

QUEENSLAND LAW SOCIETY

SUBMISSIONS

Background

1. After last year's State election, Labor, in return for Peter Wellington's support (and assistance in gaining government in a hung parliament) gave a key commitment to consider a Human Rights Act. Henceforth, a multitude of Queensland communities, organisations and individuals have lobbied increasingly for the introduction of legislative human rights protections.
2. In September, 2015 the Caxton Community Legal Centre hosted a forum at Parliament House. A number of key persons spoke at what was effectively a campaign launch by interested community groups. They included Yvette D'Ath (Attorney-General), Jackie Trad (Deputy Premier), Shane Duffy (CEO of Aboriginal and Torres Strait Islander Legal Service), Kevin Cocks (Anti-Discrimination Commissioner), Karyn Walsh (CEO of Micah Projects) and Robb Hulls (former Attorney-General of Victoria), who was largely responsible for the introduction of Victoria's *Charter of Human Rights and Responsibilities Act*,¹ (the Victorian Charter). The Attorney-General committed to an inquiry and subsequently referred the issue to the Legal Affairs and Community Safety Committee (the Committee). The Committee is due to report to Parliament by 30 June, 2016.²
3. Queensland Law Society (The Society)'s Human Rights Working Group (HRWG) has considered whether it is "*appropriate and desirable*" for parliament to legislate for a Human Rights Act in Queensland.
4. The Inquiry's Terms of Reference exclude consideration of a constitutionally entrenched model. This is consistent with the approach adopted in other Australian jurisdictions and preserves parliamentary sovereignty.
5. The Society is charged with the higher duty of providing input and recommendations to this Inquiry which achieve two inextricably linked ends: firstly, submit comment which reflects the opinion of its full membership; and secondly, assume the role of an independent, *all-partisan* representative body upon which our government can rely to provide it with fulsome advice which aligns only with the promotion of good, evidence-based law and policy, and pursues no other agenda, be it political or otherwise.
6. In this spirit, Mr Dan Rogers (HRWG Chair), along with the Society's President Mr Bill Potts and CEO Ms Amelia Hodge, formulated specific and thoughtful strategy to engage meaningfully with the Society's membership.

¹ PILCH, Homeless Persons' Legal Clinic, '*Charting the Right Course Submission to the Inquiry into the Charter of Human Rights and Responsibilities*', 6 June 2011.

² The Terms of Reference are annexed to this advice.

Society's consultation and response

7. In response to the establishment of a parliamentary Inquiry into a Human Rights Act for Queensland (the Inquiry), the Society established its HRWG. The HRWG met for the first time on 2 February, 2016. The HRWG comprises members with broad and diverse legal and human rights experience.³ The HRWG recognised the need for broad consultation with the Society's members. This was achieved through various media:
 - Items regularly published in the Society's member newsletter, *QLS Update* (including invitations to apply to join the Society's HRWG)
 - Tabling the Inquiry as an agenda item for all Society Committees' inaugural 2016 meetings.
 - Establishment of the Society's Human Rights web page (www.qls.com.au/humanrights).
 - Establishment of the Society's Human Rights Inbox to receive member comments (published on the web page and enclosed).
 - Seeking Society Committee feedback, also enclosed.
 - Articles published in the Society's *Proctor* magazine as well as other publications including the Law Council of Australia's Review.
 - The Society's Human Rights Debate hosted by the Society, and co-chaired by Anti-Discrimination Commissioner Kevin Cocks AM and Dan Rogers (Chair, HRWG), held on 20 April 2016 to offer members an opportunity to voice their opinions and discuss queries around this potential legislation.

8. The Society's broad consultation has resulted in its membership having expressed two opposing views. Consequently, the Society carries out its duty as a representative body of its integral membership by presenting both of these perspectives, along with their respective underlying merits, to this Inquiry.

³ Dan Rogers (Group Chair and Principal, Robertson O'Gorman Solicitors), The Hon. Richard Chesterman AO RFD, Society President Bill Potts, Society Councillor Karen Simpson, Professor George Williams (UNSW), Julie Ball (Principal Lawyer, Anti-Discrimination Commission Queensland), Rebecca Fogerty (Criminal lawyer, Potts Lawyers), Society Past President Peter Eardley, Mark Fowler (Director, Neumann & Turnour Lawyers), James Farrell (Director, QAILS), Murray Watt (Senior Associate, Maurice Blackburn Lawyers), Professor Sue Harris-Rimmer (Griffith University), Joanne Rennick (Managing Partner, MurphySchmidt Solicitors), Andrew Anderson (Director, Boe Williams Anderson Lawyers & Advocates), Matt Dunn (Society Governance Relations Principal Advisor) Julia Connelly (Society Policy Solicitor).

**A Human Rights Act FOR QUEENSLAND:
THE PROPONENT PERSPECTIVE**

Terms of Reference

2(a) *That in undertaking the inquiry, the committee considers the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these.*

9. One of the major arguments put forward by opponents of a Human Rights Act is that current laws already provide clear and sufficient protection of core rights and freedoms. The proponent perspective is that there are gaps in what rights are protected under current laws and that this undermines the effectiveness of current laws.
10. Annexure A sets out a summary of legislation in Queensland that protects Human Rights. This survey of legislation reveals that there is no clear systematic framework for human rights laws, but rather something of a “mish-mash” of different, sometimes overlapping statutes. An over-arching Human Rights Act would remedy any gaps and reinforce the fundamental character of those rights already protected under legislation by way of an unambiguous parliamentary statement.
11. It is important to note that Australia’s ratification of international instruments does not create binding domestic law.⁴ While courts must favour a construction aligning with international obligations where a statute is ambiguous,⁵ a Human Rights Act would encourage all arms of government to consider more fully human rights implications in decision making. The uniqueness of Queensland having a unicameral parliament is a further reason for an additional mechanism in which to protect rights and freedoms.

2(b) *The operation and effectiveness of human rights legislation in Victoria, the ACT and by ordinary statute internationally*

12. The answer to this point lies in distilling what relevant (if any) parts of the human rights statute confer a tangible benefit to the community above and beyond pre-existing laws. Accordingly, the United Kingdom (UK), New Zealand (NZ), Australian Capital Territory (ACT) and Victorian models have informed our submissions around the benefits available to a non-constitutionally entrenched human rights model.

⁴ *Dietrich v The Queen* (1992) 177 CLR 292, 305 per Mason CJ and McHugh J in reference to the *International Covenant on Civil and Political Rights*, as cited in Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, Final Report, December 2015, page 39.

⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287, as cited in Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Final Report, December 2015, page 85.

13. Both the ACT and Victorian Acts have undergone reviews since their enactment. There is general consensus that they promote a positive human rights dialogue between public entities and citizens. A review of the first five years of implementation in ACT by an Australian National University research team identified improved law making as being one of the 'clearest effects' since the Act's implementation in 2004.⁶ The Human Rights Law Centre argued a similar effect on Victorian government's law and policy making.⁷
14. In relation to Victoria, High Court of Australia Chief Justice French has stated that the Victorian Charter's rights and freedoms 'in significant measure incorporate or enhance rights and freedoms at common law.'⁸
15. The PILCH Homeless Person's Legal Clinic submission to the first statutory review of the Victorian Charter contains 20 case studies of individuals on whose behalf the Charter was invoked. These case studies suggest that the Charter can be an effective advocacy tool for vulnerable persons and the professionals who support them. Importantly, in over 50 percent of cases, matters were resolved via negotiation, rather than the courts.
16. James Farrell, a member of the QLS HRWG and Director of QAILS (who authored the review) states that in his work with PILCH (Victoria):

"We increasingly saw core and functional public authorities turning to Charter-based frameworks for guidance in making difficult decisions in the face of limited resources and competing priorities...formal legal protection of human rights in Victoria has brought about a gradual but noticeable improvement in the way decisions are made by public authorities. The Charter has had a clear and positive impact on the delivery of public services and the operation of public authorities."
17. Internationally, the UK Human Rights Act 1998 has been praised by the British Institute of Human Rights for producing 'better policy outcomes.'⁹ Reports emphasise the benefit which it confers on the lives of marginalised individuals – from the elderly to asylum seekers.¹⁰ NZ's Bill of Rights is also reported to have improved legislative process, given greater legitimacy to the values upon which the courts draw, and increased public debate and understanding surrounding human rights.¹¹

⁶ Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) at 6, <https://justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_20091.pdf>

⁷ Human Rights Law Centre, 'More Accessible, more Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights' (June 2015), 1.

⁸ *Momcilovic v The Queen* (2011) 245 CLR 1, [51], as cited in Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, Final Report, December 2015, page 30.

⁹ Department for Constitutional Affairs, 'Review Of The Implementation Of The Human Rights Act' (2006).

¹⁰ British Institute of Human Rights, *The Human Rights Act — Changing Lives* (2nd ed, 2008) 5.

¹¹ *Thampapillai V.*, 'A Bill of Rights for New South Wales and Australia,' *The Law Society of New South Wales January 2005 Discussion Paper*.

18. Generally, these similar international models have not resulted in excessive litigation or overstepped judicial power. These commonly feared outcomes seem to hold closer connection to constitutional models such as the US Bill of Rights.
19. A Human Rights Act's effectiveness is clearest in terms of improved policy, dialogue and culture. Across all relevant jurisdictions it is unanimous experience that the Acts can be more effective with improved causes and ability for redress, coupled with education and greater accessibility to justice.

2(c) The costs and benefits of adopting a Human Rights Act (including financial, legal social and otherwise)

20. As with any new legislative regime, the actual financial cost of adopting a Human Rights Act is difficult to quantify, although a Victorian committee report put the cost at 50 cents per Victorian citizen per year.¹²
21. The legal, governance and social benefits of a Human Rights Act to Queensland would be substantial. In addition, there is the potential for indirect savings through:-
 - Improving government policy focus.
 - Improving delivery and efficiency of key public services.
 - Greater protection for marginalised and disadvantaged Queenslanders.
 - Contributing to the development of ongoing Human Rights culture.
 - Assisting to fulfil Australia's Human Rights obligations.
22. Concerns about non-financial 'costs' associated with a Human Rights Act such as litigation or an overstepping of judicial power can be addressed by careful drafting that draws on the experience that has come from other jurisdictions.

2(d) Previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation.

23. A review of the Victorian charter in 2015 found, inter alia, that:-
 - Human Rights breaches should be 'fully justiciable' through a stand-alone cause of action and remedies, with VCAT to hear claims of incompatibility.¹³
 - Over-litigation has not come to fruition in Victoria or the ACT.¹⁴

¹² Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) x, as cited in George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland?: Lessons From Recent Australian Experience' (2016) University of New South Wales, page 3.

¹³ M Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (Brett Young Review)*, September 2015, Recommendation 27.

¹⁴ *Ibid*, p 128.

- It was recommended that uncertainty around whether particular entities were bound by the Charter be remedied by amending it to clarify that public authorities' decisions must be compatible with Human Rights¹⁵
24. The first review of the ACT Human Rights Act led to amendments including improvements to interpretive provisions, creating a duty on public authorities to comply with the rights under the Act and creating a direct right of action to the Supreme Court for a breach of those rights, without damages entitlement.
 25. In 2006, the Tasmanian Government commissioned the Tasmanian Law Reform Institute to report on the status of Human Rights. The Institute recommended the adoption of Human Rights legislation, as did the relevant committee in Western Australia. The Commonwealth's 2009 landmark Report of the National Human Rights Consultation recommended that Australia enact a comprehensive national Human Rights Act (although this was not adopted).¹⁶

3(a) That, if appropriate and desirable, the committee consider the objectives of the legislation and rights to be protected.

26. Following on from the Victorian and ACT examples, the paramount objectives of a Human Rights Act are to:-
 - Record a commitment between Parliament and Queenslanders to promote and protect Human Rights through fair and dignified treatment (and, more broadly, the operation of democracy in Queensland).
 - Assign inherent cultural value to diversity and its capacity to enhance the Queensland community, by enforcing the non-discriminatory application of Human Rights to all people.
 - Foster a political culture in which Human Rights underpin local and state government service delivery, formulation of policy and legislation, and interpretation of the latter by courts and tribunals.¹⁷
 - Create legal obligations to carry out Human Rights responsibilities.
 - Acknowledge the particular importance of fundamental Human Rights and freedoms to the Aboriginal and Torres Strait Islander people of Queensland.¹⁸
27. A Human Rights Act would bring 3 primary and currently unenforced governmental obligations to the fore, being to:
 - (i) Refrain from conduct which is inconsistent with international covenants to which Australia is a signatory and abolish laws, customs and practices which do not align with these.
 - (ii) Take measures to prevent conduct which is inconsistent with these covenants.

¹⁵ Ibid, pp. 58 – 79.

¹⁶ National Human Rights Consultation Committee 2009, *National Human Rights Consultation Committee Report*, Recommendations 18 and 19.

¹⁷ M Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (Brett Young Review)*, September 2015, Recommendation 27. pp.3-4.

¹⁸ Ibid.

- (iii) Take a proactive role in fulfilling human rights from administrative, political and legal perspectives. This is to be contrasted with the *Queensland Anti-Discrimination Act* which imposes only prohibitive (cf proactive and positive) obligations.¹⁹
28. Proponents of a Human Rights Act endorse the comments of the QLS' Victorian counterpart, the Law Institute of Victoria, that a human rights instrument is axiomatic to achieving the following:
- recognising and protecting universally agreed rights.
 - placing human rights above politics and arbitrary government action.
 - improving the quality of government policy making, decision making and public administration.
 - ensuring legislation reflects human rights standards.
 - educating the community about human rights and promoting a culture of respect for human rights.
 - ensuring equal respect for everyone's human rights.
 - bringing this state of Australia into line with the international community fulfilling our legal obligations under international law.²⁰

Rights to be protected

29. Human Rights are the basic rights that belong to every person, regardless of age, race, sex, social status or any other characteristic. They are derived from, and serve to protect, the inherent dignity and worth of each person as the foundation of freedom, justice and peace in the world.²¹
30. Human Rights legislation in the ACT, Victoria, UK and NZ protects and enshrines some civil and political rights. Few rights recognised in the International Covenant on Economic, Social and Cultural Rights (the ICESCR) are protected by such domestic legislation. Human Rights Act proponents recommend that the committee include all rights enshrined in the International Covenant on Civil and Political Rights (the ICCPR) as a basis for a Queensland Act. Australia has signed and ratified this treaty and such rights already form the basis of the current Victorian Charter and ACT Act.²²

¹⁹ Queensland Anti-Discrimination Commissioner Kevin Cocks AM delivering an address on the Queensland Inquiry into Human Rights at Brisbane Square Library, 29 February 2016.

²⁰ Law Institute of Victoria Submission: A submission on the Human Rights Community Discussion Paper and a Human Rights Charter for Victoria, 2005.

²¹ See, for example, the Preamble to the Universal Declaration of Human Rights, resolution adopted by the UN General Assembly, 10 December 1948, A/RES/3/217A, <<http://www.un-documents.net/a3r217a.htm>>

²² See sections 8 – 27 in both Human Rights Act 2004 (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

31. The position is more complex in respect of Economic, Social and Cultural Rights. Australia is a signatory to ICESCR which protects rights such as just work conditions and adequate housing, these being recognised as 'fundamentally important to human security, happiness, and fulfilment'.
32. The Victorian and ACT experiences give guidance in relation to ICESCR. Recommendations from the initial Victorian review suggested the inclusion of ICESCR provisions in the Charter.²³ Submissions to the 2015 Victorian Review suggest that a separation of rights is 'illusory' and that an Act with solely ICCPR provisions constitutes a 'minimal baseline.'²⁴ The Brett Young Review recognised the support for ICESCR but left the issue as a priority for future review.²⁵
33. In the ACT, ICESCR rights were incorporated into the Act after one year of operation. This process of incrementally review of the Act is ongoing, with section 27A's inclusion of the right to education being the initial step.²⁶ The importance of ICESCR can be summarized as follows:
 - ESCR rights are often more important than ICCPR rights for those living in poverty.
 - HR does not exist in isolation; they are interdependent.
 - Recognition of this interdependence improves decision and policy making.
 - Arbitrary division of rights does not make sense to the person whose rights are violated or who is experiencing marginalization.²⁷
34. Including appropriate ICESCR rights initially is recommended. In recognising that ICESCR rights raise issues of resource allocation and enforcement, Human Rights Act proponents recommend that, in the alternate, the Act provide for a four-year review to add rights subsequently.
35. Any consideration of the rights to be included must recognise their necessary limitations. It is well accepted that not all human rights are absolute, and can be limited in certain circumstances. The ACT and Victorian Charter provide that their rights may be subject 'only to such reasonable limits as can be demonstrably justified in a free and democratic society' and taking into account 'all relevant factors', including the nature of the right affected, the purpose of the limitation and its extent.²⁸ This balancing exercise is appropriate and supported by Human Rights Act proponents.

²³ Law Institute of Victoria 2005 Submission, p5.

²⁴ Brett Young, above n 16, pp. 227 – 229, see also Submissions to 2015 Review by Law Institute of Victoria, Castan Centre for Human Rights Law, Professor Rosalind Dixon and Professor George Williams AO.

²⁵ Brett Young, above n 16, pp. 227 – 229, 238.

²⁶ ANU, 'ACT Economic, Social and Cultural Rights Research Project', *Australian Research Council* (2010), and Government response to the review (2012). See also ANU Human Rights Research Project Report, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009).

²⁷ *Callanan v Attendee X* [2013] QSC 340 at [55].

²⁸ Act, section 28; Victorian Charter, section 7

36. Opponents of a Human Rights Act may raise that a codifying instrument risks unduly limiting the human rights Queenslanders ought to enjoy. This risk is mitigated by the principle of legality written into s 32(1) of the Victorian Charter²⁹ (and stated recently in *Re: Bolton; Ex parte Beane*):

*“Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.”*³⁰

37. It is important, however, to note The Honourable High Court Justice McHugh’s opposition to this as becoming an ‘interpretative fiction’³¹ - underscoring the need to create a regulatory framework around Queenslanders’ Human Rights and freedoms. The HWRG supports a dialogue model, under which all legislation is interpreted ‘against the backdrop of the supremacy of Parliament’, the full thrust of which may be exercised by words which must not only be clear, but ‘for which it [Parliament] can be held politically accountable’ (discussed further below).³²
38. Any legislation that purports to protect human rights falls well short if it does not protect all freedoms, particularly freedom of association. Freedom of association is the linchpin of society, because it is the vehicle through which people exercise their civil, cultural, economic, political and social rights.³³ It is enshrined in article 22.1 of the ICCPR.³⁴ Our High Court has attributed this freedom as a ‘fundamental aspect of our legal system.’³⁵ To that end, legislation enacted in Queensland could include, in its title, a reference to Rights and Freedoms.
39. Human Rights Act proponents advocate for an Act that highlights the rights of specific groups whose vulnerability calls for additional emphasis on protections. The right to indigenous self-determination is seen as a crucial cultural right as enunciated by articles 3, 4, and 5 of the UN General Assembly Declaration on

²⁹ Robert French, ‘Common Law Constitutionalism’ (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014) as cited in Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 38.

³⁰ *Re: Bolton; Ex parte Beane* (1987) 162 CLR 514, 523, quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) as cited in Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 36.

³¹ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [29].

³² Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2, as cited in Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 37.

³³ Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 162.

³⁴ Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 166.

³⁵ *Tajjour v New South Wales* (2014) 313 ALR 221, [224] citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J), as cited in Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws, Final Report, December 2015, page 163.

the Rights of Indigenous Peoples (UNDRIP). This right was not included in the original Victorian Charter; however, the Brett Young Review recommended it.³⁶

3(b) How the legislation would apply to the making of laws, courts and tribunals, public authorities and other entities

Laws

40. Parliamentary sovereignty is paramount. A Human Rights Act would not prohibit Government introducing certain laws; however, a Queensland Human Rights Act should require statements of compatibility to be issued with any new legislation, and bills should be scrutinised by parliamentary committees to identify non-compliance. This is a requirement of both the ACT and Victorian Acts.
41. Human Rights Act proponents support a dialogue model as the foundation upon which a Human Rights Act would be adopted and implemented. Under this model, there is a dialogue among the three arms of government, with parliament retaining its legislative supremacy, the courts playing a subsidiary but important interpretive and declaratory role, and the executive facilitating the creation of a human rights culture across government.³⁷
42. The requirement to issue a statement of compatibility provides a protection mechanism against government introducing laws which unnecessarily impinge on its citizens' rights. It has been argued that the Victorian process in particular has been designed to ensure that Members of Parliament take responsibility for the human rights impact of their legislation, and to assist Parliament in its consideration of bills.³⁸
43. The Victorian and ACT reviews have found that this mandatory consideration of laws has the following benefits:
 - Significant impact on policy development.³⁹
 - Informed parliamentary debate.⁴⁰
 - Greater human rights scrutiny of legislation.⁴¹
 - Embedding human rights in government processes.⁴²
 - Enhancing transparency and accountability.⁴³

³⁶ Above n 24, recommendation 48.

³⁷ George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland?: Lessons From Recent Australian Experience' (2016) University of New South Wales, page 2.

³⁸ Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and Their Implications for Victoria' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006), cited in Tasmania Law Reform Institute, *A Charter of Rights for Tasmania Tenth Report* (October 2007) 38.

³⁹ Brett Young, above n 16, p189.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Human Rights Law Centre Submission to Brett Young Review, 16.

⁴³ Victorian Council of Social Service Submission to Brett Young Review, 2015.

44. As with Victoria and ACT, it is recommended that failure to comply with the requirement for a statement of compatibility should not affect the validity, operation or enforcement of any law.
45. The Queensland Charter may also require new bills to be scrutinised by a parliamentary standing committee on Human Rights. The committee would report to the Queensland Parliament on the compatibility of the bill with human rights. This is the position in the ACT and Victoria.⁴⁴

Courts

46. The State Courts should not have a power to strike down laws; however, they should be obliged to interpret legislation in a manner compatible with a Human Rights Act and with international human rights jurisprudence. As always, basic principles of statutory interpretation apply. As in Victoria, Queensland's Supreme Courts should also be able to issue a declaration of incompatibility when a law cannot be interpreted consistently with Human Rights, requiring Parliamentary response. The Attorney-General and Commission must receive notice of any proceeding in which the Supreme Court is considering making a declaration, and be given time to decide whether to intervene.⁴⁵
47. Courts should also be able to exercise a vital role in adjudicating and issuing a remedy in legal proceedings where a breach of human rights is established (see ToR 3(c)). Consistently with parliamentary supremacy, under s 31 of the Victorian Charter, the Parliament may, in exceptional circumstances, declare that the Act (or a provision/subordinate instrument) has effect despite incompatibility. 'Override declarations' exclude the Charter's application to the provision.⁴⁶

Tribunals

48. In view of ACT and Victorian reviews highlighting the importance of both standalone causes of action and concerns regarding access to justice under the Acts, Human Rights Act proponents support the empowerment of QCAT to hear human rights complaints. QCAT has proven itself as a key mechanism in improving Queensland's access to justice⁴⁷ and in achieving its key related functions.⁴⁸

Public Authorities

49. A Queensland Human Rights Act should require public authorities to act consistently, and align their decision-making processes, with Human Rights. Human Rights Act proponents support a Human Rights Act that empowers a body to investigate, report on and conciliate Human Rights complaints, intervene in legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform.

⁴⁴ Act, section 38; Victorian Charter, section 30.

⁴⁵ Act, section 34.

⁴⁶ Victorian Charter, section 31.

⁴⁷ Queensland Law Society, *Access to Justice Scorecard: evaluating access to justice in Queensland: 2014 Data Analysis and Report*, 2014.

⁴⁸ Outlined in s 4 of the *Queensland Civil and Administrative Tribunal Act 2009*, as cited in Department of Justice and Attorney General, *Review of the Queensland Civil and Administrative Tribunal Act 2009*, Consultation paper, December 2012.

50. A Human Rights Act places stronger onus on all sectors to take into account Human Rights issues, therefore incentivising best practice.⁴⁹ The Anti-Discrimination Commission of Queensland (ADCQ) could fulfil a regulatory role (appropriately resourced). Alternatively, a Human Rights Commission could be established for this purpose. The Brett Young Review recommendations regarding clear definition of what constitutes a public authority should be considered in drafting an Act for Queensland.⁵⁰

Other entities

51. Public authorities' compliance with a Human Rights Act should extend to private entities contracted to carry out executive functions such as aged care, disability services, child protection services or prison facilities. A Human Rights Act will otherwise not bind private actors; however, its introduction would encourage social and community respect for Human Rights. The Act allows private entities to opt in to the responsibilities imposed on public authorities. The Brett Young Review recommended a similar provision for the Victorian Charter.⁵¹ A similar mechanism in Queensland should be instituted as a step towards fostering Human Rights dialogue in private business sectors. Potential issues around the inclusion of opt-in provisions should be considered; for example, the impact on fundraising should not-for-profit organisations elect to be bound.

3(c) The implications of laws and decisions not being consistent with the legislation

52. A Human Rights Act must allow for those whose rights are violated to seek effective remedy. This aligns with Article 2.3 (a) of the ICCPR. The Victorian and ACT experiences support Queensland having a separate cause of action with a full range of remedies, including damages.⁵² The Brett Young Report noted that 'without a clear way to remedy a breach of someone's human rights, the regulatory model for the Charter will continue to be flawed.'⁵³ Section 40C of the Act allows a person to commence proceedings against a public authority in the Supreme Court or to rely on their rights under the Act in any other legal proceeding.⁵⁴
53. The need for remedies must be counterbalanced with the practical realities which government faces in their implementation. Pragmatism dictates that remedies should be introduced on an incremental basis, following Victoria's lessons. Further, penalties applying, for example to malfeasance or negligence by public authorities, should not be duplicated in other statutes.

⁴⁹ Gallop, Geoff, 'The Case for a Charter of Rights' (2010) 12 *The University of Notre Dame Australia Law Review* 33.

⁵⁰ Above n 16, Recommendations 12 – 19.

⁵¹ Above n 16, Recommendation 15.

⁵² The Act has a freestanding cause of action, although damages are not recoverable. The Victorian remedy provision is more complex with proceedings only occurring if there is another ground on which to challenge the decision or action.

⁵³ Above n 16, p12.

⁵⁴ Human Rights Act 2004, section 40C.

54. In summary, a breach of human rights in Queensland should result in:
- A separate cause of action under the Act.
 - The ability to make complaint to the Anti-Discrimination Commission (the Commission) for the complaint to be first conciliated by the Commission.
 - The power to the Commission to investigate and report systemic HR issues.
 - Ability for QCAT to hear applications alleging breaches in addition to the Supreme Court.
 - Access to a full range of judicial remedies including declarations, orders to cease, injunctions and damages.

3(d) *The implications for existing statutory complaints processes*

55. A Human Rights Act will improve existing statutory complaints processes by facilitating dialogue and understanding in public and statutory bodies. A Human Rights Act can allow existing processes such as anti-discrimination claims to continue, while equipping individuals with appropriate recourse should those processes be abused. The Act would also require all decision-making within existing frameworks and processes to be compatible with Human Rights. A Human Rights Act only supports and improves current complaint processes.

3(e) *The functions and responsibilities under the legislation*

56. Reviews in Victoria and the ACT have highlighted ambiguity, particularly in relation to the positive statutory responsibilities of public authorities. Clearly enunciated responsibilities are advocated as being equally crucial as the declaration of particular rights under any Queensland Act. The Victorian Charter, for example, embedded the requirement for an independent review at four and eight year's post-legislative operation.⁵⁵
57. The responsibilities surrounding any new Bill are important. The Queensland Government's Queensland Legislation Handbook devotes its Chapter 7 to Fundamental legislative principles. In particular, section 7.2 refers to the rights and liberties of individuals and corollary inquiries to this as key considerations to be taken into account when drafting legislation.⁵⁶

⁵⁵ Brett Young, above n 16, p.(iii).

⁵⁶ <<http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook.aspx>> at 16 March 2016.

58. Parliamentary Committees established to scrutinise legislation operate currently. The ALRC Report recommended that Australia's Federal government follow the UK's lead by establishing a Human Rights Committee with the 'additional sifting process' of considering specific criteria such as recent relevant judicial decisions, the sufficiency of Explanatory Notes and comments from reputable stakeholders.⁵⁷ A Human Rights Committee would also seek evidence that any encroachment⁵⁸ on rights or freedoms which it identifies is justified in accordance with the operation and sustenance of good law. These are aspects which are absent, currently, from both Federal and Queensland State guidance materials.
59. Both the ACT and Victorian regimes require legislative scrutiny for compliance with human rights; however, these systems are not without issues. Accordingly, the Queensland government should ensure that:
- All legislation (including delegated legislation, which the Parliamentary scrutiny committee in the ACT does not have the power to review) should be subject to scrutiny and require a compatibility statement.
 - 60 days are given for scrutiny committees to exercise their function (unlike Victoria where as few as 9 working days have been provided).⁵⁹

⁵⁷ Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices – 23rd Report of Session 2005-06* (July 2006) [29], as cited in Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, Final Report, December 2015, page 69.

⁵⁸ Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, Final Report, December 2015, page 68.

⁵⁹ George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland?: Lessons from Recent Australian Experience' (2016) University of New South Wales, page 6.

A HUMAN RIGHTS ACT FOR QUEENSLAND

THE OPPONENT PERSPECTIVE

1. Opponents of a Human Rights Act consider it unnecessary and inappropriate as a means of adjusting the competing and conflicting interests and wants which exist among the disparate groups that make up Queensland society.
2. Rather than following the ToR format, these views are presented under the broad sentiments that a Human Rights Act would be:
 - (a) Unnecessary; and
 - (b) Inappropriate.

Unnecessary

3. The Victorian “Charter of Human Rights and Responsibilities” is a convenient reference point. Sections 9 to 27 of the Charter describe some 19 separate human rights (with some ancillary rights) which the Charter purports to protect. Twelve of these rights (sections 9, 10, 11, 12, 13, 20, 21, 23, 24, 25, 26 and 27) are already protected by the existing criminal and common law, which separately or together provide remedies or impose sanctions when the rights are infringed. Respectively these are rights to life, not to be tortured, not to be enslaved, to move, to reputation, to property, to liberty, and five particular aspects of fairness in criminal proceedings. There is a second category of six rights (sections 14, 15, 16, 17, 18 and 19) which are descriptions of modes of behaviour which are freely permitted within society, but which are not amenable to government regulation or protection. To the extent that one person attempted to prevent another person from exercising one of those freedoms, the attempt would inevitably give rise to a breach of a right in the first category, for which there are sanctions and remedies. In this category are freedom of thought, of expression, of association, the “right” of family and children to be respected, to take part in public life, and to have one’s culture respected.
4. S 12, the right to freedom of movement, deserves particular mention. The origin of the right is lost in antiquity, but is undoubted and obviously essential. Any attempt to interfere with it would involve an assault and/or restraint, which could be the subject of prosecution and an action for damages. The relevant offences are assault and deprivation of liberty. The torts are trespass to the person and false imprisonment. Legislating for a human right to freedom of movement will not confer any additional right or remedy over the existing law.
5. There is a third category which contains only one right, conferred by section 22. That “right” concerns the humane treatment of prisoners while incarcerated and, in particular, the separation of remand prisoners from those serving sentences after conviction. That laudable objection can be achieved absent a Human Rights Act.
6. Existing rights may not have their source in a single Act of Parliament but they are nonetheless firmly established and easily ascertained, as are the remedies and sanctions for their infringement. It is neither accurate nor fair to describe the present framework of rights and their protection as patchy, inadequate or

inconsistent. There may well be, however, inconsistency and confusion if “new” human rights are enacted which differ from existing rights in terms or content. A right to freedom of expression limited only by a duty to “respect the rights and reputation” of another (S15 of the Victorian Charter) will be difficult to reconcile with the law of defamation. A right not to have one’s “reputation unlawfully attacked” (S13) is not immediately compatible with the same law, or S 15. The existing laws express a balance between competing interests within society which parliaments and courts have worked out over many years. They have not been shown to be inadequate for the protection and wellbeing of the Queensland public.

7. A Human Rights Act would impose (perhaps substantial) costs, economically and socially. The social costs will come in the form of an extra layer of regulation and restrictions on ordinary citizens and expose them to an additional set of remedies and sanctions at the suit of those enforcing their own rights. These added restrictions and sanctions will be an unnecessary intrusion into the lives of citizens where existing laws, amended in the light of experience, adequately adjust competing interests and actions.
8. The economic cost is immediately apparent. The vindication of new rights, or a new expression of existing rights, must involve some adjudicative process. In Victoria this involves recourse to the state Ombudsman or to VCAT. A Human Rights Act enacted in Queensland will require appointing a public servant, such as an Ombudsman or Human Rights Commissioner, with attendant public service staff, to receive and process complaints and adjudicate the disputes. QCAT will require considerable additional resources and funding if it is to be given an added human rights jurisdiction. Proponents of a Human Rights Act argue that infringement of the rights should result in an award of damage or compensation against the infringer. The logic of the argument must be accepted. A right, which does not punish or deter a transgressor who deprives another of the right, is not much of a right; and a person whose right was infringed, who does not receive recompense, may well feel the right exists in name only.
9. The Victorian Charter applies to government departments and entities (generally speaking) and to non-government organisation which elect to be subject to its provisions. If damages are awarded for breach of human rights, the order will affect, and the payment will be from, government i.e. public revenues. Depending on the number and size of awards, departmental budgets may be impacted and finances allocated in a manner beyond the control of those responsible for implementing public policy and managing departments. An important function of responsible government, control and spending of public money, will pass to unelected Tribunals.
10. There is a separate objection to this consequence. It is that QCAT is not an appropriate Tribunal to exercise a jurisdiction to award, where the opportunities for complaint are numerous and no guidance is given for the exercise of the power. The objection becomes overwhelming if the jurisdiction were to include power to grant injunctions forbidding certain conduct, and to make declarations of right.

Inappropriate

11. The rights described in the Victorian Charter, and in others like it, are political rights. The title of the foundational document for human rights legislation, the International Covenant on Civil and Political Rights, makes that clear. A fundamental problem with any human rights legislation is that it attempts to convert political rights into legal rights justiciable by legal proceedings and adjudicated by Judges (or part time Tribunal members). The “rights” are expressed in broad and general terms. The expression offers little, if any, guidance as to how they are to be applied in particular, contested, circumstances. There is a substantial commentary on “the difficulties which confront Judges, even the ablest Judges, when they are called upon to give effect to declarations of rights expressed in broad political terms. The difficulty is compounded where other individual rights, such as the right to reputation, the right to privacy or the right to one’s personal wellbeing and dignity are also constitutionally guaranteed.”⁶⁰ The Human Rights Act, under consideration in Queensland, is not of the constitutional type, but the point is equally valid for non-constitutional legislated human rights.
12. The various human rights described by the Charter often compete and come into conflict. Each right is expressed in wide, general and dogmatic terms. One person’s right to free speech is an infringement of another person’s right to privacy or reputation. One person’s right of association to join a protest may interfere with another person’s freedom of movement on a public street or footpath; or access to business and hence a property right. One person’s right not to be made homeless by eviction from public housing because of antisocial behaviour, may impact on a neighbour’s right to security of person or property. The right of a homeless person to sleep in his or her car may impinge on another’s amenity and property value. Examples will multiply if human rights are expanded to include rights termed as economic, social and cultural rights.
13. If the conflicts are not to be settled by a tolerant give and take between affected fellow citizens, the ordering of priorities and the adjustments to rights to accommodate the points of conflict between different rights should be undertaken by parliaments rather than Judges. To quote Justice Keane again:

“The balancing process ... involved the Courts in balancing different values expressed so broadly that the balancing process requires judges to leap into a legal space without guidance. They were required to span a chasm so broad that it divides political parties. The cases illustrate that, even the ablest judges, doing their best with these statements of broad political aspirations, struggle to span this chasm in a way that does not leave at least one side of the political divide with misgivings as to whether justice would not be better served if the abstract declarations were translated into concrete outcomes by judges with different political view.”
14. The ranking of rights, and imposing limits on rights, to make society tolerable for all, are the responsibility of the whole community exercising power and making compromises through their elected representatives, who are in touch with and can respond to community values and attitudes. Judges do not have that connection. And have no particular skills in adjusting political interests, whether or not these are termed as rights.

⁶⁰ Justice Patrick Keane(2011) 2 NTLJ 77 at 84.

15. A downside to a Human Rights Act is that a Court's decree upholding an individual's human rights can restrict a government's ability to uphold peace and good order. There have been incidents in the UK where the Courts have applied EU or UK human rights legislation to block the deportation of persons convicted of inciting violence or assisting acts of terrorism. The courts did so on the basis that their human rights would be at risk if sent back to their countries of origin. Accordingly the power of government to protect its own citizens from violence was impaired. The Assange case is also instructive. A UN HRWG found that Mr Assange, who could be considered an ordinary fugitive from justice should be paid compensation for his voluntary residence in the Ecuadorian embassy because his right to liberty was denied him. The ruling did not consider the rights of his alleged victims to personal sanctity, and safety. It ignored the obligation of the Swedish state to protect its citizens by investigating and prosecuting crimes committed against them on its soil; and the obligation of the British government to lend its assistance. There is, as well, the point already mentioned that the award of damages has the potential to take the control of government funds from those responsible for raising and spending them.

RIDER 1

16. The Victorian experience suggested that the Charter has been successful in achieving beneficial results for individuals enforcing their rights against government departments. The existence of the Charter caused them to adopt a more benign and sympathetic approach to individuals in dire circumstances, particular the homeless, the mentally ill and prisoners. There may well be a worthwhile role for a legislative proclamation of standards requiring departmental officers, where there is not an adequate complaints procedure, to have regard to the constraints of humanity and decency when exercising their powers. The proclamation should in the nature of a code of conduct, having the force of law by statute or regulation, obliging public servants who deal with disadvantaged members of the public, to act with a humane concern for their plight and to afford them basic human dignity.

RIDER 2

17. If Parliament concludes that a Human Rights Act should be recommended, despite the arguments against it, then the act should include strong protections for the holding and expression of religious beliefs. The following paragraphs explain why, and describe what is necessary.
18. We discuss the concerns for the adequacy of protection for religious freedom under the following headings:
 - (a) Inconsistency with International Law
 - (b) That Corporations Require Protections
 - (c) Australian Law Reform Commission Freedoms Inquiry Findings March 2016.

Inconsistency with International Law

19. An objection of particular concern was raised by certain submissions to the 2009 Brennan Inquiry.⁶¹ They argued that the Charters in the ACT and Victoria do not reflect the protections to religious freedom required under international human rights law. Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR) provides:

*"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."*⁶²

20. They contrast this with s 7(2) of the *Victorian Charter of Rights and Responsibilities Act 2006* (Vic), which provides:

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 including —

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

21. They argued that the Victorian Charter effectively weakens the ICCPR guarantee of religious freedom by introducing the concept of 'reasonable' limitations, derogating from the standard of 'necessary' limitations found in Art 18(3) of the ICCPR.⁶³

⁶¹ Presbyterian Church of Australia in NHRC 2009 submission, [23]; General Synod Standing Committee of the Anglican Church of Australia. Other submitters that have raised their concerns with Human Rights Charters have included Muslim, Jewish, Conservative religious (Evangelicals, Catholics and other religious groups): Sydney Anglican, Presbyterian, Baptist; Melbourne and Sydney Catholic dioceses and smaller Christian and other religious groups (SDAs, Mormons LDS, JWs), for an analysis of these concerns see: Parkinson, P. (2010). "Christian Concerns about an Australian Charter of Rights." *Australian Journal of Human Rights* 15(2): 83.83, Ahdar, 'How well is religious freedom protected under a Bill of Rights? Reflections from New Zealand' (2010) 29(2) *University of Queensland Law Journal*, 279.

⁶² *International Covenant on Civil and Political Rights* Article 18(3).

⁶³ They argued that Victoria Charter fails also to reflect the subsequently enunciated United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984), which define the conditions for permissible limitations and derogations enunciated in the ICCPR. The Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue' and that 'Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and

Corporations Require Protections

22. Religious freedom rights of both corporate entities and individuals should be protected in any proposed Charter. If religious freedom includes an individual's right to believe and practise their religion, but does not include the right to associate with other religious believers in accordance with their shared convictions, then something that lies at the heart of religious faith and practice will be severely jeopardised. Religious freedom has an 'ineradicable collective or communal dimension'.⁶⁴ Religious liberty in a free society must include the right of individuals to form associations in which individuals chose to bind themselves to a set of religious values and convictions that are not necessarily 'liberal'.⁶⁵ Religious freedom rights of both corporate entities and individuals should be protected in any proposed Charter.

Australian Law Reform Commission Freedoms Inquiry Findings March 2016

23. The debate over the recognition of religious freedom within anti-discrimination law provides important considerations for any proposed Charter. The Australian Law Reform Commission's Freedoms Inquiry Final Report⁶⁶ released in March linked a finding of no significant encroachment upon religious freedom to the ongoing presence of exemptions:

"There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations."

24. The Commission stated that 'further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.' They offered as an example the following clause, drafted by Professors Nicholas Aroney and Patrick Parkinson:

- "1. A distinction, exclusion, restriction or condition does not constitute discrimination if:
- a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
 - b. it is made because of the inherent requirements of the particular position concerned; or
 - c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or

(d) is proportionate to that aim.'

⁶⁴ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) 325.

⁶⁵ From a liberal point of view, what is most crucial in order to protect individuals is not the right to join a group, but the right to exit it: Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003) 97.

⁶⁶ Australian Law Reform Commission 2016, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), published on 02 March 2016, available at <https://www.alrc.gov.au/publications/freedoms-alrc129>, accessed 02 March 2016.

- d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.*
- 25. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 1(a)".