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Office of the President

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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary,

Human Rights Bill 2018

Thank you for the opportunity to provide a submission in respect of the Human Rights Bill 2018 (the Bill). The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS commends the government for permitting public consultation on the proposed Bill. Due to the short timeframe to provide our submission, our review and analysis of the proposed amendments has been extensively truncated. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We note that the comments made in this submission are not exhaustive and we reserve the right to make further comment on these proposals.

This response has been compiled by the QLS Human Rights Working Group who have substantial expertise in this area. The views of our membership have been sought through consultation with our policy committees and through a number of requests for comment through QLS Update.

QLS members, as noted in our submission in 2016, are divided on whether Queensland should adopt a Human Rights Act in this to any other form. This position

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remains unchanged. The comments contained in this submission are the on the anticipated effect of the Bill.

Any reference in the submissions from the QLS supporting any part of the Bill is taken to be meaning support if the Bill is to achieve its objects. The submission is prepared on the assumption that the Human Rights Bill will be put in place.

If Human Rights legislation is to be implemented in Queensland, then this submission offers some comment and raises further issues for consideration.

1. Introductory comments

On 3 December 2015, the Legislative Assembly directed the Legal Affairs and Community Safety Committee to inquire into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland, other than through a constitutionally entrenched model. In 2016, QLS established a Human Rights Working Group to make submissions in response to the Inquiry.

In responding to the Inquiry, the Human Rights Working Group recognised the need for broad consultation with QLS members. This broad consultation resulted in its membership having expressed two opposing views and as such, the QLS submission put forth both a proponent and opponent perspective in relation to the need for a Human Rights Act in Queensland.

On 31 October 2018, the Attorney-General and Minister for Justice, the Honourable Yvette D'Ath MP introduced the Human Rights Bill 2018 into Parliament. The Bill was referred to the Legal Affairs and Community Safety Committee for review. Due to the importance of the Bill, the QLS Council decided that the Human Rights Working Group should be reconvened to make submissions on the Bill.

2. Part 2, division 2 - civil and political rights

The set of rights contained in Division 2 of the Bill are largely derived from the International Covenant on Civil and Political Rights (ICCPR); with one from the Universal Declaration on Human Rights (UDHR) (being clause 24 property rights); and one being from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (being clause 28 Cultural Rights—Aboriginal peoples and Torres Strait Islander peoples). In principle, the QSL supports the inclusion of the rights that are presently proposed in Part 2, Division 2 of the Bill.

Clause 24 relates to property rights and states:

- (1) All persons have the right to own property alone or *in association with others*.
- (2) A person must not be arbitrarily deprived of the person's property.

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When Clause 24 is read together with clause 107, which provides that the Bill does not affect native title rights and interests.¹ This is consistent with the recognition of native title rights and might be construed as the rights of Aboriginal and Torres Strait Islander peoples' communal rights in land (property).

Clause 28 deals with the cultural rights of Aboriginal peoples and Torres Strait Islander peoples. The QLS welcomes the specific inclusion of Aboriginal and Torres Strait Islander peoples to have their particular cultural rights recognised and protected. We understand that Indigenous peoples specifically are interested in their rights to self-determination being recognised, and we note that the inclusion of the right to self-determination is referenced in the preamble of the Bill.

The rights provided for in Part 2 Division 2 are, in our view, are a great leap forward in the promotion and protection of human rights in Queensland. The listed rights are reasonable and appropriate, being similar in nature to the Victorian regime, and consistent with the spirit of the international instruments to which these rights derive much of their wording and ambit.

We note that clause 31 details the key rights concerning a fair hearing. We propose the inclusion of the word 'expeditious' as part of the 'fair and public hearing'. Justification for this inclusion has been previously articulated and includes the Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)² of the Committee of Ministers to member States on the promotion of human rights of older persons.²

3. New rights

Right to freedom from violence, abuse and neglect

Consistent with the State Government's commitment to addressing domestic violence, QLS proposes the inclusion of 'A Right to Freedom from Violence, Abuse and Neglect'. This is presently absent from the Bill. In our view this should be included as a general right for all persons. The normative elements of that right should include:

- (a) every person has the right to freedom from exploitation, violence, abuse and neglect;
- (b) the right includes all forms of violence, abuse and neglect; and
- (c) the right applies to violence, abuse and neglect in private and public settings.

The inclusion of this right would be consistent with Article 16 of the Convention on the Rights of persons with Disabilities (CRPD), which includes a right to freedom from exploitation, violence and abuse. The Article 16 right is described broadly including, '*within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.*'

¹ *Native Title Act 1993* (Cth) ss 223 & 225.

² See cases including *Süssmann v Germany* (1998) 25 EHRR 64 and *Jablonská v. Poland*(2003) 36 EHRR 27. The Human Rights Law Centre has also suggested the importance of this element.

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Having a right to freedom from violence, abuse, exploitation and neglect is not fresh, but a longstanding issue.³ There is an opportunity here for the Queensland Government to show great leadership in the pursuit to tackle domestic violence and family violence and other forms of interpersonal violence such as elder abuse.

Right to Adequate Housing

Adequate housing is essential for human survival with dignity. Without a right to housing, many other basic human rights will be compromised including the right to family life and privacy, the right to freedom of movement, the right to assembly and association, the right to health and the right to development.⁴

Former Human Rights Commissioner Chris Sidoti said:

The right to housing is clearly supported by international law, indeed at the very foundation of the international human rights system in the Universal Declaration of Human Rights. This Declaration, adopted by the United Nations in 1948, establishes an internationally recognised set of standards for all persons without qualification. Article 25 of the Declaration provides, "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including housing".⁵

We suggest that the normative elements of that right ought to be those set out by the Office of the High Commissioner for Human Rights.⁶

4. Part 2, division 3 – economic, social and cultural rights

It is commendable that the Bill includes the recognition of some economic, social and cultural rights, which other Australian State or Territory legislatures have not included in their various human rights instruments. The rights in this Division are:

- (a) clause 36 - the right to education; and
- (b) clause 37 – the right to health services.

³ Australian Attorney-General's Department, *Protection from exploitation, violence and abuse* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Protectionfromexploitationviolenceandabuse.aspx>>; AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly and the National Association of Community Legal Centres Australia, *Normative content on the right of older persons to freedom from violence, abuse and neglect*, <[https://social.un.org/ageing-working-group/documents/ninth/Inputs%20NGOs/Joint submission Violence rev.pdf](https://social.un.org/ageing-working-group/documents/ninth/Inputs%20NGOs/Joint%20submission%20Violence%20rev.pdf)>;

⁴ Chris Sidoti, *Housing as a Human Right*, <https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf>

⁵ Chris Sidoti, *Housing as a Human Right*, <https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf>

⁶ Office of the High Commissioner for Human Rights, *The Right to Adequate Housing Toolkit*, <<https://www.ohchr.org/en/issues/housing/toolkit/pages/righttoadequatehousingtoolkit.aspx>>

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5. Other rights?

The Bill includes more rights than exist in comparable jurisdictions. In particular, the Bill does include the Right to Health Care Services the Right to Education and specific cultural rights of Aboriginal and Torres Strait Islander People. This is a positive move. It is important for the Government to consider an expansion of human rights to potentially include all human rights and responsibilities contained in international human rights instruments to which Australia is a party now and in the future, including economic, social and cultural rights, rights of women and children and the right to self-determination. The consideration of further rights should be a priority for the scheduled reviews of the legislation.

We also note that it would be prudent to include the concepts contained in articles 26 and 32 United Nations Declaration on the Rights of Indigenous Peoples in the Bill. These articles support the right of Aboriginal and Torres Strait Islander persons to self-determination and the right to full prior and informed consent, particularly in the context of decision making involving the contribution of Aboriginal and Torres Strait Islander voices and cultural traditions.

We note that the Final 2011 Report of the *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* has a useful summary of the discussion various domestic and foreign states have had in relation to adding further economic, social and cultural rights. This analysis considers the approach taken in jurisdictions such as the Australian Capital Territory (ACT), Victoria and the United Kingdom.

6. Limitations of the current Bill

The 'piggy-backed' model limits a human rights complainant coming before the courts to situations where legal proceedings can and are made under another law. The Victorian Institute of Law 2015 submissions on the same short fall in the Victorian Charter said that this resulted in '*significant resources (including legal costs, court time and scarce pro bono resources) are spent on:*

- *resolving preliminary jurisdictional questions, rather than focusing on the real issue in dispute (that is, whether a public authority has breached a person's human rights);*
- *bringing judicial review proceedings in the Supreme Court, rather than in a more accessible forum such as VCAT; and*
- *arguing potentially 'weaker' claims, when the 'stronger' claim arises from a breach of the Charter.'*⁷

In addition, bringing a judicial review application instead of a specific breach of human rights complaint cannot always provide access to justice for all breaches of the Bill, because judicial reviews can be expensive and focused only on certain errors of law in decision-making. This means many potential breaches of the Bill may be '*unlawful*' but not constitute jurisdictional error warranting a judicial review remedy.

⁷ Law Institute of Victoria, Submission to the 2015 Review of the Charter of Human Rights <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/2914/8609/7801/Submission_78_Law_Institute_of_Victoria.pdf>, p 18.

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Even if a breach of human rights is objectively '*unreasonable*' such as to enliven administrative law remedies, these remedies generally apply to regulate procedural aspects, rather than the substantive aspects, of public decision-making. For the person or persons concerned, the administrative remedy may be unable to effectively right the relevant wrong.

While a declaration available under judicial review proceedings or through the Bill's proposed Human Rights Commission can provide important acknowledgement that a person's rights have been breached, it provides no compensation to the individual for the breach. In some cases, where very serious breaches have occurred (such as assault by police officers), damages may be the only way to fairly compensate a person for a breach of their human rights.

The absence of a direct cause of action for a breach of human rights is a barrier to accessible, just and timely remedies for infringements of people's basic human rights. This is particularly so given the essence of any human rights legislation is to protect individuals from unpopular or misunderstood minority groups that are susceptible to being treated by public officials or agencies as '*problems*' rather than persons deserving of dignity and respect, when those public officials or agencies judgments can fundamentally impact the course and quality of individuals' lives.

What an independent cause of action might include

An independent cause of action is a right to bring proceedings against a public entity in the event of an unlawful breach of human rights. These proceedings are brought by a person with standing (a victim), in an appropriate court, and will provide traditional remedies (including damages) and means of enforcement. Proceedings can be brought as a freestanding right of action and do not require '*piggybacking*' with another action or claim.

This is a cause of action that is enforceable in the traditional manner of court processes. Domestic models include the ACT's *Human Rights Act 2004* at section 40C. International models include the United Kingdom's *Human Rights Act 1998* at sections 7-9.

We note clause 59 limits, like in Victoria, legal proceedings to an act or decision of a public entity that was unlawful⁸ but constrains the circumstances where relief might be sought, and constrains the relief or remedy available. There has been widespread criticism of the limitations imposed by the Victorian model. Gans (2009) was critical of (section 39) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic):

Professor George Williams, a leading proponent of statutory bills of rights and Chair of the Human Rights Consultation Committee ('Consultation Committee') that recommended the Charter, singled out this provision as an exception to the Charter's otherwise 'clear language'. He observed that it is 'a provision that can require multiple readings to yield a coherent meaning'. I disagree. Rather,

⁸ In conjunction with cl 58.

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*anyone who thinks that they have found a coherent meaning in s 39(1) ought to read it a couple more times.*⁹

We are concerned that clauses 58 and 59 may not be materially improved from sections 38 and 39. The underlying reasons as to why clause 59 is drafted as it is are not known to us. We presume that the Queensland Government also seeks to limit the operation of the Bill in a similar manner to the Victorian Government. This was confirmed by the Attorney General during the Bill's introduction to Parliament.

The Charter Review Report recommended:

*I recommend the Charter be amended so a person who claims that a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, can either apply to the Victorian Civil and Administrative Tribunal for a remedy or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the Human Rights Act 2004 (ACT). If the Tribunal finds a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages. If the Charter is raised in another legal proceeding, the court or tribunal should be able to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. The Charter should be amended to clarify that people can seek judicial review of a public authority's decision on the ground of Charter unlawfulness alone.*¹⁰

The review found the application of section 39 of the Victorian Charter was having negative impact because of the 'piggybacking' requirement:

*Further, a remedy is available only to those who already have another legal claim. Because Charter issues must be tacked on to an existing claim, they are usually a second or third string argument. So, most proceedings in which the Charter has been raised are decided on non-Charter grounds. This outcome involves duplicated effort and has led to a perception that the Charter is not worth raising because it adds nothing to existing causes of action.*¹¹

An amending clause providing an independent cause of action should be considered. This is supported by the following:

- Statutory reviews of human rights schemes across Australian jurisdictions have noted that an independent cause of action is a fundamentally important element of a contemporary human rights framework. Enforcement of human rights is considered to be consistent with, and part of, societal respect for the rule of law; and

⁹ Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105.

¹⁰ Page 117.

¹¹ Page 120.

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- The inclusion of an independent cause of action is supported by existing domestic laws (e.g. *Human Rights Act 2004 (ACT)*) and international laws (*Human Rights Act 1998 (United Kingdom)*).

If an independent cause of action is not favoured

If inclusion by way of amendment is not favoured then fresh consideration to inclusion should be mandated as part of any future statutory review process.

7. Carve out provisions

Clause 13 of the Bill is a significant improvement on section 7 of the Victorian Charter, which has been criticised for not reflecting the concept of proportionality in international law. However, the clause repeats the Victorian Charter's failure to recognise non-derogable rights.

Consideration could be given to amending clause 13 of the Bill to reflect the position at international law that some rights cannot be limited and are regarded as non-derogable. Those rights, which are absolute at international level, should be recognised as absolute and excluded from the operation of the general limitations clause in the Bill.¹²

The existence of clause 13 also makes it unnecessary to amend either the *Corrective Services Act 2006* or the *Youth Justice Act 1992*. The proposed amendments to those laws are unnecessary because clause 13 already identifies the necessary limitation of rights in certain circumstances. These 'carve out' provisions undermine the fundamental principle that human rights belong to all individuals.

We hold concerns regarding division 3, part 7 of the Bill, namely the proposed consequential amendments (*the amendments*) to the *Corrective Services Act 2006 (Qld)* and the *Youth Justice Act 1992 (Qld)*.

The current clauses are unnecessary, will create uncertainty and single out the human rights of the very individuals the Bill seeks to protect. In particular, Aboriginal and Torres Strait Islander persons, persons with a disability and persons from low-income backgrounds, are all significantly over represented in prisons and youth detention centres. Further, the amendments are unprecedented and would degrade the potential of producing a landmark piece of legislation.

Clause 13 of the Bill already recognises that human rights may be subject to 'reasonable limits that can be demonstrably justified in a free and democratic society'. This sensible, overarching clause provides an effective and stringent framework for all public authorities to operate within. The positive effect of equivalent limitation provisions in other jurisdictions such as Victoria and the ACT indicates that the clause will satisfactorily balance the need to protect the rights of prisoners and detainees against the unique challenges involved in managing corrective services facilities and

¹² Julie Bebeljak, 'Balancing right in a Democracy: The Problem with Limitations and Overrides of Right under the Victorian Charter of Human Rights and Responsibility Act 2006' (2008) 32 *Melbourne University Law Review* 422.

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youth detention centres. This is demonstrated by the limited number of human rights based challenges advanced by prisoners and youth detainees in the ACT and Victoria.

A human rights framework has assisted to improve practice in the ACT and Victoria. We are concerned that the clauses, which do not form part of the frameworks in Victoria nor the ACT, may undermine the very principles upon which the Bill rests. As they currently stand, the clauses undermine the ability of adults and juveniles in detention to enforce their human rights. This creates uncertainty in the applicability of how these laws will operate alongside existing limitations contained within clause 13 of the Bill.

8. Override declarations - clauses 43 to 47

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.

9. Part 3, division 1 – scrutiny of new legislation

Clause 38 (statements of compatibility) provides that a member who proposes to introduce a Bill in the Legislative Assembly must prepare a statement of compatibility for the bill stating:

- (a) *whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and*
- (c) *if, in the member's opinion, a part of the Bill is not compatible with human rights, the nature and extent of the incompatibility.*

In addition, clause 38 provides that *a member who introduces a Bill in the Legislative Assembly, or another member acting on the member's behalf, must table the statement of compatibility prepared under this section when introducing the Bill and the statement of compatibility is not binding on any court or tribunal.*

Clause 39 (*Scrutiny of Bills and statements of compatibility by portfolio committee*) provides that:

The portfolio committee responsible for examining a Bill introduced in the Legislative Assembly must:

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- (a) consider the Bill and report to the Assembly about whether the Bill is not compatible with human rights; and
- (b) consider the statement of compatibility tabled for the Bill and report to the Assembly about the statement’.

This provides an opportunity for greater scrutiny and consideration of the human rights aspects of all bills presented to the Queensland Parliament, particularly given Queensland’s parliamentary system is unicameral. It will ensure better law-making.

Clause 40 (*scrutiny of non-Queensland laws by portfolio committee*) provides that:

- (1) *The Legislative Assembly may refer a non-Queensland law to a portfolio committee.*
- (2) *If a non-Queensland law is referred under subsection (1), the portfolio committee must consider the law and report to the Legislative Assembly about whether the law is not compatible with human rights’.*

There is no equivalent clause 40 provision in the Victorian Charter or the ACT *Human Rights Act 2004*. This clause also provides an opportunity for greater scrutiny and consideration of the human rights aspects of national laws which operate in Queensland (i.e. the *Rail Safety National Law (Queensland)* and the *Heavy Vehicle National Law (Queensland)*) and provides surety to the Queensland public that all legislation operating in the State can be subject to the same analysis (from a human rights perspective) as all state-based legislation.

Clause 41 (*Human rights certificate for subordinate legislation*) extends the obligation in clause 38 (*Statements of compatibility*) relating to bills to certain subordinate legislation. This clause requires the responsible Minister to prepare a human rights certificate for subordinate legislation tabled in the Legislative Assembly and provides that the portfolio committee responsible for examining the subordinate legislation may also consider the human rights certificate. Again, there is no equivalent provision in the Victorian Charter or the ACT *Human Rights Act 2004*. However, as with clause 40, this clause also provides an opportunity for greater scrutiny and consideration of the human rights aspects of certain subordinate legislation (namely that tabled in the Legislative Assembly). Clause 42 of the bill is consistent with section 39 of the ACT *Human Rights Act* and also section 29 of the Victorian Charter, so is not of concern.

10. Part 3, division 3 - interpretation of laws

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

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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

- (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*¹³ 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

¹³ *Momcilovic v The Queen* [2011] HCA 34.

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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.¹⁴

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.”¹⁵ Notably, a clear majority of the High Court in *Momcilovic v The Queen*¹⁶ 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.¹⁷

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*.¹⁸ In a 4:3 majority, the High Court in *Momcilovic v The Queen*¹⁹ 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*²⁰ 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

¹⁴ *Momcilovic v The Queen* [2011] HCA 34 at 41.

¹⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

¹⁶ *Momcilovic v The Queen* [2011] HCA 34.

¹⁷ *Momcilovic v The Queen* [2011] HCA 34 at 50.

¹⁸ *Momcilovic v The Queen* [2011] HCA 34.

¹⁹ *Momcilovic v The Queen* [2011] HCA 34.

²⁰ *Momcilovic v The Queen* [2011] HCA 34.

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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.

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 8.²¹

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.

11. Part 3, division 4 (obligations on public entities) – executive government decision making and delivery of government services

A public entity includes an authority of the State, a Minister, police officer, public servant and, critically, another entity performing public functions (including a private entity performing public functions).²² It does not include Parliament or the Courts.²³ Public authorities may be required to perform their duties in a manner consistent with human rights, and to give proper consideration to human rights when making a decision of a public nature.²⁴

In its submission to the 2015 review of the Victorian Charter, the Law Institute of Victoria noted that a key benefit of the Charter has been

Improved decision-making in public authorities – by ensuring that public decision-makers (including courts and tribunals when acting in an administrative capacity) must consider and act compatibly with human rights.

²¹ The 2015 review of the Victorian Charter recommended that the terms "compatible" and "incompatible" be defined to provide greater clarity.

²² Human Rights Bill 2018 (Qld), cl 58.

²³ Human Rights Bill 2018 (Qld), cl 9.

²⁴ Human Rights Bill 2018 (Qld), cl 58.

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*For example, the Department of Human Services' public housing policy and procedure manuals now include information relevant to Charter obligations and clarify when, and how, Charter Rights may arise in day-to-day decision-making and the delivery of housing services;*²⁵

A number of submissions to this inquiry, and to this Committee's 2016 Human Rights Inquiry, support this view.²⁶

When enacted, the Bill will create a common language and platform for shared understanding about human rights across our state. However, for a human rights culture to permeate the public sector, a change in attitudes, values and behaviours about the importance of human rights and their role in public policy development, administrative decision-making and law making is required. This supports the statutory objective of the Bill, *'to help build a culture in the Queensland public sector that respects and promotes human rights'* (clause 3(b)).

QLS shares the view of the Law Institute of Victoria, informed by research from the United Kingdom,²⁷ that other measures are needed to develop a strong human rights culture are:²⁸

- Leadership from government: a consistent vision confirming the central importance of the *Human Rights Act* across all arms of government.
- Education: raising awareness and providing information to enable all types of government 'duty-holders' to engage with and apply the *Human Rights Act* in their work (duty holders being: elected representatives and unelected government officers and employees developing and making laws and policy); public authorities (across central government, statutory authorities and outsourced service providers) and courts (including judicial officers, prosecutors and lawyers).
- Accountability: enforcement and scrutiny to create an incentive for cultural change, extending existing checks and balances on executive power and providing individuals with a clear avenue to seek meaningful remedies for breaches. These measures will require both resources and commitment from government to ensure the cultural change is long term and sustainable.

12. Strengthening reporting requirements

We note the reporting requirements for certain public entities contained in clause 97 of the Bill. We also note that the Bill requires the Commissioner to prepare a report about the operation of the Act during the year. However, we consider that Queensland should adopt the ACT's requirement that government departments and agencies (i.e.

²⁵ See Victorian Equal Opportunity and Human Rights Commission, *2013 Report on the operation of the Charter of Human Rights and Responsibilities*, 37.

²⁶ See eg submission 387 (Caxton Legal Centre); submission 440 (Queensland Public Interest Law Clearing House); submission 475 (Queensland Law Society) [15]-[19], [49]; submission 476 (Queensland Association of Independent Legal Services).

²⁷ See Knott et al, 'Achieving Cultural Change: A Policy Framework' (January 2008), Cabinet Office (United Kingdom).

²⁸ <https://www.liv.asn.au/getattachment/f069f70d-366b-4b3a-933f-ab9064aed587/2015-Review-of-the-Charter-of-Human-Rights-and-Res.aspx>.

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'public authorities') report on the implementation of the ACT *Human Rights Act 2004* in their annual reports.²⁹

At a federal level, the Brennan Report recommended that the federal government require federal departments and agencies to develop human rights action plans and to report on human rights compliance in their annual reports.³⁰ This would be a good addition to this Bill.

These mechanisms ensure public authorities engage with human rights obligations in a meaningful way. They encourage the development of a human rights culture within government and also assist the relevant human rights body in surveying human rights compliance and progress. As the ACT experience shows, it is not enough to merely enact a *Human Rights Act*; public authorities must be required to engage with and proactively apply the law for a human rights culture to develop.

13. Part 4 - Queensland Human Rights Commission

Clause 61(a) states that one of the functions of the Queensland Human Rights Commission (QHRC) is to '*deal with human rights complaints*'. The phrase *deal with*' is too ambiguous. Given the importance of the Commission's work, particularly where the Bill does not have an independent cause of action, consideration should be given to the removal of '*deal with*' and replace with '*receive, consider, and resolve*'.

Clause 61(b) and (c) state that two of the Commissioner's functions are '*if asked by the Attorney-General, to review the effect of Acts, statutory instruments and the common law on human rights and give the Attorney-General a written report about the outcome of the review*' and '*review public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights*'. However, there is no accountability following such reviews. All Queensland legislation should be reviewed by the Commissioner against the *Human Rights Act*, and the Commissioner's recommendations based on such a review should be sent to the Attorney-General for consideration. Similarly, all Queensland government agencies should be required to submit a compatibility statement to the Commissioner and receive recommendations from the Commissioner regarding their compliance.

Clause 62 lists the Commissioner's powers but it is too vague. We recommend a list all of the Commissioner's powers, as they are currently understood, and lastly include a catch all phrase as per what is currently listed in clause 62 of the Bill, such as '*and to all things necessary and convenient to be done for the performance of the commission's functions under the Act*'.

Clause 64(1)(b) covers the term '*agent*' but it is not defined in the Bill. We recommend a definition of the term '*agent*' to avoid ambiguity and safeguard against potential exploitation or misrepresentation of complainants by people who are not qualified to act as '*agents*'.

²⁹ This obligation is included in the *Annual Reports (Government Agencies) Act 1995* (ACT) ss 5, 8. It could be inserted by consequential amendment into the equivalent Queensland legislation. Alternatively, it could be imposed by a provision in the Queensland Human Rights Act itself.

³⁰ Brennan Report, recommendation 10.

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Clause 65 provides that there is no avenue for making a human rights complaint directly to the QHRC. We recognise the desirability, in most cases, of allowing a relevant government department to receive and try to resolve human rights complaints. However, in some circumstances, a person should be able to make a human rights complaint directly to the QHRC. The requirement that a person must first make a complaint to the public entity may deter potential complainants from making such complaints due to fear of reprisal from the entity alleged to have contravened the *Human Rights Act*.

A requirement imposed by clause 65(1)(b) that a person must first make a complaint with the relevant public entity and then after a period of 45 days make a complaint to the QHRC. It is our submission that this will cause significant and unnecessary delays. The only exception to this is if there is 'exceptional circumstances'. In our view, the term 'special reasons' would be preferable to the phrase 'exceptional circumstances'. We also suggest reducing the timeframe from 45 days to 28 days, in line with other review timeframes. Administrative review processes generally have 21 days or 28 days review and appeal timeframes.

Clause 65(1)(c) provides an important safeguard, in that a person can make a complaint to QHRC if 'a person has not received a response to the complaint or has received a response the person considers to be an inadequate response', 45 days after making complaint to the public entity. We recommend including an additional avenue to allow persons to make complaints directly to QHRC outside the relevant timeframes for making a complaint with the specific public entity. This could include, for example, the QHRC accepting a complaint outside of relevant timeframes for making a complaint with the public entity because it considers it appropriate on the basis of 'exceptional circumstances' or something similar. Without such a safeguard, potential complainants who are out of time due to unforeseen circumstances or significant vulnerability or marginality are barred from making a complaint. This would undermine the purpose of the Bill, particularly in this role. This would protect vulnerable and disadvantaged persons.

We are concerned that clause 66(2) provides potential for the referral avenue to be a mechanism for relevant referral entities delaying or avoiding consideration of a complaint. We recommend including a clause that safeguards the interests of the complainant and ensures due process before any referral, particularly since the referral entity must seek consent from the complainant to refer the complaint to the Commissioner.

Clause 70(1)(d) limits the timeframe for making a complaint or referral to the commissioner within one year after the alleged contravention to which the complaint relates. Vulnerable and marginalised persons may not have the resources to facilitate making a complaint within such a short time frame, particularly if they have been required to wait significant time to receive a response from the relevant public entity. Placing such a restrictive timeframe on the making of complaints is likely to be a prohibitive barrier for vulnerable and marginalised populations. In turn undermining the purpose of the bill. We recommend extending the period of time from one year after the alleged contravention to at least five years.

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We also recommend adding a section that details a non-exhaustive list of the circumstances that the Commissioner will consider in making a determination to 'deal with' a complaint lodged five years after the alleged contravention. In particular, any period of delay attributable to any fault by the respondent (such as any time taken by the public entity to respond to the complaint) should be a relevant consideration for the QHRC.

Clause 71(1) requires that the Commissioner must give notice of the refusal or deferral and the reasons for the refusal or deferral is an important natural justice safeguard. This section should be amended to also include that the notice and reasons for the refusal or deferral from the Commissioner must be provided in writing to the complainant to ensure accountability and support the complainant's access to justice, and any decision to refuse or defer a complaint is subject to judicial review.

The requirement in clause 76 that the Commissioner must give notice of acceptance of the complaint is an important natural justice safeguard. This section should be amended to include that the notice of acceptance must be provided in writing to the human rights complainant to ensure accountability and support the complainant's access to justice.

The requirement in clause 89 that the Commissioner must give notice to the human rights complainant and respondent that the complaint has been resolved is an important natural justice safeguard. This section should be amended to include that the notice to the human rights complainant and respondent that the complaint has been resolved must be provided in writing to the complainant to ensure accountability and support the complainant's access to justice.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team at [REDACTED]

Yours faithfully



Ken Taylor
President