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**A HUMAN RIGHTS ACT FOR QUEENSLAND?
LESSONS FROM RECENT AUSTRALIAN
EXPERIENCE**

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A HUMAN RIGHTS ACT FOR QUEENSLAND?

Lessons from recent Australian experience

GEORGE WILLIAMS and DANIEL REYNOLDS

Australia is a latecomer to the idea of having anything akin to a bill of rights. When drafting the national Constitution in the final decade of the 19th century, the framers chose not to include broad-ranging guarantees of human rights. They did so on the ground that protection could be provided by other means, in particular the system of parliamentary democracy. This view has since been challenged, and in the 1970s and early 1980s legislation was introduced into federal parliament for a national human rights act. These bills were not passed, but other initiatives have since sought change. In 1988, Australians voted No in a referendum to constitutionally entrench a number of specific rights, while 2009 saw a wide-ranging national human rights consultation. It reported that the public overwhelmingly supported reform, but its recommendations for a national human rights act were not adopted. As a result, Australia remains the only democracy without some form of national bill of rights.

Instead, Australia's states and territories have taken the lead in advancing human rights protection. Since 2003, governments in the ACT, Victoria, Tasmania and Western Australia have held community consultations on whether to enact human rights acts, with each inquiry reporting strong community support for change. Of these, two culminated in legislation, the *Human Rights Act 2004* (ACT) ('HRA') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'). These Acts are underpinned by the same idea, namely that human rights protection should be the shared responsibility of each branch of government, rather than the preserve of one branch alone.

On 14 September 2015, it was announced that the Queensland Parliament would also inquire into this issue. This fulfilled a promise made by the Palaszczuk Labor government to the Hon Peter Wellington — the independent member for Nicklin — in order to secure his support in the hung parliament produced by the state election held earlier that year. The inquiry was announced by Attorney-General Yvette D'Ath, who expressed the position of the government as follows:

This is an important conversation to be having and it's certainly the right time to be having this conversation. As a Government we are very pleased to be joining in on the conversation about the role of a human rights act in a free and democratic society. This government is a passionate defender of human rights. The protection of human rights is central to our policy platform.¹

The inquiry has commenced, with the Queensland Parliament's Legal Affairs and Community Safety Committee due to report by 30 June 2016. If the Committee supports a human rights act, it will need to consider what form the act will take. Queensland is in a better position to resolve this question than any Australian jurisdiction before it, as there is now a total of 22 years' experience available for it to consider from the two jurisdictions that already have such acts. Unsurprisingly, the Terms of Reference for the inquiry require the Committee to give consideration to 'the operation and effectiveness of human rights legislation in Victoria [and] the Australian Capital Territory'.²

This paper does not re-agitate whether Queensland, or indeed any other Australian jurisdiction, should have a human rights act. Instead, we assess what such jurisdictions might learn from the ACT and Victorian experience. Our focus is not on the settled features of those models, but on aspects that might warrant change and improvement. We examine three areas: the availability of an effective remedy; the effectiveness of parliamentary rights scrutiny; and judicial interpretation. In each case, we explore not only the difficulties that have been encountered, but the lessons that can be learned.

The ACT and Victorian experience

The HRA and the Charter approach in similar ways the question of how human rights should be protected and promoted. The shared conviction is that there should be a dialogue between 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.

This is achieved as follows. First, within parliament, proponents of legislation are required to prepare a statement of compatibility detailing whether — and in Victoria, how — their proposed measure impacts on human rights. The legislation and accompanying statement is then assessed by a standing committee, which provides a report on the rights compatibility of the proposed law to parliament. However, it remains the prerogative of parliament to enact whatever laws it sees fit. Second, the Executive is brought into the mix by means of duties placed on public authorities in state and local government to act compatibly with, and to give proper consideration to, human rights.

Finally, the judiciary can determine whether the executive has breached those duties. It is also required to interpret all legislation compatibly with human rights, where it is possible to do so consistently with the purpose of the enactment. This falls short of empowering the courts to strike down legislation that cannot be so interpreted. Instead, judges can make a declaration that legislation cannot be interpreted compatibly with human rights, to which parliament is expected to respond. To date, only one such declaration has been made in each jurisdiction.³ The amount of litigation generated by these Acts generally has also not been substantial. On average, only 81 cases per year in Victoria and 24 in the ACT have contained some mention of their respective

Acts, with many such mentions being cursory.⁴

Recent reviews of each of the Acts reveal that they have each enjoyed a good measure of success. This was, for instance, the view taken by Michael Brett Young — the independent reviewer of the Charter in 2015 — who said in his Foreword, '[h]aving conducted this review, it is clear to me that the Charter has helped to promote and protect human rights in Victoria'.⁵ Such views were also reflected in many of the submissions to that review, such as that of the Law Institute of Victoria, which highlighted seven major benefits of the Charter to date:

[T]he Charter has had a positive impact on human rights in Victoria. The Charter has:

Shaped the law and policy development process...

Ensured that Parliament takes human rights into account when passing laws...

Generated a greater awareness of human rights within public bodies...

Improved decision-making in public authorities...

Been an important advocacy tool for people whose rights are at risk...

Directed courts to interpret legislation compatibly with human rights...

Provided remedies for individuals when their human rights have been breached.⁶

An earlier report published by the Human Rights Law Centre collected 101 case studies where the Charter had had a positive effect.⁷ These included, for example, its role in the removal of rights-infringing provisions from earlier legislation,⁸ and its use in a challenge to the eviction of a single mother from public housing. In the latter case, a finding of the Victorian Supreme Court that the Ministry of Housing reconsider its decision in light of the Charter, led the department to withdraw its eviction notice.⁹ The HRA has also led to positive outcomes, with one of its 'clearest effects' being 'to improve the quality of law-making in the Territory'.¹⁰ Importantly, the benefits of these Acts have not come at a significant cost to the public purse: an analysis of the Victorian Charter in 2011 found that it had cost 50 cents per Victorian per year.¹¹

Such reviews also make clear that there is still much that can be improved in each instrument. Indeed, the 2015 independent review of the Charter and the 2014 review of the HRA by the ACT Human Rights Commission collectively make over 60 recommendations for reform.¹² A few problems are pronounced. In Victoria, there is no effective remedy for those whose rights have been infringed, which has weakened the enforceability of the duties placed on the executive. Also in that state, there is often not enough time set aside for parliamentary scrutiny, while in the ACT the scrutiny does not extend to all forms of legislation. In addition, in both jurisdictions, uncertainty about the courts' interpretive duty has produced an unclear test. The following sections explore these problems and show what can be learned from each.

1. An effective remedy

When first enacted, neither the HRA nor the Charter gave a direct remedy to individuals whose human rights had been breached by public authorities. Rather, people seeking to allege that a public authority had violated their rights were required to rely on some other, separate, ground of relief, at which point they could raise unlawfulness under the Acts as an additional argument. In Victoria for instance, a remedy can only be sought from a court where:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.¹³

In other words, as explained by Brett Young, 'a Charter claim can "piggy back" an existing legal claim'.¹⁴

While the rationale was to reduce recourse to the courts, this has made litigation lengthier and more complex. As the Law Institute of Victoria has explained:

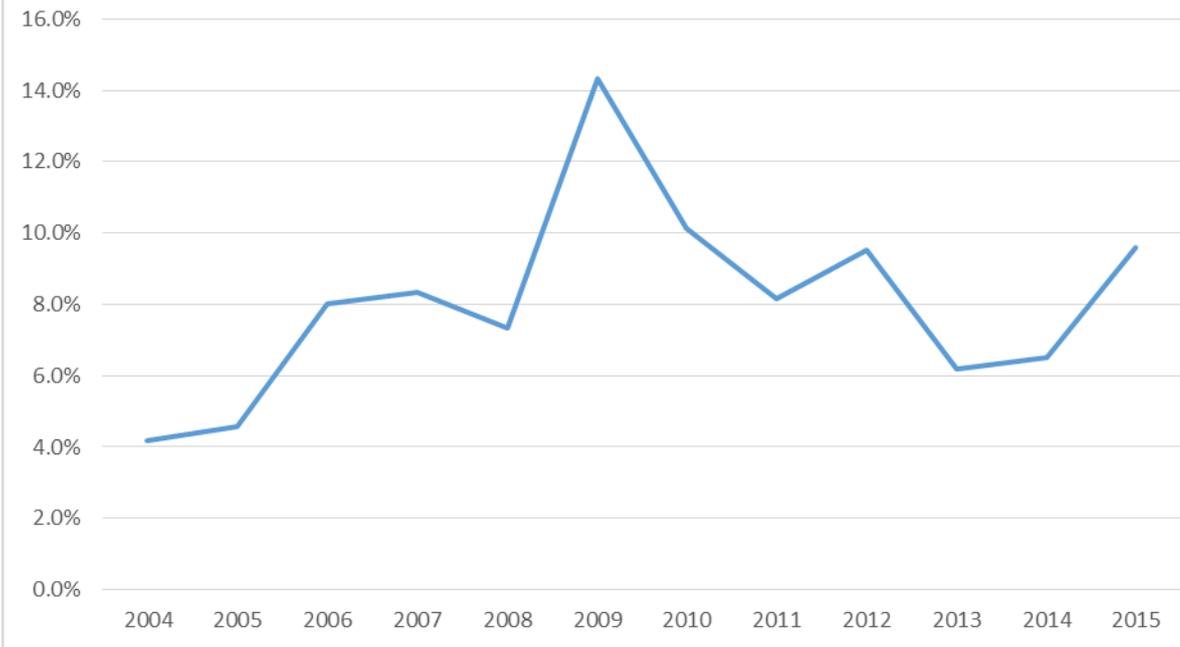
[S]ignificant resources (including legal costs, court time and scarce pro bono resources) are spent on: resolving preliminary jurisdictional questions, rather than focusing on the real issue in dispute (that is, whether a public authority has breached a person's human rights); bringing judicial review proceedings in the Supreme Court, rather than in a more accessible forum such as VCAT [Victorian Civil and Administrative Tribunal]; [and] arguing potentially 'weaker' claims, when the 'stronger' claim arises from a breach of the Charter.¹⁵

This approach is convoluted and counter-productive. It can require the government to expend public money running lengthy intervenor cases, thereby cancelling out the one benefit that such a limitation had aimed to secure: to reduce the government's exposure to litigation. The ACT fixed this problem in 2008 by introducing s 40C(2) into the HRA, which provides that a person claiming to be affected by a public authority's contravention of the Act may:

- (a) start a proceeding in the Supreme Court against the public authority; or
- (b) rely on the person's rights under this Act in other legal proceedings.¹⁶

As the following Figure shows,¹⁷ while there was a rise in the percentage of cases in the ACT mentioning the HRA in the year that amendment was introduced, that increase has not been sustained:

Figure 1. Percentage of total ACT cases containing mention of HRA



Brett Young observed in recommending the same reform for Victoria, that ‘there has not been a flood of applications to the [ACT] Supreme Court in reliance on the freestanding cause of action created by section 40C(2)(a)’.¹⁸ Further, community consultations have repeatedly shown that members of the public want there to be consequences for public authorities that breach human rights. As one individual submitted to the consultation that led to the Victorian Charter, ‘if it is nothing more than a statement of what ought to be, without the means to ensure that those statements have legal force, then it is likely to engender cynicism rather than engagement’.¹⁹ More simply still, ‘the charter must have teeth’.²⁰

If Victoria chooses not to accept the independent reviewer’s recommendation, it will remain the only major common law jurisdiction to have a human rights act that lacks a direct right of action.²¹ In Queensland’s case, it should avoid this problem by ensuring that any human rights act enacted in that state contains a stand-alone cause of action from its inception.

2. Legislative scrutiny

Another central feature of the ACT and Victorian regimes is that they require proposed legislation to be subjected to human rights scrutiny by a parliamentary committee. The rationale behind this is to expose impacts upon human rights for parliamentary debate, and to provide an incentive for the drafters of legislation to ensure that such impacts are minimised or eliminated at the drafting stage.

The ACT and the Victorian parliamentary scrutiny systems suffer from problems. In the ACT, the issue is that not all kinds of legislation are subject to scrutiny. For example, the ACT’s Standing Committee on Justice and Community Safety (‘SCJCS’), while required to scrutinise all bills for rights compatibility, is not statutorily empowered to do so for delegated legislation.²² This means a government can evade scrutiny by enacting its more contentious policies in the form of regulations rather than acts. A related issue in the ACT is that both delegated legislation and private members’ bills are exempt from the requirement of statements of compatibility, meaning that the Committee is left to divine for itself how any limitations on rights contained in such legislation might be justified.²³ The solution is simple: all forms of legislation should be accompanied by a statement of compatibility and subject to parliamentary scrutiny.

In Victoria, the issue is that its scrutiny committee is not given enough time to carry out its function. The parliamentary sitting calendar means that the Scrutiny of Acts and Regulations Committee (‘SARC’) often has as few as nine working days to scrutinise and report on a bill before it proceeds to debate.²⁴ In that time the Committee is expected to read and analyse the bill along with its accompanying statement of compatibility; invite submissions from the public and, if it chooses to do so, hold hearings; produce a draft Charter report; circulate that to all Committee members for discussion and approval; and then, publish the report in the Alert Digest. Finally, before the bill proceeds to a debate, it is expected that parliamentarians will have the opportunity to read and consider the report.²⁵ This problem of insufficient time has been further exacerbated by a readiness by government to rush bills through parliament.²⁶

In light of this, it is unsurprising that the track record of Victoria's SARC in securing amendments to rights-infringing legislation has been poor. As the Chair of that Committee has noted, '[i]n our experience SARC has had little influence over the content of legislation once the bill has been presented to Parliament'.²⁷ A more recent self-assessment by the SARC found that it had had an effect on only 21 pieces of legislation in its (then) seven-year history.²⁸ This same issue of delay has also hamstrung the federal Parliamentary Joint Committee on Human Rights from having an impact: in its four-year history, that Committee has made 95 findings that proposed legislation may be incompatible with human rights. Of those findings, 66 were not published until after the legislation had been enacted into law.²⁹

Again, there is a solution, which in this case has already been adopted by the ACT, at least in relation to amendments proposed by the government to their own bills: a requirement that no bill proceed to debate until the Committee has reported.³⁰ A requirement of this kind, extended to all forms of legislation rather than merely amendments, would ensure that the relevant parliamentary committee has the time it needs to conduct its analysis. Perhaps unsurprisingly, the ACT's Committee has also had the greatest impact, with government members moving almost 100 amendments to bills in response to Committee comments in 2014 alone.³¹ The lesson for Queensland is that, if it does choose to require a parliamentary committee to scrutinise new legislation for human rights compatibility, it needs to ensure that the committee is empowered to scrutinise all kinds of legislation, and that it is given sufficient time to do so.

3. Judicial interpretation

A further feature of the ACT and Victorian regimes is that they require courts to interpret legislation in a rights-compatible way. The text of the relevant provisions in the two Acts is nearly identical, and reads (in Victoria):

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.³²

Both Acts also provide that in carrying out this interpretive function, '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered'.³³

Despite the apparent simplicity of these provisions, they have resulted in confusion. In both the ACT and Victoria, courts have divided on how this interpretive function ought to be carried out. A key question is whether the provision amounts to a mere restatement of the ordinary principles of statutory interpretation, or whether it imposes a 'special' rule of interpretation requiring the courts to do something novel. In particular, it remains unclear how far courts are expected to go in ensuring that their interpretation of a statute is compatible with human rights. On one view, courts should adhere as closely as possible to the 'ordinary' meaning of the provisions they interpret, and should be satisfied that they have discharged their duty so long as the interpretation reached avoids abrogating rights. On another view, courts should take a more flexible approach and seek to reach the interpretation that best accords with rights, even if that interpretation is a 'strained' one.

The latter view was taken in the UK decision of *Ghaidan v Godin-Mendoza*,³⁴ where it was held that the *Human Rights Act 1998* (UK) empowers courts, in seeking the most rights-compatible reading of legislation possible, to adopt an interpretation that may be inconsistent with the intention of Parliament in respect of that statute. That possibility has been excluded in Australia as both the HRA and Charter require courts to reach their interpretation consistently with the purpose of the statute under consideration. However, within that boundary, it is still not clear whether courts are expected, or even permitted, to strive for the most rights-compatible interpretation available.

The high point of this confusion was reached in 2011 when the High Court handed down its decision in *Momcilovic v The Queen*,³⁵ an appeal from the only decision to date in which a Victorian court has made a declaration that 'a statutory provision cannot be interpreted consistently with a human right'. In that decision, the five judgments produced an array of views as to what approach judges should take, and which principles they should apply, in carrying out the interpretive duty under of the Charter. The Court also provided three contradictory views on whether and when judges should consider the reasonableness of limitations on rights in the interpretive process (which we discuss further below). This has been detrimental to the Victorian and ACT instruments, as, their effectiveness is reduced when the nation's top court prescribes a multiplicity of approaches to such an important judicial function. To borrow the words of Justice Gageler of the High Court in a different context, '[t]here is a net cost to society which arises from uncertainty as to the principle to be applied'.³⁶

The consequence of *Momcilovic* for Queensland is that, if it simply copies the interpretive provisions contained in the ACT and Victorian Acts, it will inherit the uncertainty afflicting those jurisdictions. Rather, it should sidestep this by enacting a new form of interpretive provision that sets out, step by step, how courts are expected to perform their duty. There are multiple ways it can do this, but one way might be a provision that states:

Interpretation

- (1) So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.
- (2) For the purpose of this section, international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered.

This proposal is similar to the recommendation for a new interpretive provision made by Brett Young in the 2015 Charter Review.³⁷ Both Brett Young's proposal and the above seek to make clear that the goal for courts in interpreting legislation is to seek the optimal interpretation from a rights perspective, rather than simply to check that no rights have been abrogated without a clear intention to do so. The optimal outcome is achieved by requiring legislation to be 'interpreted in *the way that is most compatible with human rights*', rather than simply 'in a way that *is compatible*'.

We go one step further than Brett Young by altering his requirement that provisions be interpreted 'consistently with their *purpose*' to read 'consistently with their *language, context and purpose*'. This makes clear that each of these factors should be considered and weighed against each other, and that they provide broad parameters within which the court is permitted to carry out its interpretive function. We have also dispensed with Brett Young's recommendation for a subsequent provision requiring that apparently incompatible legislation be interpreted in the way that is 'least incompatible' with rights, as we believe this to be unnecessary given the 'most compatible' requirement.

The above proposal resolves the uncertainty at the heart of how the interpretive provision operates. It clarifies that judges are expected to reach an interpretation that is as compatible with rights as possible. What the proposal does not deal with is the later question of when judges should make a declaration that a statute is incompatible with human rights. This has also proven to be a vexed issue in the ACT and Victoria, although not one that we will canvass in detail here.

As above, the effectiveness of the solution will depend upon its clarity (and, amongst other things, its constitutional validity). One way to bring clarity to this aspect of the interpretive process is to have a provision that sets out how judges are to arrive at the conclusion that a provision cannot be interpreted compatibly with human rights. The provision should spell out the criteria by which courts are to determine whether any limitations upon rights are reasonably justified. This would have the benefit not only of ensuring a consistent approach across courts, but of giving legislators a clearer idea of how much leeway they have in drafting legislation that may have a limiting effect on rights. It should also specify that this process of evaluating the reasonableness of such limitations is to occur after the interpretive exercise set out above, rather than before or during that process, as this has also been a point of confusion in the ACT and Victoria.

Our proposal represents one of a number of ways to resolve the issues that have beset the ACT and Victoria. Whichever way it proceeds, the main objective for Queensland should be to ensure that any interpretive provision it adopts is clear and comprehensive.

Conclusion

Australia is on a long journey when it comes to the protection of human rights. Since 2004, states and territories, rather than the Commonwealth, have led the way. Queensland is the latest jurisdiction to consider doing so. It has the advantage that it can learn from the many years of experience of the models that have operated in the ACT and Victoria. These regimes have enjoyed significant successes, but have also exposed problems about how such laws should be drafted.

This provides a significant opportunity for Queensland, which can enact its own human rights act in a way that overcomes these concerns. In particular, any Queensland law should contain a stand-alone cause of action; ensure that a parliamentary committee charged with a scrutiny function is empowered to scrutinise all kinds of legislation, and is given enough time to do so; and set out a clear judicial interpretive provision. If Queensland can apply these lessons, it stands to gain the best-drafted human rights act in the country.

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