Charter of Human Rights Act in Queensland – Options Paper – Mechanisms

1. Introduction

The Queensland Parliament is currently considering the introduction of human rights legislation in Queensland (the ***Queensland Charter***). QAILS has asked us to prepare a submission to advocate for the mechanisms to be included in such legislation.

1. Summary

This paper outlines the various positions QAILS may wish to support in relation to the mechanisms that could be adopted in the Queensland Charter. It does so by drawing on current examples from human rights legislation in the ACT, Victoria, UK and New Zealand.

The available mechanisms are broadly summarised as follows:

* mechanisms relating to scrutiny of new legislation (discussed in part 3 of this paper);
* mechanisms relating to the interpretation of laws (part 4);
* obligations on public authorities (part 5);
* functions and powers of a human rights commission (part 6); and
* statutory review provisions (part 7).

If QAILS wishes to advocate for particular mechanisms in a Queensland Charter, it should form a view as to its preferred approach in relation to those mechanisms.

For the definition of key terms and acronyms used in this paper, please refer to the Glossary on page 6.

1. Scrutiny of new legislation
   1. Statements of compatibility

A Queensland Charter could require new bills introduced to the Queensland Parliament to be accompanied by a statement of compatibility with human rights. This is the position in the ACT Act and Victorian Charter.[[1]](#footnote-1)

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.[[2]](#footnote-2)

A failure to comply with the requirement for a statement of compatibility should not affect the validity, operation or enforcement of any law.[[3]](#footnote-3)

**[Note to QAILS: *please provide your instructions as to whether you would like new bills introduced into Queensland Parliament to be accompanied by a statement of compatibility with the Charter]***

* 1. New laws to be considered by committee

The Queensland Charter may also require new bills to be scrutinised by a parliamentary standing committee. The committee would report to the Queensland Parliament on the compatibility of the bill with human rights. This is the position in the ACT Act and Victorian Charter.[[4]](#footnote-4)

A recent independent review of the Victorian Charter recommended that the Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations made under those laws, to the Scrutiny of Acts and Regulations Committee for consideration.[[5]](#footnote-5)

In the ACT, the ACT Government concluded in a recent review that it would not change the current legislative scrutiny process, however it will maintain a watching brief on the Commonwealth scrutiny of bills scheme. It would be prudent for the Queensland Government to do similarly.[[6]](#footnote-6)

**[Note to QAILS: *please provide your instructions as to whether you would like new bills to be scrutinised by a standing committee for compliance with the Charter. If so, please also confirm:***

* + 1. ***Whether amendments to non-Qld laws that apply in Qld should also be referred to the standing committee; or***
    2. ***It would be preferable to simply maintain a watching brief on the Commonwealth scrutiny of bills scheme.]***

1. Interpretation of laws
   1. Courts to interpret laws in a manner consistent with human rights

All Queensland courts could be required to interpret laws in a manner consistent with the human rights identified in the Queensland Charter, so far as it is possible to do so consistently with the purpose of those laws. This is the position in the ACT Act and Victorian Charter.[[7]](#footnote-7)

When interpreting the laws, the courts may be empowered to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to the human right or rights. The Victorian Charter adopts this approach, as does the ACT Act (with the exception of the reference to the judgments of domestic courts and tribunals).[[8]](#footnote-8) The ACT Act provides the following parameters for deciding whether the extraneous materials should be considered, and their weight:

* the desire to rely on the ordinary meaning of the Act;
* the desire not to prolong proceedings; and
* the public accessibility of the relevant material.[[9]](#footnote-9)

Consideration would need to be given as to whether the provisions should affect the validity of an Act, subordinate instrument (for example, a regulation or by-law) or provision that is incompatible with a human right. In Victoria, the provisions do not affect the validity of such laws.[[10]](#footnote-10)

The position is somewhat different in the UK. In that jurisdiction, courts have the power to declare legislation incompatible with the Human Rights Convention.[[11]](#footnote-11) However, in response to a declaration of incompatibility, the Government may in certain circumstances make a remedial order to amend the legislation where there are compelling reasons to do so.[[12]](#footnote-12)

**[Note to QAILS: *please provide your instructions as to whether you would like Parliament to interpret laws in a manner consistent with the Charter by adopting the position of:***

* + 1. ***Victoria;***
    2. ***ACT (like Victoria, with the exception of reference to judgments of domestic courts and tribunals); or***
    3. ***The UK]***
  1. Referral to the Supreme Court

Lower courts may be empowered to refer to the Supreme Court a question of law relating to the application of the Queensland Charter, or a question about the interpretation of a statutory provision in accordance with the Charter. The effect of this mechanism would be that the court or tribunal making the referral cannot then make a determination or proceed with the matter until, and in accordance with, the Supreme Court's decision.

This power exists in Victoria, but only in circumstances where there is an existing proceeding before a court or tribunal, a party has made an application for referral and the court or tribunal considers that the question is appropriate for determination by the Supreme Court.[[13]](#footnote-13)

**[Note to QAILS: *please provide your instructions as to whether you would like lower Courts to be empowered to refer questions of law or interpretation about the Charter to the Supreme Court*]**

* 1. Rights to intervene

The Queensland Attorney-General, and any human rights commissioner (discussed below) with leave, may be empowered to intervene in a court proceeding that involves the application of the Queensland Charter. This is the position in the ACT Act and Victorian Charter.[[14]](#footnote-14)

**[Note to QAILS: *please provide your instructions as to whether you would like the Charter to adopt the ACT and Victorian position and have a right to intervene in court proceedings]***

Additionally, in both the ACT and Victoria, a party to a relevant proceeding in the Supreme Court (or referred to the Supreme Court) must give notice to the Attorney-General and the Commission.[[15]](#footnote-15)

**[Note to QAILS: *please provide your instructions as to whether you would like the additional requirement of the ACT and Victoria to apply to the Queensland Charter]***

* 1. Declarations of incompatibility

The Supreme Court may be empowered to make a declaration that an Act of Parliament or a subordinate instrument is not consistent with a relevant human right.

**[Note to QAILS: *please provide your instructions as to whether you would like the Supreme Court to be empowered to declare Acts inconsistent with human rights]***

This is the position in the ACT Act, however the declaration of incompatibility does not affect the validity, operation or enforcement of law, or the rights or obligations of people.[[16]](#footnote-16) The Attorney‑General and Commission must receive notice of any proceeding in which the Supreme Court is considering making a declaration, and will be given time to decide whether to intervene.[[17]](#footnote-17) Once the ACT Attorney-General receives a copy of the declaration, he or she must present a copy to the Parliament within 6 sitting days. Then, within 6 months, the Attorney-General must prepare and table a written response to the declaration.[[18]](#footnote-18)

In Victoria, the declaration is called a 'declaration of inconsistent interpretation'. The provisions of the Victorian Charter are largely similar to those described above (although the process is slightly different to the ACT Act), however the provisions are expressly subject to any relevant 'override declaration'.[[19]](#footnote-19)

Under section 31 of the Victorian Charter, the Parliament may, in exceptional circumstances, declare in an Act that the Act (or a provision of the Act) has effect despite incompatibility with human rights or the Charter. Such an 'override declaration' extends to any subordinate instrument made under the Act. The effect of a declaration is that the Charter has no application to the relevant statutory provision.[[20]](#footnote-20)

**[Note to QAILS: *please provide your instructions as to whether you would like the Charter to adopt:***

* + 1. ***the ACT approach (where a declaration of invalidity does not affect the validity, operation or enforcement of law, and the Attorney General can decide to intervene in Court proceedings for a declaration of invalidity); or***
    2. ***the Victorian approach (where Parliament may declare in an Act that the Act has effect despite incompatibility with the Charter, and the Charter has no application to the relevant statutory provision)]***

It has recently been recommended that the provision for override declarations be repealed. This is because the Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting any incompatibility. It was nevertheless recommended that, if legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years.[[21]](#footnote-21)

**[Note to QAILS: *please provide your instructions as to whether you would like legislation that is passed and incompatible with human rights to be reported on by the responsible Minister every five years]***

1. Obligations on public authorities
   1. What is a public authority?

A public authority 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). It is does not include Parliament or the Courts.[[22]](#footnote-22) This issue is discussed in more detail in our options paper relating to the proposed scope of application of a Queensland Charter.

* 1. Conduct of public authorities

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. This is the position in the ACT Act (except in relation to economic, social and cultural rights).[[23]](#footnote-23)

In Victoria, special protections exist for the actions of religious bodies.[[24]](#footnote-24) A recent independent review of the Victorian Charter recommended that the Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights. This could be achieved by defining ‘to act’ as including ‘to make a decision’, or by specifying in another section of the Charter (section 38(1)) that it is unlawful for a public authority to make a decision that is incompatible with a human right.[[25]](#footnote-25)

**[Note to QAILS: *please provide your instructions as to whether you would like the Charter to adopt the approach of the ACT (to consider human rights) or Victoria (similar to ACT but with exceptions for actions of religious bodies)]***

The review further recommended that section 4 of the Victorian Charter be amended to set out a non-exhaustive list of functions of a public nature, including:

* the operation of prisons and other correctional facilities;
* the provision of public health services;
* the provision of public education, including public tertiary education;
* the provision of public housing, including by registered housing providers;
* the provision of public disability services;
* the provision of public transport;
* the provision of emergency services; and
* the provision of water supply.[[26]](#footnote-26)

It recommended that the Victorian Government use the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) to prescribe entities to be or not be public authorities, including entities that provide services under national schemes, where necessary to resolve doubt.[[27]](#footnote-27)

**[Note to QAILS: *please provide your instructions as to whether you would support the enactment of a regulation that prescribed entities to be or not be public authorities]***

* 1. Legal proceedings

The Queensland Charter may provide for a freestanding cause of action for victims of any contravention by public authorities of the requirement to act consistently with human rights, with the full range of remedies, including damages.

The ACT Act has a freestanding cause of action, although damages are not recoverable.[[28]](#footnote-28) The issue of damages was recently considered in an ACT Government review of the ACT Act, and the Government confirmed:

…the existing human rights framework affirmatively meets the requirement for an effective remedy through the availability of other suitable remedies such as declaratory or injunctive relief, interpreting legislation in accordance with human rights and vindication through declarations of incompatibility…Consistent with the Government’s response to the five year review of the [Act], the Government does not agree that damages be available as a form of relief for breach of a human right under the [Act].[[29]](#footnote-29)

Claims of unlawfulness under the Victorian Charter may only be raised in legal proceedings if there is another ground on which to impugn the decision or action. Damages are not recoverable.[[30]](#footnote-30)

A recent review of the Victorian Charter recommended that the Charter provide a freestanding cause of action similar to the one that exists in the ACT. However, rather than being required to start court proceedings in the Supreme Court, it is recommended that proceedings commence in the Victorian Civil and Administrative Tribunal.[[31]](#footnote-31)

In the UK, a freestanding cause of action applies in certain circumstances. In relation to any act (or proposed act) of a public authority that the court finds is (or would be) unlawful, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Damages may only be awarded by a court that has power to award damages or the payment of compensation in civil proceedings. No award of damages will be made unless, in all the circumstances, the court is satisfied that the award is necessary to afford just satisfaction to the victim.[[32]](#footnote-32)

**[Note to QAILS: *please provide your instructions as to whether you would like claims brought against entities for contravention of the charter to be:***

* + 1. **a freestanding cause of action with recoverable damages;**
    2. **a freestanding cause of action but no recoverable damages (ACT position);**
    3. **a claim for unlawfulness only where another ground exists to impugn the decision or action with no recoverable damages (Victorian position); or**
    4. **a freestanding cause of action where the court may order any relief or remedy it considers appropriate, including damages where necessary to justly compensate the victim (UK position)].**

**[Note to QAILS: *please provide your instructions as to whether you would like proceedings to be commenced in the Supreme Court of Queensland or the Civil and Administrative Tribunal]***

* 1. 'Opt-in' mechanism

The ACT Act also includes an 'opt-in' provision, which allows private entities to write to the ACT Attorney-General to request a declaration that they be bound by the provisions of the ACT Act that apply to public authorities.[[33]](#footnote-33) A recent review of the Victorian Charter recommended that this provision be included in the Charter.[[34]](#footnote-34)

This issue is also discussed in our options paper relating to the proposed scope of application of a Queensland Charter.

1. Functions and powers of a human rights commission
   1. Human rights commission

A Queensland Charter could empower a body to investigate, report on and conciliate human rights complaints, intervene in relevant legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform of the Charter. In Queensland, the Anti-Discrimination Commission could carry out this role, if it were appropriately empowered and resourced.[[35]](#footnote-35) A recent review of the Victorian Charter recommended empowering the Victorian Human Rights and Equal Opportunity Commission to conciliate complaints, and provide human rights education to the public sector.[[36]](#footnote-36)

**[Note to QAILS: *please provide your instructions as to whether you would like the Charter to empower a body to perform the above functions and if you agree with having the Queensland Anti-Discrimination Commission to perform this role*].**

1. General
   1. Review of the Queensland Charter

It is preferable that, similarly to the ACT and Victorian position, the Queensland Charter provide for a review of the operation of the Charter within a specified number of years.[[37]](#footnote-37)

**[Note to QAILS: *please provide your instructions as to whether you would like the Charter provide for a review within a specified number of years, and if so, how many years*].**

Glossary

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| **ACT** | Australian Capital Territory |
| **ACT Act** | *Human Rights Act 2004* (ACT) |
| **UK** | United Kingdom |
| **UK Act** | *Human Rights Act 1998* (UK) |
| **Victorian Act** | *Charter of Human Rights and Responsibilities Act 2006* (Vic) |

1. ACT Act, section 37; Victorian Charter, section 28 [↑](#footnote-ref-1)
2. 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. [↑](#footnote-ref-2)
3. ACT Act, section 39 [↑](#footnote-ref-3)
4. ACT Act, section 38; Victorian Charter, section 30 [↑](#footnote-ref-4)
5. Michael Brett Young, ‘From Commitment to Culture the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', recommendation 38 [↑](#footnote-ref-5)
6. ACT Government, 'Economic, social and cultural rights in the Human Rights Act 2004 Section 43 review' (November 2014), page 26 [↑](#footnote-ref-6)
7. ACT Act, section 30; Victorian Charter, section 32(1) [↑](#footnote-ref-7)
8. Victorian Charter, section 32(2); ACT Act, section 31(1) [↑](#footnote-ref-8)
9. ACT Act, section 31(2) [↑](#footnote-ref-9)
10. Victorian Charter, section 32(3) [↑](#footnote-ref-10)
11. UK Act, section 4 [↑](#footnote-ref-11)
12. UK Act, section 10 [↑](#footnote-ref-12)
13. Victorian Charter, section 33 [↑](#footnote-ref-13)
14. ACT Act, sections 35-36; Victorian Charter, section 34 [↑](#footnote-ref-14)
15. Victorian Charter, section 35; ACT Act, section 34 [↑](#footnote-ref-15)
16. ACT Act, section 32 [↑](#footnote-ref-16)
17. ACT Act, section 34 [↑](#footnote-ref-17)
18. ACT Act, section 33 [↑](#footnote-ref-18)
19. Victorian Charter, section 36 [↑](#footnote-ref-19)
20. Victorian Charter, section 31 [↑](#footnote-ref-20)
21. Young, above, n5, recommendation 46 [↑](#footnote-ref-21)
22. Victorian Charter, section 4 [↑](#footnote-ref-22)
23. ACT Act, section 40B [↑](#footnote-ref-23)
24. Victorian Charter, section 38; religious exceptions and equality measures in other Victorian laws are currently under review in Victoria, and an independent review recommended this provision also be examined during the review process: Young, above, n5, recommendation 18 [↑](#footnote-ref-24)
25. Young, above, n5, recommendation 17 [↑](#footnote-ref-25)
26. Young, above, n5, recommendation 12 [↑](#footnote-ref-26)
27. Young, above, n5, recommendation 13 [↑](#footnote-ref-27)
28. ACT Act, section 40C; see also ACT Government, 'Economic, social and cultural rights in the Human Rights Act 2004 Section 43 review' (November 2014), pages 23-24 [↑](#footnote-ref-28)
29. ACT Government, above, n28, page 25 [↑](#footnote-ref-29)
30. Victorian Charter, section 39 [↑](#footnote-ref-30)
31. Young, above, n5, recommendations 6, 23 and 27 [↑](#footnote-ref-31)
32. UK Act, section 8 [↑](#footnote-ref-32)
33. ACT Act, section 40D [↑](#footnote-ref-33)
34. Young, above, n5, recommendation 15 [↑](#footnote-ref-34)
35. See for example, *Human Rights Commission Act 2005* (ACT), Victorian Charter, Part 4 and *Human Rights Act 1993* (NZ), Part 1 [↑](#footnote-ref-35)
36. Young, above, n5, recommendation 23 [↑](#footnote-ref-36)
37. ACT Act, Part 6; Victorian Charter, Part 5 [↑](#footnote-ref-37)