h) provides that a private organisation is a 'public entity' when it performs 'functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise)'. This recognises one of the realities of modern government: that governments frequently outsource functions to the private sector. The Bill attempts to ensure that when the government outsources its functions, there is no reduction in the level of human rights protection afforded to the public. Accordingly, we consider that the extended definition of 'public entity' is appropriate. We also note that the definition is based on, but attempts to improve and clarify, that in the *Victorian Charter*.

However, it is not clear that any or all of the legal remedies that are available against the government will be available against private entities exercising public functions (hereinafter

¹⁵ The Hon Justice Mark Moshinsky, 'Charter Remedies' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) 69.

¹⁶ Jeremy Gans, 'The *Charter's* Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105.

¹⁷ *Director of Housing v Sudi* (2011) 33 VR 559, 596 [214] (Weinberg JA).

¹⁸ The Hon Justice Mark Moshinsky, 'Charter Remedies' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) 69, 78-80.

‘government contractors’). As noted above, s 59 provides that a person must be able to seek a remedy under the common law or another statute on the grounds that a decision or action is unlawful, in order to seek that same remedy for the breach of their human rights (subject to the uncertainties discussed above). The remedies associated with judicial review of administrative action under common law and the *Judicial Review Act 1991* (Qld) may not be available against government contractors.

This application of common law judicial review remedies (ie mandamus, certiorari, prohibition, injunction and declaration) against government contractors has not yet been resolved in Australia.¹⁹ But there is a strong possibility that they would not apply. It is also unlikely that the *Judicial Review Act 1991* (Qld) applies to the actions of government contractors, as that Act only applies to decisions made ‘under an enactment’ and those of officers or employees of ‘the State or a State authority or local government authority’.²⁰ Decisions made by government contractors are not usually made ‘under an enactment’, but find the legal source of their power under contract. And government contractors are not officers or employees of ‘the State [etc]’.

The result is that, while government contractors have obligations to consider and act compatibly with human rights, individuals affected by the unlawful actions of government contractors may have no legal recourse to enforce those obligations.

(b) The effect of a breach of s 58

Another issue which causes some confusion under the *Victorian Charter* is the effect of a public authority breaching its *Charter* obligations. When a government decision-maker acts unlawfully under general law (eg by breaching a provision in a statute, or by failing to afford procedural fairness), their decision may be either invalid, or not invalid. The question of whether a particular error results in invalidity depends on statutory construction (and more particularly, whether it was Parliament’s intention that the error lead to invalidity).²¹

Under the common law, different remedies are available in each of these circumstances. If a decision is invalid, then a Court can quash the decision and order that it be remade according to law. A court can also prohibit a decision-maker from making an invalid decision. If a decision is unlawful but not invalid, then a court has fewer remedial options. It can issue an injunction or a declaration. A court can only quash a decision which is not invalid if the error of law appears ‘on the face of the record’. The law surrounding these issues is technical and confusing.²²

This issue arose in the Victorian case of *Bare v IBAC*.²³ While the majority of the Court of Appeal did not have to make a determination as to whether a breach of s 38 of the *Victorian Charter* would result in invalidity, they indicated that it probably did not.²⁴ The Bill clarifies

¹⁹ See, generally, Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 149-56; Nicholas Seddon, *Government Contracts* (Federation Press, 6th ed, 2018) ch 8.

²⁰ *Judicial Review Act 1991* (Qld) s 4.

²¹ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

²² As discussed by Gageler J in *Probuild Constructions v Shade Systems* [2018] HCA 4.

²³ *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 178 [145] (Warren CJ) (who did decide this question), 255-59 [388]-[396] (Tate JA) (who did not reach a conclusion), 327-31 [617]-[626] (Santamaria JA) (who reaches this conclusion, but in obiter).

²⁴ See Janina Boughey, ‘The Charter’s Effect on Administrative Decision-Making’ (2016) 27 *Public Law Review* 3.

this issue by expressly providing (in s 58(6)(a)) that a breach of s 58(1) does not result in the relevant decision or action being invalid.

This probably reflects the position in Victoria. But it does not resolve many of the technicalities or uncertainties that come from this position. In particular, the question of whether a Court may quash a decision that breaches s 58(1) will depend on whether or not the public entity's error 'appears on the face of the record'. There are a range of technicalities associated with determining this.

Indeed, the position in Queensland may turn out to be even more complicated than in Victoria, because the remedies under the *Judicial Review Act 1991* (Qld) do not depend on whether the breach results in invalidity. Yet the remedies themselves are otherwise the same as those under the common law. This might simplify legal proceedings and remedies compared with Victoria. Or it may add yet another layer of complexity.

Recommendation

The obvious solution to these problems is to re-draft s 59 along the lines of s 40C of the ACT's *Human Rights Act 2004* (ACT). The ACT legislation provides an independent cause of action when a public authority is alleged to have contravened its human rights obligations, and allows the Supreme Court to issue any remedy it considers appropriate except damages. This provides a much clearer and simpler remedial model than the Victorian Charter, and is not attended by the same technicalities associated with judicial review remedies. Brett Young recommended this reform for the *Victorian Charter* in his 2015 review.

Importantly, there is no evidence that the freestanding cause of action in s 40C of the ACT *Human Rights Act* has resulted in a flood of human rights litigation.²⁵ Therefore, there is no good reason to adopt the Victorian remedial approach rather than the simpler ACT one.

Yours sincerely

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²⁵ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), 126. George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland' (2016) 41 *Alternative Law Journal* 81, 83.