Queensland Law Society

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Office of the President

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Our ref: BDS-HRWG 2018

Mr David Janetzki MP
Shadow Attorney-General
Shadow Minister for Justice
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Shadow Attorney-General,

Amendments during consideration in detail to be moved by Leader of the Opposition - Human Rights Bill 2018

Thank you for meeting with representatives of the Queensland Law Society on 6 February 2019 and providing us with a confidential consultation draft of the proposed amendments to the Human Rights Bill 2018 to be moved by the Leader of the Opposition during consideration in detail.

This response has been compiled with the assistance of members of the QLS Human Rights Working Group 2018 who made submissions on the Human Rights Bill 2018.

Our full submission can be viewed on the Parliamentary Committee's website here - https://www.parliament.qld.gov.au/documents/committees/LACSC/2018/HumanRights2018/submissions/103.pdf.

1. Proposed amendments

We understand that the proposed amendments in the confidential consultation draft relate to:

1. The capacity of the Courts to make declarations of incompatibility and the subsequent process
2. The capacity of the Supreme Court to receive questions of law upon application
3. A review of the legislation in 2021 and 2025 instead of 2023 and 2027.

2. Override declarations - clauses 43 to 47

In relation to the Society's view on override declarations, we reaffirm our position at item 8 (page 9) of our original submission. We reproduce it below for ease of reference.

QLS recognises that the inclusion of the provisions relating to override declarations preserve Parliament's sovereignty with respect to the scrutinising and making of legislation and, as stated in the Explanatory Notes (page 3), *'maintains the existing relationship between the Courts, the Parliament and the executive (government)'*. Notwithstanding this, the *'override provision'* at clause 43 and 47 of the Bill should be consistent with international law. Under international law, human rights cannot be abrogated except in limited circumstances, such as in times of public emergency.

On one view, the override provisions are unnecessary because the Bill (if enacted) would not affect constitutionally entrenched rights and therefore Parliament has the ability to pass any legislation regardless of its compatibility with the legislation or not. However, we recognise that the benefits of having and using the override provisions. In particular, it makes Parliament's intention clear namely, that it recognises that the laws being passed are incompatible, or potentially incompatible, under the Bill.

3. Part 3, division 3 - interpretation of laws

In relation to the Society's view on override declarations, we reaffirm our position at item 10 (pages10- 12) of our original submission. We reproduce it below for ease of reference. We note that the override declaration are discussed in the section dealing with clauses 53-57.

Clause 48 - interpretation

Part 3, Division 3 incorporates clauses 48 to 57, which address the roles and obligations of the Courts. Clause 48 places a positive obligation on anyone interpreting legislation to do so in such a way (to the extent possible consistent with its purpose) that is compatible with human rights. Where questions of interpretation come before the Courts, this Part provides the Supreme Court with a framework to assist it to incorporate this principle of statutory interpretation, and allows the Court to make a declaration of incompatibility when it is of the opinion that a statutory provision cannot be interpreted in a way that is compatible with human rights.

Clause 48 states

> **48 Interpretation**
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> (1) 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.

(2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
(3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
(4) This section does not affect the validity of—
  (a) an Act or provision of an Act that is not compatible with human rights; or
  (b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.
(5) This section does not apply to a statutory provision the subject of an override declaration that is in force.

The High Court in *Momcilovic v The Queen*[1] considered the constitutional validity of section 32(1) of the Victorian Charter – the Victorian equivalent to clause 48 of the current Bill. Section 32(1) of the Victorian Charter states

32 Interpretation

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

One of the questions before the court was whether section 32(1) of the Victorian Charter conferred a legislative power on the Victorian Supreme Court and was therefore contrary to the Constitution and invalid. The High Court held that section 32(1) of the Victorian Charter was constitutionally valid. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that section 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts. It did not confer on courts a function of a law-making character which does not accord with the exercise of judicial power. In reaching this decision, the High Court adopted a conservative approach to statutory interpretation and relied on section 14A(1) of the *Acts Interpretation Act 1954* (Cth) which states that, "in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation." In his judgment Justice French notes,

> Statutory provisions applicable to the interpretation of Victorian statutes are found in the Interpretation Act and include the requirement, in s 35(a), common to all Australian jurisdictions, that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object.[2]

[1] *Momcilovic v The Queen* [2011] HCA 34.
[2] *Momcilovic v The Queen* [2011] HCA 34 at 41.

Therefore, the role of the court is "to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have."[3] Notably, a clear majority of the High Court in *Momcilovic v The Queen*[4] rejected the approach to interpretation taken in the United Kingdom in relation to the equivalent provision in the *Human Rights Act 1998* (UK). The High Court in *Momcilovic v The Queen* held that section 32(1) of the Victorian Charter exists in a constitutional setting which differs from the setting in which the *Human Rights Act 1998* (UK) operates.[5]

Clause 48 of the Bill closely reflect the Victorian and ACT legislation. They do so because the Bill is seeking to operate within a human rights model that preserves the existing balance between the legislative, executive and judicial arms of government – maintaining parliamentary supremacy.

Clauses 53-57 - declarations of incompatibility

Clauses 53-57 of the Bill deal with declarations of incompatibility. The constitutional validity of the Victorian Charter equivalent of declarations of incompatibility was considered by the High Court in *Momcilovic v The Queen.*[6] In a 4:3 majority, the High Court in *Momcilovic v The Queen*[7] upheld the constitutional validity of section 36 of the Victorian Charter – the equivalent of clause 53 of the Bill. The High Court held that while section 36 of the Victorian Charter did not involve the exercise of a judicial function and was not incidental to judicial power, it did not surpass the constitutional limitations on the Court's role. The High Court held that it merely provided a mechanism for the Court to direct the legislature to a deviation between a State law and a human right in the Charter, and it remained Parliament's ultimate responsibility to determine the laws it enacts. However, some judges of the the High Court in *Momcilovic v The Queen*[8] raised uncertainty as to how the declaration may operate in the future.

The Society respectfully holds concerns that the functions set out in clause 53 of the Bill might be perceived not to fit within a judicial officer's role. We are concerned about the involvement of judicial officers in making declarations of incompatibility and the subsequent referral of those declarations to the Attorney-General and relevant parliamentary committees. In our view, the substance of a declaration of incompatibility can be contained within a judicial officer's judgment.

It is important to note that the making of declarations of incompatibility do not affect the validity of any law. Ultimately, the result is that the Queensland Parliament is kept informed of rights issues that arise in the Courts and given the final say with respect to issues of compatibility. Whilst this limits the role of the courts, it aligns with the preservation of parliamentary supremacy.

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[3] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.
[4] *Momcilovic v The Queen* [2011] HCA 34.
[5] *Momcilovic v The Queen* [2011] HCA 34 at 50.
[6] *Momcilovic v The Queen* [2011] HCA 34.
[7] *Momcilovic v The Queen* [2011] HCA 34.
[8] *Momcilovic v The Queen* [2011] HCA 34.

As with the Victorian and ACT legislation, the Bill explicitly provides for the consideration of international law, as well judgments from domestic, foreign and international courts when considering the interpretation of a statutory provision. This is detailed in clause 48, which is relatively broad, and provides sufficient clarity with respect to the limits of "*compatibility*". That is, the meaning of *"compatible with human rights"* is defined in clause 8.[9]

The reviews of the Victorian and ACT legislation have not recommended any significant changes that have not been considered in the drafting of the Bill. QLS hopes and expects that the presentation of and responses to incompatibility statements does not become mere formalities (especially in a unicameral Parliament). The Queensland Courts are well respected and this will hopefully mean that such declarations will be taken seriously by Parliament. To achieve this end, we recommend that all statements of incompatibility, and the corresponding government response, be provided, as a requirement, to the Human Rights Commissioner. The Commissioner should be empowered to publish these statements and the corresponding response as part of their annual report or on a public register of human rights issues.

4. Timing of reviews

The proposed amendments suggest a review of the legislation in 2021 and 2025 instead of 2023 and 2027.

As there is a 12 month period for the legislation to become operational (i.e. mid-2020 is when the legislation is due to commence), we consider that a review in 2021 would be premature. In our view, the time current timetable in the Bill is appropriate.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team at policy@qls.com.au.

Yours faithfully

[redacted]

Bill Potts
President

[9] The 2015 review of the Victorian Charter recommended that the terms "compatible" and "incompatible" be defined to provide greater clarity.